
THE CARTELS AND LENIENCY REVIEW

FIFTH EDITION

EDITORS

CHRISTINE A VARNEY AND JOHN TERZAKEN

LAW BUSINESS RESEARCH

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CHRISTINE A VARNEY AND JOHN TERZAKEN

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EDITORS' PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors of these chapters are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations, and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with chapters on 30 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the fifth edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2017

Chapter 8

EUROPEAN UNION

Philippe Chappatte and Paul Walter¹

I ENFORCEMENT POLICIES AND GUIDANCE

Both EU and national competition laws apply to cartels in the European Union. The relevant EU competition law provision is Article 101 of the Treaty on the Functioning of the European Union (TFEU). The relevant national competition law provisions in respect of a number of the Member States are covered in other chapters of this book.

Article 101(1) TFEU provides that ‘all agreements between undertakings,² decisions by associations of undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market’ are prohibited. As a matter of practice, any agreement between competitors or potential competitors that fixes prices, limits output or shares markets, customers or sources of supply will generally be regarded as an agreement restricting competition within the meaning of Article 101(1) TFEU.

The principal enforcement agency in the EU is the European Commission, with the Competition Directorate General (the DG Competition) primarily responsible for the enforcement of the competition rules. However, in accordance with Regulation 1/2003,³ the national competition authorities (NCAs) throughout the EU are also fully competent to

1 Philippe Chappatte is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would like to thank Sophia Haq, a visiting lawyer at Slaughter and May, for her help in preparing this chapter.

2 Article 101 TFEU applies to ‘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).

3 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty.

enforce Article 101 TFEU, as well as their domestic competition rules, on cartels.⁴ National courts must also apply Article 101 TFEU to such conduct in addition to national antitrust rules.

The Commission has extensive powers of investigation and inspection, including the power to demand the production of information, take statements from individuals, search private premises, and seal premises or business records.⁵ The Commission also has wide discretion to impose substantial fines for cartel behaviour in breach of Article 101 TFEU and for breaches of the procedural rules, for example, for failure to provide information.

The incumbent EU Commissioner for Competition, Margrethe Vestager, has commented that ‘fighting cartels is a very high priority for the European Commission’ due to the ‘serious harm cartels cause to consumers and businesses [and to] the economy as a whole in terms of removing incentives to compete on prices or to innovate’.⁶ The Commission is, however, prepared to offer lenient treatment to businesses that come forward with information about a cartel in which they are involved. The framework principles for the Commission’s leniency policy are set out in the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (Leniency Notice) and are discussed in further detail in Section IV, *infra*. The Commission has also published various notices providing guidance for the application of Article 101 TFEU, including notices on, *inter alia*, fines and handling complaints.

II COOPERATION WITH OTHER JURISDICTIONS

i Cooperation within the EU

There is close cooperation in the application of the EU competition rules between the Commission and European NCAs within the framework of the European Competition Network (ECN). For example, authorities may ask each other for assistance in collecting information in their respective territories. The members of the ECN can also exchange information, including confidential information, for the purpose of applying Article 101 TFEU or for parallel proceedings under national competition law.⁷

The ECN members also cooperate with a view to ensuring the efficient allocation of cases. When an authority is assigned a case, it may decide to reallocate that case to another authority if it is better placed to deal with it. The Commission is usually best placed to handle

4 Article 3(1) of Regulation 1/2003 provides that, if an NCA within the EU uses domestic competition law to investigate a cartel that may affect trade between Member States, it must also apply Article 101 TFEU. Moreover, national competition rules should not be used to prohibit agreements that are compatible with the EU competition rules or to authorise agreements that are prohibited under the EU competition rules.

5 The key provisions regarding the Commission’s cartel enforcement procedures are set out in Regulation 1/2003. Further relevant provisions are set out in Regulation No. 773/2004, which governs the initiation of proceedings, conduct of investigations, handling of complaints and hearing of parties.

6 Margrethe Vestager, EU Commissioner for Competition: ‘Press release Statement 15/5260’, 24 June 2015.

7 See Paragraphs 40 and 41 of the Commission Notice on cooperation within the Network of Competition Authorities (Cooperation Notice).

an investigation if the cartel has an impact on competition in at least three Member States, whereas an NCA will normally be best placed if it mainly affects competition within its territory.⁸ Where the Commission initiates proceedings in relation to a case, this will end the NCA's competence to apply Article 101 TFEU to the same conduct. However, parallel action by the Commission and the NCA is possible when they focus on cases that are not the same in terms of product or geographical markets.⁹

In September 2006, the ECN published its Model Leniency Programme, which is intended to simplify the burden for applicants and authorities in cases of multiple leniency applications. One of the key features of the programme is that it envisages undertakings making summary applications to NCAs where the Commission is particularly well placed to deal with a case. These applications are intended to help the applicant protect its position by securing its place in the queue before the NCA. The ECN published a revised programme in November 2012, intended to further simplify the process and make it easier for undertakings to protect their position pending resolution of the case allocation issues. While the Model Leniency Programme is a helpful tool, the Court of Justice of the European Union (CJEU) held in 2016 that there is no legal link between an application for immunity submitted to the Commission and a summary application submitted to an NCA in respect of the same cartel. Accordingly, the NCAs are not required to assess a summary application in light of the application for immunity nor are they required to contact the Commission in order to obtain information on the purpose and results of the leniency procedure carried out at the European level.¹⁰

ii Cooperation with non-EU countries

The EU also has cooperation agreements with a number of non-EU countries, notably the United States, China, Canada, Australia, Japan, Switzerland, Brazil, South Africa, India and South Korea. These agreements can help the Commission to obtain information and evidence located outside the EU. Most of these are 'first generation' agreements that provide for cooperation in the area of competition policy but do not allow the Commission to disclose confidential information received in the course of its investigations. Owing to this restriction, it is common for the Commission to request the investigated parties to provide waivers in order to allow it to discuss cases with other competition authorities. The EU has, however, entered into a 'second generation' cooperation agreement with Switzerland that allows their respective competition authorities to exchange information they have obtained during their investigations into the same case, subject to strict conditions regarding confidentiality, personal data and other requirements.¹¹

8 See Paragraph 5 et seq. of the Cooperation Notice.

9 See Paragraph 51 of the Cooperation Notice.

10 Case C-428/14, *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) Srl v. Autorità Garante della Concorrenza e del Mercato*, judgment of 20 January 2016.

11 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014). At the time of writing, the EU is in the process of adopting a revised cooperation agreement with Canada that would include enhanced information sharing provisions, comparable to the EU-Switzerland agreement.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality

Article 101 TFEU can apply to agreements between undertakings located outside the EU if they have effects on competition within the EU. The CJEU has recognised that it is not necessary that companies implicated in the alleged cartel activity be based inside the EU; nor is it necessary for the restrictive agreement to be entered into inside the EU, or the alleged acts to be committed or business conducted within the EU. In *Wood Pulp I*, the CJEU found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented.¹² 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.

ii Parent company liability

The conduct of a subsidiary may be imputed to the parent company where, having regard to the economic, organisational and legal links between those two entities, the subsidiary does not decide independently upon its own conduct in the market but carries out in all material respects the instructions given to it by the parent company. In such a situation, the parent and subsidiary form a single undertaking for the purposes of EU competition law. The Commission is therefore able to impose fines on a parent company without first having to establish its involvement in the infringement. Where a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable presumption that the parent company exercises a decisive influence over its subsidiary, and therefore the two entities form a single undertaking. Shareholdings below 100 per cent may also give rise to a position of a single undertaking depending on the level of the shareholding and the nature of the links between the companies.¹³ Parent companies may also be held liable for infringements of the European competition rules committed by their full-function joint ventures.¹⁴

iii Affirmative defences and exemptions

Article 101(3) TFEU exempts those agreements that, although they restrict competition, have pro-competitive effects outweighing the competition concerns. However, it is highly unlikely that a hard-core cartel agreement could qualify for such an exemption.

There are no industry-specific defences. There are, however, special rules governing the application of Article 101 TFEU to the agricultural and transport sectors.

12 Cases 114/85, etc. *Ahlstrom v. Commission* [1988] ECR 5193.

13 See, for example, Case C-97/08 P, *Akzo Nobel NV and others v. Commission*, judgment of 10 September 2009.

14 Case C-172/12P, *El du Pont de Nemours and Company v. European Commission* and Case C-179/12P, *The Dow Chemical Company v. European Commission*.

IV LENIENCY PROGRAMMES

i Overview of the leniency programme

In December 2006, the Commission adopted the Leniency Notice, which built on its experience with its previous leniency programmes. The Leniency Notice is essentially based on two principles: first, that the earlier undertakings contact the Commission, the higher the reward; and second, that the value of the reward will depend on the usefulness of the materials supplied.

ii Immunity

Full immunity from fines that might otherwise be imposed by the Commission will be granted under the Leniency Notice to either the first undertaking to provide the Commission with information and evidence that enables it to carry out a targeted inspection in connection with the alleged cartel; or the first undertaking to submit information and evidence enabling the Commission to find an infringement of Article 101 TFEU.

These options are mutually exclusive, so only one undertaking can qualify for full immunity.

The undertaking seeking immunity must provide the Commission with a corporate statement and other evidence relating to the alleged cartel, and in particular any evidence contemporaneous with the infringement. Corporate statements may take the form of written documents signed by or on behalf of the undertaking or may be made orally.¹⁵ They should include:

- a* a detailed description of the cartel arrangement;
- b* contact details of the applicant and the other members of the cartel;
- c* the names, positions and addresses of all individuals involved in the cartel; and
- d* information on which other competition authorities have been (or are intended to be) approached in relation to the cartel.

To obtain full immunity, an undertaking must also fulfil the following conditions:

- a* it must cooperate fully and expeditiously on a continual basis with the Commission (see subsection v, *infra*);
- b* it must put an end to its involvement in the cartel immediately following its application (except where, in the Commission's view, it would be reasonably necessary to preserve the integrity of the inspections);
- c* it cannot have destroyed, falsified or concealed evidence of the cartel or disclosed the leniency application (except to other competition authorities); and
- d* it cannot have taken steps to coerce other undertakings to participate in the cartel.

Assuming all the relevant conditions are satisfied at the time of application, the Commission should grant conditional immunity to the undertaking. If it then continues to comply with its obligations, the conditional immunity should be confirmed in the final decision.

15 The Commission notice entitled 'Delivering oral statements at DG Competition', of 8 October 2013, provides practical guidance on the content and delivery of oral corporate statements in cartel cases.

iii Reduction in fine

If an undertaking does not qualify for immunity, favourable treatment is also available under the Leniency Notice if it provides evidence representing significant added value to that already in the Commission's possession and terminates its involvement in the cartel activity. Provided these conditions are met, the cooperating undertaking 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 undertaking to provide significant added value; 20 to 30 per cent for the second undertaking to provide significant added value; and zero to 20 per cent for any subsequent undertakings that provide significant added value.

The amount received within these bands depends upon the time at which the undertaking started to cooperate, the quality of evidence provided and the extent to which it represents added value. If a leniency applicant supplies information previously unknown to the Commission showing that the cartel had lasted longer or was in some way more serious than the Commission had been aware, the Commission will not take account of those elements (regarding duration or gravity) when setting the level of that applicant's fine.

Undertakings wishing to benefit from a reduction in their fine should provide the Commission with their evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed whether the evidence submitted at the time of their application has passed the significant added value threshold (as well as 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 reduction to be granted should be confirmed in the final decision.

iv Markers

To take advantage of the Commission's leniency programme, an undertaking (or its legal advisers) must contact DG Competition. If immunity is still available for the particular cartel in question, the undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines.

The Commission may grant a marker protecting an immunity applicant's place in the queue to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning:

- a* its name and address;
- b* the parties to the alleged cartel;
- c* the affected products and territories;
- d* the estimated duration of the alleged cartel;
- e* the nature of the alleged cartel conduct;
- f* details of any other past or possible future leniency applications to other authorities in relation to the alleged cartel; and
- g* its justification for requesting a marker.

Where the Commission grants a marker, it will specify the time period in which the applicant must perfect the marker by submitting information and evidence required to meet the relevant threshold for immunity.

v **Duties of cooperation**

A leniency applicant must maintain complete and continuous cooperation throughout the Commission's investigation. The Leniency Notice explains that this includes:

- a* promptly providing the Commission with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;
- b* remaining at the Commission's disposal to promptly answer any request that may contribute to the establishment of the facts;
- c* making current (and, if possible, former) employees and directors available for interviews with the Commission;
- d* not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
- e* not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed.

vi **Access of private litigants to leniency materials**

Information and documents communicated to the Commission under the Leniency Notice are treated as confidential. Any subsequent disclosure to the parties under investigation, as may be required by the proceedings, will be made in accordance with the rules relating to access to the file.¹⁶ In practice, the Commission does not publicly reveal the identity of a leniency applicant as long as the investigations continue. Eventually, however, details of the cartel investigation and the applicant's involvement may be made publicly available in the final Commission decision and the associated press release issued by the Commission.

In June 2011, the CJEU provided guidance in the *Pfleiderer* case regarding when private litigants may obtain discovery of materials surrendered as part of a leniency programme.¹⁷ The CJEU noted that EU law does not automatically preclude the disclosure of a leniency applicant's submission in subsequent court proceedings where such disclosure is required by national law. However, rather than adopting a definitive line, the CJEU concluded that it was for each national court to determine on a case-by-case basis the response to be applied to such requests, balancing concerns over disclosure undermining the effectiveness of leniency regimes against the need to ensure that it is not unduly difficult for parties to bring damages actions to recover losses arising from competition law violations.

In June 2013, following a reference from the Austrian Cartel Court for a preliminary ruling, the CJEU further clarified that EU law precludes national legislation that prevents potential claimants from accessing court files without the consent of the parties to the competition proceedings.¹⁸ The CJEU objected to such national legislation on the basis that it does not leave any possibility for the national court to weigh up the interests involved.

In December 2014, a new Directive on rules governing actions for damages under national law for breach of the EU antitrust rules and those of Member States came into force,

16 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004.

17 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, judgment of 14 June 2011.

18 Case C-536/11, *Bundeswettbewerbsbehörde v. Donau Chemie AG and others*, judgment of 6 June 2013.

giving Member States two years to implement it (see Section VIII, *infra*).¹⁹ The Directive sets out a number of safeguards in relation to leniency programmes, including requiring Member States to ensure that leniency corporate statements and settlement submissions have absolute protection from disclosure or use as evidence, and that documents specifically prepared in the context of the public enforcement proceedings by the parties (e.g., replies to authorities' requests for information) or the competition authorities (e.g., a statement of objections) have temporary protection, for the duration of the Commission's proceedings. In addition, Member States must ensure that national courts limit the disclosure of evidence to that which is proportionate considering the legitimate interest of the parties and third parties concerned.

Potential leniency applicants and litigants should also have regard to the transparency rules contained in EU Regulation 1049/2001, which gives EU citizens and companies a right of access to documents drawn up by, or in the possession of, EU institutions. The CJEU has held that the Commission is entitled to presume, without carrying out an individual examination of each of the documents in the file, that disclosure is likely to undermine the protection of the commercial interests of the relevant undertakings as well as the general interest that such proceedings seek to protect. It is up to the party seeking disclosure to rebut this presumption or to show that there is an overriding public interest in disclosure; the mere fact that the documents are requested in order to bring a private action for damages will not be sufficient for these purposes.²⁰

vii Potential issues arising from simultaneous representation by counsel of the corporate entity and its employees

It may be possible for external counsel to represent a corporate entity while also advising the employees that have participated in the cartel (provided that this is compatible with the law firm's own professional conduct obligations). However, such an arrangement could give rise to issues in respect of criminal proceedings against individuals under national legislation where conflicts of interest between the corporate entity and the employees may arise. Conflicts of interest may also arise in respect of disciplinary measures imposed upon employees pursuant to their contract of employment. A decision on the appropriateness of such arrangements will therefore need to be made on a case-by-case basis.

V PENALTIES

i Overview

The principal sanction available to the Commission is the imposition of fines on the undertakings that have engaged in cartel activities. The Commission does not have any powers to impose criminal sanctions on individuals involved (in contrast to the position at the national level in some countries).

19 Directive 2014/104/EU of 26 November 2014 of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

20 Case C-365/12 P, *European Commission v. EnBW Energie Baden-Württemberg*, judgment of 27 February 2014.

Regulation 1/2003 provides that fines can be imposed for a breach of Article 101 TFEU up to a maximum of 10 per cent of worldwide turnover of the undertaking in the financial year preceding the decision. The CJEU has confirmed that the Commission has wide discretion in setting the level of fines on companies within these limits. The Commission has, at various times, reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. The highest fines imposed by the Commission in respect of cartel cases include:

- a* in July 2016, record total fines of €2.93 billion²¹ upon four undertakings for participation in a cartel relating to medium and heavy trucks. Daimler received the highest individual fine of €1.01 billion;
- b* in December 2013, total fines of €1.71 billion on eight undertakings in two cartel decisions relating to euro interest rate derivatives (EIRD) and yen interest rate derivatives (YIRD). The Commission fined a ninth undertaking €14.96 million in relation to the *YIRD* case in April 2015 and three other undertakings €485 million in relation to the *EIRD* case in December 2016, bringing the total to €2.21 billion;²²
- c* in December 2012, total fines of €1.47 billion on seven undertakings for participation in two cartels relating to cathode ray tubes;²³ and
- d* in November 2008, total fines of €1.38 billion²⁴ upon four undertakings in respect of a cartel for car glass. The highest individual fine was that imposed upon Saint Gobain (€896 million).²⁵

ii Factors taken into account when setting the penalty

A financial penalty imposed by the Commission in respect of a cartel will be calculated following the methodology set out in its Fining Guidelines.²⁶ This methodology may be summarised as follows:

- a* value of sales: the Commission starts by applying a percentage of the undertaking's value of sales in the market affected by the infringement. The percentage applied in each case will be based on the gravity of the infringement and, as a general rule, will be

21 Case AT.39824, Trucks, Commission decision of 19 July 2016.

22 Reduced to €1.99 billion by decision of 6 April 2016 – the Commission amended the fine for Société Générale based on corrected sales data provided by Société Générale in February 2016.

23 Reduced to €1.41 billion on appeal to the General Court. See joined Cases T-82/13 *Panasonic Corp and MT Picture Display Co Ltd v. Commission*, T-84/13 *Samsung SDI Co Ltd and Others v. Commission*, T-91/13 *LG Electronics, Inc v. Commission*, T-92/13 *Koninklijke Philips Electronics NV v. Commission* and T-104/13 *Toshiba Corp v. Commission*, judgments of 9 September 2015.

24 Reduced to €1.19 billion on appeal to the General Court. See joined Cases T-56/09 and T-73/09, *Saint-Gobain Glass France SA and others v. Commission*, judgment of 27 March 2014.

25 Reduced to €715 million on appeal to the General Court. See joined Cases T-56/09 and T-73/09, *Saint-Gobain Glass France SA and others v. Commission*, judgment of 27 March 2014.

26 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003.

- set at a level of up to 30 per cent of sales. In determining the proportion of the value of sales, account is taken of the nature of the infringement, its actual impact on the market and the size of the relevant geographic market;
- b* duration: the amount determined based on the value of sales will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year, and periods of longer than six months but shorter than one year will be counted as a full year;
 - c* entry fee: an additional sum of between 15 and 25 per cent of the value of sales is included to deter undertakings from participating in cartels even for only a short period;
 - d* aggravating or attenuating circumstances and other adjustments: the sum achieved from the value of sales multiplied by the duration, plus the entry fee, is adjusted to reflect a variety of possible aggravating or attenuating circumstances. The Fining Guidelines place an emphasis on recidivism as an aggravating factor: the Commission may increase a fine by up to 100 per cent for each similar infringement found by the Commission or by an NCA. Additional adjustments are possible on the basis of other objective factors, such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the companies in question and their real ability to pay in a specific social and economic context; and
 - e* adjustment for leniency or settlement discounts.

Given the substantial discretion the Commission has in setting fines, it can in practice be difficult to assess with certainty the ultimate penalty that will be imposed in cartel cases. This is largely justified on public policy grounds, as increased transparency could prompt companies to engage in offsetting calculations between the likely level of fines and the likely benefit arising from their anticompetitive cartel conduct. Nonetheless, the Commission generally follows the Fining Guidelines, and must exercise its discretion in a coherent and non-discriminatory way.

iii Early resolutions and settlement procedures

The Commission's procedure for settling cartel cases is intended to complement the Leniency Notice and the Fining Guidelines. The aim of the settlement procedure is to simplify and speed up the administrative procedure for investigations (and to reduce CJEU litigation in cartel cases), thereby freeing up the Commission's resources and enabling it to pursue more cases.

Pursuant to the settlement procedure, the parties are expected to acknowledge their participation in and liability for the cartel, and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with a 10 per cent reduction in fines (cumulative with any leniency reduction) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two).

The Commission has a broad margin of discretion to determine which cases may be suitable for settlement. An undertaking does not have the right to enter into settlement discussions, but nor is it obliged to do so if invited by the Commission. The procedure is available in cases where the Commission has initiated proceedings with a view to adopting an infringement decision and imposing fines but has not yet issued a formal statement of objections. Settlements may, however, be explored at an earlier stage if requested by the undertakings under investigation.

The Commission is using the settlement procedure with increasing frequency. It had used the procedure in respect of 21 cartel decisions at the time of writing, two of which were issued in 2016 (*Trucks* and *Alternators and starters*). The Commission has also shown increasing willingness to compromise with ‘hybrid’ cases where one or more parties elect not to settle.

VI ‘DAY ONE’ RESPONSE

Officials from the European Commission may carry out unannounced inspections anywhere in the EU in order to investigate possible cartel activities. The team conducting a dawn raid usually consists of between five and 10 officials. The Commission officials are normally accompanied by two or three officials from the relevant NCAs assisting the Commission in its investigation. The Commission officials will often be willing to wait for a short period for an undertaking to consult its legal advisers before commencing the inspection. Any such delay must, however, be kept to a minimum. In 2012, the General Court upheld a Commission decision to increase a fine on an undertaking under investigation partly on the basis that officials were refused access to the premises pending the arrival of external lawyers.²⁷

When carrying out a surprise inspection visit, the officials may:

- a* enter the premises, land and means of transport of undertakings or an association of undertakings;
- b* examine the books and other business records of the company under investigation (irrespective of how they are stored);
- c* take copies of books and records;
- d* require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection; and
- e* seal any business premises and books or records for the time necessary for the inspection.

The European Commission issued an explanatory note in March 2013 that provides details on the extent to which officials will use IT procedures to carry out an inspection.²⁸ In particular, the note explains that officials can search an undertaking’s IT environment and storage media using both built-in search tools and their own forensic IT tools. The Commission may also remove copies of data for searching at a later date. Undertakings must cooperate with the inspection and may be required to provide assistance, not only for explanations on the organisation and its IT environment, but also for specific tasks such as the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and reinstalling hard drives from computers, and providing ‘administrator access rights’ support. When such actions are taken, the undertaking under inspection must ensure that employees do not interfere in any way with these measures.

27 Case T-356/06, *Koninklijke Volker Wessels Stevin v. Commission*, judgment of 27 September 2012.

28 Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation (EC) No. 1/2003, revised on 18 March 2013.

In 2014, the General Court upheld a Commission fine of €2.5 million on an undertaking that failed to comply with a request to block email accounts of key individuals during an inspection.²⁹

The Commission may 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.

The Commission can impose penalties of up to 1 per cent of the total turnover upon any undertaking that obstructs an inspection. For example, in 2008 the Commission imposed a fine of €38 million on EON Energie for the breach of a Commission seal in EON's premises during an inspection. The fine was upheld by the CJEU on appeal in November 2012.

It is therefore essential to develop a coordinated strategy for dealing with an inspection. Important issues to consider include:

- a* arranging for each official to be assisted or shadowed by a member of staff or lawyer, and for the provision of appropriate IT support to allow the officials to conduct their inspection;
- b* briefing relevant employees that they should not obstruct the investigation (e.g., by destroying or deleting records or by interfering with IT measures) while also noting that anything they say to the officials may be recorded as evidence;
- c* establishing a process for identifying documents that may be covered by legal privilege before officials are allowed to see or copy them;
- d* maintaining a record of what officials ask for and inspect, and keeping copies of documents copied by the officials; and
- e* ensuring that the fact that the inspection is taking place is not leaked outside the company.

In addition to carrying out unannounced inspections, the Commission may issue information requests under Article 18 of Regulation No. 1/2003 as a means of obtaining information from undertakings based in the EU. The Commission can impose fines upon EU undertakings of up to 1 per cent of their total turnover for supplying incorrect or misleading information in response to an information request. With respect to non-EU undertakings, the Commission is often able to exercise its jurisdiction by sending the information request within the EU to a subsidiary company that belongs to the non-EU parent group. However, where a firm has no physical presence in the EU, this will not be possible. In such cases, the Commission usually sends out informal information requests; it is normal for addressees to cooperate in the provision of information in response to such requests.

In light of the significant penalties that may be imposed for a breach of Article 101 TFEU, a tailored strategy should be developed to deal with the fallout from an unannounced inspection or receipt of information covering alleged cartel activities. Active consideration should be given to whether it is appropriate to be making applications for leniency. The strategy should be developed with senior management and the legal department in view of the surrounding facts and the different issues and risks raised in all potentially relevant

29 Case T-272/12, *Energetický a průmyslový holding as, and EP Investment Advisors sro, v. European Commission*, judgment of 26 November 2014.

jurisdictions. Delay in the implementation of a strategy could have serious consequences (e.g., in terms of the priority of leniency applications), as could the implementation of a policy that does not take due account of identifiable risks (in terms of potential civil actions, follow-on investigations in other jurisdictions, etc.).

VII PRIVATE ENFORCEMENT

Third parties 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 vary between different EU Member States. Overall, there are still some impediments to pursuing such damages claims in Europe that the European institutions are attempting to address (see Section VIII, *infra*).

VIII CURRENT DEVELOPMENTS

Member States had until 27 December 2016 to implement a Directive on rules governing actions for damages under national law for breach of the EU antitrust rules and those of Member States (the Damages Directive).³⁰ The Directive's main objective is to ensure the effective enforcement of EU antitrust rules by optimising the interaction between the public and private enforcement of these rules, and improving the conditions under which compensation can be obtained for harm caused by infringements of the rules. The Damages Directive therefore contains a number of measures aimed at facilitating damages actions, most notably:

- a* allowing national courts to order parties to the proceedings and third parties to disclose evidence when victims claim compensation;
- b* ensuring national courts cannot take decisions that run counter to final infringement decisions by national competition authorities;
- c* introducing limitation periods that provide victims with a reasonable opportunity to bring a damages action;
- d* recognising the possibility for defendants to invoke the passing-on defence;
- e* facilitating consensual settlements to allow a faster and less costly resolution of compensation disputes; and
- f* providing a rebuttable presumption that a cartel infringement has caused harm.

The Damages Directive also sets out a number of safeguards against diminishing the incentives for companies to cooperate with competition authorities, including absolute protection from disclosure or use as evidence for leniency corporate statements and settlement submissions, and temporary protection for documents specifically prepared in the context of the public enforcement proceedings by the parties or the competition authorities. On 5 August 2015, the European Commission published amendments to its antitrust procedural rules and notices in order to reflect these changes.

30 Directive 2014/104/EU of 26 November 2014 of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

At the time of writing, six Member States have passed national laws (or adopted amendments to existing laws) to transpose the Damages Directive (Denmark, Finland, Hungary, Luxembourg, Sweden and the Netherlands) and it has been partially implemented in Latvia. Proposals for its implementation have been made to parliaments in another eight Member States (Austria, Bulgaria, Czech Republic, Germany, Italy, Lithuania, Slovakia and the UK) and to the government in two Member States (Poland and Portugal). Proposals regarding the Damages Directive were subject to stakeholder consultation in another six Member States (Croatia, Estonia, Malta, Romania, Slovenia and Spain). As the Damages Directive is relevant to the EEA, it must also be implemented in the EFTA States – at the time of writing, proposals are subject to stakeholder consultation in Norway.

The Commission is also due to report in 2017 on the status of its 2013 recommendation that Member States put in place national collective redress mechanisms. Member States were given two years from the date of the recommendation to put in place appropriate measures in response to the recommendation. The Commission will assess the state of play and examine whether any legislative measures should be proposed in this area.

Further legislative changes are also expected in response to the Commission's recent consultation on the empowerment of NCAs to be more effective enforcers of the EU competition rules. The results of the consultation were published in May 2016 and show strong support for NCA independence, sufficient resources, investigative tools and enforcement powers. According to the Commission, new legislation could be introduced as early as 2017.

Appendix 1

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Philippe Chappatte is head of the Slaughter and May competition group. He is resident in the London office but also spends a portion of his time in Brussels. He is responsible for the running and development of the firm's global competition practice, including through the firm's Beijing and Hong Kong offices and 'best friend' firms. Mr Chappatte is listed as a leading individual in the 'Competition/European Law: Non-contentious' section of *Chambers UK 2017*, and for 'EU and competition' in *The Legal 500 UK 2016*. Mr Chappatte has extensive experience of EU and UK competition law with expertise in merger, cartel and behavioural cases in both jurisdictions. He has represented clients in respect of cartel cases in front of the UK competition authorities, the European Commission and other competition regulators, and in relation to appeals to the European courts.

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