# Cartel Regulation

*Contributing editor*
**A Neil Campbell**

2018

GETTING THE DEAL THROUGH

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*Contributing editor*
**A Neil Campbell**
**McMillan LLP**

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

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**Anna Lyle-Smythe and Murray Reeve** Slaughter and May
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**Jolling de Pree and Martijn Snoep** De Brauw Blackstone Westbroek

## Legislation and institutions

### 1 Relevant legislation

**What is the relevant legislation?**

Within the EU member states (as well as Iceland, Liechtenstein and Norway, by virtue of the 1992 EEA Agreement), both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is article 101 of the Treaty on the Functioning of the European Union (TFEU). Council Regulation No. 1/2003 contains the implementing rules and procedural rules.

### 2 Relevant institutions

**Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?**

Cartel matters can be investigated by the European Commission (the Commission) or national competition authorities (NCAs), or by both. Regulation No. 1/2003 contains the implementing rules regarding enforcement procedures. The key provisions that relate to cartel proceedings are as follows:

- the principal enforcement agency in the EU is the Commission, with DG Competition being the service responsible for the enforcement of the competition rules;
- where an NCA within the EU uses domestic competition law to investigate a cartel, if that cartel affects trade between member states, it must also apply article 101 TFEU;
- there is close cooperation between the Commission and the NCAs of member states, including exchange of confidential information, within the framework of the European Competition Network (ECN) established between the Commission and the NCAs;
- the Commission has extensive powers of inspection, including the power to take statements, seal premises or business records, and ask for oral, on-the-spot explanations about particular documents or facts during an inspection;
- the Commission can impose substantial fines for breaches of the procedural rules (eg, for failure to provide information); and
- the Commission has the power to impose structural remedies (eg, divestments) and fines for breaches of article 101 TFEU.

The Commission has also adopted an implementing Regulation (Regulation No. 773/2004) further clarifying the proceedings under Regulation No. 1/2003. This lays down rules concerning the initiation of proceedings and the conduct of investigations by the Commission, as well as the handling of complaints and the hearing of the parties concerned.

In addition, the Commission has published various notices providing guidance for the application of article 101 TFEU. Notices have been adopted, inter alia, on cooperation within the ECN, on cooperation between the Commission and the courts of EU member states, on the handling of complaints and on the effect on trade concept contained in articles 101 and 102 TFEU.

National courts must apply, in addition to national antitrust rules, articles 101 and 102 TFEU. They may not adopt decisions that run counter to a Commission decision on the same subject matter. The Commission can transmit opinions and statements as amicus curiae in proceedings before national courts that must apply articles 101 and 102 TFEU.

### 3 Changes

**Have there been any recent changes, or proposals for change, to the regime?**

There are no current proposals to change the overall legislative regime. However, in November 2014 a directive on actions for damages for violations of EU competition law was adopted (the Damages Directive), which the member states had to implement by 27 December 2016. The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions (see further question 22). In August 2015, the Commission adopted amendments to its Regulation No. 773/2004 and four related notices (Notices on Access to the File, Leniency, Settlements and Cooperation with National Courts) to reflect the provisions of the new directive on accessing and using information in the files of competition authorities for the purposes of follow-on damages litigation.

In June 2015, the Commission published guidance on the data it can release to the public in non-confidential antitrust decisions, including explanations of what companies can claim for redaction as business secrets and confidential information.

In September 2015, the Commission updated its explanatory note on the conduct of surprise antitrust investigations ('dawn raids'). The new guidance allows officials to search 'private devices… used for professional purposes,' as well as information held on external hard drives or in cloud-computing services. The note also includes an explanation of how the Commission will handle and review data copied from servers.

In March 2017, the Commission published a draft directive to grant greater enforcement powers to NCAs. As stated above, NCAs and courts apply the EU competition rules within their jurisdictions on the basis of Regulation 1/2003. To ensure the consistent application of these rules, the European Commission and the 28 national competition authorities of the EU work together in the ECN. However, not all NCAs currently have the same enforcement powers. The draft directive aims to address this problem.

### 4 Substantive law

**What is the substantive law on cartels in the jurisdiction?**

Article 101(1) TFEU provides that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' are prohibited. Article 101(1) TFEU provides a non-exhaustive list of prohibited practices, which includes agreements, decisions or concerted practices that: directly or indirectly fix purchase or selling prices or any other trading conditions (price fixing); limit or control production, markets, technical development or investment (eg, output restrictions); or share markets or sources of supply. Both horizontal and vertical restraints fall within article 101(1)

TFEU. For horizontal agreements, specific guidance is given on the status of R&D agreements, production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. For vertical agreements specific guidance is given on single branding agreements, exclusive distribution agreements, exclusive customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and RPM.

Article 101(2) TFEU provides that agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the Commission that the agreement breaches article 101 TFEU. Article 101 TFEU is also capable of enforcement before the national courts and NCAs in EU member states.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of article 101(1) TFEU. The Commission's view is that these types of restriction are hard-core and may be presumed to have negative market effects (recently confirmed by the European Court of Justice (ECJ) in *Dole* (2015)).

According to article 1(2) of Regulation No. 1/2003, agreements that satisfy the conditions of article 101(3) TFEU are not prohibited, no prior decision to that effect being required. This requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is almost inconceivable that a hard-core cartel agreement could qualify for such an exemption. As regards vertical restraints, article 4 of Regulation No. 330/2010 (vertical agreements block exemption) provides a blacklist of agreements to which the block exemption will not apply (eg, where the object of the agreement is to impose a fixed or minimum resale price or an export ban). Horizontal cooperation agreements between competitors (such as information exchange, standardisation and R&D agreements), are assessed in line with the Commission's 2010 Regulations and Guidelines.

## Application of the law and jurisdictional reach

### 5 Industry-specific provisions

**Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?**

There are no industry-specific offences or defences. There are, however, special rules governing the application of article 101 TFEU to the agricultural and transport sectors. The Insurance Block Exemption Regulation expired on 31 March 2017 with no replacement.

### 6 Application of the law

**Does the law apply to individuals or corporations or both?**

Article 101 TFEU applies only to undertakings, not to individual employees or officers of undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in an economic or commercial activity (whether or not it is profit-making). It covers, for instance, limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and non-profit-making bodies. National legislation within some member states may, however, provide for criminal sanctions (see, eg, the UK chapter), administrative fines (see, eg, the Netherlands chapter) or other personal sanctions (see, eg, directors' disqualification orders in the UK chapter) where individuals participate in infringements of article 101 TFEU.

### 7 Extraterritoriality

**Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?**

Article 101 TFEU can apply to agreements, decisions and concerted practices concluded between undertakings located outside the EU but that have an effect on competition within the EU. This is wide enough to cover indirect sales provided the conduct may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the internal market. The Commission may choose not to take indirect sales into account if the fine based on direct sales alone is regarded as having a sufficient deterrent effect (*LCD*, 2010). When setting its fine the Commission is entitled to take into account sales of products in the EEA that include cartelised component products produced and sold outside the EEA (ECJ, *InnoLux* (2015)). As a consequence, manufacturing companies that produce and sell components outside Europe can still come under the Commission's scrutiny if those components are then built into products sold in Europe. The EU courts have recognised that it is not necessary that companies involved in the alleged cartel activity have their seats inside the EU, that the restrictive agreements were entered into inside the EU, or that the alleged acts were committed or business conducted within the EU. In *Wood Pulp I* (1988), the ECJ found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented. Where parties established in third countries implement a cartel agreed outside the EU with respect to products sold directly into the EU, the cartel will be subject to investigation under article 101 TFEU. Overall, according to the 'effects doctrine', the application of competition rules pertaining to cartels is justified under public international law whenever it is foreseeable that the relevant anticompetitive agreement or conduct will have an immediate and substantial effect in the EU (see also Commission Notice of 27 April 2004 on the effect on trade concept contained in articles 101 and 102 TFEU, paragraph 100). Recent cases in which the Commission assumed jurisdiction over cartel members incorporated outside the EEA include *Automotive Wire Harnesses* (2013), *Power Cables* (2014), *Smart card chips* (2014), *Automotive Bearings* (2014), *Optical Disc Drives* (2015) and *Alternators and Starters* (2016). In *Intel* (2017), the ECJ confirmed that the Commission has jurisdiction to apply EU competition law not only against conduct which is implemented in the EEA but also where it is 'foreseeable' that the conduct will have an 'immediate and substantial effect' in the EEA.

### 8 Export cartels

**Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?**

There is no such express exemption under EU law. However, on the basis of the effects doctrine (see question 7), conduct can only be caught under article 101 TFEU if it affects customers or other parties within the EU. Such conduct must be 'foreseeable' and have an 'immediate and substantial effect' in the EEA. In the absence of such effect, the conduct will not fall within the scope of article 101 TFEU.

## Investigations

### 9 Steps in an investigation

**What are the typical steps in an investigation?**

Investigations may be triggered as a result of one or more of the parties to an agreement or a concerted practice approaching the Commission (as a whistle-blower under the Commission's leniency programme), a third party making a complaint, an NCA raising the matter with the Commission or the Commission launching an inquiry on its own initiative.

If complainants wish to make formal complaints, they are required to use form C. However, the Commission may dispense with a complainant's obligation to provide all the information and documents required by form C where it considers that this information is unnecessary for the examination of the case. The form must be provided in triplicate and, if possible, an electronic version should be sent to the Commission (see article 5 of Regulation No. 773/2004).

Once a case comes to its attention (which may be as a result of a leniency or immunity application – see questions 24 and 27), the next step for the Commission is to collect further information, either informally or using its formal powers of investigation (including dawn raids – see question 10) to decide whether to take action on the complaint. Following the initial fact-finding, if the Commission considers that there is evidence of an infringement of article 101 TFEU that should be pursued, it will decide to open formal proceedings.

The Commission may then make use of the formal settlement procedures (see question 30) or proceed to serve a formal statement of objections on the parties setting out the Commission's case. If the

Commission issues a statement of objections, the parties are then allowed to examine the documents in the Commission's file (access to the file) and to respond to the statement of objections, in writing and at a hearing within the time limit set by the Commission (see article 27 of Regulation No. 1/2003 and article 10 et seq of Regulation No. 773/2004). In 2011, the Commission strengthened and expanded the role of the hearing officer to safeguard the parties' procedural rights and issued a notice on best practices in antitrust proceedings. The Commission further expanded on this Notice by publishing the Antitrust Manual of Procedures in March 2012, which is its internal working document intended to give practical guidance to staff on how to conduct an investigation applying articles 101 and 102 TFEU.

Before the Commission takes its final decision it must consult the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of officials from each of the member states' competition authorities (see article 14 of Regulation No. 1/2003). The final decision is taken by the full College of Commissioners and then notified to the undertakings concerned.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition they usually take several years.

## 10 Investigative powers of the authorities

**What investigative powers do the authorities have? Is court approval required to invoke these powers?**

The Commission's principal powers of investigation under Regulation No. 1/2003 are the power to require companies to provide information (article 18), and the power to conduct voluntary or mandatory on-the-spot investigations (dawn raids) on company premises (article 20) and to inspect employees' homes and cars, etc (article 21). It also has the power to take voluntary statements for the investigation from natural or legal persons under article 19.

Generally, the Commission has a wide discretion to collect any information that it considers necessary. The Commission may also request a member state's NCA to undertake any investigation or other fact-finding measure on its behalf (article 22). These powers are, however, subject to the general principles of proportionality and the rights of the defence. Certain documents will be protected by the principle of lawyer–client confidentiality (or legal professional privilege, LPP), although what this covers is limited and is ultimately for the courts to decide. In September 2010, the ECJ in *Akzo Nobel* confirmed its decision in *AM&S* (1982), which excluded the advice of in-house legal counsel from LPP. The ECJ clarified that, for the confidentiality of legal advice to be protected by LPP, such communication must emanate from independent EEA-qualified lawyers, and that the requirement of independence means the absence of any employment relationship. The adherence of many in-house lawyers to professional and ethical obligations was not sufficient to render them independent from their employers for this purpose. National rules may, however, continue to recognise LPP for in-house lawyers (see, eg, the UK and Netherlands chapters).

**Information requests**

Information requests ('article 18 requests' under Regulation No. 1/2003) are widely used by the Commission as a means of obtaining all necessary information from undertakings and associations of undertakings. A company that is the subject of an investigation can receive several such requests. Information requests may also be addressed to third parties, such as competitors and customers. These requests are addressed in writing to the companies under investigation and must set out their legal basis and purpose, as well as the penalties for supplying incorrect or misleading information. The requests must also be adequately reasoned. The statement of reasons cannot be excessively brief, vague or generic, having regard in particular to the length of the questions asked (ECJ, *Heidelberg Cement* (2016)).

The Commission can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. The Commission's choice whether to issue a simple information request or a formal decision needs to be proportionate (ECJ, *Schwenk Zement* (2014)). With respect to non-EU companies, the Commission is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

Undertakings or associations of undertakings that supply incorrect or misleading information in reply to a simple information request or incorrect, misleading or incomplete information to a formal decision, or who do not supply information within the time limit set by a formal decision, are liable to fines that may amount to up to 1 per cent of their total annual turnover.

The EU courts have recognised a privilege against self-incrimination, albeit one limited in scope. In *Orkem* (1989), the ECJ held that undertakings are obliged to cooperate actively with the Commission's investigation. The court also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel an undertaking to provide it with answers that might involve an admission on its part of the existence of an infringement that it is incumbent on the Commission to prove. In this respect, the court distinguished between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members on the other. Whereas the former type of questioning is generally permitted, the latter infringes the undertaking's rights of defence. The approach taken in *Orkem* was confirmed in *Mannesmannröhren-Werke* (Court of First Instance 2001, now the General Court (GC) after the entry into force of the Lisbon Treaty) and *Tokai Carbon* (GC 2004, ECJ 2006). The European courts have refused to acknowledge the existence of an absolute right to silence, as claimed by the applicants by virtue of article 6 of the European Convention on Human Rights. However, the GC held in *Tokai Carbon* (2004) that the Commission may not request undertakings to describe the object and the contents of meetings when it is clear that the Commission suspects that the object of the meetings was to restrict competition. The same applies to requests for protocols, working documents, preparatory notes and implementing projects relating to such meetings. On the other hand, in *Tokai Carbon* (2006), the ECJ clarified that undertakings subject to a Commission investigation must cooperate and may not evade requests for production of documents on the grounds that, by complying with the requests, they would be required to give evidence against themselves.

**Dawn raids**

Dawn raids may be conducted under two grounds: pursuant to a written authorisation only (article 20(3) of Regulation No. 1/2003) and pursuant to a formal Commission decision (article 20(4)). In an investigation made pursuant to a decision, the company must permit the investigation to proceed, and fines may be imposed for refusal to submit to the investigation. However, if the investigation is by request only, the company is not obliged to comply but is asked to submit to the investigation voluntarily.

When carrying out a surprise inspection visit (or dawn raid), Commission officials may:

- enter the premises, land and means of transport of undertakings or an association of undertakings;
- examine the books and other business records of the company (including computers, private devices used for professional purposes, external hard drives and cloud-computing services) falling within the scope of their investigation;
- take copies of books and records; and
- require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection.

The Commission may also seal any business premises and books or records for the time necessary for the investigation. The breach of a seal is considered a violation of the undertakings' obligation to cooperate and can lead to significant fines, with a fine of €38 million imposed on E.ON confirmed by the GC in 2010 and by the ECJ in 2012, and fines of €8 million imposed on Suez Environnement and Lyonnaise des Eaux in 2011. The Czech company EPH was also fined €2.5 million in 2012 for obstructing the Commission's inspection. The Commission can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned,

if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there. During the investigation procedures in Marine Hose (2009), the Commission carried out an on-the-spot investigation in a private home.

Commission officials have no power of forcible entry under Regulation No. 1/2003. They may, however, rely on the cooperation of member states' NCAs, who may use force to enter premises according to national procedural law. Forcible entry may require a court warrant under the applicable national law. In practice, officials will have obtained such a warrant before conducting the search. Under Regulation No. 1/2003, a national court called upon to issue such a warrant cannot call into question the legality of the Commission's decision or the necessity of the inspection. It may only assess whether the Commission decision is authentic and verify that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. To that end, it may ask the Commission for detailed explanations, in particular on the grounds the Commission has for suspecting infringement of article 101 TFEU, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. It cannot demand that it be provided with the information contained in the Commission's file.

The Commission team conducting a dawn raid usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCAs assisting the Commission in its investigation.

As is the case for information requests, the undertaking concerned is only required to cooperate if the Commission has taken a formal decision. The Commission usually issues such a decision in the case of a dawn raid. The decision must specify the subject matter and the purpose of the inspection, so that the undertakings understand the scope of their duty to cooperate (ECJ, *Nexans* (2014)). Apart from relying on the cooperation of national authorities to gain forcible entry, the Commission may also impose periodic penalty payments if the undertaking does not submit to an inspection ordered by a Commission decision. These penalty payments may amount to up to 5 per cent of the average daily turnover in the preceding business year.

The Commission has the power to ask for on-the-spot oral explanations on facts or documents relating to the subject matter and purpose of an inspection from any representative or member of staff of a company and to record the answers. The company must cooperate actively and ensure that the most appropriate staff of sufficient seniority and knowledge of operations are available to deal with the enquiries. The Commission may also compel an undertaking to provide copies of pre-existing documents and factual replies.

As is the case for information requests, a company has certain fundamental rights of defence during a dawn raid, including:

- the right not to be subject to an unauthorised investigation;
- the right to legal advice;
- the right not to be required to produce legally privileged documents (limited to correspondence with EEA-qualified external counsel – see above); and
- the right not to be required to incriminate itself (see above).

In the *Deutsche Bahn* case (2015), the Commission had informed the officials conducting the dawn raid of another complaint against Deutsche Bahn, which was not the subject of the investigation at hand, and was not mentioned in the warrant. The ECJ ruled that the use of the documents relating to the suspected infringements of which the officials had been informed, but that were not mentioned in the warrant, violated the right of defence of the companies involved.

**Power to take statements**

In addition, the Commission has the power to take statements from any natural or legal person on a voluntary basis only (that is, such persons cannot be summoned to testify). This power is additional to the Commission's power to ask for on-the-spot oral explanations during a dawn raid.

Where the Commission takes statements or conducts interviews, the recent ECJ decision in *Intel* (2017) has clarified that there is no distinction between 'formal' and 'informal' interviews and has made clear that the Commission must record any interview it conducts for the purpose of collecting information relating to the subject matter of an investigation. The ECJ set a high bar to establish that the Commission's procedural breach provides sufficient basis for annulling the Commission's decision. A firm seeking to rely on non-disclosure must show that it did not have access to exculpatory evidence and that it could have used such evidence for its defence.

## International cooperation

### 11 Inter-agency cooperation

**Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?**

The EU has cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Japan, Switzerland, Brazil and South Korea. These agreements can help the Commission to obtain information and evidence located outside the EU. The Commission also has memoranda of understanding (MOUs) with China, Brazil, Russia, India and South Africa which allow the relevant authorities to engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement. The MOUs also provide a mechanism for positive comity (allowing one authority to request that another engages in enforcement activity) and negative comity (to avoid conflicts if one authority's enforcement activity may affect the other in its enforcement).

The most significant of the cooperation agreements are the 1991 and 1998 EU–US agreements envisaging the exchange of information and establishing positive comity between the Commission and US antitrust authorities. They provide for the Commission and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anticompetitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been growing cooperation between the EU and the US in cartel matters (for example, in *Automotive Wire Harnesses* (2013) and *Automotive Bearings* (2014)). These cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations.

The Commission is a member of the International Competition Network (ICN), a network of competition agencies and a multilateral forum to address international cooperation and convergence.

Obviously, the Commission also cooperates extensively with the NCAs in member states. Regulation No. 1/2003 increased the scope of this cooperation within the framework of the ECN, which encompasses all member states' competition authorities as well as the Commission. The members of the ECN closely cooperate in the application of the EU competition rules. One authority may ask another for assistance by collecting information on its behalf. When an authority is assigned a case, it may decide to reallocate that case to another authority that is better placed to deal with it. The Commission may decide to take up a case, which will end the NCA's competence to apply article 101 TFEU (but not its equivalent national rules). Members of the ECN can also exchange information, including confidential information, for the purpose of applying article 101 TFEU or for parallel national proceedings under national competition law. Information so exchanged may only be used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information, or where the information was collected respecting the same level of rights of defence as in the receiving state and where the sanction does not involve imprisonment. Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on cooperation within the Network of Competition Authorities. In particular, the Commission will be assigned a case if it has an impact in more than three member states. In March 2017, the Commission published a draft directive to empower the NCAs to be more effective enforcers of the EU competition rules.

### 12 Interplay between jurisdictions

**Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?**

It is increasingly the case that a cartel investigation in the US may lead to the Commission launching an investigation in the EU. This raises a particular problem, in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the US and could increase exposure to civil damages (see question 32).

As regards the interplay between the EU and the NCAs in the member states, the work allocation between the different authorities is regulated within the framework of the ECN (see question 11). There is generally cooperation between the different authorities to decide which authority pursues a case. Once the Commission decides to initiate proceedings, the NCAs lose their competence to apply article 101 TFEU. However, there is no formal rule on avoiding double sanctions in the event that there are multiple investigations by several authorities. Nevertheless, the ECJ in its *Walt Wilhelm* judgment (1969) recognised a general requirement of natural justice that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. By contrast, the Commission does not consider that fines imposed elsewhere (outside the EU), especially in the US, have any bearing on the fines to be imposed for infringing European competition rules. Nor does the possibility that undertakings may have been obliged to pay damages in civil actions have any relevance (*Lysine*, 2000). The GC confirmed this view (*Lysine*, 2003).

The cooperation between NCAs and the Commission does not always lead to perfectly harmonious outcomes: in April 2015 the German NCA pursued antitrust charges against Booking.com while the French, Italian and Swedish regulators settled the case. This has prompted a statement by the current Commissioner for Competition that the Commission should intervene earlier to avoid such divergent outcomes.

## Cartel proceedings

### 13 Decisions

**How is a cartel proceeding adjudicated or determined?**

The Commission both investigates and adjudicates on cartel matters. At the end of an investigation by the officials of DG Competition, the final decision is taken by the College of Commissioners.

### 14 Burden of proof

**Which party has the burden of proof? What is the level of proof required?**

The burden of proof lies with the Commission to establish the facts and assessments on which its infringement decision is based. However, if a party is claiming that the relevant agreement or concerted practice satisfies the conditions for an exemption under article 101(3) TFEU, the burden of proof lies with the party making that claim. The legislative framework does not provide for precise rules regarding the standard of proof. Case law emphasises the presumption of innocence and clarifies that the Commission must produce 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place' (GC, *Danone* (2005)).

### 15 Circumstantial evidence

**Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?**

Yes, direct evidence of a cartel is often difficult to find. It is therefore possible to prove the existence of a cartel on the basis of circumstantial evidence which, as a whole, provides 'sufficiently precise and consistent evidence' of the existence of a cartel. Furthermore, direct evidence of an agreement or a decision is not needed if there are grounds to show that there is a concerted practice, which amounts to a form of coordination between undertakings without having reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risk of competition (*ICI* (1972)). Parallel market conduct will often create suspicion that a concerted practice has occurred, although on its own this is not conclusive evidence of a concerted practice, unless there is no other possible explanation (*Åhlström* (1994)). See also question 14.

### 16 Appeal process

**What is the appeal process?**

Commission decisions can be appealed to the GC in Luxembourg. The GC has jurisdiction to review the legality of and reasons for Commission decisions and the procedural propriety of the decision, and to assess the appropriateness of the amount of the fines imposed. The GC may cancel, reduce or increase the fine. From the GC, appeals on points of law may be made to the ECJ in Luxembourg.

Companies do not necessarily have to pay their fine immediately if they lodge an appeal before the GC. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest. Alternatively, the company may pay the fine into a ring-fenced account pending the outcome of the appeal. Typically, cartel cases before the GC last approximately four years and cases before the ECJ an additional two to three years. In January 2017, the GC ordered the EU to pay more than €50,000 in damages to Gascogne for excessive length of the proceedings before the General Court. The proceedings lasted for more than five years and nine months (GC, *Gascogne Sack Deutschland and Gascogne* (2017)).

## Sanctions

### 17 Criminal sanctions

**What, if any, criminal sanctions are there for cartel activity?**

EU law sanctions only undertakings and not individuals. National legislation within some member states may, however, provide for criminal or administrative sanctions where individuals participate in infringements of article 101 TFEU (see, for example, the UK and Netherlands chapters). For penalties on undertakings, see question 18.

### 18 Civil and administrative sanctions

**What civil or administrative sanctions are there for cartel activity?**

The sanction available to the Commission is the imposition of fines on the undertakings or associations of the undertakings concerned. In general, the EU courts have confirmed that the Commission has wide discretion in setting the level of fines within the limits of Regulation No. 1/2003. The fines imposed can be up to 10 per cent of worldwide group turnover in the preceding business year where an undertaking or association of undertakings has infringed article 101 TFEU. The ECJ has confirmed that fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling (*Pre-insulated Pipe Cartel Appeals* (2002)). Regulation No. 1/2003 states that these fines are not of a criminal nature. However, given the size of the potential fines, there are strong arguments as to why, pursuant to the European Convention on Human Rights (ECHR), the fines should be characterised as criminal or quasi-criminal (with the higher level of procedural protection this involves under article 6 of the ECHR).

The Commission imposes fines according to its Guidelines on the method of setting fines using a two-step method. In a first step, the basic amount of the fine is calculated taking into account the value of the undertaking's direct or indirect sale of goods or services concerned by the infringement within the EEA. For undertakings without EEA sales the Commission has used an alternative method taking into account sales outside the EEA to calculate the hypothetical turnover within the EEA. This happened, for example, in *Automotive Wire Harnesses* (2013), *Power Transformers* (2009), *Marine Hoses* (2009) and *Aluminium Fluoride* (2008). In a second step, the amount of the fine may be adjusted taking into account aggravating or mitigating circumstances. The basic amount of the fines may be increased by up to 100 per cent in the case of recidivism. A fine may also be increased for the purpose of deterrence. In *InnoLux* (2015), the ECJ confirmed that for a vertically integrated company the fine calculation may be based on non-EEA sales of cartelised components if they are built into a final product that is subsequently sold in the EEA as a 'direct EEA sale through transformed products'. In *AC Treuhand II* (2015) the ECJ

confirmed that the Commission was entitled to fix the fine as a lump sum instead of using value of sales because AC Treuhand, a consultancy firm, did not have any sales in the markets concerned.

The Commission also has the power to require the parties to terminate the infringement and may require them to undertake any action necessary to ensure their conduct in future is lawful. For this purpose, it has in some circumstances the power to impose structural remedies and to accept binding commitments. The Commission also has the power to take interim measures in relation to infringements of article 101 TFEU. Such measures are intended to preserve the position before the parties entered into the agreement in question. Performance of such orders can be compelled by means of periodic payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day.

The Commission's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the Commission intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the Commission began to impose much heavier fines in landmark cases such as *Polypropylene* (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the Commission has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years, the Commission has at various times reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. Recent years have brought new record fines: the *Trucks* cartel (2016) was fined €2.93 billion, the largest fine ever imposed by the Commission in a single cartel investigation, including a fine of €1.01 billion on Daimler and €753 million on DAF, being to date the largest fines imposed on single companies for their involvement in cartel activity. In *Car Glass* (2008), the Commission fined members of the alleged cartel over €1.19 billion, including a fine of €715 million on Saint Gobain. Saint Gobain's fine included a 60 per cent increase to reflect its previous involvement in cartel activity. The *TV and Computer Monitor Tubes* cartel (2012) was fined €1.41 billion. The Commission investigated the attempted manipulation of benchmark interest rates and imposed fines totalling €1.51 billion split across two separate investigations (*Euro Interest Rate Derivatives* and *Yen Interest Rate Derivatives* (2013)).

It is very difficult to rebut the presumption of actual decisive influence by a parent company over a wholly owned subsidiary. The failure to comply with a parent company's instruction is not sufficient, as long as the failure to carry out instructions is not the norm (ECJ, *Evonik Degussa and Alzchem* (2016)). The ECJ has, in *DuPont and Dow* (2013), confirmed that, in addition to penalties for infringements by their wholly owned subsidiary companies, parent companies may also be held liable for the penalties imposed in respect of article 101 TFEU infringements committed by their full-function joint venture subsidiaries, provided that the Commission is able to establish that the parent company did, in fact, exercise 'decisive influence' over that joint venture company. More recently in *Power Cables* (2014), Goldman Sachs, the former 47 per cent financial investment shareholder of Prysmian, was fined €37 million jointly and severally with Prysmian. Liability was based on Goldman Sachs's decisive influence over Prysmian, which, the Commission found, was to all intents like that of a traditional industrial owner.

### 19 Guidelines for sanction levels

**Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?**

The Commission's Guidelines on the method of setting fines, having the status of soft law, are only self-binding on the Commission, and do not have a binding effect on the General Court or on NCAs or national courts.

### 20 Debarment

**Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?**

The sanctions available under Regulation No. 1/2003 do not include the possibility of debarment from government procurement procedures for cartel infringements. However, an exclusion from the tendering process is possible under the rules on public procurement (article 57 of Directive 2014/24/EU). The public contracting authorities may, in a discretionary decision, exclude the undertaking where they have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition. They may further apply the catch-all element of grave professional misconduct. The time period for debarment due to anti-competitive conduct is subject to national law and fixed at a maximum of three years by Directive 2014/24/EU. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability.

### 21 Parallel proceedings

**Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?**

Not applicable; see questions 17 and 18.

## Private rights of action

### 22 Private damage claims

**Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?**

Third parties (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour in breach of article 101 TFEU can sue for damages before the national courts. For example, the European Commission, on behalf of the EU's institutions, filed a claim for damages in Belgium against manufacturers of elevators and escalators that were fined for price fixing in 2007. The Commission argued that the price fixing had led to increased costs for equipment installed in institutional buildings, however its claim was dismissed by the Brussels commercial court in November 2014 on the basis that the Commission's cartel decision did not provide sufficient proof that the elevators were more expensive and economic evidence did not prove there was any damage linked to the EU institutions.

The precise rules of standing, procedure and quantification of damages vary in the different EU member states. In November 2014, however, the Damages Directive was adopted. The directive is designed to ensure that victims of competition law infringements in Europe have access to effective mechanisms for obtaining compensation for the harm they have suffered. Victims should obtain full compensation for the actual loss suffered as well as for lost profits. The directive also allows for the use of passing-on as a defence, and for Commission and NCA decisions to be binding on the national courts and to serve as evidence of an infringement. This further reinforces the requirement that Commission infringement decisions must be unambiguous (GC, *British Airways* (2015)). In the event that an antitrust infringement is shown by the injured party the directive provides, with regard to the establishment of fault, a reversal of the burden of proof to the detriment of the infringer in terms of a rebuttable presumption that cartels cause harm. The directive also provides a common standard for limitation periods and the protection of leniency applicants. Member states were required to implement the Damages Directive in their national legal systems by 27 December 2016. With the implementation of the Damages Directive now complete, it will be interesting to observe if there are any changes to the number of claims and quantum of the damages in follow-on damages cases.

A further interesting development is that the ECJ recently held that there should be no national rule preventing third parties from seeking compensation from cartelists for loss allegedly suffered owing to the

surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from the cartel by increasing their own prices (*Kone* (2014)).

In relation to the jurisdiction of national courts over cartel damages claims, the ECJ held in May 2015 that cartel victims may sue for damages in the country where any one of the cartelists is domiciled and that the jurisdiction of the national court is not in principle affected by the claimant's withdrawal of its action against the sole participant domiciled in the member state in which the court is seised. The claimant also has the option to bring its action for damages in the jurisdiction where the cartel was concluded, where an agreement implying the existence of the cartel was concluded, or where the loss arose (the latter generally presumed to be the claimant's registered office). Furthermore, the ECJ found that jurisdiction clauses that derogate from the provisions of the Brussels I Regulation only encompass disputes relating to the payment of damages arising from an unlawful cartel if the claimant has consented to such derogation (*Cartel Damage Claims (CDC) Hydrogen Peroxide SA* (2015)).

### 23 Class actions

**Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?**

The directive on damages actions for breaches of EU competition rules does not include provisions opening the possibility for opt-out class actions. The Commission has, however, recognised that many member states provide for collective redress mechanisms under national law. While the directive on damages actions does not include a requirement for member states to introduce collective redress mechanisms for the enforcement of competition rules, the Commission has in the past published a non-binding Recommendation setting out common principles regarding collective redress mechanisms. The Recommendation aims at bringing more coherence in the different systems of collective redress within the EU. As a general rule, collective redress mechanisms should be based on the opt-in principle, according to which every represented party individually needs to join the action (in contrast to opt-out actions, which are possible without identifying the individual parties to the lawsuit). Member states should also provide for mechanisms that provide for safeguards against an abuse of collective redress. Possible safeguards could be a requirement for entities that are representing claimants to be of a non-profit character or the exclusion of punitive damages. The Commission invited member states to put in place appropriate measures by 26 July 2015. Within two years of that date, the Commission will assess the state of play on the basis of practical experience and, if necessary, take further measures to promote the principles set out in the Recommendation. A report on the practical implementation of the principles of the Recommendation is expected by the end of 2017. It is noteworthy that some member states (see, eg, the UK chapter) have declined to follow the Recommendation and have introduced some form of opt-out system.

## Cooperating parties

### 24 Immunity

**Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?**

To qualify for full immunity from fines (and, under the Damages Directive, to benefit from a softening of joint and several liability in any follow-on actions such that a successful applicant can generally only be liable to compensate their direct or indirect purchasers or providers) a party must be the first to inform the Commission of an undetected cartel, and must provide sufficient information for the Commission to carry out an inspection at the premises of the companies allegedly involved in the cartel. If the Commission has already begun an investigation into the suspected cartel, the informing party must provide sufficient information for the Commission to prove the alleged infringement. The informing party must also cooperate fully with the Commission on an ongoing basis throughout the investigation, offer up all evidence in its possession, and cease committing the infringement immediately. A party cannot, however, benefit from immunity if it was active in coercing other parties to participate in the cartel.

Companies that have recently benefited from full immunity include:

- Denso in *Alternators and Starters* (2016);
- MAN in *Trucks* (2016);
- Valeo in *Lighting systems* (2017);
- Denso in *Thermal systems* (2017); and
- Johnson Controls in *Car battery recycling* (2017).

Any information and documents submitted by a party in the course of an application for immunity or leniency (see further below) are treated with confidentiality by the Commission. The response to question 27 provides more information on the practicalities of approaching the Commission.

In March 2017, the Commission introduced an anonymous whistleblower tool for individuals to alert the Commission anonymously about secret cartels and other antitrust violations.

### 25 Subsequent cooperating parties

**Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?**

Under the Leniency Notice (part III), favourable treatment is also available to companies that do not qualify for immunity but that provide evidence representing 'significant added value' to that already in the Commission's possession, and that immediately terminate their involvement in the cartel activity. Provided these conditions are met, the cooperating company may receive up to a 50 per cent reduction in the level of fine that would have been imposed had it not cooperated. The envisaged reductions are split into three bands:

- 30 to 50 per cent for the first company to provide significant added value;
- 20 to 30 per cent for the second company to provide significant added value; and
- zero to 20 per cent for any subsequent companies to provide significant added value.

The amount received within these bands depends upon the time at which they started to cooperate and the quality of evidence provided.

Companies that have recently benefited from a reduction of their fines include:

- Hitachi and Melco (30 per cent and 28 per cent respectively) in *Alternators and Starters* (2016);
- Riberebro (50 per cent) in *Mushrooms* (2016);
- Volvo/Renault, Daimler and Iveco (40 per cent, 30 per cent and 10 per cent respectively) in *Trucks* (2016);
- Sony, Panasonic and Sanyo (50 per cent, 20 per cent and 20 per cent respectively) in *Rechargeable lithium-ion batteries* (2016); and
- Eco Bat and Recycle (50 per cent and 30 per cent respectively) in *Car batteries recycling* (2017).

There is currently no 'immunity plus' or 'amnesty plus' option.

### 26 Going in second

**What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?**

See question 25.

### 27 Approaching the authorities

**Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?**

In practice, the decision on whether to apply for leniency if a violation is discovered internally requires an assessment of the risks, advantages and disadvantages. Factors include:

- risk of the authorities being on the track already;
- the danger that another participant will get in first and 'slam the door';
- the jurisdictions in which liability to sanctions may arise;

- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty;
- the consequences in terms of civil liability, including punitive or triple damages in some jurisdictions; and
- the implications of a leniency application in terms of document disclosure requirements in other jurisdictions.

Where the Commission grants a marker, it will specify the time period in which the applicant undertaking must perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. If the undertaking complies within the time frame, the marker is deemed perfected at the time it was first granted. If the undertaking fails to supply the information and the deadline is not extended, the undertaking can still present an application for immunity, but its place in the queue is no longer protected.

There is no specific deadline for immunity or leniency applications; these are possible at any time in the Commission's investigation provided the criteria are met (see questions 24 and 25). However, applications cannot be made once settlement discussions have commenced.

Recent cases have shown that international cartels are highly likely to result in exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as possible and, where appropriate, simultaneously. If an undertaking wishes to benefit from full leniency at the EU level, it needs to tell the Commission as soon as it has gathered evidence of the cartel's existence sufficient for purposes of the Leniency Notice. Otherwise, it runs the risk that one of the other cartelists may blow the whistle first.

Within the ECN (see question 11), an application for leniency to a given authority is not considered as an application for leniency to any other authority and leniency programmes of the national competition authorities are autonomous in respect of other national programmes and the EU leniency programme (ECJ, *DHL* (2016)). When an undertaking decides to seek immunity, it is therefore in its interest to apply for leniency to all competition authorities that are competent to apply article 101 TFEU and that may potentially deal with the case under the work allocation rules within the ECN.

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members, but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place; that the Commission is 'particularly well placed' to deal with the case in accordance with the Notice on Cooperation Within the ECN; and that the NCA authority 'might be well placed' to act. Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity. NCAs are not required to assess a summary application submitted to them in the light of an application for immunity submitted to the Commission, or to contact the Commission where the summary application has a more limited material scope (ECJ, *DHL* (2016)).

### 28 Cooperation

**What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?**

To receive immunity, the Leniency Notice provides that the applicant must provide a corporate statement including a detailed description of the alleged cartel arrangement and explanations of the evidence provided, full details of the applicant and the other members of the cartel and information on which other competition authorities have been or will be approached, as well as all other evidence relating to the alleged cartel where no inspection has yet been conducted.

Only one undertaking can qualify for full immunity. To obtain full immunity a company must, in addition, cumulatively satisfy the following conditions:

- put an end to its involvement in the illegal activity immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the Commission's inspection;
- cooperate genuinely, fully, on a continued basis and expeditiously with the Commission – the company is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not have taken steps to coerce other undertakings to participate or remain in the cartel.

The Leniency Notice explains that full cooperation also entails:

- providing the Commission promptly with all relevant information and evidence that comes into the undertaking's possession or is available to it;
- remaining at the Commission's disposal to respond to any request promptly;
- making current and, if possible, former employees and directors available for interview;
- not destroying, falsifying or concealing evidence of the cartel, or disclosing any information, except to other competition authorities; and
- unless otherwise agreed, not disclosing the fact or any content of the application before a statement of objections has been issued.

A company is not required to provide decisive evidence for a grant of full immunity, nor is the company automatically excluded for having acted as an instigator of, or for having played a determining role in, the cartel. Full immunity may also still be available after an investigation has been initiated.

A noteworthy case in 2005 concerned the Italian raw tobacco market. The immunity applicant, Deltafina, had been granted conditional immunity at the beginning of the procedure under the terms of the 2002 Leniency Notice. However, the final decision withheld such immunity due to a breach by Deltafina of its cooperation obligations (confirmed by the GC in 2011): Deltafina had revealed to its main competitors that it had applied for leniency before the Commission could carry out dawn raids.

As far as the level of cooperation is concerned, any subsequent leniency applicants must satisfy the same conditions as the first. Only the quality of evidence differs insofar as the second (and subsequent) applicant has to provide evidence representing significant added value to that already in the Commission's possession.

### 29 Confidentiality

**What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?**

Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file. According to the Commission Notice on Access to the File (December 2005, as amended in August 2015), no access will be granted to internal documents of the Commission or of NCAs (including correspondence between the Commission and NCAs or between NCAs, and the internal documents received from such authorities), documents containing business secrets and other confidential information (which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking). The Commission's notes of meetings with leniency applicants are classified as internal documents. Where, however, the leniency applicant has agreed to the minutes, such minutes will be made accessible to third parties after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the Commission's evidence in the case.

The Leniency Notice further provides that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used by the Commission for any other purpose than the enforcement of article 101 TFEU. The amendments made to the Leniency Notice in August 2015 following adoption of the Damages Directive add that the Commission will not transmit leniency corporate statements to national courts for use as evidence in support of actions for damages for breaches of EU antitrust law. The Commission also

stresses that documents received in the context of the Leniency Notice will not be disclosed under Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations.

In practice, the Commission does not reveal the name of the whistle-blower as long as the investigations continue. In the *Stanley Adams* case (1985), the ECJ held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity by an individual whistle-blower, if the Commission accepts such information it is bound to comply with such a condition. Failure to do so meant that the Commission was liable to pay damages. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final Commission decision. The 2015 Guidance on the preparation of public versions of Commission Decisions explains the types of information that companies may request be redacted on the grounds that it contains business secrets or is confidential. The GC highlighted in *AGC Glass Europe* (2015) that the Commission should not be prevented from publishing, in its decision bringing the administrative procedure to an end, information relating to the description of an infringement which has been submitted to it as part of the leniency programme. The ECJ in *Evonik Degussa* (2017) also found that the Commission is not prevented from supplementing the extended cartel decision with information provided by a leniency applicant. The ECJ ruled that the fact that immunity is granted cannot protect a leniency applicant from civil damages claims. The only protection available to leniency applicants is protection concerning immunity from, or reduction in, the fine, in return for providing the Commission with evidence of the cartel, and the Commission's non-disclosure of documents and written statements that it has received in accordance with the Leniency Notice. As a result, the Commission is allowed to publish verbatim quotations of information included in the documents provided by a leniency applicant, provided that business secrets, professional secrecy and other confidential information is protected. It is for the hearing officer to take account of all the arguments related to general EU law principles raised by a leniency applicant to protect the information's confidentiality. However, verbatim quotations from the leniency statement itself may not be published under any circumstances.

Parties to international cartels need to bear in mind that written submissions to the Commission may be subject to US civil discovery rules in US proceedings regarding damages claims. In the interest of its leniency policy, the Commission has attempted to address these concerns by adjusting both the Leniency Notice and its overall practice as regards US civil proceedings (see question 32). In such cases, it may be advisable to make a paperless application to the Commission via external lawyers benefiting from legal privilege. The continuing conflict between public and private enforcement of competition law raises concerns over the future effectiveness of leniency programmes at national and European level. In its *Pfleiderer* ruling (2013), the ECJ held that the provisions of European law did not per se preclude private damages claimants from obtaining access to documents submitted to a national competition authority under a leniency programme. However, the ECJ left open the question of how to weigh conflicting concerns of obtaining compensation versus protecting leniency programmes.

Further, in the recent UK case *National Grid v ABB & Ors*, National Grid applied to the High Court seeking disclosure from the defendants of the Commission's confidential decision and some leniency materials from the defendants. In light of the *Pfleiderer* decision, National Grid argued that the national court had jurisdiction to order the disclosure of such documents and was no longer required to make a request to the Commission under article 15 of Regulation No. 1/2003.

The High Court concluded that the ruling of the ECJ clearly applies to the Commission leniency programme as well as to national leniency programmes, and that the Commission does not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme. It is open for a national court to request the Commission to provide leniency materials, and there is nothing in Regulation No. 1/2003 precluding a national court from applying its national procedures for access to documents. Further, *Pfleiderer* expressly established that, in the absence of binding regulation under EU law on the subject, the question of access to leniency materials by the victim of a cartel is to be determined under national rules. The High Court also commented that if every application for disclosure of leniency materials had to be referred to the Commission, it would place a significant burden on the Commission to carry out the balancing exercise required by *Pfleiderer* and would also give rise to significant delay.

The High Court held that other relevant considerations for the *Pfleiderer* balancing exercise included whether the information is available from other sources, the relevancy of leniency materials to the issues in context, and the evidential difficulties facing claimants seeking damages for an infringement of EU competition rules.

In November 2014 the Damages Directive was adopted (see also question 22). The directive provides that national courts must be able to order a defendant or third party to disclose evidence independently of whether such evidence is in the possession of a competition authority and regardless of the medium in which the information is stored. The directive provides, however, a specific exemption to this rule which affords absolute protection to leniency corporate statements and settlement submissions held by the Commission or an NCA. Under the directive, no national court can order the disclosure of such documents in a damages action, as their disclosure would pose a serious risk to the effectiveness of the leniency programme and settlement procedures. The directive was followed by, among others, amendments to the Notices on Access to the File and Leniency in August 2015. Access to the file will only be granted on the condition that the information thereby obtained is used for the purposes of judicial or administrative proceedings for the application of EU competition rules. In addition, the Commission will not send leniency corporate statements to national courts for use in actions for damages for breach of EU antitrust provisions (except for the sole purpose of confirming that they are 'leniency statements' or 'settlement submissions' as defined by the Damages Directive).

## 30 Settlements

**Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?**

The Commission does not have authority to enter into plea bargaining or similar arrangements. However, in 2008 the Commission introduced procedures for a simplified handling of cases in which the parties to a cartel and the Commission concur about the nature and scope of the illegal activity and the appropriate penalty. These rules on the conduct of settlement procedures aim at ensuring the continued effectiveness of the Commission's long-term zero-tolerance policy by simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases. The rules allow for settlements of cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it, but also agree to a faster and simplified procedure, as well as the imposition of lower fines on those who agree to the settlement procedure.

The Commission's initiative is intended to complement the Leniency Notice (see questions 24 to 29) and the Fining Guidelines. The settlement procedure aims at simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases.

Under the settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction. Instead, the parties are expected to acknowledge their participation in and liability for the cartel, and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with a 10 per cent reduction in fines (cumulative to any reduction received under the Leniency Notice) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two). Parties also benefit from a shorter public decision. Such cooperation differs from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the Leniency Notice. Parties have neither the right nor the duty to settle. Parties would be made aware of the Commission's anticipated objections and be given an indication of the potential maximum fine they can expect. They would be informed about the evidence and allowed to state their views prior to any formal objections. If parties

**Update and trends**

National competition authorities are soon to be empowered. The European Commission recently published a draft directive to grant greater enforcement powers to NCAs. NCAs and courts apply the EU competition rules within their jurisdictions on the basis of Regulation 1/2003. To ensure the consistent application of these rules, the European Commission and the 28 national competition authorities of the EU work together in the ECN. However, not all NCAs currently have the same enforcement powers. The draft directive aims to address this problem. Increased competition enforcement by NCAs, including a more extensive enforcement toolbox, a uniform maximum fine level for EU competition law infringements and a common set of leniency conditions may soon become reality.

chose to introduce a settlement submission (which would include an acknowledgment of liability), the Commission's statement of objections could be much shorter than the usual statements of objections issued to face contradiction. The abbreviated statement of objections would endorse the contents of the parties' settlement submission.

Since parties would have been heard effectively in anticipation of the 'settled' statement of objections, other procedural steps would be simplified. After confirmation by the parties, the Commission could, after consulting member states in the framework of the Advisory Committee, adopt an accelerated final decision. However, the Commission retains the possibility to depart from the parties' settlement submission until the final decision, in which case the standard procedure would apply. Once parties choose to dispense with the settlement procedure, the Commission is not bound by its indications given during settlement discussions with regard to the levels of fines (GC, *Timab* (2015), confirmed by the ECJ (2017)).

The amendments to Regulation No. 773/2004 accommodate the settlement option within the existing framework. The changes amend provisions on issues such as the initiation of proceedings, access to the file and oral hearings and choice for a different sequence of procedural steps, advancing some before the adoption of the statement of objections.

The Settlement Notice sets out the specifics of the procedure. It provides guidance for the legal and business community and foresees that companies could anticipate the kind and extent of cooperation expected from them to settle and estimate the individual benefits of settling. The Settlement Notice also provides that settlement submissions may be given orally and will be given the same protections as those granted to leniency applications. Settlement decisions may be appealed to the General Court and, on points of law, to the Court of Justice.

The Commission has settled over 20 cases so far. Recently, in *Alternators and Starters* (2016) all fines were reduced by 10 per cent for settling the case with the Commission. In *Trucks* (2016), the Commission is pursuing a 'hybrid' decision. It has agreed a 10 per cent reduction in fines for those undertakings which agreed to settle and is currently pursuing Scania under the ordinary procedure. *Trucks* was also notable as the procedure only shifted to a settlement procedure after issuing of a formal statement of objections pursuant to the ordinary procedure. In *Panalpina* (2016) the GC recalled that the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. It confirmed that the Commission was entitled to choose not to apply the settlement procedure, particularly given the large number of parties involved (47) and the fact that many were not willing to cooperate on the basis of the Leniency Notice.

## 31 Corporate defendant and employees

**When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?**

Not applicable at the EU level, as the Commission cannot impose penalties on individuals. However, there may be implications for criminal proceedings against individuals that may arise under national legislation (see, eg, the UK chapter).

## 32 Dealing with the enforcement agency

**What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?**

In general, the procedure applicable to cartel investigations is the standard one for all antitrust cases as provided for by Regulation No. 1/2003 (see questions 1, 3 and 10).

If an undertaking wishes to take advantage of the leniency programme, it should contact DG Competition, primarily through the following dedicated email address: comp-leniency@ec.europa.eu (assistance is given via the following dedicated telephone numbers: +32 2 298 4190 or +32 2 298 4191). Only persons empowered to represent the enterprise for that purpose or intermediaries acting for the enterprise, such as legal advisers, should take such a step.

**Application for immunity (part II of the Leniency Notice)**
Following initial contact, the Commission will immediately inform the applicant if immunity is no longer available for the infringement in question (in which case the applicant may still request that its application be considered for a reduction of fines, under part III of the Notice). If immunity is still available, a company has two ways to comply with the requirements for full immunity. It may choose:

- to provide the Commission with all the evidence of the infringement available to it; or
- to initially present this evidence in hypothetical terms, in which case the company is further required to list the evidence it proposes to disclose at a later agreed date; this descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence; the applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.

In either of the two scenarios, immunity applicants will be informed speedily about their situation and, if they meet the substantive criteria, conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

**Application for reduction of a fine (part III of the Leniency Notice)**
Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed of whether the evidence submitted at the time of their application passed the 'significant added value' threshold, as well as of the specific band within which any reduction will be determined, at the latest on the day of adoption of a statement of objections. The specific amount to be imposed will be finalised in the Commission's decision.

In practice, companies applying either for immunity or reduction of fines provide a written statement (sometimes referred to as the corporate statement) for the purposes of the leniency application, in which they give their own description of the cartel activity and assist the Commission in understanding any related evidence (internal notes, minutes of meetings, etc). Given the broad scope of US civil discovery rules, producing such documentary evidence may expose EU leniency applicants in the event of US civil litigation (in particular, regarding claims for treble damages), where US plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. To avert the undermining of its leniency policy, the Commission protects leniency applications from disclosure in the following ways:

- asserting in the Leniency Notice that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 101 TFEU (see, however, recent case law re disclosure in the context of private enforcement and also the position under the Damages Directive in question 29);
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of amicus

curiae (the Commission has intervened in this way in a number of cases); and
- accepting oral corporate statements (paperless submissions).

In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, with a view to avoiding admission of misconduct with effects in the US or elsewhere.

### 33 Policy assessments and reviews

**Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?**

At the time of writing, there are no ongoing or proposed leniency or immunity policy reviews.

## Defending a case

### 34 Disclosure

**What information or evidence is disclosed to a defendant by the enforcement authorities?**

See also questions 29 and 30.

The disclosure of information and evidence depends on whether the normal or the settlement procedure is followed (see questions 9 and 30).

In the normal procedure, the written statement of objections must contain all factual and legal aspects that the Commission intends to use in its decision, ie, clarification of the nature, area, duration and gravity of the infringement and the responsibility of each undertaking, but not the range of potential fines. The objections must be sufficiently clear to enable the undertakings concerned to properly identify the alleged conduct. The parties are then allowed to examine the documents in the Commission's file (access to the file), but no access will be granted to internal documents of the Commission or of NCAs, documents containing business secrets and other confidential information, unless it is necessary to prove the infringement (article 27(1), (2) of Regulation No. 1/2003, articles 10(1) and 15(1), (2), (3) of Regulation No. 773/2004).

In the settlement procedure, parties are informed of the Commission's anticipated objections and are given an indication of the potential maximum fine they can expect. They are given access to the evidence the Commission intends to base its findings upon (such as corporate statements by the other participants in the alleged conduct and historical documents) and are allowed to state their views prior to any formal objections. The Commission's statement of objections may be much shorter than the document used in non-settlement proceedings. A subsequent access to the file is only granted if the statement of objections does not reflect the contents of the parties' settlement submissions, as parties should have been sufficiently informed beforehand (article 15(1a) of Regulation No. 773/2004).

### 35 Representing employees

**May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?**

As individuals cannot be penalised for breach of the EU competition rules, this is not generally a concern at the EU level. However, the issue of separate representation may arise where, for instance, the employee may be subject to disciplinary measures pursuant to his or her contract of employment, or in the event of possible criminal proceedings under relevant national legislation (see, eg, the UK chapter).

### 36 Multiple corporate defendants

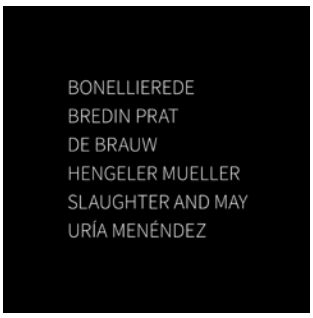
**May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?**

Conflicts of interest are governed by the relevant bar rules in each member state. Conflicts of interest arise fairly regularly between alleged parties to a cartel.

### 37 Payment of penalties and legal costs

**May a corporation pay the legal penalties imposed on its employees and their legal costs?**

Penalties cannot be imposed on individual employees at the EU level.




**Anna Lyle-Smythe** **anna.lyle-smythe@slaughterandmay.com**
**Murray Reeve** **murray.reeve@slaughterandmay.com**
**Hans-Jörg Niemeyer** **hans-joerg.niemeyer@hengeler.com**
**Hannah Ehlers** **hannah.ehlers@hengeler.com**
**Jolling de Pree** **jolling.depree@debrauw.com**
**Martijn Snoep** **martijn.snoep@debrauw.com**

Square de Meeûs 40
1000 Bruxelles
Belgium

www.belex.com
www.bredinprat.fr
www.debrauw.com
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**38 Taxes**

**Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?**

The tax consequences of fines or other penalties for competition law infringements are governed by national law. The Commission has the power under article 15(3) of Regulation No. 1/2003 to present written observations to national courts as amicus curiae. Notably, on 30 October 2012, the Commission published amicus curiae observations on a case then before the Belgian Constitutional Court which concerned the question of whether fines imposed by the Commission for competition law infringements are tax-deductible. The Commission was of the opinion that allowing such penalties to be tax-deductible would diminish their deterrent effect, and would effectively mean that a part of the fine was borne by the relevant state. The Belgian Constitutional Court followed the Commission's opinion.

In respect of private damages awards, tax consequences are governed by national law.

**39 International double jeopardy**

**Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?**

In principle, penalties imposed in other non-member state jurisdictions (re member state jurisdictions see question 12) are not taken into account by the Commission when determining sanctions for a cartel (recently reaffirmed by the ECJ in *InnoLux* (2015)). However, when it comes to including indirect sales for the purpose of calculating the amount of the fine, the Commission may take into account the fact that these sales have also been included in sanctions imposed in another jurisdiction. In *Automotive Wire Harnesses* (2013), the Commission is believed to have refrained from including the indirect sales of cars manufactured in Japan and exported into the EEA in its calculation, taking into consideration the fact that the Japanese FTC had already imposed sanctions with respect to these cars.

**40 Getting the fine down**

**What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?**

The Commission's leniency programme has led to a significant change in the defence strategy of companies involved in cartel cases. Whereas in the past undertakings accused of being part of a secret cartel tended to present a joint defence based on denial and silence, today such an approach is rare given the advantages that can be obtained from cooperation with the Commission. The Commission has repeatedly emphasised its willingness to give companies the chance to get off the hook if they cooperate actively at the earliest possible opportunity. At the same time, it has made clear that companies that do not seize this chance must be aware of the responsibilities they will face. If the company decides to cooperate, it is therefore crucial to develop a cooperation strategy as early as possible tailored to the particular case and with the aim of providing the Commission with as much evidence as possible. The rules on the conduct of settlement procedures (introduced in 2008) allow the Commission to reward companies for their cooperation to attain procedural economies by means of a 10 per cent reduction in fines in addition to any reduction granted under the Leniency Notice.

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