Cartel Regulation

Contributing editor
A Neil Campbell

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GETTING THE DEAL THROUGH

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United Kingdom

Lisa Wright and Shruti Hiremath
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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

There are two principal pieces of UK legislation governing cartel activity in the UK: the Competition Act 1998 (the Competition Act) and the Enterprise Act 2002 (the Enterprise Act). Both the Competition Act and the Enterprise Act were amended in 2014 by the Enterprise and Regulatory Reform Act 2013 (the Reform Act). In addition, EC Council Regulation No. 1/2003 allows the UK competition authorities and courts to apply and enforce article 101 (and 102) of the Treaty on the Functioning of the European Union (TFEU).

See also question 4 for an explanation of the substantive law.

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?

In the UK, both the Competition Act and article 101 (and 102) TFEU are currently enforced by the Competition and Markets Authority (CMA) and certain sectoral regulators, such as those responsible for communications matters, electricity and gas, water and sewerage, civil and railway services. These sectoral regulators have concurrent competition powers, subject to the CMA's role as a central governing body. The Financial Conduct Authority (in relation to financial sector activities) and the Payment Services Regulator (in relation to participation in payment systems) are the most recent regulators to be given a full set of concurrent powers (from 1 April 2015). There is no separate prosecution authority for civil cartel infringements.

The CMA's powers of investigation and prosecution in respect of the criminal cartel offence under the Enterprise Act are shared with the Serious Fraud Office (SFO). The SFO is the intended prosecutor for this criminal offence in England, Wales and Northern Ireland in cases that involve serious or complex fraud. In Scotland, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO through the National Casework Division (NCD) of the Crown Office. The CMA and NCD cooperate to investigate and prosecute criminal cartel cases in Scotland.

The Competition Appeal Tribunal (CAT) hears appeals against cartel decisions taken by the CMA or the sectoral regulators under the Competition Act. The criminal cartel offence may be tried either in a magistrates' court or before a jury in the crown court. With regard to the criminal cartel offence, there is a right of appeal to the higher courts under the normal rules governing criminal cases. For further details of the appeals regime, see question 16.

3 Changes

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

The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the Damages Regulations), which implement the EU Damages Directive in the UK, came into force on 9 March 2017. The Damages Regulations amend the Competition Act to introduce further provisions in relation to private actions for damages including clarification on the burden of proof in claims relating to overcharges or underpayments, a rebuttable presumption that cartels cause harm and limits on the disclosure of cartel leniency statements, settlement submissions, competition authority investigation materials and materials in a competition authority's file. It also provides that final decisions of the competition authorities or review courts of EU member states are prima facie evidence of an infringement of competition law and prohibits the award of exemplary damages in competition proceedings.

As at the time of writing, the CMA is consulting on proposed revisions to its existing guidance on penalties (OFT423). The proposed revisions are intended to clarify the CMA's approach to calculating penalties and do not represent any major changes to the CMA's practices.

See also 'Updates and trends'.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The provisions of article 101 TFEU are outlined in the EU chapter. The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that:

- may affect trade within the United Kingdom; and
- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

This prohibition, known as the Chapter I prohibition, is modelled on article 101. The Competition Act contains a non-exhaustive list of conduct that will be caught by the Chapter I prohibition, mirroring the equivalent provisions of article 101. This includes agreements, decisions or practices that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, technical development or investment; or
- share markets or sources of supply.

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 Chapter I. The CMA's view is that these types of restriction are 'hard-core' and may be presumed to have negative market effects.

If, however, the criteria set out in section 9 of the Competition Act are satisfied, an agreement that is otherwise caught by the Chapter I prohibition will be exempt. This provision mirrors article 101(3) TFEU and requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is, however, almost inconceivable that a hard-core cartel agreement could qualify for such an exemption.

The Competition Act provides that, as far as possible, it is to be interpreted consistently with the corresponding EU rules.

Under the Enterprise Act, it is a criminal offence if an individual agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings involving the following prohibited cartel activities: price fixing, market sharing, limitation of production or supply, and bid

rigging. Generally, the offence only applies to horizontal agreements (although it may also apply, for example, where a supplier procures or facilitates a horizontal arrangement between retailers). An offence may be committed regardless of whether the agreement is actually implemented.

The Reform Act has removed the requirement in the cartel offence for individuals to have acted 'dishonestly' in order for a conviction to be secured. The only mental elements that the prosecution has to prove are the intention to enter into an agreement and the intention as to the agreement's effect. To counter-balance the broader scope of the reformed cartel offence, the Reform Act has introduced new exclusions and defences. The exclusions provide that no offence will be committed where:

- in a case where the arrangements would affect the supply of a product or service in the UK, customers are given relevant information regarding such arrangements prior to purchasing the product or services;
- in the case of bid-rigging arrangements, the person requesting bids is given relevant information regarding the arrangements before the bids are made; or
- in any case, if relevant information about these arrangements is published in a specified manner.

Relevant information includes the names of the relevant undertakings, the nature of the agreements between them, and the products or services (or both) to which the agreements relate. The Enterprise Act 2002 (Publishing of Relevant Information under section 188A) Order 2014 specifies that relevant information is published if it is advertised once in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

Similarly, the defences provide that an individual shall not be convicted:

- in a case where the arrangements would affect the supply of a product or service in the UK but the defendant did not intend that the nature of the arrangements would be concealed from customers before they acquired the product or service;
- if, at the time of making the agreements, the defendant did not intend the nature of the agreements to be concealed from the CMA; or
- if, before making the agreements, the defendant took reasonable steps to ensure that the nature of the agreements was disclosed to professional legal advisers to obtain advice about the making or implementation of the agreements.

Note that arrangements or agreements made before the new cartel offence came into force on 1 April 2014 remain subject to the previous version of the offence, which requires an element of dishonesty.

The CMA has published guidance relating to the exercise of its prosecutorial discretion in relation to the criminal cartel offence (see *Cartel offence prosecution guidance* (CMA9)). The CMA intends to apply the Full Code Test, as set out in the Code for Crown Prosecutors, in deciding whether or not to prosecute the offence. This is composed of the evidential stage and the public interest stage. If the evidential stage is passed (ie, the CMA considers that there is sufficient evidence against a suspect to provide a realistic prospect of conviction), the CMA will go on to consider whether a prosecution is in the public interest. In doing so, it will pay particular attention to:

- the severity of the offence;
- the level of culpability of the suspect;
- the impact on the community; and
- whether prosecution is a proportionate response.

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?

The Competition Act excludes from the scope of the Chapter I prohibition certain agreements relating to the production of, or trade in, agricultural products. Certain types of public transport ticketing schemes are also exempt (pursuant to a block exemption expiring in February 2026). In addition, the Competition Act excludes agreements that are subject to competition scrutiny under other legislation (the Broadcasting Act 1990 and the Communications Act 2003). Provision is also made for other non-industry-specific exclusions. The Secretary of State may exclude further categories of agreement if satisfied that there are exceptional and compelling public policy reasons for exclusion. There is no blanket exemption for government-sanctioned activity or regulated conduct – such conduct must be assessed in accordance with any sector-specific legislation or, if there is none, the Competition Act.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both article 101 and the Chapter I prohibition apply to agreements and practices between undertakings as defined in EU case law. An undertaking includes any natural or legal person engaged in commercial or economic activity, whatever its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit-making organisations.

In contrast, the criminal cartel offence only applies to individuals.

7 Extraterritoriality

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

The Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Article 3(1) of EC Council Regulation No. 1/2003 provides that, where the CMA applies national competition law to agreements or practices that may affect trade between member states, it must also apply article 101. In practice, the CMA will usually apply both article 101 and the Chapter I prohibition in parallel (although an undertaking will not be penalised twice for the same anticompetitive conduct).

In accordance with the European Commission notice on cooperation within the Network of Competition Authorities (2004/C 101/03), the CMA can be considered well placed to act in a particular article 101 case if the following three criteria are all met:

- the agreement or practice has substantial, direct, actual or foreseeable effects on competition within the UK, is implemented within or originates from the UK;
- the CMA is able effectively to bring an end to the entire infringement; and
- the CMA can gather, possibly with the assistance of other national competition authorities (NCAs), the evidence required to prove the infringement.

The criminal offence under the Enterprise Act only applies to an agreement outside the UK if it has been implemented in whole or in part in the UK.

8 Export cartels

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

As described in question 7, the Chapter I prohibition only applies to agreements implemented, or intended to be implemented, in the UK.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

The CMA has published guidance on its investigation procedures in Competition Act 1998 cases from 1 April 2014.

The key stages in an investigation are set out below.

The sources of the CMA's investigations

The CMA obtains information about possible competition law breaches through a number of sources:

- its own research and market intelligence functions;
- other workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory

Powers Act 2000, or information received via the European Competition Network or the European Commission;
- individuals with 'inside' information about a cartel who apply for leniency; and
- complaints.

What the CMA does when it receives a complaint

The CMA decides which cases to investigate on the basis of the principles laid out in its publication *Prioritisation principles for the CMA* (CMA16). These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation.

The CMA Enforcement Directorate is responsible for investigating and enforcing suspected civil cartel infringements of the Competition Act and criminal cartel and consumer law infringements.

Once the CMA has decided to take forward a case within the Enforcement Directorate, it may gather more information from the complainant, the company or companies under investigation and any third parties on an informal basis. On the basis of the information it has gathered at that time, if the CMA considers that it has reasonable grounds for suspecting that competition law has been breached, it can open a formal investigation.

Opening a formal investigation

The decision to open a formal investigation depends on whether the legal test that allows the CMA to use its formal investigation powers has been satisfied (ie, there are reasonable grounds for suspecting that competition law has been breached) and whether the case continues to fall within the CMA's casework priorities.

When the CMA opens a formal investigation, the case is allocated a Team Leader (responsible for the day-to-day running of the case), a Project Director (directs the case and is accountable for delivery of high quality timely output), and a Senior Responsible Officer (SRO) (responsible for authorising the opening of the formal investigation and taking certain other decisions including, where the SRO considers that there is sufficient evidence, authorising the issue of a statement of objections).

Once the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter, setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable and key contacts. The CMA will also generally publish a notice of investigation on its website, containing basic details of the case, a brief summary of the suspected infringement and the industry sector involved. The CMA will also outline the administrative timetable for the case. It may include the names of any businesses it is investigating. CMA guidance notes that it would not generally expect to publish the names of the parties under investigation other than in exceptional circumstances (eg, where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation and the CMA therefore considers it appropriate to publish details of the parties).

The CMA will keep parties under investigation (and any complainants) updated about the progress of the investigation, either by telephone or in writing. Parties under investigation will also have an opportunity to meet with representatives of the case team at 'state of play' meetings, at which the CMA will update the party of the progress it has made and its provisional thinking.

The CMA's formal powers of investigation are set out in question 10.

Investigation outcomes

CMA investigations can be resolved in a number of ways. The CMA may:
- close an investigation on grounds of administrative priorities;
- issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law;
- accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments fully address the competition concerns; or
- issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law – after allowing the parties under investigation to make representations, if the CMA still considers that they have committed an infringement, the CMA may issue an infringement decision against them and impose fines and/or directions to bring the anticompetitive conduct to an end (enforceable by court order).

Infringement decisions are generally extensive and detailed (eg, the non-confidential version of the OFT decision in the *Tobacco Chapter I* infringement case runs to 715 pages). A non-confidential version of the decision will be published on the register kept at the CMA and on the CMA's website.

If the decision is taken to prosecute an alleged criminal cartel offence under the Enterprise Act, the case will be tried either in a magistrates' court or before a jury in the crown court.

10 Investigative powers of the authorities

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

Information requests

Where the CMA has reasonable grounds for suspecting that an agreement or concerted practice falls within article 101 or the Chapter I prohibition, it may, by written notice, require any person (not only the alleged cartel members but also third parties) to provide specified documents or information relevant to the investigation. This is the power that the CMA will rely on most frequently. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents). The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is a criminal offence, punishable by fine and/or imprisonment, to provide false or misleading information, or to destroy, falsify or conceal documents.

The Reform Act has also given the CMA the power to require individuals connected to a business which is a party to an investigation to answer questions (in the form of a compulsory interview) during an article 101 or Chapter I investigation, similar to the power under the Enterprise Act for criminal investigations (see below). Any information obtained by virtue of the exercise of this power will not be able to be used against that person in a criminal prosecution, except in certain limited circumstances. Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation; however, the CMA's starting point is that it will generally be inappropriate for a legal adviser acting only for the undertaking to be present at the interview.

Dawn raids

In addition, the CMA may at the outset of or during an article 101 or Chapter I investigation, conduct on-site investigations to:
- require the production of any relevant document or information (including relevant information that is held on a computer and accessible from the premises);
- take copies of, or extracts from, any document produced;
- require an explanation of any such document; and
- if a document is not produced, require a statement as to where it can be found.

The procedure for, and scope of, an on-site investigation or 'dawn raid' differs according to whether the investigation is made with or without a court-obtained warrant, and whether the premises concerned belong to a person being investigated or to a third party.

The type of on-site investigation described above may be carried out at any business premises without a warrant.

In addition, where certain conditions are met, the CMA has a power of entry in respect of both business and domestic premises with a warrant issued by the CAT or by a judge of the High Court (or of the Court of Session in Scotland). Where a warrant has been issued, reasonable force may be used to obtain entry. The warrant will specify the kind of documents in respect of which the authorised officer may search the premises and take copies and extracts. The officer has available to him or her those powers that apply in the case of entry without warrant and can, in addition, take away originals of documents and retain them for three months if copying on the premises is not practicable, or if taking them away appears necessary to prevent their disappearance.

The investigating officer can also take any other steps necessary to preserve the existence of documents. The officer can also take away copies of computer hard drives, mobile phones, mobile email devices and other electronic devices. The CMA can exercise similar powers of investigation when assisting a European Commission investigation in the UK and when carrying out an inspection in the UK on behalf of the European Commission or another NCA.

Powers of investigation under the Enterprise Act

The CMA may only commence a formal investigation in respect of an alleged criminal cartel offence under the Enterprise Act where there are reasonable grounds for suspecting that such an offence has been committed. Although it is likely that a criminal cartel investigation will initially be led by the CMA in cooperation with the SFO, the SFO may, at a later stage in the investigation, decide to carry out additional inquiries using its powers of investigation under section 2 of the Criminal Justice Act 1987. These powers are broadly equivalent to the CMA's powers of investigation under the Enterprise Act. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents).

Power to require information and documents

For the purposes of a criminal cartel investigation, the CMA may by written notice require the person under investigation or any other person, at a specified time and place, to:

- answer questions or otherwise provide information related to the investigation (including in the form of a compulsory interview);
- produce documents related to the investigation (the CMA may take copies of such documents or extracts from them and may require an explanation of them); and
- if such documents are not produced, provide a statement as to where they are.

Where individuals are required to participate in a compulsory interview, they are entitled to seek legal advice but will face criminal sanctions if they fail to answer all questions put to them (or provide false or misleading answers). However, the information obtained under a compulsory interview cannot be used against that person in a criminal prosecution except in certain limited circumstances.

Alternatively, when investigating a potential criminal cartel offence, the CMA may conduct a voluntary interview under caution. In this case, the interviewee will be given the standard criminal caution before being questioned and is again entitled to legal advice: interviewees may refuse to answer some or all of the questions but their answers (or failure to answer) may be given as evidence in court.

Power to enter premises under a warrant

For the purposes of a criminal investigation and on specified grounds, the CMA may apply to the CAT or to the High Court (or in Scotland, the procurator fiscal may apply to the sheriff) for a warrant. Where a warrant has been issued, a named officer of the CMA, accompanied by other named CMA officers and specified persons (such as IT experts) will be authorised to:

- enter and search premises, using such force as is reasonably necessary;
- take possession of relevant documents (including original documents) or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation of a relevant document or to state, to the best of his or her knowledge and belief, where it may be found; and
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away.

CMA officials also have the power, on giving written notice to the occupier of the premises, to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized (eg, where there is a large bulk of material or where special technical equipment is needed to separate material that the CMA would be entitled to take, such as a computer hard drive). At the time of writing, the UK government has concluded its consultation on the Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 (Draft Warrant Rules), which prescribe the procedure to be followed on an application by the CMA (or one of the sectoral regulators with concurrent powers) to the CAT for a warrant to enter premises. The Draft Warrant Rules draw on existing practice directions dealing with warrant applications under the Competition Act and the Enterprise Act, but are tailored to the particular procedures of the CAT and will be adapted for application outside England and Wales. The final rules are still to be published.

Surveillance and access to communications data

The CMA can authorise directed surveillance (such as the watching of business premises) and covert human intelligence sources (informants) in cartel investigations under both the Competition Act and the Enterprise Act (ie, in relation to both civil and criminal cartel investigations).

The Enterprise Act also gives the CMA additional powers of surveillance solely to investigate the criminal cartel offence. These powers enable the CMA to carry out intrusive (covert) surveillance in respect of residential premises and private vehicles and to interfere with property for the purpose of covert installation of surveillance devices. The CMA is also authorised to obtain access to communications data (such as records of telephone numbers called) in criminal investigations under the Enterprise Act.

Use of evidence obtained under the Competition Act and the Enterprise Act

Any information obtained from an individual by the CMA using its compulsory interview powers under the Enterprise Act will not be used as evidence in a Competition Act investigation against the undertaking that employs that individual. However, information provided during a voluntary interview under caution in the course of a criminal investigation may also be used in a Competition Act investigation.

Any statement obtained from an individual by the CMA using its compulsory powers of investigation under the Competition Act cannot be used in a criminal prosecution against that person except in certain limited circumstances.

Original documents seized by the CMA or SFO during a criminal investigation under the Enterprise Act may also be used by the CMA in proceedings against undertakings under the Competition Act. Equally, any documents obtained by the CMA using its powers of investigation under the Competition Act may be admissible in a subsequent criminal prosecution of the cartel offence under the Enterprise Act (subject to the rules regarding the standard of evidence used in criminal prosecutions). In addition, the CMA can use its powers under the Enterprise Act to obtain original versions of documents copied during a Competition Act investigation.

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 CMA cooperates extensively with the European Commission and with the NCAs in the other member states through the European Competition Network (see the EU chapter).

The CMA has a memorandum of understanding with the authorities in Scotland in respect of cooperation in criminal cartel cases over which Scottish courts may have jurisdiction.

In addition, the Enterprise Act permits the CMA, in certain circumstances, to disclose confidential information to agencies in other jurisdictions to facilitate the performance of their respective enforcement functions. This takes into account existing mutual assistance arrangements relating to competition law enforcement such as those in force between the UK and each of the United States, Australia, Canada and New Zealand.

As noted in question 2, UK competition law is enforced by both the competition regulators (the CMA) and sectoral regulators. Under the Reform Act, sectoral regulators are required to consider whether their cartel powers are more appropriate than their sector-specific powers to promote competition. The Reform Act also requires the CMA and sectoral regulators to work more closely in competition cases. The CMA has published a guidance document, *Regulated industries: Guidance on concurrent application of competition law to regulated industries* (CMA10),

which sets out the proposed arrangements for cooperation between the CMA and the sectoral regulators in connection with the enforcement of competition law.

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?

If a cartel has an effect on trade within the UK and on trade between EU member states, it may be caught by both article 101 and the Chapter I prohibition. In these circumstances, Council Regulation No. 1/2003 requires the CMA to apply article 101 in parallel with the Chapter I prohibition (see the EU chapter).

In cases where the European Commission is investigating an infringement of article 101 involving a potential criminal cartel offence in the UK under the Enterprise Act, the CMA and the European Commission will cooperate to coordinate their investigations.

When the CMA is investigating a suspected infringement of article 101 in the UK on its own behalf or on behalf of the European Commission or another NCA, the UK rules on legal professional privilege will apply. However, when CMA officials assist the European Commission in its investigations, the European Commission's privilege rules (which do not extend to in-house lawyers or non-EU qualified lawyers) apply.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

See questions 9 and 16.

14 Burden of proof

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

In its judgment in *Napp* (2002) [CAT 1], the CAT confirmed that, throughout the procedure, the burden is on the OFT (now the CMA) to prove its case according to the normal civil standard (balance of probabilities) but that, given the seriousness of the penalties for infringement of the Competition Act, strong and convincing evidence would be required. In criminal cartel cases, the onus will be on the prosecution to prove its case according to the normal criminal standard (beyond reasonable doubt).

15 Circumstantial evidence

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

Yes. This has been confirmed by the CAT in various cases including in *Napp*, where the CAT stated that it would be permissible to rely on inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts.

16 Appeal process

What is the appeal process?

Decisions of the CMA and the sectoral regulators made under the Competition Act may be appealed to the CAT, an independent judicial tribunal, on a point of law or fact or as to the amount of any fine. An appeal to the CAT in respect of a decision made under the Competition Act is a full appeal on the merits of the case. There is a further right of appeal from judgments of the CAT, either on a point of law or as to the amount of any fine, to the Court of Appeal (or the Inner House of the Court of Session in Scotland). Permission must be granted either by the CAT or the Court of Appeal. Further appeal lies to the Supreme Court (formerly the House of Lords) on a point of law of general public importance. Permission must be granted by the Court of Appeal or the Supreme Court. Appeals to and from the CAT may be made by any party to an agreement in respect of which the CMA has made a decision, and by third-party applicants who can show a sufficient interest in relation to any such decision (although third-party applicants cannot appeal the quantum of any fine imposed). Interested parties may also apply to intervene in appeal proceedings in the CAT. Appeals from the CAT to the Court of Appeal (and subsequently the Supreme Court) may additionally also be made by the CMA or the relevant sectoral regulator who is a party to the proceedings at the CAT (or the Court of Appeal).

Appeals to the CAT are initiated by filing a notice of appeal, containing details of the parties and the case, summarising the issues in dispute and stating the relief sought. The notice must be filed with the CAT registrar within two months of the appellant being notified of the decision. The CAT registrar will then send the notice to the respondent (eg, the CMA), which will have six weeks to file a defence. Once a notice of appeal has been served on the respondent, the CAT will normally convene a case-management conference to fix the timetable for the case and deal with other procedural issues. The CAT aims to deal with the more straightforward cases in nine months, although more complex cases may take longer.

In respect of criminal cartel offences, there is a right of appeal to the higher courts under the normal rules governing criminal cases. It is also possible to challenge procedural issues, either by way of an application to the CMA's Procedural Officer or by an application to the High Court for judicial review.

Sanctions

17 Criminal sanctions

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

Any individual found guilty of committing the criminal cartel offence under the Enterprise Act may be imprisoned for up to six months and receive a fine of up to the statutory maximum (up to £5,000 for offences committed before 12 March 2015 and unlimited for offences committed on or after 12 March 2015) if tried and convicted in a magistrates' court, and may be imprisoned for up to five years and receive an unlimited fine if tried and convicted in the crown court. Criminal sanctions may also be imposed on individuals who fail to comply with or frustrate CMA or SFO criminal cartel investigations under the Enterprise Act. The offences and sanctions range in severity, with the most serious (falsification, destruction or concealment of relevant documents in the knowledge that an investigation is being, or is likely to be, carried out) attracting a prison sentence of up to five years and an unlimited maximum fine if tried and convicted in the crown court.

The longest sentence that a court has imposed so far on a defendant convicted of the cartel offence is two-and-a-half years, in the *Marine Hose* cartel case (*R v Whittle & Others* [2008] EWCA Crim 2560 (14 November 2008)). The case was highly unusual in that the defendants had entered into plea agreements with the US authorities. Under these plea agreements, the defendants' US sentences were reduced by the number of days of imprisonment to which they would be sentenced in the UK. As part of these agreements, the defendants had committed not to seek terms of imprisonment in the UK shorter than those provided for in the US plea agreements. The crown court initially imposed sentences of three years on two of the defendants and two-and-a-half years on the third defendant. The defendants appealed, seeking sentences that were no longer than their respective US terms of imprisonment. On appeal, the Court of Appeal suggested that the extensive cooperation of the defendants with the authorities was a significant mitigating factor that could warrant a reduction of the sentences beyond that which was sought by the defendants. However, the Court of Appeal was constrained by the absence of submissions to reduce the sentences below the levels of the US plea agreements. It therefore reduced each of the sentences to a level equivalent to that of the US plea agreements: two-and-a-half years, two years and 20 months respectively.

In June 2014, the CMA announced that an individual who had been charged under the cartel offence for dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage had pleaded guilty. In September 2015, this individual received a six month suspended sentence (suspended on the condition that the defendant completes 120 hours of unpaid work and does not commit any offence punishable by imprisonment for the next 12 months). The individual was not subject to a fine and was not disqualified from serving as a director due to mitigating factors (eg, no previous convictions; not motivated by personal gain; cooperated with the authorities to a 'very substantial degree'). Two other individuals who had pleaded not

guilty in relation to the same investigation were acquitted following a trial in June 2015.

Most recently, in March 2016, an individual pleaded guilty to dishonestly agreeing with others to divide supply, fix prices and divide customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products. Following further investigation, the CMA determined in June 2017 that there was insufficient evidence to charge any further individuals with the cartel offence.

In all of the above cases, the applicable cartel offence was as it existed before April 2014. There have been no cases under the new cartel offence (introduced by the Reform Act in April 2014 (see question 4)).

Criminal sanctions (fines and, in certain cases, imprisonment for up to two years) also exist for failing to comply with or frustrating a CMA investigation under the Competition Act. Under the Reform Act, the criminal offences for failing to comply with certain CMA investigative powers have been replaced with civil penalties, but criminal liability still attaches to certain frustrating actions, including obstructing an officer in the exercise of powers to enter premises, destroying or falsifying documents, and providing false or misleading information.

There are no criminal sanctions under the Competition Act for cartel activity itself in the UK (although the CAT has confirmed (in *Napp*) that the scale of the civil fines that may be imposed for breaches of the Competition Act is such that cartel proceedings should be treated as criminal proceedings for the purposes of the procedural right to a fair trial under article 6(1) of the European Convention on Human Rights).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

On making an infringement decision under the Competition Act in respect of a breach of article 101 or the Chapter I prohibition, the CMA may impose a fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its last business year. In addition, the CMA or the relevant sectoral regulator may apply to the High Court (or Court of Session in Scotland) for the disqualification of a company director in certain circumstances (see below for further details). Directors may be disqualified for up to 15 years.

Fines are levied in the majority of cases in which the CMA finds that there has been a breach of the article 101 or Chapter I prohibition, although disqualification of directors is less common. Nevertheless, the CMA decides each case on its facts: the nature and the level of the sanctions imposed on parties to cartel arrangements are determined by the nature of the anticompetitive arrangements between the parties, the impact of these arrangements on consumers, whether the parties have applied for leniency and, if so, the conditions under which they have applied.

Recent and/or notable penalties include:

- £58.5 million on British Airways for its role in an alleged transatlantic passenger air transport fuel surcharge price-fixing agreement with Virgin Atlantic in April 2012;
- £2.8 million on Mercedes-Benz and four of its dealers for market-sharing, price coordination and exchange of commercially sensitive information, with the object of restricting competition for sales of vans and trucks in March 2013;
- £44.99 million on GlaxoSmithKline (GSK) and two suppliers of generic medicines for entering into a series of agreements that delayed generic entry of the drug paroxetine in February 2016 (the CMA also found that GSK's conduct infringed the Chapter II prohibition);
- £786,668 on Ultra Finishing for online resale price maintenance in the bathroom fittings sector in May 2016;
- £2.29 million on ITW for resale price maintenance in internet sales of its commercial fridges in May 2016;
- £2.8 million collectively on three suppliers of furniture parts (drawer fronts and drawer wraps) for entering into an agreement to share the market and coordinate commercial behaviour (in particular pricing practices) through bid rigging and the exchange of confidential commercially sensitive information in March 2017; and
- £2.7 million on the National Lighting Company Limited (NLC) for online resale price maintenance in the domestic light fittings sector in May 2017.

Under the Company Directors Disqualification Act (as amended by the Enterprise Act) the court must make a competition disqualification order (CDO) on the application of the CMA or a sectoral regulator if the following two conditions are satisfied:

- the company of which the individual is a director has committed a breach of competition law (including, for these purposes, a breach of the Chapter I prohibition and a breach of article 101); and
- the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of a company.

As regards this second condition, the court must have regard to the following considerations:

- whether the director's conduct contributed to the breach of competition law;
- whether, even if his or her conduct did not contribute to the breach, he or she had reasonable grounds to suspect that the conduct of the company constituted a breach of competition law and he or she took no steps to prevent it; and
- whether he or she did not know but ought to have known that the company's conduct constituted such a breach.

Moreover, the court may have regard to the individual's conduct as a director of a company in connection with any other breach of competition law.

CMA guidance on the circumstances in which it and sectoral regulators will exercise their powers to apply for a CDO (*Director disqualification orders in competition cases*, OFT 510), identifies five factors relevant to the decision of whether to apply for a CDO:

- whether the company has committed a breach of competition law proven by a competition authority decision or the courts. In exceptional circumstances, the CMA (or sectoral regulator) may also apply for a CDO against a director even where there is no prior infringement decision (but they will then still have to satisfy the court that there has been an infringement of competition law);
- the nature of the breach of competition law. The CMA (or sectoral regulator) is more likely to consider an application for a CDO to be appropriate in cases involving serious breaches, such as those in which a financial penalty has been imposed;
- whether the company has made a successful leniency application. The CMA (or sectoral regulator) will not apply for a CDO against any current director whose company has benefited from leniency in respect of the activities concerned, unless the director has been removed or otherwise ceases to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency, or both; or the director fails to maintain continuous and complete cooperation throughout the leniency process. The CMA (or sectoral regulator) will not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel offences specified in the letter;
- the extent of the director's responsibility for, or involvement in, the breach. The CMA (or sectoral regulator) will consider: whether the director's conduct contributed to the breach; whether the director had reasonable grounds to suspect there was a breach but took no steps to prevent it; and whether the director ought to have known of the breach. The CMA and sectoral regulators do not expect directors to have specific expertise in competition law. However, they do expect all company directors to appreciate the importance of complying with competition law and, more specifically, that price-fixing, market-sharing and bid-rigging agreements are likely to breach competition law; and
- the presence of any aggravating or mitigating factors. Aggravating factors increase the likelihood that the CMA (or sectoral regulator) will apply for a CDO, and include evidence that the director destroyed or advised others to destroy records relating to the breach of competition law. Conversely, the presence of mitigating factors, for example, evidence that there was genuine uncertainty as to whether the activity was illegal, may reduce the likelihood that an application for a CDO will be made.

The maximum period of disqualification under a CDO is 15 years. During the disqualification period it is a criminal offence for the individual to be a director of a company, act as a receiver of a company's property, in any way (whether directly or indirectly) be concerned with or take part in the promotion, formation or management of a company

without the leave of the Court or act as an insolvency practitioner. In addition, details of a CDO will be entered in a public register.

Instead of applying for a CDO, the CMA or sectoral regulator may accept a competition disqualification undertaking (CDU). In this case the person giving the CDU undertakes for a specified period (not exceeding 15 years) not to perform any acts that would breach a CDO as listed above. Breach of a CDU has the same consequences as breach of a CDO but engaging with the CMA voluntarily through the CDU process may result in a shorter period of disqualification than under a CDO. As with a CDO, details of a CDU will be entered in a public register.

Additionally, where an individual company director has been convicted of the criminal cartel offence under the Enterprise Act and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director.

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?

According to the CMA's guidance on penalties, any financial penalty imposed in respect of an article 101 or a Chapter I infringement will be calculated according to the six-step approach set out below. The Competition Act requires both the CMA and the CAT to 'have regard' to this penalty guidance.

Step 1: calculation of the starting point
The starting point will be calculated with regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking.

Price-fixing or market-sharing agreements and other cartel activities are considered among the most serious infringements of article 101 and the Chapter I prohibition. The relevant turnover is that of the undertaking in the relevant product and geographic markets affected by the infringement in the last full financial year before the infringement ended. This may include turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or the NCA is given. The starting point may not exceed 30 per cent of the relevant turnover of the infringing undertaking. The starting point for hard-core cartel activity will generally be at the upper end of the range.

Step 2: adjustment for duration
The starting point may then be increased (or, exceptionally, and only in the case of infringements lasting less than one year, decreased) to take account of the duration of the infringement, provided that it is not multiplied by more than the number of years of the infringement. Part years may be treated as full years.

Step 3: adjustment for aggravating and mitigating factors
Aggravating factors include:

- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action (including missing deadlines);
- the role of the undertaking as a leader in, or instigator of, the infringement;
- the involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisals sought by the undertaking against a leniency applicant.

Mitigating factors include:

- the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with competition law (the mere existence of compliance programmes is not sufficient, but a clear and unambiguous commitment to competition compliance throughout the organisation from the top down may be given some weight);
- termination of the infringement as soon as the CMA intervenes (unless the CMA directs otherwise); and
- cooperation which enables the enforcement process to be concluded more effectively or speedily than would otherwise be the case.

Step 4: adjustment for specific deterrence and proportionality
The penalty figure may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again in the future, having regard to the undertaking's size and financial position, and any other relevant circumstances. The penalty figure may also be increased under this head to take account of any gain made by the undertaking from the infringement. The CMA will then assess whether, in its view, the overall penalty proposed is proportionate and appropriate in the round.

Step 5: adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy
The overall penalty figure may not exceed 10 per cent of the worldwide turnover of the undertaking in the previous business year. The penalty will therefore be adjusted if necessary to ensure that it does not exceed this maximum. If a penalty has already been imposed by the European Commission or by another member state in respect of the same agreement or conduct, the CMA must take that penalty into account.

Step 6: adjustment for leniency or settlement discounts
The CMA will reduce the penalty where an undertaking has entered into a leniency or settlement agreement with the CMA. In exceptional circumstances, the CMA may reduce the penalty where the undertaking is unable to pay the proposed amount due to financial hardship. Parties will have the opportunity to make written and oral representations in response to the draft penalty statement that will be issued by the CMA before it makes any infringement decision. On 14 August 2015 the CMA published the final version of its guidance on its new powers under the Consumer Rights Act 2015 (the Consumer Rights Act) to approve voluntary redress schemes (CMA40). The CMA may take any voluntary redress schemes established by the infringing party (see question 30) into account when assessing the level of the fine to be imposed and grant a fine reduction (likely to be up to 20 per cent of the penalty that would otherwise have been imposed).

As at the time of writing, the CMA is consulting on proposed revisions to its existing guidance on penalties (see question 3).

The sentencing limits in respect of the criminal cartel offence are set out in the Enterprise Act (see question 17). The UK courts have sentencing guidelines regarding criminal offences generally which also apply to the cartel offence. The sentencing limits in respect of the criminal cartel offence under the Enterprise Act are binding.

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?

Automatic debarment from government procurement procedures is not available as a sanction for cartel infringements. Under the Public Contracts Regulations 2015, which took effect from 26 February 2015 for public procurements that commenced on or after 26 February 2016, there is the possibility of discretionary debarment by the contracting authority where it has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. For discretionary debarment, the period during which the economic operator may be excluded is three years from the date of the relevant event.

An exclusion from the tendering process may also be possible under the EU rules on public procurement with regard to grave professional misconduct (article 57(4)(c) Directive 2014/24/EU) (see the EU chapter).

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?

Criminal and administrative sanctions can be pursued in respect of the same conduct, although as noted above the criminal offence applies only to individuals and the Chapter I prohibition applies only to undertakings (see question 6).

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?

Private actions for damages for breach of the Chapter I prohibition or article 101 may be brought in the High Court. In addition, under section 47A of the Competition Act, the CAT may hear claims for damages in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition or of article 101 ('follow-on' action) or in cases where no such decision has been reached but there is an alleged infringement ('stand-alone' action). The possibility of bringing a 'follow-on' action is intended to create a quicker and cheaper route for aggrieved persons – both consumers and businesses – to obtain compensation. Representative bodies may also bring damages actions before the CAT on behalf of groups of named and identifiable consumers (see question 23).

For both the High Court and the CAT, claims may be brought by any individual or business who has suffered loss as a result of an infringement of competition law. This includes both direct and indirect purchasers, as well as other parties who have suffered loss.

Where an action for damages is brought in a UK court in respect of a breach of the Chapter I or article 101 prohibition, the court is bound by a prior decision of the CMA, European Commission or CAT that the relevant provision has been infringed, provided that any period for appeal has expired. Similarly, under EC Council Regulation No. 1/2003, a UK court cannot take a decision that runs counter to a prior European Commission decision relating to the same agreement or practice.

In April 2014, the Supreme Court considered the issue of whether it was possible to bring a private action where some, but not all, of the parties to a cartel had appealed against a decision of the European Commission (*Deutsche Bahn AG v Morgan Crucible Co Plc* [2014] UKSC 24). The Supreme Court held that, as a successful appeal by an addressee of a European Commission decision would deprive an addressee who had not appealed of a potential contributing party, it might be appropriate to adjourn the determination of the contribution proceedings until all appeals by other addressees had been determined. However, it remained the case that, as against a non-appealing addressee, the Commission decision that there had been a cartel involving all addressees stood, even though some of them might appeal successfully. As a result, a non-appealing addressee might, at least theoretically, find itself carrying full civil liability (without any fellow cartel members from which it might seek contribution) in respect of a cartel. However, if there really was no cartel, it might be difficult for a claimant to prove that it had suffered any loss caused by the conduct.

The UK government has implemented a raft of measures, including the encouragement of alternative dispute resolution and changes to the role of the CAT. The Consumer Rights Act widens the CAT's scope and improves its operations, by:

- enabling the courts to transfer competition law cases from the High Court to the CAT and vice versa (irrespective of whether such cases are stand-alone, follow-on, or hybrid cases involving both stand-alone and follow-on aspects);
- harmonising the limitation periods for the CAT with those of the High Court;
- enabling the CAT to grant interim and final injunctions; and
- introducing a fast-track procedure for simpler private claims in the CAT.

The level of damages that may be recovered is assessed by reference to the victim's loss. Damages are therefore usually calculated by reference to what is necessary to restore the victim to the position in which he or she would otherwise have been had the infringement not occurred. In *Sainsbury's v MasterCard* [2016] CAT 11, the CAT noted that the pass-on 'defence' is in reality not a defence and simply reflects the need to assess damages in a way that ensures that a claimant is not overcompensated. Part 2 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) clarifies that the burden of proving that an overcharge has been passed on lies with the defendant.

The UK government has previously rejected the idea of introducing treble damages. Section 36 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) provides that exemplary damages cannot be awarded by a court or a tribunal in competition proceedings. The Consumer Rights Act also explicitly provides that exemplary damages will not be available in collective actions.

As regards costs awards, in the High Court, the general rule is that the losing party must pay the winning party's costs. There is no general rule on costs in the CAT; the 'loser pays' principle is not necessarily the starting point (although it is often applied in practice) and the CAT may make any order it thinks fit in relation to costs. Section 47C of the Competition Act (inserted by the Consumer Rights Act) does, however, make special provision in relation to the costs of collective proceedings: any unclaimed part of aggregated damages in opt-out collective proceedings may be used by the class representative to pay legal costs or expenses.

Damages in relation to a cartel claim have so far only been awarded in the *Sainsbury's* case in which MasterCard was ordered to pay £68,582,245 in respect of overcharge in relation to credit cards and £760,406 in respect of overcharge in relation to debit cards, plus interest.

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?

Section 47B of the Competition Act provides that a specified consumer body can bring a representative action before the CAT on behalf of two or more consumers. Schedule 8 of the Consumer Rights Act amends the Competition Act to introduce a new collective proceedings regime, which covers both opt-in and opt-out actions.

In the new 'opt-out' collective action regime, affected consumers are automatically included in a claim and have to take positive steps to exclude themselves from it (should they wish to do so). The regime covers both follow-on and stand-alone cases and is available to both consumer and business complainants. The opt-out aspect of a claim only applies to UK-domiciled claimants, but non-UK claimants are able to opt in to a claim.

Collective proceedings must be commenced by a person who will act as the representative of the claimants. The CAT may authorise a person to act as representative whether or not that person is also a class member. However, proceedings may only be commenced if the CAT grants a collective proceedings order following a hearing to certify the representative claimant. The collective proceedings order authorises the person bringing the proceedings to act as representative, it provides a description of the class of persons whose claims may be included in the proceedings and it specifies whether the proceedings are to continue on an opt-in or opt-out basis. A collective proceedings order is only granted if:

- the CAT considers that it is just and reasonable for the person bringing the proceedings is to act as the representative (whether or not they are a claimant); and
- the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

If an opt-out action results in the award of damages to the class of claimants, any unclaimed damages will not be returned to the defendants. Rather, these unclaimed sums will be paid to the Access to Justice Foundation (an organisation which supports pro bono legal assistance). Defendants will be free to settle on other terms, subject to the approval of the CAT judge.

In addition, the Consumer Rights Act provides for an opt-out collective settlement regime to allow for rapid settlement of opt-out cases in relation to which a collective proceedings order has been made. Under this system, a representative of those who have suffered loss and a potential defendant can jointly apply to the CAT, providing agreed details of the claims to be settled and the proposed terms of the settlement. The CAT can approve such mutually agreed settlement agreements on an opt-out basis if it is satisfied that the terms of the relevant agreement are just and reasonable.

The CMA has published guidance relating to taking action for breaches of competition law (see *Competition law redress: A guide to taking action for breaches of competition law* (CMA55)).

An application for the first UK class action was made in May 2016 in relation to the CMA's finding of an infringement in the market for mobility scooters. This application was adjourned by the CAT in March 2017 on the basis that the claimant's proposed methodology for estimating consumer losses was inadequate. However, the claimant was given the opportunity to amend her application using new economic evidence to estimate consumer losses on a new basis. The class action was subsequently abandoned. A second application for a class action was made in September 2016 in relation to the European Commission's decision regarding interchange fees charged by MasterCard. The CAT dismissed this class action in July 2017 on the basis that it would not be possible to estimate the loss to each individual consumer (which would form the basis for distribution of any damages awarded) in a practicable manner. The claimant sought the right to appeal against the CAT's ruling in August 2017. On 28 September 2017, the CAT rejected the claimant's application on the basis that an appeal from the CAT is only available on a point of law or when the CAT awards damages or grants an injunction in collective or standalone damages proceedings.

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?

The CMA's immunity programme is set out in the OFT-published document *Applications for leniency and no-action in cartel cases* (OFT 1495; published July 2013 (and adopted in full by the CMA)). This provides different types of protection to an applicant depending on its position in the queue and whether an investigation has already commenced, as set out below.

Type A immunity
Available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation into such activity. Type A immunity provides automatic immunity from civil fines for an undertaking, and criminal immunity for all current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification.

Type B immunity
Available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation into such activity. In such circumstances, the CMA retains discretion regarding whether to provide civil immunity to the undertaking and criminal immunity to current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification. Type B immunity will no longer be available where the CMA has sufficient information to establish an infringement, where another undertaking has been granted Type B immunity, or when the CMA already has, or is in the course of gathering, sufficient information to bring a successful criminal prosecution.

Type B leniency
Where the CMA decides not to grant Type B immunity to an undertaking, it may still provide a reduction from any financial penalty imposed under the Competition Act. There is no limit to the level of reduction that may be granted under Type B leniency. The CMA will consider whether it is in the public interest to grant immunity (from criminal sanctions) on a blanket or individual basis. Cooperating individuals should also avoid director disqualification.

Type C leniency
Available to undertakings which are not the first to apply but provide evidence of cartel activity before a statement of objections is issued (provided such evidence genuinely advances the investigation). Recipients of Type C leniency may be granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the Competition Act. The CMA may exercise its discretion to award immunity from criminal prosecution for specific individuals. Cooperating individuals should also avoid director disqualification.

In addition to fulfilling the criteria above, an undertaking must fulfil the following conditions to be granted Type A or Type B immunity or leniency:

- accept that it participated in cartel activity in breach of law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

In order to be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except the non-coercion condition, which does not apply.

When it comes to vertical agreements, the CMA's leniency policy only applies to vertical price fixing such as resale price maintenance (although leniency is in principle also available for vertical behaviour that facilitates horizontal cartel activity). This is justified on the basis that other vertical restrictions on competition are visible on the market and are therefore, over time, self-detecting.

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?

See question 24.

26 Going in second

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

Importance of going in second
See question 24.

Any reduction in the financial penalty in these circumstances is discretionary and will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the CMA's possession, the evidence provided by the undertaking and the overall level of cooperation provided. The guidance on leniency and no-action notes that Type C leniency will generally involve discounts in the range of 25 to 50 per cent, although it is possible that low value or late applications may gain awards of less than 25 per cent. Blanket criminal immunity will not be granted in Type C leniency cases, but the CMA will consider whether it is in the public interest to grant immunity on an individual basis.

Immunity or amnesty plus
The leniency programme under the Competition Act provides an incentive for applicants to come forward with information about other cartels they may be involved in. If an undertaking is cooperating with an investigation in respect of one cartel activity and comes forward with information such that it obtains total immunity from (or a reduction in) fines in relation to a completely separate cartel activity (on the basis that it is the first undertaking to come forward with evidence regarding that second cartel activity), it will also receive a reduction in the fine imposed in respect of the first cartel (over and above the reduction it would have received for its cooperation in relation to the first cartel alone). The additional reduction granted in relation to the first market because of the successful application in the second market is known as 'leniency

plus'. However, the guidance on leniency and no-action makes clear that leniency plus should be regarded as a secondary benefit and, as such, reductions to financial penalties granted under leniency plus are unlikely to be high. The most recent example was in 2011 in the context of the dairy retail price initiatives investigation, when the OFT granted Asda a 10 per cent discount on the basis that it had been granted total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.

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?

If an undertaking or individual wishes to apply for leniency, it is advisable to approach the CMA as soon as possible to secure the benefits of being the first to come forward as described above. In particular, type A immunity is only available before the CMA has commenced an article 101 or Chapter I investigation. The CMA will not accept leniency applications from undertakings after it has issued a statement of objections in relation to the reported cartel activity. Similarly, the CMA will not accept leniency applications from an individual after that individual has been charged with a cartel offence in relation to the reported activity. Additionally, financial incentives are offered to individuals to come forward with information about cartels – the CMA offers to pay up to £100,000 to individuals in return for information that helps the CMA to identify and take enforcement action against cartels (this is separate from the leniency-immunity programme).

While it is preferable to approach the CMA as soon as possible to be the 'first in', there may be some disadvantages to seeking leniency or immunity that need to be considered carefully before approaching the CMA:

- It is not possible for an undertaking to know for sure whether it will be the first to provide the CMA with evidence of the existence and activities of a cartel (although it is possible to seek confirmation as to whether type A immunity is available on a confidential, no-names basis provided that the legal adviser making such contact with the CMA can confirm that he or she has instructions to apply for type A immunity if it is available).
- Similarly, it is not possible to know in advance whether the information being provided to the CMA is new, or indeed what the precise state of the CMA's existing knowledge is (although, as noted above, it is possible to seek confirmation as to whether type A immunity – and, if not, Type B immunity – is available).
- The CMA does not (and cannot) provide immunity from third-party damages actions (see question 22).

Any undertaking considering an approach to the CMA ought first to assess carefully its exposure risk, not only in the UK but in all jurisdictions in which the cartel is active, thus recognising the impact of the likely cooperation that will occur between competition authorities. The exposure assessment will need to take account of the degree of consumer detriment that has resulted from the cartel, the impact of the cartel on the relevant market and the likelihood that the CMA will otherwise discover the existence of the cartel, either independently or through a third party. Account will also need to be taken of the exposure of individuals to criminal prosecution under the Enterprise Act if they do not secure leniency. Before conducting internal investigations into possible cartel conduct, undertakings should refer to the CMA guidance on leniency and no-action, which sets out guidelines designed to ensure that internal investigations do not prejudice any subsequent CMA investigation or enforcement action. The undertaking should ensure, before approaching the CMA, that it is able to prove positively that it has withdrawn from the cartel, and also that it can provide a sufficiently complete document trail to meet the stringent conditions for leniency.

In a case involving cartel activity that may have an effect on trade between member states, the undertaking should also consider as a matter of urgency whether it is appropriate to make simultaneous leniency applications to the European Commission and other competition authorities within the European Competition Network (ECN). An application for leniency to the CMA will not be considered as an application for leniency to the European Commission or another NCA within the ECN. The ECN Model Leniency Programme has been established to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Leniency Programme therefore sets out the treatment that an applicant can anticipate in any ECN jurisdiction once the alignment of all programmes has taken place. In addition, the ECN Model Leniency Programme aims to alleviate the burden associated with multiple filings in cases with which the European Commission is particularly well placed to deal by introducing a model for a uniform summary application system.

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?

The CMA has adopted the OFT's *Guidelines on applications for leniency and no action in cartel cases*, published in July 2013 (OFT 1495). These provide that all leniency applicants, whether they are applicants for immunity or leniency, have a duty to maintain 'continuous and complete' cooperation throughout the CMA's investigation and any subsequent proceedings (including criminal proceedings and defending civil or criminal appeals) by the CMA as a result of the investigation. This requires applicants to engage positively, proactively and in a timely manner with the CMA to assist it in effectively detecting, investigating and taking enforcement action against cartel conduct. In particular, leniency applicants must provide the CMA with all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel. They must also, where appropriate, make current and former directors, employees and agents available for interviews and use their best endeavours to ensure that relevant individuals respond completely and truthfully to the CMA and not attempt to falsely protect or implicate any undertaking in relation to any infringement or any individual in relation to a cartel offence. Failure to comply could lead to a loss of all protection under the leniency programme.

Furthermore, leniency applicants must accept that the activity in which they engaged amounts to cartel activity in breach of article 101 or the Chapter I prohibition, or, in the case of individual applicants, amounted to commission of the cartel offence. This will ultimately be reflected in the leniency agreement. The CMA will regard any of the applicant's representations following the issue of a statement of objections which amount to a denial of cartel participation as inconsistent with the grant of leniency.

See also question 24.

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?

The CMA will endeavour, to the extent that it is consistent with its statutory obligations to disclose information, and its obligations to exchange information with the ECN, to keep the identity of cooperating undertakings confidential throughout the course of the investigation until the issue of a statement of objections. These protections apply both to applicants for immunity and to other leniency applicants.

In practical terms, the rights of access to the file afforded to the undertakings under investigation and the eventual publication of a reasoned decision will normally result in the identity of an immunity applicant becoming apparent both to other members of the cartel and, more widely, to others operating in the industry and to the public. Details of a leniency application may also be disclosed during an appeal to the CAT in respect of the infringement decision. Similarly, the fact that an individual has received a no-action letter may become evident because of disclosure obligations during the prosecution of other participants in a criminal cartel offence.

Section 28 of Schedule 8A of the Competition Act (as recently introduced by the Damages Regulations) explicitly provides that a disclosure

order may not be made in respect of leniency statements regardless of whether they have been subsequently withdrawn. The CMA's guidance also emphasises that the CMA will 'firmly resist' requests for disclosure of leniency materials.

The CMA's guidelines confirm that the CMA will not require the waiver of legal professional privilege as a condition for leniency either in civil or criminal proceedings. However, the CMA has decided that it will require a review of any relevant information in respect of which legal professional privilege is claimed by external independent counsel who will be selected, instructed and funded on a case-by-case basis by the CMA. While external independent counsel will be instructed by the CMA, the relevant information in respect of which legal professional privilege is claimed will not be provided to the CMA (unless independent counsel concludes that it is not privileged).

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?

In March 2014, the CMA published guidance on its investigation procedures which includes the first formal guidance on the settlement process (the OFT had previously covered the issue only very briefly, in response to a consultation which took place in 2012). The CMA will consider settlement for any case falling under the Chapter I prohibition or article 101 as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. There is no 'right' to settle – the CMA retains broad discretion in determining which cases to settle. Should the CMA decide to proceed with settlement, at a minimum, it will require the settling parties to:

- make an admission of liability;
- cease the infringement immediately; and
- confirm that they will pay a penalty set at a maximum amount.

Settlement discussions can be initiated either before or after the statement of objections is issued. Businesses may wish to approach the CMA during an investigation to discuss the possibility of settlement – the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in settlement decisions. Before the CMA case team can commence settlement discussions, the SRO will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. Once this is received, the settlement discussions themselves will be overseen by the SRO. There may, however, be exceptional circumstances where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision-maker on the case.

In exchange for settling a case, the CMA will grant settling parties a discount of up to 20 per cent (if settlement took place pre-statement of objections) or 10 per cent (if settlement took place post-statement of objections). The actual discount awarded will take account of the resource savings achieved.

Previous OFT practice suggests that there is a growing appetite for flexible, 'settlement-type' arrangements in cartel cases. For example, in December 2013, the OFT announced that it had reached a settlement with Hamsard 3149 Limited, which had agreed to pay a fine of £380,000 for breaching the Chapter I prohibition in relation to a market-sharing agreement between its subsidiary, Quantum Pharmaceutical, and Lloyds Pharmacy in relation to the supply of prescription medicines to care homes between May and November 2011. The fine was reduced from £646,246 to reflect Hamsard's application for leniency and Hamsard's admission of liability/further cooperation under the settlement process which enabled the case to be resolved in a faster and more efficient manner (the case was only opened 10 months before, in March 2013). The OFT also reached a settlement with Mercedes-Benz and three of its dealers in relation to infringements relating to market sharing, price coordination and exchange of commercially sensitive information in February 2013 – each party qualified for a 15 per cent reduction from the penalties otherwise imposed.

The increasing use of early resolution illustrates a clear preference by the OFT for resolving disputes as flexibly, quickly and cost-effectively as possible. This preference has already been reflected in the CMA's decisional practice: the CMA agreed its first settlement under the formalised procedure in March 2015, in relation to its property sales and letting investigation, and granted a 10 per cent settlement discount; in July 2015, the CMA announced a settlement in relation to the private ophthalmology (information exchange and pricing agreements) investigation and granted a 15 per cent settlement discount. The CMA also reached a settlement with ITW in relation to infringements relating to online resale price maintenance in the commercial refrigeration sector in May 2016 and granted a 20 per cent settlement discount.

Finally, it should be noted that the Consumer Rights Act provides that the CMA is able to approve voluntary redress schemes, that is to say, binding commitments entered into by infringers to provide compensation (whether monetary or otherwise) to consumers.

Settlements can be judicially reviewed. The developments in relation to the settlements in the OFT's tobacco investigation provide an interesting insight. In that case, the OFT's case collapsed following an appeal by non-settling parties. Two settling parties who had not joined the appeal, Gallaher and Somerfield, sought to recover the fines levied against them. They pursued appeals against the OFT's decision using normal routes. However, their appeals were held to be out of time. In the meanwhile, the OFT announced that it would be returning the £2.7 million fine it had imposed on TM Retail, one of the parties investigated, together with a contribution to certain other costs. This was because TM Retail had been given assurances by the OFT that even if it entered into a settlement agreement, any successful appeal against the decision would allow it to claim its money back. Gallaher and Somerfield applied for a judicial review of the OFT's behaviour, alleging breach of the principles of fairness and equal treatment. They argued that the benefit of these assurances should be extended to them. They were unsuccessful. The High Court held that the OFT had made a mistake by giving the other party those assurances (as they were simply wrong in law), and that as a matter of principle mistakes should not be replicated where public funds are involved, even in the interests of fairness. Gallaher and Somerfield appealed to the Court of Appeal, which overturned the High Court's decision – it held that the OFT had breached the principle of fairness and equal treatment and ordered the authority to repay the penalties paid by Gallaher and Somerfield together with interest and costs. In October 2016, the CMA sought permission from the Supreme Court to appeal the Court of Appeal's judgment. The Supreme Court granted permission in March 2017.

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?

See question 24.

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?

An undertaking or individual wishing to take advantage of the CMA's leniency programme must contact the senior director of cartels and criminal enforcement at the CMA (or, where appropriate, the relevant sectoral regulator).

Where a leniency application under the Competition Act regime is made on behalf of an undertaking, this step has to be taken by a person who has the power to represent the undertaking for that purpose. However, an initial approach to the CMA may be made by the undertaking's legal advisers on a hypothetical 'no names' basis to secure a marker, provided that the adviser has instructions to apply for type A immunity if the CMA confirms that it is available. The adviser must also ensure that there is a concrete basis for a suspicion that the undertaking has participated in cartel activity and the undertaking must have a 'genuine intention to confess'; that is, acceptance as a matter of law and fact that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I or article 101 prohibitions. If the CMA confirms that type A immunity is available, the adviser must identify the undertaking and apply for immunity. A discussion of the timing and process for perfecting the marker will then follow. The undertaking can also apply for automatic individual immunity for all of its current and former employees and directors.

A similar approach may be made to obtain a marker for Type B immunity, although in Type B cases it is possible to ask the CMA whether immunity is available without a requirement to make an immediate application if the CMA confirms that it is available. To perfect a marker for Type B immunity, the undertaking must add significant value to the CMA's investigation. An undertaking can explore on a no names basis whether the information it is likely to provide would genuinely advance the CMA's investigation. Again, where a marker in a Type B case has been perfected, the undertaking can also apply for automatic individual immunity in respect of all current and former employees and directors.

In the case of a separate application for a no-action letter, the approach to the CMA may be made by the individual concerned, by a lawyer representing the individual or by an undertaking on behalf of named employees where that undertaking is also seeking leniency from the CMA or the European Commission. The senior director of cartels and criminal enforcement will give an initial indication as to whether the CMA may be prepared to issue a no-action letter. The CMA will then interview the individual concerned before advising the applicant in writing whether it is prepared to issue a no-action letter. Again, the CMA may also advise on a no names basis whether a hypothetical scenario would be likely to lead to individual criminal prosecution.

33 Policy assessments and reviews

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

The latest version of the guidance regarding leniency and no-action letters was published in July 2013. The CMA has adopted this guidance.

Defending a case

34 Disclosure

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

Part 6 of Schedule 8A of the Competition Act (as introduced recently by the Damages Regulations) prohibits the court or CAT from granting a disclosure order in respect of cartel leniency statements (whether or not withdrawn), settlement submissions (if not withdrawn), competition authority investigation materials (prior to the day on which the competition authority closes the investigation to which those materials relate) and materials in a competition authority's file (unless the court or CAT is satisfied that no-one else is reasonably able to provide the documents or information).

As a general rule, the CMA and its staff cannot disclose information obtained under the Enterprise Act, Competition Act or certain other legislation (specified in Schedule 14 of the Enterprise Act) that relates to the affairs of a living individual, or to the business of an existing undertaking during the lifetime of such individual or the existence of such undertaking, unless such information has already been previously lawfully disclosed to the public. However, the following statutory information gateways in Part 9 of the Enterprise Act allow the CMA to disclose 'specified information' (information that the CMA obtains during the exercise of any of its functions) to the defendant where:

- the CMA has obtained the required consents;
- the disclosure is for the purpose of facilitating the exercise by the CMA of its statutory function; or
- the information is disclosed to any person in connection with the investigation of a criminal offence or any criminal proceedings in any part of the UK or for the purpose of deciding whether to commence or bring to an end such an investigation or proceedings.

Where the CMA discloses information to a defendant under the gateways listed above, there are restrictions on the further disclosure or use of the information by the defendant. It is a criminal offence to breach these restrictions.

Before making a disclosure, the CMA takes the following considerations into account:

- the need to exclude from disclosure, so far as practicable, information whose disclosure would be against the public interest;
- the need to exclude from disclosure business information or information relating to an individual's private affairs, where such disclosure would significantly harm the legitimate business interests of the undertaking to which the information relates, or the interests of the individual to whom the information relates; and
- the extent to which disclosure related to the private affairs of an individual or commercial information is necessary for the purpose for which the disclosure is being made.

Update and trends

The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, which implements the EU Damages Directive in the UK, came into force in March 2017. They amend the Competition Act to make it easier to bring a claim by introducing a rebuttable presumption that cartels cause harm. It, however, restricts claimants' access to materials that may be helpful for their case such as leniency statements (which are not disclosable), settlement submissions (which are disclosable only if withdrawn) and information or material on a competition authority's file (which is disclosable only if the court or tribunal making the disclosure order is satisfied that no one else is reasonably able to provide the documents or information).

The UK's withdrawal from the European Union may – depending on the model for exit that is adopted – result in changes to cartel regulation within the UK. At this stage it is not possible to predict how and when the legal framework may change.

To safeguard the right to a fair trial, the CMA must allow defendants reasonable time (typically six to eight weeks in practice) to inspect copies of disclosable documents on its file that relate to the matters contained in the statement of objections. The CMA's guidance on its investigation procedures clarifies that confidential information (ie, commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests, or information whose disclosure the CMA thinks is contrary to the public interest) and CMA internal documents are not disclosable.

Where documents are disclosable, the CMA will consider the best means to protect any confidential information (eg, it may redact, anonymise or aggregate confidential information or use confidentiality rings or data rooms). It will be a condition of access to a confidentiality ring or data room that information accessed and reviewed by any adviser is not shared with its client.

The CMA may disclose new documentary evidence or information relevant to the infringement received during settlement discussions; however, any admissions made during failed settlement discussions will not be disclosed.

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?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority. In addition, given the real possibility for conflicts of interest, separate representation is likely to be appropriate where individual employees face possible criminal prosecution under the Enterprise Act.

See question 10 in relation to representation of individuals being interviewed under the CMA's compulsory interview powers.

36 Multiple corporate defendants

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

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with

counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

37 Payment of penalties and legal costs

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

There is no absolute prohibition on an undertaking paying the legal costs incurred by, or financial penalties imposed on, individual employees. However, company law provisions may restrict such payments in certain circumstances.

38 Taxes

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

Fines or penalties imposed for a breach of the law are not tax-deductible in circumstances where the penalty is intended to punish. Where the payment is intended to compensate for damages caused by normal trading operations, it may be tax-deductible to the extent that it can be described as a loss connected with or arising out of trade (and wholly and exclusively so incurred).

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?

The CMA is required to take into account penalties imposed by the Commission or by another EU member state when setting the amount of penalty in relation to that conduct. However, UK authorities are not required to take into account penalties imposed on economic operators by jurisdictions outside of the EU.

There are no rules specifically preventing international double jeopardy against individuals in relation to the cartel offence (see the *Marine Hose* cartel discussed in question 17).

In the context of private damages claims, the UK courts generally award compensatory damages only (ie, to cover the amount actually lost by the claimant as a result of the defendant's breach of competition law). If the claimant has already recovered damages for exactly the same loss in another jurisdiction, it will no longer be able to prove its loss in the UK courts so damages would no longer be available (avoiding double recovery).

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?

Avoidance or reduction of an undertaking's exposure to fines as a result of its participation in a cartel is inevitably subject to one precondition: withdrawal from the cartel. Withdrawal needs to be managed, however, in such a way as to optimise the possibility of a fine reduction. There are three key points listed below:

- Internal investigation – the undertaking should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to assess its exposure fully, not only in the UK but in all jurisdictions in which the cartel is operating. Undertakings should note the section dealing with internal investigations in the CMA's guidance on leniency and no action (see questions 24 to 26).
- Paper trail – the documents and witness statements collected will provide the basis for an assessment by the undertaking, together with its external lawyers, of its ability to meet the often stringent conditions to benefit from the leniency programmes of the regulatory authorities. It is, however, important to avoid the creation of new documents that are not legally privileged.
- Whistle-blowing – where the decision is taken to 'blow the whistle' on the cartel, it will often be helpful to be able to demonstrate conclusively the undertaking's withdrawal from the cartel. Such withdrawal may, however, put the other members on notice that the undertaking may make an early approach to the CMA or other regulator for leniency. The undertaking should be prepared to act swiftly to make the most of this first-mover advantage to obtain a maximum reduction in fines. In exceptional cases, the CMA may direct that the applicant continues to participate in the cartel to protect the element of surprise of any forthcoming inspection or to obtain further evidence.

Compliance programmes may be considered as a 'mitigating factor' under the CMA's six-step approach to calculating financial penalties (see question 19). The mere existence of a compliance programme will not be sufficient to prove that a party has taken the required steps to ensure compliance with competition law and thereby qualify for a fine to be reduced. However, if the party is able to demonstrate that

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its senior management has taken adequate steps to achieve a clear and unambiguous commitment to competition law compliance from the top down - together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – this is likely to be treated as a mitigating factor, warranting a fine reduction of up to 10 per cent. The CMA in two decisions in March 2017 in relation to its furniture parts investigation granted two furniture parts suppliers a 10 per cent reduction after they provided evidence that they had developed a competition compliance policy that would be distributed to every member of staff who might come into contact with other businesses in the course of his or her employment. They also provided evidence to show that senior managers, directors and sales teams had been trained in competition compliance, that appropriate employees would continue to receive competition compliance training on a regular basis, and that they had published a compliance plan on their websites. The reduction was granted on the condition that the two suppliers would provide an annual update to the CMA confirming their ongoing commitment to compliance activities for the next three years. In May 2017, The CMA also granted NLC a 10 per cent reduction in recognition of its constructive engagement with the CMA to introduce a comprehensive competition law compliance programme to which its board had fully committed. In particular, the CMA identified that NLC had provided it with evidence that the area sales managers and the board would be trained in competition compliance and that adherence to the competition law compliance policy would form an integral part of the NLC Group employment policy.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
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Enforcement of Foreign Judgments
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Equity Derivatives
Executive Compensation & Employee Benefits
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Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
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Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
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Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
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