Cartel Regulation 2020

Contributing editor
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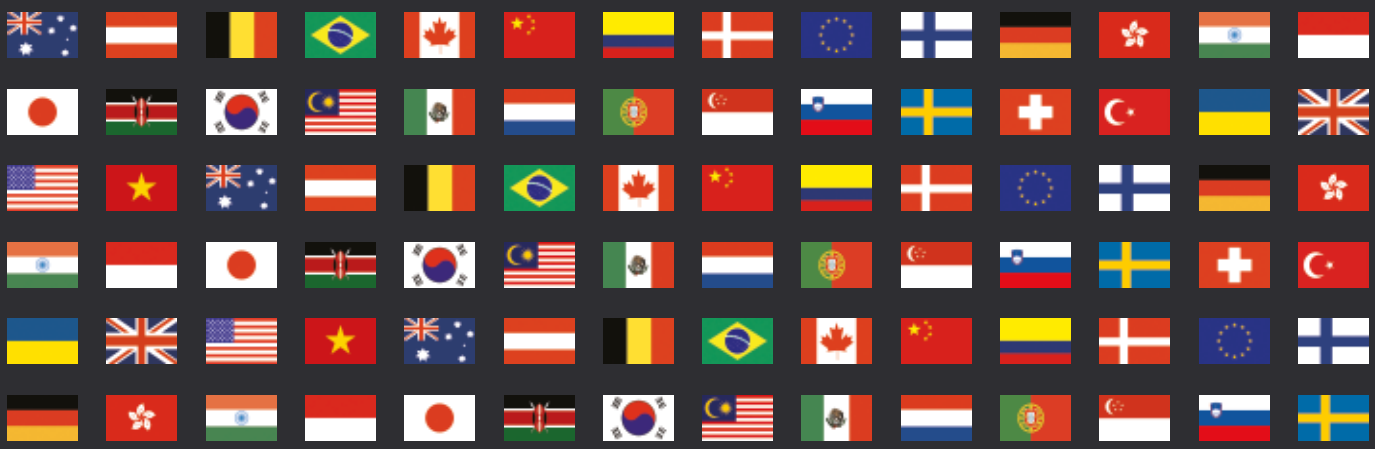

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Cartel Regulation*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Vietnam.

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.

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LEGISLATION AND INSTITUTIONS

Relevant legislation

1 | What is the relevant legislation?

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

Relevant institutions

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

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

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

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

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

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

In August 2019, the EC published guidelines for national courts on how to estimate the passing-on of overcharges to indirect purchasers in the context of damages claims for breaches of competition law. The guidelines provide judges and interested parties with a number of practical examples. The guidelines are intended to be used together with the Damages Directive and the EC's Practical Guide on Quantifying Harm.

Changes

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

There are no current proposals to change the overall legislative regime. However, in November 2014, a directive on actions for damages for violations of EU competition law was adopted (the Damages Directive). Member states were required to implement the Damages Directive by 27 December 2016; all member states have now transposed the directive into national legislation.

The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions (see question 24). In August 2015, the EC adopted amendments to its Regulation No. 773/2004 and four related notices (Notices on Access to the File, Leniency, Settlements and Cooperation with National Courts) to reflect the provisions of the new directive on accessing and using information in the files of competition authorities for the purposes of follow-on damages litigation. In August 2019, the EC adopted guidelines for national courts on how to estimate the share of overcharge that would have been passed on to the indirect purchaser. The guidelines are intended to give national courts, judges and other stakeholders in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain. The guidelines are intended to supplement the Practical Guide on Quantifying Harm (which focuses on how to quantify the damage caused by antitrust infringements), published in 2013.

In March 2017, the EC published a draft directive to grant greater enforcement powers to NCAs. As stated above, NCAs and courts apply

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the EU competition rules within their jurisdictions on the basis of Regulation 1/2003. To ensure the consistent application of these rules, the EC and the 28 NCAs of the EU work together in the ECN. However, not all NCAs currently have the same investigative and enforcement powers. The Directive aims to address this problem by requiring that NCAs be given powers such as the ability to inspect private homes and to summon people for interview, as well ensuring that NCAs can impose more severe penalties for infringements. The Directive will also ensure that NCAs have greater operational independence when making enforcement decisions. A provisional political agreement on the directive was reached in May 2018 by the European Parliament and the Council, and the European Parliament's Economic and Monetary Affairs Committee approved the compromise text in July 2018. The final draft was adopted in December 2018. The deadline for the transposition of the directive into the member states' national legislation is 4 February 2021.

Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU provides that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' are prohibited. Article 101(1) TFEU provides a non-exhaustive list of prohibited practices, which includes agreements, decisions or concerted practices that: directly or indirectly fix purchase or selling prices or any other trading conditions (price fixing); limit or control production, markets, technical development or investment (eg, output restrictions); or share markets or sources of supply. Both horizontal and vertical restraints fall within article 101(1) TFEU. For horizontal agreements, specific guidance is given on the status of research and development (R&D) agreements, production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. For vertical agreements specific guidance is given on single branding agreements, exclusive distribution agreements, exclusive customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and RPM.

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

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

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

APPLICATION OF THE LAW AND JURISDICTIONAL REACH

Industry-specific provisions

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

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

Application of the law

6 | Does the law apply to individuals, corporations and other entities?

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

Extraterritoriality

7 | Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

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

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on the effect on trade concept contained in articles 101 and 102 TFEU, paragraph 100). Recent cases in which the EC assumed jurisdiction over cartel members incorporated outside the EEA include *Automotive Wire Harnesses* (2013), *Power Cables* (2014), *Smart Card Chips* (2014), *Automotive Bearings* (2014), *Optical Disc Drives* (2015), *Alternators and Starters* (2016) and *Capacitors* (2018). In Intel (2017), the ECJ confirmed that the EC has jurisdiction to apply EU competition law not only against conduct which is implemented in the EEA but also where it is 'foreseeable' that the conduct will have an 'immediate and substantial effect' in the EEA, confirming the alternative character of the implementation test and the qualified effects test. In *Optical Disc Drives* (2019), the GC found that some of the optical disk drives covered by the cartel were sold in EU member states to entities owned by Dell and HP or shipped to those states for operators acting on behalf of Dell and HP. Consequently, the court confirmed the EC's assessment that the geographic scope of the cartel at issue covered the entire EU and therefore that the EU competition law rules were applicable.

Export cartels

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

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

INVESTIGATIONS

Steps in an investigation

9 | What are the typical steps in an investigation?

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

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

Once a case comes to its attention (which may be as a result of a leniency or immunity application – see questions 26 and 29), the next step for the EC is to collect further information, either informally or using its formal powers of investigation (including dawn raids – see question 10) to decide whether to take action on the complaint. Following the initial fact-finding, if the EC considers that there is evidence of an infringement of article 101 TFEU that should be pursued, it will decide to open formal proceedings.

The EC may then make use of the formal settlement procedures (see question 32) or proceed to serve a formal statement of objections on the parties setting out the EC's case. If the EC issues a statement of objections, the parties are then allowed to examine the documents in the EC's file (access to the file) and to respond to the statement of objections, in writing and at a hearing within the time limit set by the EC (see article 27 of Regulation No. 1/2003 and article 10 et seq of Regulation No. 773/2004). In 2011, the EC strengthened and expanded the role of the hearing officer to safeguard the parties' procedural rights and issued a notice on best practices in antitrust proceedings. The EC further expanded on this Notice by publishing the Antitrust Manual of Procedures in March 2012, which is its internal working document intended to give practical guidance to staff on how to conduct an investigation applying articles 101 and 102 TFEU.

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

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

Investigative powers of the authorities

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

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

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

Information requests

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

The EC can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. The EC's choice whether to

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issue a simple information request or a formal decision needs to be proportionate (ECJ, *Schwenk Zement* (2014)). With respect to non-EU companies, the EC is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

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

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

Dawn raids

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

According to the EC's Explanatory Note on Inspections Pursuant to Article 20 (4) of Council Regulation 1/2003, when carrying out a dawn raid, EC officials may:

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

The EC may also seal any business premises and books or records for the time necessary for the investigation. The breach of a seal is considered a violation of the undertakings' obligation to cooperate and can lead to significant fines, with a fine of €38 million imposed on E.ON confirmed by the GC in 2010 and by the ECJ in 2012, and fines of €8 million imposed on Suez Environnement and Lyonnaise des Eaux in 2011. The Czech company EPH was also fined €2.5 million in 2012 for obstructing the EC's inspection. The EC can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there. During the investigation procedures in *Marine Hose* (2009), the EC carried out an on-the-spot investigation in a private home.

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

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

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

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

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

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

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In the *Deutsche Bahn* case (2015), the EC had informed the officials conducting the dawn raid of another complaint against Deutsche Bahn, which was not the subject of the investigation at hand, and was not mentioned in the warrant. The ECJ ruled in 2018 that the use of the documents relating to the suspected infringements of which the officials had been informed (but that were not mentioned in the warrant) violated the right of defence of the companies involved. The Court clarified the *Deutsche Bahn* case finding that the conduct of an initial unlawful dawn raid will only be relevant to questioning the validity of follow-up inspection decisions based on the information resulting from the initial unlawful raid, rather than previous decisions (including the decision which authorised the initial raid itself) (*Alcogroup and Alcodis* (2018)).

Power to take statements

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

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

INTERNATIONAL COOPERATION

Inter-agency cooperation

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

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

The most significant of the cooperation agreements are the 1991 and 1998 EU–US agreements envisaging the exchange of information and establishing positive comity between the EC and US antitrust authorities. They provide for the EC and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anticompetitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been significant cooperation between the EU and the US in cartel matters (eg, in *Automotive Wire Harnesses* (2013) and *Automotive Bearings* (2014)).

These cooperation agreements do not allow the EC to disclose confidential information received from companies in the course of its investigations. However, there are proposals under way for 'second generation' cooperation agreements to facilitate the exchange of company confidential information: the EU has signed such a 'second generation' agreement with Switzerland, and is in the process of negotiating a similar agreement with Japan. For the moment, the talks have hit a stumbling block – the Japanese officials are concerned with the unique set up of the EC, which shares investigative information with the antitrust regulatory bodies of its member states. Another stumbling block is the uncertainty surrounding the outcome of the Brexit process in terms of evidence-sharing with Japan. The EC is a also member of the International Competition Network (ICN), a network of competition agencies and a multilateral forum to address international cooperation and convergence.

Obviously, the EC cooperates extensively with the NCAs in member states. Regulation No. 1/2003 increased the scope of this cooperation within the framework of the ECN, which encompasses all member states' competition authorities as well as the EC. The members of the ECN closely cooperate in the application of the EU competition rules. One authority may ask another for assistance by collecting information on its behalf. When an authority is assigned a case, it may decide to reallocate that case to another authority that is better placed to deal with it. The EC may decide to take up a case, which will end the NCA's competence to apply article 101 TFEU (but not its equivalent national rules). Members of the ECN can also exchange information, including confidential information, for the purpose of applying article 101 TFEU or for parallel national proceedings under national competition law. Information so exchanged may only be used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information, or where the information was collected respecting the same level of rights of defence as in the receiving state and where the sanction does not involve imprisonment. Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on Cooperation within the Network of Competition Authorities. In particular, the EC will be assigned a case if it has an impact in more than three member states. See question 3 for more details regarding the newly adopted NCA directive.

Interplay between jurisdictions

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

It is increasingly the case that a cartel investigation in the US may lead to the EC launching an investigation in the EU. This raises a particular problem, in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the US and could increase exposure to civil damages (see question 34).

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

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CARTEL PROCEEDINGS

Decisions

13 | How is a cartel proceeding adjudicated or determined?

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

Burden of proof

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

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

Circumstantial evidence

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

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

Appeal process

16 | What is the appeal process?

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

Companies do not necessarily have to pay their fine immediately if they lodge an appeal before the GC. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest. Alternatively, the company may pay the fine into a ring-fenced account pending the outcome of the appeal. Typically, cartel cases before the GC last approximately two-and-a-half to three years and cases before the ECJ an additional one-and-a-half to two years. In January 2017, the GC ordered the EU to pay more than €50,000 in damages to Gascogne (along with fines to a number of other companies involved in a cartel in the industrial plastic bags sector) for the excessive length of proceedings before the GC. The proceedings involving Gascogne lasted for more than five years and nine months (*GC, Gascogne Sack Deutschland and Gascogne* (2017)). The EC appealed the GC's decision. In December 2018, the ECJ overturned the GC's ruling due to the lack of a causal link between the breach of the obligation to adjudicate within a reasonable time and the loss sustained by Gascogne as a result of paying bank guarantee charges during the relevant period.

SANCTIONS

Criminal sanctions

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

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

Civil and administrative sanctions

18 | What civil or administrative sanctions are there for cartel activity?

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

The EC imposes fines according to its Guidelines on the method of setting fines using a two-step method. In a first step, the basic amount of the fine is calculated taking into account the value of the undertaking's direct or indirect sale of goods or services concerned by the infringement within the EEA. For undertakings without EEA sales, the EC has used an alternative method taking into account sales outside the EEA to calculate the hypothetical turnover within the EEA. This happened, for example, in *Automotive Wire Harnesses* (2013), *Power Transformers* (2009), *Marine Hoses* (2009) and *Aluminium Fluoride* (2008). In a second step, the amount of the fine may be adjusted taking into account aggravating or mitigating circumstances. The basic amount of the fines may be increased by up to 100 per cent in the case of recidivism. A fine may also be increased for the purpose of deterrence. In *InnoLux* (2015), the ECJ confirmed that for a vertically integrated company the fine calculation may be based on non-EEA sales of cartelised components if they are built into a final product that is subsequently sold in the EEA as a 'direct EEA sale through transformed products'. In *AC Treuhand II* (2015) the ECJ confirmed that the EC was entitled to fix the fine as a lump sum instead of using value of sales because AC Treuhand, a consultancy firm, did not have any sales in the markets concerned.

Under a draft directive published in 2018, member states will be obliged to establish non-criminal penalties that can be imposed at the domestic level for breaches of EU competition law, although whether these can be imposed by the NCA itself in its own proceedings or requires judicial action is a matter of discretion for member states. The proposals also require that the maximum fine available to NCAs must be at least 10 per cent of global turnover, which will represent a significant

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increase in some jurisdictions once implemented. Fines will also be able to be collected from the members of insolvent corporations provided the fines relate to the member's activities, for instance in respect of joint ventures. NCAs will also be empowered to impose structural and behavioural remedies, such as requiring the divesting of certain assets, which are not available in all member states at present.

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

The EC's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the EC intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the EC began to impose much heavier fines in landmark cases such as Polypropylene (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the EC has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years, the EC has at various times reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. Recent years have brought new record fines: the Trucks cartel (2016/2017) was fined a total of €3.81 billion, the largest fine ever imposed by the EC in a single cartel investigation, including a fine of €1.01 billion on Daimler, €881 million on Scania, and €753 million on DAF, being to date the largest fines imposed on single companies for their involvement in cartel activity. In February 2018, in three separate decisions, the EC fined four maritime car carriers €395 million, two suppliers of spark plugs €76 million, and two suppliers of braking systems €75 million, for taking part in cartels. The same year, the EC fined eight Japanese manufacturers a total of €254 million for their involvement in an alleged cartel concerning the supply of aluminium and tantalum capacitors. In March 2019, the EC fined Autoliv and TRW a total of € 368 million for breaching EU antitrust rules by taking part in two cartels for the supply of car seatbelts, airbags and steering wheels to European car producers. In May 2019, Barclays, RBS, Citigroup, JPMorgan and MUFG were fined by the EC a total of €1.07 billion for participating in foreign exchange spot trading cartel.

It is very difficult to rebut the presumption of actual decisive influence by a parent company over a wholly owned subsidiary. The failure to comply with a parent company's instruction is not sufficient, as long as the failure to carry out instructions is not the norm (ECJ, *Evonik Degussa and Alzchem* (2016)). The ECJ has, in *DuPont and Dow* (2013), confirmed that, in addition to penalties for infringements by their wholly owned subsidiary companies, parent companies may also be held liable for the penalties imposed in respect of article 101 TFEU infringements committed by their full-function joint venture subsidiaries, provided that the EC is able to establish that the parent company did, in fact, exercise 'decisive influence' over that joint venture company. More recently in *Power Cables* (2014), Goldman Sachs, the former 47 per cent financial investment shareholder of Prysmian, was fined €37 million jointly and severally with Prysmian. Liability was based on Goldman Sachs's decisive influence over Prysmian, which, the EC found, was to all intents like that of a traditional industrial owner. In July 2018, following an appeal from Goldman Sachs, the GC confirmed the EC's decision. The GC observed that the bank's voting rights (which fluctuated between 84 and 91 per cent) and other powers gave it decisive influence comparable to a sole owner and that it failed to show that its interest was intended solely as a pure financial investment (*Goldman Sachs Group* (2018)). In late 2018, Goldman Sachs appealed the GC's ruling before the ECJ, arguing that it did not exercise decisive influence in the sense required by the case law. Equally anticipated is the ECJ's ruling in Deutsche Telekom's appeal of the GC's decision in particular regarding the concept of decisive influence; the initial GC appeal was filed by Deutsche Telekom's concerning its Slovak broadband market antitrust fine (*Slovak Telekom*, 2014).

Guidelines for sanction levels

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

The EC's *Guidelines on the Method of Setting Fines*, having the status of soft law, are only self-binding on the EC, and do not have a binding effect on the European courts or on NCAs or national courts.

Compliance programmes

20 Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

While the EC positively regarded the existence of compliance programmes during the 1990s when calculating the fine, the mere existence of a compliance programme today is no longer regarded as a mitigating circumstance regarding sanctions. This was confirmed by the ECJ in *P Dansk Røhrindustri* (2005) and by the GC in *BASF/UCB* (2007) and in *Donau-Chemie* (2014).

Director disqualification

21 Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is currently no EU legislation prohibiting individuals involved in a cartel from serving as corporate directors or officers (although such sanctions do exist at the member state level, see, eg, UK chapter).

Debarment

22 Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

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

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Parallel proceedings

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

Not applicable; see questions 17 and 18.

PRIVATE RIGHTS OF ACTION

Private damage claims

24 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Third parties (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour in breach of article 101 TFEU can sue for damages before the national courts.

The precise rules of standing, procedure and quantification of damages may, however, vary between member states. In November 2014, the Damages Directive was adopted. The Directive is designed to ensure that victims of competition law infringements in Europe have access to effective mechanisms for obtaining compensation for the harm they have suffered. Victims should obtain full compensation for the actual loss suffered as well as for lost profits. The Directive also allows for the use of passing-on as a defence, and for EC and NCA decisions to be binding on the national courts and to serve as evidence of an infringement. This further reinforces the requirement that EC infringement decisions must be unambiguous (*GC, British Airways* (2015)). If an antitrust infringement is shown to have been committed, the Directive provides a reversal of the burden of proof to the detriment of the infringer in terms of a rebuttable presumption that cartels cause harm. The Directive also provides a common standard for limitation periods and the protection of leniency applicants. All member states have now transposed the directive into national legislation , so it will be interesting to observe if there are any changes to the number of claims and quantum of the damages in follow-on damages cases.

In August 2019, the EC adopted the guidelines for national courts on how to estimate the share of overcharge that was passed on to the indirect purchaser, by taking into account the stakeholders' views expressed during the public consultation on the topic. The guidelines are intended to give national courts, judges and other stakeholders in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain. The guidelines are intended to supplement the Practical Guide on Quantifying Harm (which focuses on how to quantify the damage caused by antitrust infringements), published in 2013.

A related development is that the ECJ held that there should be no national rule preventing third parties from seeking compensation from cartelists for loss allegedly suffered owing to the surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from the cartel by increasing their own prices (*Kone* (2014)).

The German highest court confirmed in the *Grauzementkartell II* case in 2018, that owing to the *Kone* case and a cartel where participants had over 71.3 per cent market share, it could be assumed that the pricing of a non-cartel member was influenced by the cartel and therefore damages for its customers would also be available. The Oberlandesgericht Düsseldorf also assumed in the 2019 *Schienenkartell III* case, that damages could be caused by a non-cartel member raising its prices higher than it would have without the cartel.

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

Class actions

25 Are class actions possible? If so, 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?

While the Damages Directive does not include a requirement for member states to introduce collective redress mechanisms for damages suffered as a result of breaches of competition rules, in 2013 the EC published a non-binding recommendation setting out common principles regarding collective redress mechanisms. The recommendation, which invited member states to implement appropriate measures by 26 July 2015, was intended to bring more coherence to the different systems of collective redress within the EU. From 22 May 2017 to 15 August 2017, the EC conducted a consultation to assess the implementation of the recommendation on the basis of practical experience and determine whether further measures to promote the principles set out in the recommendation should be considered.

Following this consultation, a report on the practical application of the principles of the recommendation was published. The report showed that the availability of collective redress mechanisms, as well as the implementation of safeguards against the potential abuse of such mechanisms, was still unevenly distributed across the EU. Therefore, in April 2018, the EC proposed new legislation (Proposal for a Directive on Representative Actions for the Protection of Collective Interests of Consumers, and repealing Directive 2009/22 (the Injunctions Directive)), which, if implemented, will effectively introduce an EU-wide right of collective redress, allowing certain entities (see below) to seek redress (eg, compensation, replacement or repair) on behalf of consumers who have been harmed by an illegal commercial practice. It is, however, of note that the proposal focuses on consumer law, rather than antitrust breaches.

Owing to a number of safeguards designed to prevent abuse of the procedure, the EU collective redress mechanism will be different from US-style class actions: only qualified entities (eg, consumer organisations and independent public bodies) will be able to begin an action (not private law firms), and such entities will have strict obligations of transparency regarding the source of their funding. Accordingly, the proposal concludes that it is necessary to amend existing consumer protection Directives and repeal the existing Injunctions Directive. As a general rule, collective redress mechanisms should be based on the opt-in principle, according to which every represented party individually needs to join the action (in contrast to opt-out actions, which are possible without identifying the individual parties to the lawsuit). In March 2019, the European Parliament adopted a common position on the proposal.

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However, it appears unlikely that consensus will be reached by the end of 2019. One of the main concerns is the potential for 'forum shopping' that the proposal might facilitate.

COOPERATING PARTIES

Immunity

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

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

Companies that have recently benefited from full immunity include:

- Valeo in *Lighting Systems* (2017);
- Denso in *Thermal Systems* (2017);
- Johnson Controls in *Car Battery Recycling* (2017);
- Takata in *Occupant Safety Systems* (2017);
- Denso in *Spark Plugs* (2018);
- TRW (and Continental for one cartel) in *Braking Systems* (2018);
- Sanyo Electric and its parent Panasonic Corporation in *Electrolytic Capacitors* (2018); and
- MOL in *Maritime Car Carriers* (2018)
- Takata in *Occupants Safety Systems II* (2019)
- UBS in *Forex* (2019)

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

In March 2017, the EC introduced an anonymous whistle-blower tool for individuals to alert the EC anonymously about secret cartels and other antitrust violations.

Additionally, in April 2018, it announced a proposal for new legislation to guarantee a high level of protection for whistle-blowers by introducing new EU-wide standards. Under the proposal, all companies with more than 50 employees, or with an annual turnover of over €10 million, will be required to set up an internal procedure to manage whistle-blowers' reports. A provisional agreement on the proposal was reached in March 2019 between the European Parliament and the member states, the next step being the formal approval of the text by both the European Parliament and the Council.

The EC recently formed a special unit to uncover cartels by employing computer experts which trawl the internet for clues of unlawful behaviour. The EC also created a 'centralised intelligence network', which facilitates the gathering of information from other EC services, other EU institutions, and from non-competition national enforcers.

Subsequent cooperating parties

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

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

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

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

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

- Volvo/Renault, Daimler and Iveco (40 per cent, 30 per cent and 10 per cent respectively) in Trucks (2016);
- Sony, Panasonic and Sanyo (50 per cent, 20 per cent and 20 per cent respectively) in Rechargeable Lithium-ion Batteries (2016);
- Eco Bat and Recycle (50 per cent and 30 per cent respectively) in Car Batteries Recycling (2017);
- Bosch and NGK (28 per cent and 42 per cent, respectively) in Spark Plugs (2018); and
- Hitachi Chemical, Rubycon, Elna and NEC Tokin (35 per cent, 30 per cent, 15 per cent and 15 per cent respectively) in Electrolytic Capacitors (2018);
- TRW and Autoliv (50 per cent and 30 per cent respectively) in Occupants Safety Systems II (2019);
- Barclays, RBS, Citigroup and JPMorgan (50 per cent, 30 per cent, 20 per cent and 10 per cent, respectively) in the Three Way Banana Split infringement, and Barclays and RBS (50 per cent and 25 per cent respectively) in the Essex Express infringement - in FOREX (2019).

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

Going in second

28 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' option?

See question 25.

Approaching the authorities

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

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

- risk of the authorities being on the trail already;
- the danger that another participant will get in first and 'slam the door';

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

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

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

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

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

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members, but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place; that the EC is 'particularly well placed' to deal with the case in accordance with the Notice on Cooperation within the ECN; and that the NCA authority 'might be well placed' to act.

Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity. NCAs are not required to assess a summary application submitted to them in the light of an application for immunity submitted to the EC, or to contact the EC where the summary application has a more limited material scope (ECJ, *DHL* (2016)). Changes have been proposed to ensure that applicants for immunity to an NCA can also request a place in the leniency queue and receive a marker at that time, even if it transpires that they are not eligible for immunity.

Cooperation

30 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 that are seeking partial leniency?

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

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

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

The Leniency Notice explains that full cooperation also entails:

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

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

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

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

However, there are proposals to ensure that directors, officers and employees of applicants in immunity (but not leniency) applications before NCAs also receive immunity from individual sanctions provided they cooperate with investigations, unless proceedings are already under way against individuals prior to their cooperation. This

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will mitigate the risks of non-compliance by persons working for applicants for fear of revealing their role in unlawful actions. However, this immunity is subject to a derogation allowing member states to opt for cooperation as a mitigating factor for individual sanctions imposed, rather than blanket immunity.

Confidentiality

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

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

The Leniency Notice further provides that any written statement made as regards the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used by the EC for any other purpose than the enforcement of article 101 TFEU. The amendments made to the Leniency Notice in August 2015 following adoption of the Damages Directive add that the EC will not transmit leniency corporate statements to national courts for use as evidence in support of actions for damages for breaches of EU antitrust law. The EC also stresses that documents received in the context of the Leniency Notice will not be disclosed under Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations.

In practice, the EC does not reveal the name of the whistle-blower as long as the investigations continue. In the *Stanley Adams* case (1985), the ECJ held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity by an individual whistle-blower, if the EC accepts such information, it is bound to comply with such a condition. Failure to do so meant that the EC was liable to pay damages. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final EC decision. The 2015 Guidance on the Preparation of Public Versions of Commission Decisions explains the types of information that companies may request be redacted on the grounds that it contains business secrets or is confidential. The GC highlighted in *AGC Glass Europe* (2015) that the EC should not be prevented from publishing, in its decision bringing the administrative procedure to an end, information relating to the description of an infringement that has been submitted to it as part of the leniency programme. The ECJ in 2017 upheld the *AGC Glass Europe* ruling by the GC as a mistake by the EC on the powers of the hearing officer did not provide grounds for annulment.

The ECJ in *Evonik Degussa* (2017) also found that the EC is not prevented from supplementing the cartel decision with information provided by a leniency applicant. The ECJ ruled that the fact that immunity is granted cannot protect a leniency applicant from civil damages claims. The only protection available to leniency applicants is protection concerning immunity from, or reduction in, the fine, in return for providing the EC with evidence of the cartel, and the EC's non-disclosure of documents and written statements that it has received in accordance with the Leniency Notice. As a result, the EC is allowed to publish verbatim quotations of information included in the documents provided by a leniency applicant, provided that business secrets, professional secrecy and other confidential information is protected. It is for the hearing officer to take account of all the arguments related to general EU law principles raised by a leniency applicant to protect the information's confidentiality. However, verbatim quotations from the leniency statement itself may not be published under any circumstances. According to the EC, summaries of parts of the leniency statement can be published.

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

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

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

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

The Damages Directive provides that national courts must be able to order a defendant or third party to disclose evidence independently of whether such evidence is in the possession of a competition authority and regardless of the medium in which the information is stored. The

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

Settlements

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

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

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

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

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

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

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

The EC has settled more than 28 cases so far four out of seven cartel decisions reached in 2017 were full settlement cases, while three out of four cartel decisions issued in 2018 were settlement cases.

A recent trend has been the use of 'hybrid' cases, in which one or more parties decides not to settle. For example, in *Trucks* (2016/2017), the EC agreed a 10 per cent reduction in fines for those undertakings which agreed to settle, but pursued Scania under the ordinary procedure. *Trucks* was also notable as the procedure only shifted to a settlement procedure after issuing of a formal statement of objections pursuant to the ordinary procedure. In *Panalpina* (2016) the GC recalled that the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. It confirmed that the EC was entitled to choose not to apply the settlement procedure, particularly given the large number of parties involved (47) and the fact that many were not willing to cooperate on the basis of the Leniency Notice. In its *Icap* judgment of 2017 the GC warned against 'hybrid' settlements, where an early settlement with some parties risks infringing the presumption of innocence applying to non-settling parties. Following this criticism, the EC now appears to be pursuing settlement and adversarial procedures in the same cases in parallel rather than sequentially (see, for example, recent (ongoing) *bioethanol* investigation). The recent 2019 *Forex* decision comprised a classic settlement enforcement, where all the parties cooperated with the EC and were rewarded accordingly.

Corporate defendant and employees

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

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

Dealing with the enforcement agency

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

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

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

Application for immunity (Part II of the Leniency Notice)

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

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

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

Application for reduction of a fine (Part III of the Leniency Notice)

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

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

- asserting in the Leniency Notice that any written statement made as regards the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 101 TFEU (see, however, recent case law regarding disclosure in the context of private enforcement and also the position under the Damages Directive in question 29);
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of amicus curiae (the EC has intervened in this way in a number of cases); and
- accepting oral corporate statements or statements via its eLeniency portal.

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

DEFENDING A CASE

Disclosure

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

See also questions 31 and 32.

The disclosure of information and evidence depends on whether the normal or the settlement procedure is followed (see questions 9 and 32).

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

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

Representing employees

36 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 or representation?

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

Multiple corporate defendants

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

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

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Payment of penalties and legal costs

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

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

Taxes

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

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

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

International double jeopardy

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

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

Getting the fine down

41 | What is the optimal way in which to get the fine down?

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

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UPDATE AND TRENDS

Recent cases

42 | What were the key cases, judgments and other developments of the past year?

In August 2019, the EC adopted guidelines for national courts on how to estimate the share of overcharge passed on to the indirect purchasers. The guidelines are intended to supplement the 2013 Practical Guide on Quantifying Harm and in damages actions for infringements of articles 101 and 102 TFEU practical guidance on how to estimate the passing on of overcharges to persons at different levels of the supply chain.

In March 2017, the EC introduced a whistle-blower tool for individuals to alert the EC anonymously about secret cartels and other antitrust violations.

Additionally, in April 2018, it announced a proposal for new legislation to guarantee a high level of protection for whistle-blowers by introducing new EU-wide standards. Under the proposal, all companies with more than 50 employees, or with an annual turnover of over €10 million, will be required to set up an internal procedure to manage

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whistle-blowers' reports. A provisional agreement on the proposal was reached in March 2019 between the European Parliament and the member states, the next step being the formal approval of the text by both the European Parliament and the Council.

The EC recently formed a special unit to uncover cartels by employing computer experts that trawl the internet for clues of unlawful behaviour. The EC also created a 'centralised intelligence network', which facilitates the gathering of information from other EC services, other EU institutions, and from non-competition national enforcers.

In March 2019, the EC unveiled its eLeniency platform – its new online tool for cartel leniency and settlements and non-cartel cooperation. It was designed to ease the burden for companies and their legal representatives in submitting statements and documents as part of leniency and settlement proceedings in cartel and non-cartel cooperation cases. Users can directly submit corporate statements and upload supporting documents on a dedicated secure EC server. eLeniency can also be used for submitting replies to requests for information made under the EC's Leniency Notice.

Regime reviews and modifications

43 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

The settlement procedure is being extended outside purely horizontal cartels. The new EC cooperation mechanism has not been codified yet and is still being considered in its testing phase. In the nine cases it has been applied insofar, the fine was reduced by 10 per cent to 50 per cent.

The amount of fines reduction depends on an overall evaluation of the timing and the amount of the cooperation, as well as the resulting procedural efficiencies. So far, the system is optional and can be applied when companies express their interest in it, but companies are not obligated to cooperate. The EC then estimates the range of likely fines, while the company indicates its willingness to acknowledge the infringement under the condition of a maximum fine. Cooperation is possible before and after a statement of objections has been issued. The final decision still can be challenged before the GC.

This procedure does not include plea-bargaining with the EC, and focuses on companies' acknowledgement of the facts, their legal qualification and the companies' liability for the infringement. In addition, cooperation on evidence, as well as the proposal and design of suitable remedies is rewarded.

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

European Union	
Is the regime criminal, civil or administrative?	No penalties on individuals, but substantial fines may be imposed on undertakings. Although the regime is technically civil and administrative, arguably the size of the fines makes it criminal or quasi-criminal in nature for human rights purposes.
What is the maximum sanction?	10 per cent of worldwide group turnover.
Are there immunity or leniency programmes?	Yes
Does the regime extend to conduct outside the jurisdiction?	Yes
Remarks	Fines imposed by the EC in cartel cases are high and the trend is towards even higher penalties. To complement the Fining Guidelines and Leniency Notice, the EC introduced a settlement procedure in 2008.

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