

A low-angle, close-up photograph of a sailboat's mast and complex rigging system, featuring numerous ropes and pulleys. The image is dark and moody, with a deep blue and black color palette, serving as a background for the document's title and header.

SLAUGHTER AND MAY/

# THE EU COMPETITION RULES ON CARTELS

A guide to the enforcement of the rules  
applicable to cartels in Europe

May 2021

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## 1. Introduction

- 1.1 Anti-cartel enforcement has evolved substantially in Europe over recent decades. After a period of low levels of enforcement during the 1960s and 1970s, the European Commission began to impose heavier fines in the 1980s in a number of landmark cases. Since the late 1990s, the Commission has repeatedly reaffirmed its commitment to detecting and punishing “hardcore” cartels, increasing the number and intensity of its investigations and imposing record fines. It has been increasingly active in the area of international cartels, cooperating with the competition authorities in the US and elsewhere. The National Competition Authorities (NCAs) in the EU have likewise placed increased emphasis on investigating and pursuing cartels.<sup>1</sup> Some statistics illustrating trends in the enforcement of the EU cartel rules are provided at [Annex 1](#).
- 1.2 This publication provides an overview of the competition rules applicable to cartels within the EU.<sup>2</sup> It explains the relevant legislation and who enforces it ([Chapter 2](#)). It also describes the typical steps involved in an investigation and the investigative powers available to the enforcement authorities ([Chapter 3](#)). It then considers the applicable sanctions ([Chapter 4](#)), the leniency options available to companies ([Chapter 5](#)), the potential for settlement of cases ([Chapter 6](#)), and the judicial review process ([Chapter 7](#)). A comparison of the EU and UK rules applicable to cartels is provided at [Annex 2](#).<sup>3</sup>
- 1.3 This publication also aims to assist companies in managing cartel investigations. [Annex 3](#) provides guidelines on how to develop a focused strategy for handling cartel investigations. The effectiveness of such a strategy will partly depend on the company’s ability to set up and implement preventive internal checks on the basis of compliance programmes; for this purpose, this publication also includes some basic information at [Annex 4](#) on how to establish an effective antitrust compliance policy.<sup>4</sup> [Annex 5](#) provides an overview of the key dos and don’ts for handling a surprise inspection (or “dawn raid”) by the competition regulators.

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<sup>1</sup> The current 27 EU Member States are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden. By virtue of the 1992 EEA Agreement, the EU competition rules also extend to three other countries: Iceland, Liechtenstein and Norway (sometimes referred to as the EFTA contracting states). Together, the EU Member States and the EFTA contracting states make up the EEA.

<sup>2</sup> For general guidance on the application of the EU competition rules, see the separate Slaughter and May publications: *An overview of the EU competition rules*, *The EU competition rules on vertical agreements*, *The EU competition rules on horizontal agreements*, *The EU competition rules on intellectual property licensing*, and *The EU Merger Regulation*. For further guidance on the UK rules applicable to cartels, see also the Slaughter and May publication: *An overview of the UK competition rules*.

<sup>3</sup> The summary at [Annex 2](#) to this publication is limited to the rules at EU level and in the UK. Slaughter and May, in cooperation with competition specialists at leading law firms in key jurisdictions in the EU (and in other countries) can also provide comparable summaries and information for other jurisdictions.

<sup>4</sup> The Commission has published a brochure “*Compliance matters: What companies can do better to respect EU competition rules*” (updated February 2013), available on the DG Competition website.

## 2. Anti-cartel legislation and enforcement

### Article 101 and national competition laws

- 2.1 Within the EU, both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is Article 101 TFEU.
- 2.2 Any secret agreement or understanding between competitors that seeks to fix prices, limit output, share 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. These types of restrictions are generally viewed as “hardcore” infringements of the competition rules, presumed to have negative market effects. Arrangements involving “hardcore” price-fixing or market sharing will attract intense regulatory scrutiny if they come to the attention of the competition authorities.
- 2.3 Article 101 can apply to agreements between undertakings located outside the EU if they could have effects on competition within the EU. According to the “effects doctrine”, the application of competition rules on cartels is justified under public international law whenever it is foreseeable that the relevant anti-competitive agreement or conduct would have an immediate and appreciable effect in the EU. The European Courts have 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.

### The European Competition Network

- 2.4 The implementing rules are contained in Regulation 1/2003.<sup>5</sup> The principal enforcement agency in the EU is the Commission, in particular its DG Competition.<sup>6</sup>
- 2.5 In accordance with Regulation 1/2003, the NCAs throughout the EU are also fully competent to enforce Articles 101 and 102 (as well as their domestic competition rules) with respect to cartels at the EU level and at national level. In this regard, if an NCA within the EU uses domestic competition law to investigate a cartel that may affect trade between Member States, it must (in accordance with Article 3 of Regulation 1/2003) also apply Article 101. Generally, national competition rules should not be used to prohibit agreements that are compatible with the EU competition rules nor to authorise agreements that are prohibited under the EU competition rules.
- 2.6 There is close cooperation between the Commission and the NCAs, which have established the European Competition Network (ECN). The various authorities exchange information and cooperate through the ECN structures to ensure the efficient allocation of cases.<sup>7</sup>

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<sup>5</sup> Council Reg. (EC) 1/2003 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (OJ 2003 L1/1, 4.1.2003).

<sup>6</sup> For cases affecting trade between non-EU countries that are covered by the EEA Agreement, an agency known as the EFTA Surveillance Authority (ESA) enforces competition law. Where trade between the EU and one or more EFTA countries is affected, allocation of cases between the Commission and the ESA depends on the relative importance of the activities concerned in the affected EFTA and EU territories.

<sup>7</sup> In principle, the Commission (and not the NCAs) is generally seen as the best placed authority to deal with a suspected cartel (or other infringement of the EU competition rules) if:

- the relevant market covers more than three Member States;
- issues raised by the case are closely linked to other EU rules that may be exclusively or more effectively applied by the Commission;
- a Commission decision is needed to develop EU competition policy; or
- it is appropriate for the Commission to act to ensure effective enforcement of the antitrust rules.

## International cooperation

- 2.7 The EU has bilateral cooperation agreements with certain non-EU countries, notably the US, China, Canada, Japan, South Korea and Switzerland. These agreements can help the Commission to obtain information and evidence located outside the EU. The EU has also agreed other forms of cooperation with a number of other competition regulators, including with the other OECD member countries and China.
- 2.8 These international cooperation agreements do not generally allow the Commission to disclose confidential information received from companies in the course of its investigations (in contrast to the extensive cooperation and disclosure that is possible between the NCAs within the ECN following the implementation of Regulation 1/2003). Because of this restriction on the supply of confidential information, deliberations are not possible on the substance of the evidence gathered unless the investigated parties grant “waivers”. That said, there are currently proposals for moving forward with so-called “second generation” cooperation agreements to enable the exchange of company confidential information. The EU has signed such a “second generation” agreement with Switzerland, and, since 2017, has been negotiating one with Japan, although progress in this area appears to have stalled.
- 2.9 Competition authorities also cooperate in the context of various international organisations and networks which have facilitated discussions on practical problems and the exchange of experiences in the handling of competition issues, including international cartels. For example, more than 100 competition agencies currently participate in the International Competition Network (ICN). Similarly, many agencies contribute to the work of the OECD Competition Committee, which issues recommendations and reports regarding enforcement action against hardcore cartels.

### 3. Investigations

- 3.1 The Commission and NCAs have wide powers of investigation under Regulation 1/2003. Investigations may be triggered as a result of:
- one or more of the parties to a cartel or anti-competitive agreement approaching the Commission (and/or the NCAs), e.g. as a "whistleblower" under applicable leniency programmes;
  - a third party making a complaint, e.g. customers, competitors, consumers or any other party with information;
  - the Commission or an NCA launching an inquiry of its own initiative; or
  - an NCA referring a case with a cross-border element to the Commission (or vice versa) through the structures of the ECN.
- 3.2 Once a case comes to the Commission's attention, it will collect further information, either informally or using its formal powers of investigation laid down in Regulation 1/2003 (e.g. Article 18 requests for information and "dawn raids", as considered below). Information may also be offered by third parties or by the cartel participants themselves under the Commission's leniency programme. If the Commission considers that there is evidence of an infringement of Article 101 that should be pursued, it may decide to open formal proceedings itself or it may refer the case to one or more of the NCAs through the structures of the ECN.
- 3.3 Where the proceedings are brought at the Commission level, this may lead to the Commission formally addressing a written "statement of objections" (or SO) to the parties setting out the Commission's case. The parties are then allowed to examine the documents on the Commission's file ("access to the file") and to respond to the SO (in a written "reply" and at an "oral hearing"). The Commission's final decision is then taken by the full College of Commissioners and is notified to the undertakings concerned. A different procedure is adopted where the parties elect to pursue settlement with the Commission - see [Chapter 6](#) of this publication.
- 3.4 It is difficult to generalise about the timing of cartel cases, but from initial investigation to final disposition they usually take several years.

#### Dawn raids

- 3.5 Under Article 20 of Regulation 1/2003, an important way for the Commission to gather information - particularly early on in a cartel investigation - is for it to conduct unannounced on-site inspection visits (commonly known as "dawn raids"). Most of the NCAs have broadly similar powers to conduct inspection visits, as do many competition authorities outside Europe. In the case of international cartels, authorities increasingly coordinate their dawn raids to maintain the element of surprise. Where appropriate these inspection powers can also be used with warning (for example, where the Commission has already gathered some information from suspected key participants in a cartel but subsequently seeks additional information either from the same companies or from third parties).
- 3.6 Commission officials can conduct dawn raids anywhere in the EU.<sup>8</sup> They can enter the premises, land and means of transport of a company, examine its books and other business records (including computer records, chats, and instant messages), take copies from books and records and ask for

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<sup>8</sup> The Commission can also request that the ESA (responsible for enforcement of the EEA competition rules in the EFTA contracting states) conduct a dawn raid in respect of undertakings located in Iceland, Liechtenstein or Norway, in cases also investigated by the Commission under Arts. 53 and/or 54 of the EEA Agreement. Information so obtained is transmitted to the Commission (which usually also takes part in such raids).

oral explanations on the spot. Regulation 1/2003 also provides for the power to seal premises and records; the breaking of a seal is considered a violation of the obligation to cooperate and can lead to significant fines. The Commission can also inspect any other premises (including the homes of directors and employees), subject to obtaining a court warrant, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are kept at the premises.

- 3.7 The Commission has no power to require individuals to make statements or provide evidence under oath. Under Regulation 1/2003 (Article 19) the Commission only has the power to take statements from any natural or legal person on a voluntary basis (i.e. such persons cannot be summoned to testify). Commission investigations therefore tend to focus heavily on documentary evidence.
- 3.8 The Commission can, however, require on-the-spot oral explanations of documents/information that it finds in the course of a dawn raid; the precise scope of this power is not clearly defined. The European Courts have confirmed that Commission officials are only empowered to require explanations in respect of specific issues arising out of the books and business records they examine; this should not be treated as a power to ask general questions of a type that would require more consideration and that might be used to gather new information from the company being investigated. Consistent with the Courts' interpretation, Regulation 1/2003 grants the Commission the power to interrogate a company's representatives and staff for explanations only on facts or documents relating to the subject matter and purpose of the inspection.
- 3.9 The Commission team conducting a dawn raid typically consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCA assisting the Commission in its investigation. The officials will be acting pursuant to either a formal decision or an authorisation; in either case, the document must specify the subject matter and purpose of the investigation and the penalties for non-compliance or incomplete information. The company is only required to cooperate if the Commission has taken a formal decision (which it will generally have done in the context of unannounced on-site inspection visits). For an overview of the key dos and don'ts for handling a dawn raid, see [Annex 5](#) to this publication.
- 3.10 Commission officials have no power to force entry; however, where an investigation is obstructed, the NCA officials assisting the Commission in its investigation may use force to gain entry, provided they have obtained the necessary warrant (under national procedures). In practice, as a precaution, the NCA officials generally have such a warrant. National courts called upon to issue a warrant in support of a Commission investigation cannot second-guess the need for the investigation and are only required to assess whether national procedural safeguards are satisfied with respect to that investigation.<sup>9</sup>

### Information requests

- 3.11 Under Article 18 of Regulation 1/2003, the Commission also has extensive powers to request information from companies. These requests for information (RFIs) are addressed in writing to the companies subject to the investigation or to third parties (such as competitors and customers). They must set out the legal basis and the purpose of the request, as well as the penalties for supplying

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<sup>9</sup> According to the Court of Justice (CJ) in Case C-94/00 *Roquette Frères*, judgment of 22 October 2002, to allow such assessment the Commission is only required to provide national courts with detailed explanations demonstrating that it is in possession of solid information and evidence, but not to present the information and evidence as such.



incorrect information. RFIs are widely used by the Commission as a means of obtaining information, both as part of the initial fact-gathering and subsequently in the course of investigations. Particularly at the initial fact-finding stage they tend to be framed very broadly and impose tight deadlines, so are very burdensome for their addressees. There is, however, some possibility for negotiating reasonable limitations in their scope and/or extensions of the time deadline. Generally, it is advisable for companies to respond to RFIs as fully and as accurately as possible.

- 3.12 Regulation 1/2003 permits the Commission to impose fines up to 1% of total annual turnover for providing incorrect or misleading information, or failing to supply information, in response to an RFI.
- 3.13 With respect to non-EU companies, the Commission is often able to exercise its enforcement jurisdiction by sending the RFI within the EU to a subsidiary company of the non-EU parent firm or group. However, where a firm has no physical presence in the EU, this will not be possible. In the latter case, the Commission usually sends out informal RFIs (without reference to its fining powers under Regulation 1/2003); it would be normal for addressees to cooperate in the provision of information in response to such requests.

### Rights of defence

- 3.14 During the Commission's investigations, a company has certain fundamental rights of defence, 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) and the right not to be required to incriminate itself.

### Legal professional privilege

- 3.15 The Commission is not entitled to require disclosure of written exchanges between a company and its EEA-qualified external lawyers seeking or giving legal advice where the exchange:
- follows the initiation of proceedings by the Commission and concerns the company's defence; or
  - is linked with the subject matter of those proceedings (even if the exchange occurred before the initiation of proceedings).
- 3.16 The extent of this privilege is therefore limited in scope. In particular, legal professional privilege does not apply to exchanges between a company and its in-house lawyers (unless they are simply reporting the statements of an EEA-qualified external lawyer), or between a company and an external lawyer qualified outside the EEA. Although advice from in-house lawyers or from lawyers qualified outside the EEA may qualify as privileged under national legislation (including in the UK), caution is still required because of the risk that the Commission may investigate.

### Privilege against self-incrimination

- 3.17 The European Courts have also recognised a privilege against self-incrimination, albeit narrow in scope. The precise scope of the privilege is not clearly defined. European Courts have previously refused to acknowledge the existence of an absolute right to silence and have held that companies are obliged to cooperate actively. They have also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel a company to provide answers that might involve an admission of the existence of an infringement that it is incumbent on the Commission to prove. In this context, the European Courts appear to draw a distinction 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 hand. Whereas the former type of question is generally permitted, the latter infringes the undertaking's rights of defence.

## 4. Sanctions and sentencing

### Fines

- 4.1 The principal sanction available to the Commission is the imposition of fines. The Commission has no powers to impose criminal sanctions on individuals involved (in contrast to the position at the national level in some countries, as well as in the UK: see [paragraphs 4.12 to 4.14](#)).
- 4.2 In general, the European Courts have confirmed that the Commission has wide discretion in setting the level of fines on companies, within the limits of Regulation 1/2003.<sup>10</sup> In fixing the amount of the fine, regard must be had to the gravity and the duration of the infringement, as well as to any aggravating or attenuating circumstances. The calculations also take account of the market shares held by each party and their overall size, so as to reflect each company's capacity to harm consumers and to act as a deterrent. Fines can in theory be up to 10% of worldwide group turnover in the financial year preceding the decision. The Court of Justice (CJ) has confirmed that fines may exceed the turnover in the products concerned by the infringement, provided that they stay within the overall 10% ceiling (*Pre-insulated Pipe Cartel Appeals*, 2002).

### Guidelines on the method for setting fines

- 4.3 The Commission has published Guidelines on the method of setting fines (the Fining Guidelines).<sup>11</sup> The flowchart at the end of this [Chapter 4](#) describes the steps taken by the Commission in setting fines:
- **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 is based on the gravity of the infringement and, as a general rule, will be set at a level of up to 30% of sales. In determining the proportion of the value of sales, account is taken of the nature of the infringement, its actual effect on the market, and the size of the relevant geographic market;
  - **Duration:** To take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales is multiplied by the number of years of participation in the infringement;
  - **Entry fee:** In cartel cases (and other hardcore infringements) an additional sum of between 15% and 25% of the infringer's value of sales is included to deter undertakings from participating in cartels even for only a short period;
  - **Aggravating/attenuating circumstances and other adjustments:** The sum of the value of sales multiplied by the duration, plus the entry fee, is the "basic amount". The basic amount 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% for each similar infringement found by the Commission or an NCA. Additional adjustments are possible for 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 ability to pay in a specific social context; and

<sup>10</sup> Under Council Reg. (EEC) 2988/74 (OJ 1974 L319, 29.11.1974), a limitation period may be available to protect a company from fines, provided it has not been involved in the cartel activity for at least five years before the Commission took any steps to investigate the cartel.

<sup>11</sup> Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Reg. 1/2003 (OJ 2006 C210/2, 1.9.2006).

- **Leniency Notice:** The final (payable) amount is then calculated following the possible application of the Commission's Leniency Notice (see [Chapter 5](#) of this publication).

4.4 Given the substantial discretion the Commission has in setting fines, in practice it can be difficult to assess with any certainty the basic amount or final (payable) amount in cartel cases. This is largely justified on public policy grounds, as increased transparency could prompt companies to engage in off-setting calculations between the likely level of fines and the likely benefit arising from the anti-competitive cartel conduct. Nonetheless, the Commission does generally follow the Fining Guidelines and must exercise its discretion in a coherent and non-discriminatory way.

### Parental liability

4.5 Parent companies may face penalties for infringements of their wholly or majority owned subsidiaries where "decisive influence" is established, regardless of whether or not they were aware of the cartel activity.<sup>12</sup> The CJ has confirmed that parent companies may also be liable for penalties imposed in respect of infringements committed by their full function JVs, provided the Commission is able to establish that the parents actually exercised "decisive influence" (jointly) over that JV company (*DuPont and Dow, 2013*).

### Ascertaining overall exposure to sanctions

- 4.6 In addition to the risk of fines at the EU level, a company involved in cartel activity also runs the risk of various penalties under national legislation.
- 4.7 Some NCAs may take criminal or other enforcement action against individuals, depending on their respective national legislation (see [paragraphs 4.12 to 4.14](#)). A number of other Member States also provide for some kind of personal exposure for directors. Furthermore, in international cartel cases, executives face the real prospect of extradition resulting in personal fines and imprisonment in jurisdictions outside the EU (e.g. in the US).
- 4.8 Third parties who have suffered loss as a result of cartel behaviour in breach of the competition rules can also sue for damages before the national courts. In December 2014, a new EU Directive came into force that was intended to harmonise the rules governing actions for damages under national law for competition law infringements (Damages Directive).<sup>13</sup> Member States had until 27 December 2016 to implement the Damages Directive, and all have now done so in full, although there are divergences in their approaches. The Damages Directive aims to facilitate damages actions through the following measures:
- allowing national courts to order the defendant or third parties to disclose relevant evidence, provided that such disclosure is proportionate;
  - ensuring that a final decision by an NCA from any Member State may be presented before the national courts of any other Member State as at least prima facie evidence that an infringement of competition law has occurred;
  - ensuring the joint and several liability of all undertakings that have infringed competition law (subject to certain exceptions applicable to SMEs);

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<sup>12</sup> This can extend, for example, to companies controlled by private equity firms - which can be found jointly and severally liable with the subsidiary company that actually participated in the cartel.

<sup>13</sup> Directive 2014/104/EU 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 (OJ 2014 L349, 5.12.2014).

- introducing limitation periods that allow a reasonable time during which damages claims may be brought;
- ensuring that defendants have the possibility of invoking the passing-on defence;
- encouraging consensual out-of-court settlements; and
- creating a rebuttable presumption that a cartel infringement has caused harm.

4.9 Additionally, in August 2019, the Commission published guidelines for national courts on how to estimate the share of the overcharge which, as a result of infringements of EU competition law, were passed on to indirect purchasers.<sup>14</sup> These guidelines are intended to ensure citizens and companies are able to get compensation when direct customers of infringing companies are able to fully or partially pass on a cartel-related price increase further down the supply chain.

4.10 Class action litigation has been slower to develop in the EU compared with the US (where there is the risk of treble damages). However, in July 2013, the Commission released a non-binding recommendation on mechanisms for collective redress and a Communication and accompanying practical guide on quantifying harm in antitrust damages actions.<sup>15</sup> In November 2019, the Council reached an agreement on a draft directive on 'representative actions for the protection of the collective interests of consumers', and on 24 November 2020 the Directive was formally adopted (Directive 2020/1828 and repealing Directive 2009/22/EC). The Directive entered into force on 24 December 2020. The EU Member States have 24 months from this date to transpose the Directive into national law, and an additional 6 months to start applying the provisions.<sup>16</sup>

4.11 Another important factor to be considered when ascertaining a company's overall exposure is that there are no formal rules on avoiding overlapping sanctions in the event of multiple investigations within the EU and other jurisdictions. There are no formal rules requiring the Commission to take account of penalties in other jurisdictions when determining fines, although the European Courts have previously recognised a general principle that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. Still, the Commission appears to take the view that fines imposed or damages in civil actions paid outside the EU (most notably in the US) have no bearing on the fines to be imposed for infringing European competition rules.

## Criminalisation of cartels

4.12 A number of countries provide for criminal sanctions, including fines and imprisonment, for individuals who participate in cartels. In the UK, participation in a cartel is a criminal offence, punishable by jail terms or fines (or both). The first criminal convictions for the UK cartel offence were secured in 2008 (when three businessmen were convicted for participating in a cartel that had

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<sup>14</sup> Commission Communication on guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (OJ 2019 C267/4, 9.08.2019).

<sup>15</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 2013 L201, 26.7.2013); Commission Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ 2013 C167/19, 13.06.2013); Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.

<sup>16</sup> Directive 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers (OJ 2020 L409/1, 4.12.2020). The Directive is part of the "New Deal for Consumers" package and provides redress measures as well as injunction measures in case of infringements of EU law affecting a group of consumers.

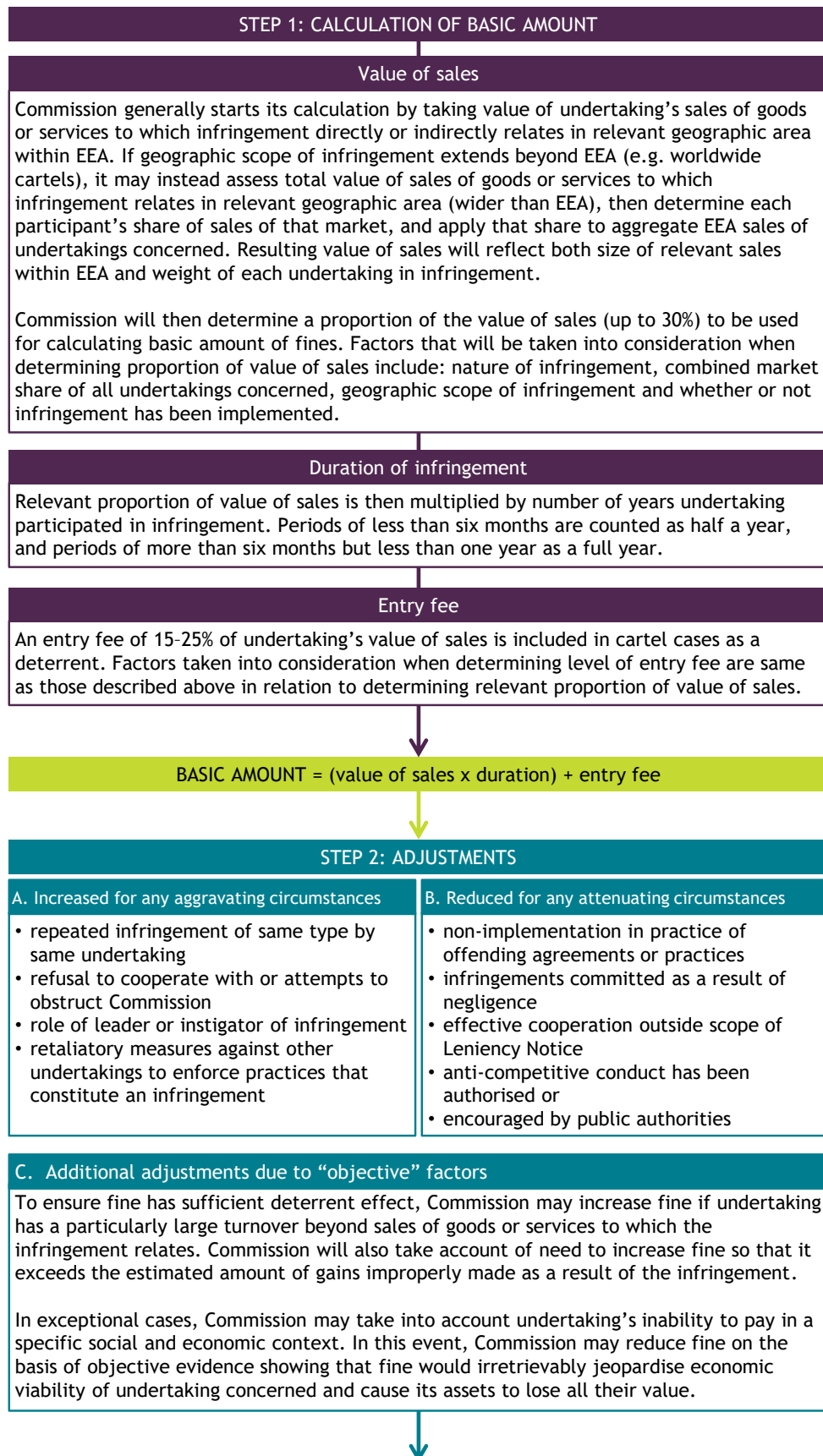
been running for nearly four years, and were sentenced to terms of imprisonment from two to three years each).<sup>17</sup>

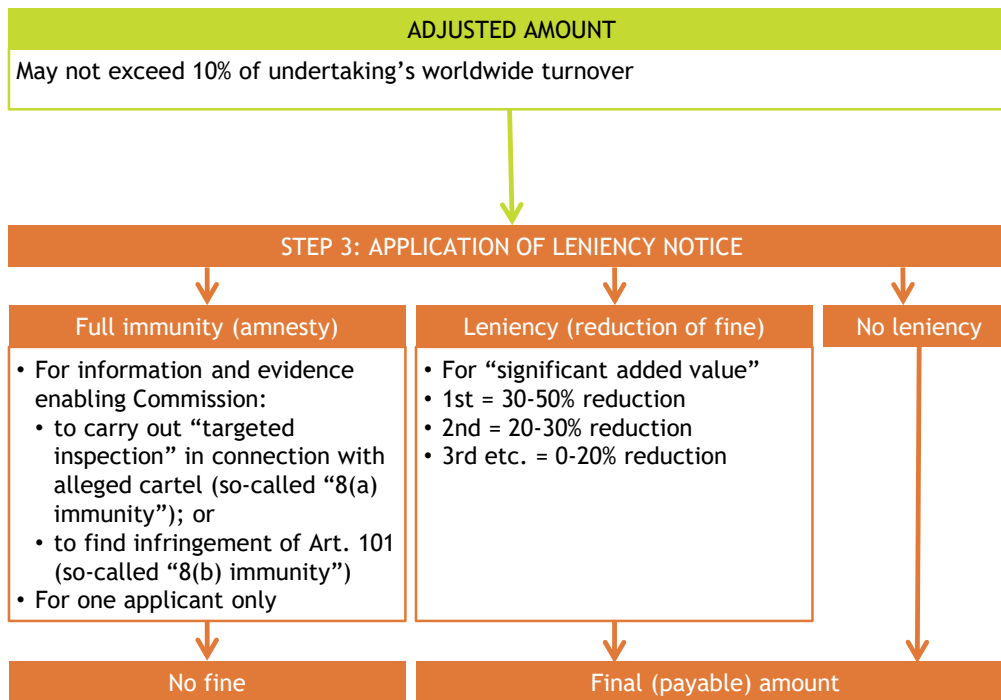
- 4.13 A cartel for these UK criminal purposes is an arrangement between at least two persons that, if implemented, would lead to at least two competitors agreeing to fix prices, limit supply or production, share markets or engage in bid-rigging. Vertical agreements are not within the scope of the offence. It is important to note that it is not the participation in an infringement of the UK Competition Act 1998 that is criminalised; the cartel offence under the Enterprise Act 2002 is quite separately defined. Furthermore, it is not necessary to demonstrate an appreciable anti-competitive effect to prove the cartel offence. The issue of whether or not an individual was acting with the company's authority is not relevant to determining whether an offence has been committed. Where the relevant agreement was reached outside the UK, a criminal prosecution can be commenced only if the agreement was also implemented in the UK.
- 4.14 The Enterprise Act gives the CMA the power to grant leniency to individuals who would otherwise face prosecution, but who inform the CMA of the cartel and fully cooperate with its investigation. In cases where it seems appropriate to grant immunity from prosecution, a "no-action" letter will be issued to the individual giving notice that the individual will not be prosecuted for the cartel offence. The grant of immunity will be made conditional on complete and ongoing cooperation with the CMA and any breach of the conditions may lead to the withdrawal of the no-action letter. The identity of recipients of no-action letters will remain confidential, other than in exceptional circumstances.

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<sup>17</sup> The UK cartel offence originally required the individual to have acted dishonestly. From 1 April 2014 the dishonesty element of the offence has been removed and a number of new exclusions and defences have been added.

## Commission's method of setting fines





Note: In its 2003 judgment in *Daesang and Sewon v Commission*<sup>16</sup> (an appeal against the Commission's decision in *Lysine*)<sup>17</sup> the General Court (GC) confirmed that any percentage increases or reductions to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine, not to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances.

Note: In its 2003 judgment in *Daesang and Sewon v Commission*<sup>18</sup> (an appeal against the Commission's decision in *Lysine*)<sup>19</sup> the General Court (GC) confirmed that any percentage increases or reductions to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine, not to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances.

<sup>18</sup> Case T-230/00 *Daesang and Sewon v Commission*, judgment of 9 July 2003.

<sup>19</sup> Case COMP/36.545/F3 - *Amino Acids*, Commission Decision of 7 June 2000.



## 5. Leniency

- 5.1 Leniency applications are one of the principal drivers of cartel investigations undertaken by competition enforcement agencies around the world. Virtually all the NCAs within the EU now have leniency programmes of their own in place.<sup>20</sup> Most key jurisdictions outside the EU likewise operate leniency programmes.<sup>21</sup> For a summary and comparison of the leniency programmes currently operated by the Commission and in the UK, see [Annex 2](#) to this publication.<sup>22</sup>

### Overview of the Commission's leniency programme

- 5.2 In 2006 the Commission adopted the Leniency Notice.<sup>23</sup> This replicates in a number of ways the US leniency rules thereby making it easier for companies to make coordinated applications in both the US and Europe (and elsewhere). The Leniency Notice is essentially based on two principles: first, the earlier that undertakings contact the Commission, the higher the reward; second, the value of the reward will depend on the usefulness of the materials supplied.

### Substantive conditions under the Commission's leniency programme

#### Amnesty - full immunity from fines (Part II, Section A)

- 5.3 Under the Leniency Notice, full immunity will be granted to either:
- the first undertaking to provide the Commission with information and evidence to enable it to carry out a “targeted inspection” in connection with the alleged cartel (Part II, Section A, 8(a)); or
  - the first undertaking to submit information and evidence enabling it to find an infringement of Article 101 (Part II, Section A, 8(b)).
- 5.4 These options are mutually exclusive so only one undertaking can qualify for full immunity. To obtain full immunity, an undertaking must also:
- not have taken steps to coerce other undertakings to participate in the cartel;
  - put an end to its involvement in the illegal activity no later than the time at which it discloses the cartel (except where in the Commission's view it would be reasonably necessary to preserve the integrity of the inspections);
  - cooperate fully, on a continued basis and expeditiously with the Commission. The undertaking is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
  - not destroy, conceal or falsify any evidence relating to the cartel and not disclose the cartel or the content of its application for immunity, except to other competition authorities.

<sup>20</sup> Currently the only exception is Malta (where a public consultation on draft leniency regulations was held in 2013).

<sup>21</sup> These include countries elsewhere in Europe and the Middle East (e.g. the United Kingdom, Norway, Switzerland, Israel and Turkey), the Americas (e.g. US, Canada and Brazil), Asia (e.g. China, Japan and South Korea), Oceania (e.g. Australia and New Zealand) and South Africa.

<sup>22</sup> The summary at [Annex 2](#) to this publication is limited to the rules at EU level and in the UK. Slaughter and May, in cooperation with competition specialists at leading law firms in key jurisdictions in the EU (and in other countries) can also provide comparable summaries and information for other jurisdictions.

<sup>23</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006, C298/11, 8.12.2006) (amending the 2002 Notice, which replaced an earlier 1996 Notice on the non-imposition or reduction of fines in cartel cases).

## Leniency - reduction of fines for “significant added value” (Part II, Section B)

- 5.5 Under the Leniency Notice (Part II, Section B), favourable treatment is also available to undertakings that (while not qualifying for immunity) provide evidence representing “significant added value” to that already in the Commission’s possession and terminate immediately their involvement in the cartel activity. Provided these conditions are met, the cooperating undertaking may receive up to a 50% reduction in the level of fine that would have been imposed if it had not cooperated. The envisaged reductions are split into three bands:
- 30-50% for the first undertaking to provide “significant added value”;
  - 20-30% for the second undertaking to provide “significant added value”; and
  - 0-20% for any subsequent undertakings to provide “significant added value”.
- 5.6 The amount received within these bands depends upon the time at which they started to cooperate, the quality of evidence provided and the extent to which it represents added value.
- 5.7 Although undertakings seeking leniency under Section B are ineligible for total immunity, they may be able to qualify for a form of partial amnesty. 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.

## Procedural conditions under the Commission’s leniency programme

- 5.8 If an undertaking wishes to take advantage of the Commission’s leniency programme, it must contact DG Competition. Only persons empowered to represent the undertaking for that purpose or intermediaries acting for the undertaking (such as legal advisers) should take such a step.<sup>24</sup>
- 5.9 The Commission will seek to establish its case on the basis of documentary proof. The undertaking must provide the Commission with a corporate statement and other evidence relating to the alleged cartel, in particular, any evidence contemporaneous to the infringement. Corporate statements may take the form of written documents signed by or on behalf of the undertaking or may be made orally. Given the prospect of written materials needing to be disclosed in court proceedings in the event of damages claims, they are normally made orally. They should include a detailed description of the alleged cartel arrangement; full contact details of the applicant and the other members of the cartel; the names, positions and addresses of all individuals involved in the alleged cartel; and information on which other competition authorities have been (or are intended to be) approached in relation to the alleged cartel.
- 5.10 Information and documents communicated to the Commission under the Leniency Notice are treated as confidential. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to the file.<sup>25</sup> In practice, the Commission does not publicly reveal the identity of a leniency applicant as long as the investigations continue.

<sup>24</sup> For these purposes, DG Competition operates dedicated telephone numbers (+32-2 298 4190 or +32-2 298 4191) and an email address (comp@leniency@ec.europa.eu). Undertakings may apply for leniency via the Commission’s eLeniency online tool (eleniency.ec.europa.eu). The eLeniency tool provides the same guarantees in terms of confidentiality and legal protection as the more ‘traditional’ procedure and is available online 24 hours per day, seven days a week.

<sup>25</sup> According to the Commission’s Notice on Access to the File (OJ 2005 C325/7, 22.12.2005), information on the case file that involves business secrets, internal Commission and other confidential documents is not to be disclosed, unless it provides evidence proving an alleged infringement or contains information that invalidates or rebuts the Commission’s reasoning or tends to exonerate a company suspected of infringing the rules.

Eventually, however, details of the cartel investigation and the applicant's involvement may be made publicly available in the final Commission decision.

- 5.11 In addition, the Damages Directive<sup>26</sup> sets out a number of safeguards in relation to leniency programmes, 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 (e.g. replies to authorities' requests for information) or the competition authorities (e.g. a statement of objections).

## Application for full immunity

- 5.12 Following initial contact, the Commission will immediately inform the applicant if full immunity is no longer available for the particular cartel in question (in which case the applicant may still request that its leniency application be considered for a reduction of fines). If immunity is still available, the undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines.
- 5.13 The Commission may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis 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: its name and address, the parties to the alleged cartel, the affected product(s) and territory(ies), the estimated duration of the alleged cartel, the nature of the alleged cartel conduct, details of any other past or possible future leniency applications to other authorities in relation to the alleged cartel, and 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.
- 5.14 An undertaking making a formal immunity application to the Commission has two ways to comply with the requirements for full immunity. It may choose either:
- to provide the Commission with all the evidence of the infringement available to it; or
  - to present this evidence initially in hypothetical terms, in which case the undertaking is further required to list the evidence it proposes to disclose at a later agreed date. This descriptive list should accurately reflect - to the extent feasible - the nature and content of the evidence. The applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.
- 5.15 In an attempt to increase legal certainty, for full immunity cases the Commission will grant conditional leniency up-front through a formal Commission decision. It normally takes at least 14 days to issue such a decision once the evidence has been provided (although in some cases this period may stretch to a number of weeks). Hypothetical applications take longer to process, as they require two Commission decisions. In the past, the Commission had been unwilling to offer any assurances until the final decision. In either of the above scenarios, if the immunity applicant meets the substantive criteria, conditional immunity will be granted in writing. If the applicant

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<sup>26</sup> See [para. 4.9](#).

subsequently complies with its obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

## Application for fine reduction

- 5.16 Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed whether the evidence submitted at the time of the 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 will be finalised in the Commission’s decision.

## Leniency policy in the UK

- 5.17 In price-fixing and market-sharing cases, the CMA is prepared to offer leniency treatment to undertakings that come forward with information.<sup>27</sup> The UK leniency programme may take the form of total immunity or a significant reduction of fines.
- 5.18 Automatic full immunity is available for the first member of the cartel to come forward with relevant information before the CMA has started an investigation. To qualify, the CMA must not already have sufficient evidence to establish the existence of the cartel. The undertaking must cooperate and it must not have been the instigator of the cartel or have compelled others to join. Full immunity is also available at the discretion of the CMA for the first undertaking to come forward after an investigation has begun, but before written notice of a proposed infringement decision is given. It is theoretically possible for reductions of up to 100% of the penalty to be granted to firms that provide evidence of the existence and activities of a cartel but are not the first to do so or do not qualify for full immunity; however, the maximum reduction is normally capped at 50%. The cartel leader is also eligible for a reduction.

## Multi-jurisdictional considerations

- 5.19 Recent cases have shown that international cartels are highly likely to result in an 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 sensibly possible (and, where appropriate, simultaneously). Given the convergence between the EU and the US leniency rules, it has become easier for companies to apply simultaneously in both the US and Europe (as well as elsewhere).
- 5.20 In practice, the decision on whether to apply for leniency if a violation is discovered internally requires a careful assessment of the risks, advantages and disadvantages. Factors include:
- the risk of the authorities being on the track already;
  - the danger that another participant will get in first. If an undertaking wishes to benefit from full immunity, it needs to tell the Commission as soon as it has gathered evidence of the cartel’s existence, sufficient for the purposes of the Leniency Notice. Otherwise, it runs an increased risk that one of the other cartelists may blow the whistle first;

<sup>27</sup> [Annex 2](#) to this publication provides further guidance on the CMA’s leniency policy. Slaughter and May, in cooperation with competition specialists at leading law firms in key jurisdictions in the EU (and in other countries), also maintains and updates summaries and information on leniency programmes in other jurisdictions.

- 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. Although at the European level the Commission cannot impose penalties on individuals, there may be implications for criminal proceedings against individuals under national legislation within or outside the EU;
- the consequences in terms of civil liability, including punitive or treble damages in some jurisdictions (notably in the US); and
- the implications of an approach to the Commission in terms of document disclosure requirements in other jurisdictions.

5.21 Parties to international cartels need to bear in mind that although the Damages Directive provides for leniency submissions to the Commission to be protected under the national laws of Member States (see [paragraph 5.11](#)), these documents may be subject to civil disclosure (or discovery) rules in litigation proceedings in other jurisdictions, in particular US civil litigation regarding claims for treble damages. Plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. In an attempt to avoid the undermining of its leniency policy, the Commission has been willing to assist in efforts to protect leniency applications from disclosure in foreign courts in the following ways:

- asserting in the Leniency Notice that any written statement made vis-à-vis the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of Article 101;
- intervening in pending US civil proceedings by means of amicus curiae where disclosure of leniency corporate statements is at stake. The Commission has intervened in this way in a number of cases; and
- accepting oral corporate statements ("paperless submissions").

5.22 In international cartel cases it may be advisable to make a paperless leniency application to the Commission via EU qualified external lawyers benefiting from legal professional privilege. In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, to avoid admission of misconduct with effects in the US or elsewhere outside the EU.

## 6. Settlement

### Overview of the Commission's settlement procedure

- 6.1 In 2008 the Commission introduced a new procedure for settling cartel cases, complementing the Leniency Notice and the Fining Guidelines.<sup>28</sup> The aim of the procedure is to simplify and speed up the administrative procedure for investigations (and to reduce European Court litigation in cartel cases), thereby freeing up the Commission's resources and enabling it to pursue more cases.
- 6.2 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 SO. 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, (a) the parties are rewarded with a 10% reduction in fines (cumulative to any leniency reduction) and (b) any specific increase for deterrence used in their regard will not exceed a multiplication of two.

### Procedural conditions under the Commission's settlement procedure

- 6.3 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 under an obligation to do so if invited by the Commission. When the Commission determines the suitability of a case, account is taken of the probability of reaching a common understanding within a reasonable time frame in view of factors such as the number of parties involved, the extent of contested facts and the prospect of achieving procedural efficiencies.
- 6.4 Where the Commission considers a case to be potentially suitable for settlement, it will request that the parties indicate, in writing, their wish to engage in such settlement discussions. The Commission's request will set a time limit of up to two weeks in which the parties must respond. This written indication by the parties does not imply an admission of participation in or liability for the cartel. If two or more parties within the same corporate group indicate their willingness to engage in settlement discussions, they must appoint a joint representative to engage in discussions with the Commission on their behalf. This will not, however, prejudice a finding of joint and several liability among such undertakings. Following receipt of an expression of interest, the Commission retains its discretion whether to proceed with the settlement discussions and to determine the appropriateness and the pace of the discussions. The Commission may decide at any time during the procedure to discontinue settlement discussions altogether.
- 6.5 The settlement discussions will cover the alleged facts, the gravity and duration of the infringement, the liability of the undertaking and the potential maximum fine. The parties do not have full access to the Commission's file, nor do they have the right to negotiate the existence of the infringement or the appropriate sanction. The Commission will, however, hear the parties' arguments and disclose some (non-confidential) information from its file upon the reasonable request of a party. The content of any settlement discussions with the Commission cannot be disclosed by the parties to the proceedings to any other undertaking or third party unless the Commission has given its prior consent. A breach of such confidentiality may result in the

<sup>28</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Reg. (EC) No 1/2003 in cartel cases (OJ 2008 C167/1, 2.7.2008); Commission Reg. (EC) 622/2008 (OJ 2008 L171/3, 1.7.2008) amending Reg. 773/2004 as regards the conduct of settlement procedures in cartel cases.



termination of the settlement discussions and, for the purposes of setting a fine, it may be treated as an aggravating circumstance.

- 6.6 Should the Commission and the parties reach a common understanding as to the scope of the potential objections and the likely fines, the Commission will request a settlement submission from the parties within a set time period of at least 15 working days. The settlement submission is an oral or written statement that must contain the following: a clear, unequivocal acknowledgment of the parties' liability for the infringement; an indication of the maximum amount of fine that the parties would accept; confirmation that the parties have been sufficiently informed of the Commission's objections and have been given sufficient opportunity to be heard; confirmation that the parties do not wish to have an oral hearing; and an agreement to receive the Commission's SO and decision in an official EU language.
- 6.7 Once the settlement submission has been received by the Commission, the Commission will issue its SO, which may or may not endorse the view in the settlement submission. If it does, the parties will have at least two weeks to respond to the SO by confirming that it corresponds to the contents of their settlement submission and that the parties remain committed to the settlement procedure. Following this, there will be no formal access to the file or oral hearing, and the Commission can proceed directly to issuing its decision (following consultation with the Advisory Committee). The decision will reflect the parties' cooperation, and all parties who participated in the settlement procedure will receive the same reduction of 10% in addition to any reduction they may receive for leniency (see [Chapter 5](#) of this publication). Decisions made following the settlement procedure are still subject to judicial review (see [Chapter 7](#) of this publication).
- 6.8 If, however, the SO does not endorse the view in the settlement submission, the parties' acknowledgments will be deemed to be withdrawn and normal administrative procedures will be followed (e.g. the parties will have full access to the Commission's file and there will be an oral hearing).
- 6.9 Even if the Commission endorses the view in the settlement submission in its SO, the Commission may nevertheless adopt a decision that departs from this position. This may be a result of the views put forth by the Advisory Committee and/or the College of Commissioners. In this event, the Commission will issue a new SO and normal administrative procedures will be followed.

## Settlement procedure in the UK

- 6.10 Previously, there was no formal procedure for the settlement of cartel cases in the UK, though the competition authorities had developed a practice of adopting "early resolution agreements" whereby fines could be substantially reduced if the parties admitted liability and agreed to cooperate fully with the investigation.
- 6.11 In 2014 the CMA issued guidance setting out details of a formal settlement procedure, which was further updated in November 2020.<sup>29</sup> Key features of the procedure include:
  - a reduced penalty where an undertaking is prepared to admit that it has breached competition law and accepts that a streamlined administrative procedure will govern the remainder of the investigation;

<sup>29</sup> Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8, March 2014); updated by The CMA's investigation procedures in Competition Act 1998 cases (CMA8, November 2020).



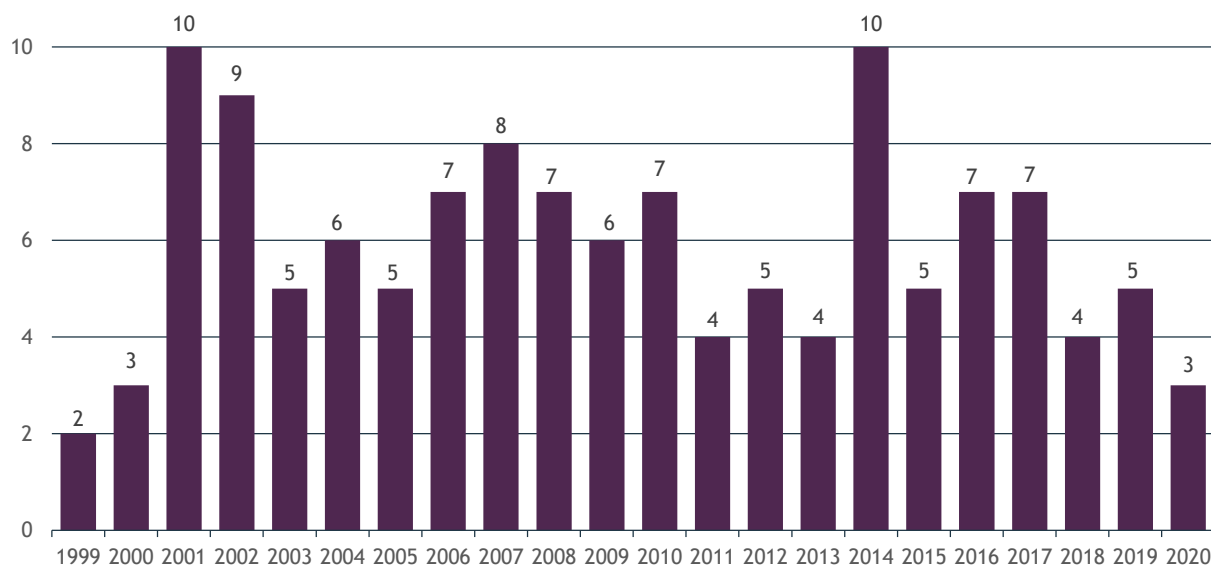
- the CMA retains broad discretion in determining which cases to settle. Investigated parties do not have a right to settle in a given case, but are also not under any obligation to settle or enter into any settlement discussions where these are offered by the CMA. Settlement discussions can be initiated either before or after the SO is issued;
- at a minimum, the CMA requires a settling undertaking to make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, cease the infringing behaviour and confirm that it will pay a penalty set at a maximum amount;
- the streamlined administrative procedure will normally include streamlined access to file arrangements; no written representations on the SO (except in relation to manifest factual inaccuracies); no oral hearings; no separate draft penalty statement after settlement has been reached; and no case decision group will be appointed;
- settlement discounts are capped at a level of 20%. The actual discount award will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The discount available for settlement pre-SO is up to 20%, and that available for settlement post-SO is up to 10%; and
- the leniency policy and the use of settlements are not mutually exclusive - it is possible for a leniency applicant to settle a case and benefit from both leniency and settlement discounts.

## 7. Judicial review

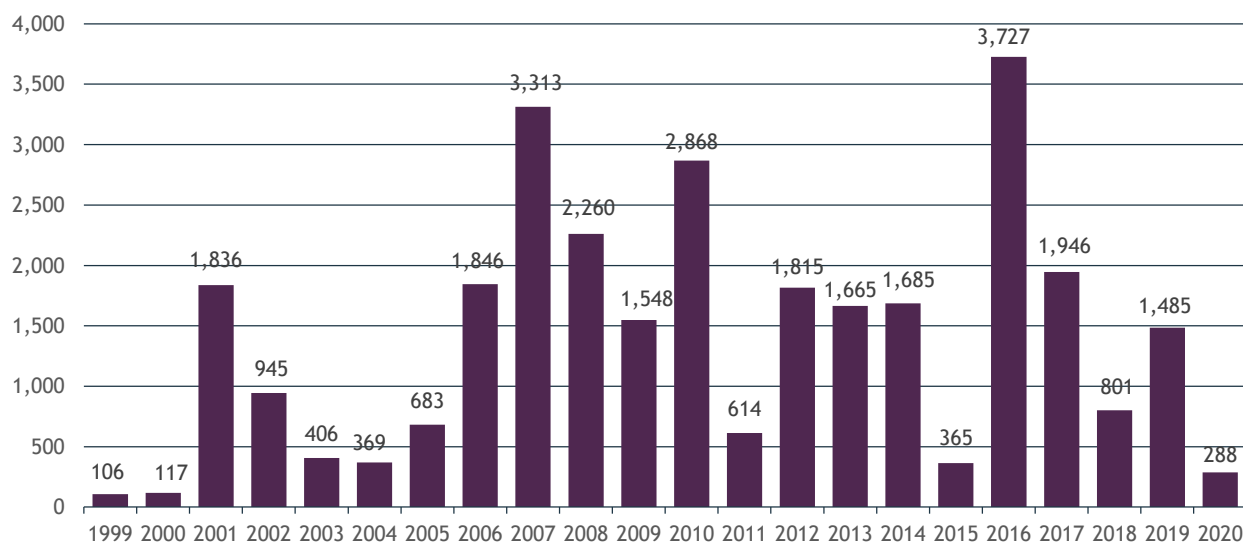
- 7.1 Commission decisions can be appealed to the GC in Luxembourg. The grounds for appeal are: lack of competence, infringement of an essential procedural requirement, infringement of the TFEU or of any rule relating to its application, or misuse of powers. The GC has unlimited jurisdiction, as regards matters of fact and law, to review the legality of and reasons for Commission decisions regarding fines and to assess the appropriateness of the amount of the fines imposed. It may cancel, reduce or increase the fines imposed. The burden of proof lies with the Commission to establish the facts and assessments on which its decision was based. GC judgments may be appealed (on points of law only) to the CJ.
- 7.2 Companies do not necessarily have to pay their fines 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.

## Annex 1: Statistics on Commission cartel enforcement

### A. Number of Commission cartel decisions by year



### B. Total Commission fines imposed on cartels by year<sup>30</sup>



<sup>30</sup> Amounts adjusted for changes following judgments of the GC and CJ.

## C. Commission cartel decisions by year (since 1994)

Year	Case	Competition Commissioner
1994	<i>Steel Beams</i> (16 February 1994) <i>HOV SV2/MCN</i> (containers by railways) (29 March 1994) <i>Cartonboard</i> (13 July 1994) <i>PVC</i> (27 July 1994) <i>Cement</i> (30 November 1994) <i>Far Eastern Freight Conference</i> (21 December 1994)	Karel Van Miert (14 cases)
1995	<i>SCK/FNK</i> (Dutch Cranes) (29 November 1995)	
1996	<i>Fenex</i> (Expedition Companies) (5 June 1996) <i>Ferry Operators</i> (30 October 1996)	
1997	-	
1998	<i>Stainless Steel</i> (21 January 1998) <i>Trans-Atlantic Conference Agreement (TACA)</i> (16 September 1998) <i>British Sugar</i> (14 October 1998) <i>District Heating Pipe</i> (21 October 1998) <i>Greek Ferries</i> (9 December 1998)	
1999	<i>FEG and TU</i> (26 October 1999) <i>Seamless Steel Tubes</i> (8 December 1999)	Mario Monti (34 cases)
2000	<i>FETTSCA</i> (16 May 2000) <i>Lysine</i> (7 June 2000) <i>Soda Ash</i> (13 December 2000)	
2001	<i>SAS/Maersk Air</i> (18 July 2001) <i>Graphite Electrodes</i> (18 July 2001) <i>Sodium Gluconate</i> (2 October 2001) <i>Vitamins</i> (21 November 2001) <i>Citric Acid</i> (5 December 2001) <i>Luxembourg Brewers</i> (5 December 2001) <i>Belgian Brewers</i> (5 December 2001) <i>German Banks</i> (11 December 2001) <i>Zinc Phosphate</i> (11 December 2001) <i>Carbonless Paper</i> (20 December 2001)	
2002	<i>Austrian Banks (Lombard Club)</i> (11 June 2002) <i>Methionine</i> (2 July 2002) <i>Dutch Industrial Gases</i> (24 July 2002) <i>Fine Arts Auction</i> (30 October 2002) <i>Plasterboard</i> (27 November 2002) <i>Methylglucamine</i> (27 November 2002) <i>Concrete Reinforcing Bars</i> (17 December 2002) <i>Speciality Graphites</i> (17 December 2002) <i>Nucleotides</i> (17 December 2002)	
2003	<i>French Beef</i> (2 April 2003) <i>Sorbates</i> (1 October 2003) <i>Carbon and Graphite Products</i> (3 December 2003) <i>Organic Peroxides</i> (10 December 2003) <i>Industrial Copper Tubes</i> (16 December 2003)	

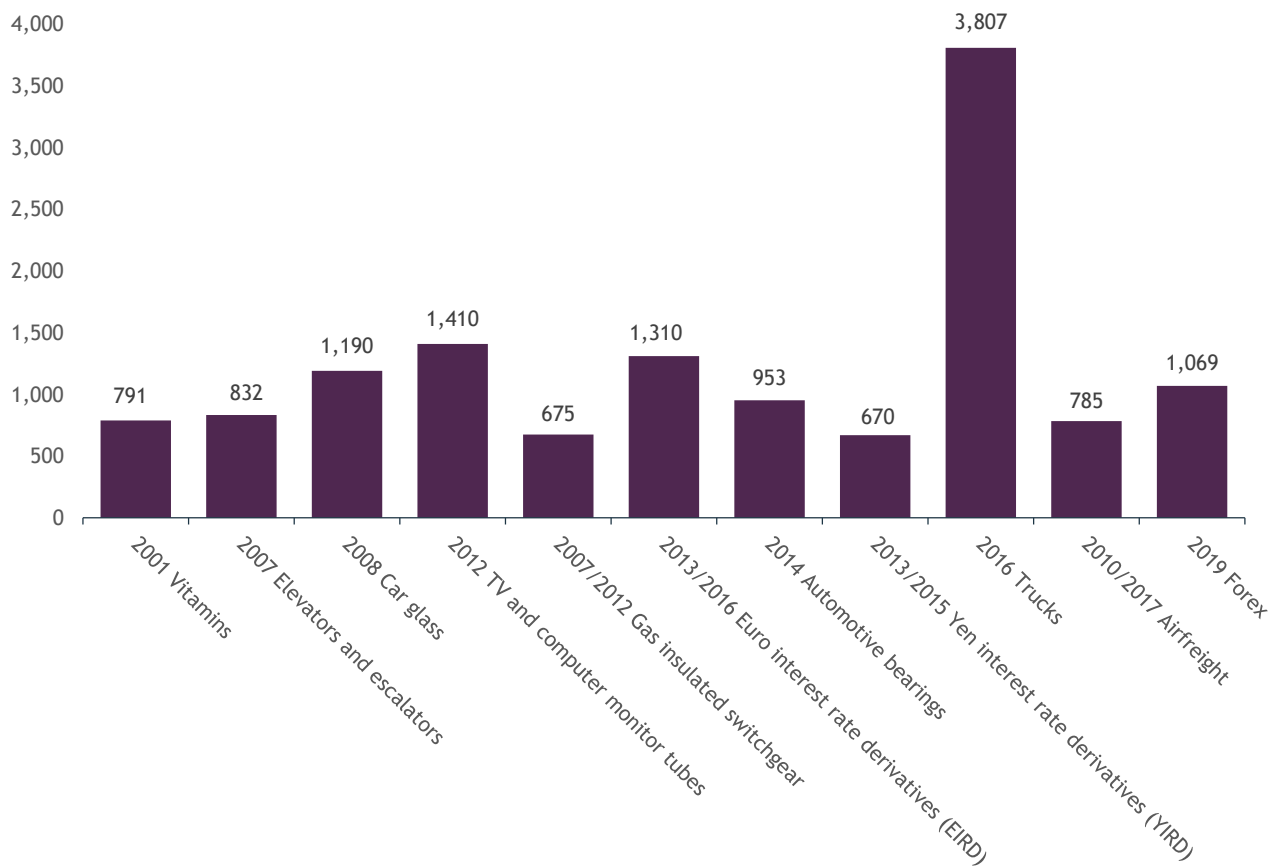
Year	Case	Competition Commissioner
2004	<i>Copper Plumbing Tubes</i> (3 September 2004) <i>French Beer</i> (29 September 2004) <i>Sodium Gluconate II</i> (29 September 2004) <i>Spanish Raw Tobacco</i> (20 October 2004) <i>Haberdashery Products</i> (26 October 2004) <i>Choline Chloride Animal Feed Additive</i> (9 December 2004)	
2005	<i>Monochloroacetic Acid</i> (19 January 2005) <i>Industrial Thread</i> (14 September 2005) <i>Italian Raw Tobacco</i> (20 October 2005) <i>Industrial Bags</i> (30 November 2005) <i>Rubber Chemicals</i> (21 December 2005)	Neelie Kroes (34 cases)
2006	<i>Hydrogen Peroxide</i> (3 May 2006) <i>Acrylic Glass</i> (31 May 2006) <i>Dutch Road Bitumen</i> (13 September 2006) <i>Copper Fittings</i> (20 September 2006) <i>Steel Beams</i> (re-adoption of 1994 decision) (8 November 2006) <i>Synthetic Rubber</i> (29 November 2006) <i>Alloy Surcharge</i> (re-adoption of 1998 decision) (20 December 2006)	
2007	<i>Gas Insulated Switchgear</i> (24 January 2007) <i>Elevators and Escalators</i> (21 February 2007) <i>Dutch Brewers</i> (18 April 2007) <i>Fasteners and Attaching Machines</i> (19 September 2007) <i>Spanish Bitumen</i> (4 October 2007) <i>Professional Videotape</i> (20 November 2007) <i>Flat Glass</i> (28 November 2007) <i>Chloroprene Rubber</i> (5 December 2007)	
2008	<i>Nitrile Butadiene Rubber</i> (23 January 2008) <i>International Removals</i> (11 March 2008) <i>Sodium Chlorate Paper Bleach</i> (11 June 2008) <i>Aluminium Fluoride</i> (25 June 2008) <i>Paraffin Waxes</i> (1 October 2008) <i>Bananas</i> (15 October 2008) <i>Car Glass</i> (12 November 2008)	
2009	<i>Marine Hose</i> (28 January 2009) <i>French and German Gas Markets</i> (8 July 2009) <i>Calcium Carbide</i> (22 July 2009) <i>Concrete Reinforcing Bars</i> (re-adoption of 2002 decision) (30 September 2009) <i>Power Transformers</i> (7 October 2009) <i>Heat Stabilisers</i> (11 November 2009)	
2010	<i>DRAM Chips</i> (19 May 2010)* <i>Carbonless Paper</i> (re-adoption of 2001 decision) (23 June 2010) <i>Bathroom Fittings</i> (23 June 2010) <i>Prestressing Steel</i> (30 June 2010) <i>Animal Feed Phosphates</i> (20 July 2010)** <i>Airfreight</i> (9 November 2010) <i>LCD Panels</i> (8 December 2010)	Joaquín Almunia (29 cases)
2011	<i>Consumer Detergents</i> (13 May 2011)* <i>Exotic Fruit</i> (12 October 2011) <i>CRT Glass</i> (19 October 2011)* <i>Refrigeration Compressors</i> (7 December 2011)*	

Year	Case	Competition Commissioner
2012	<i>Freight Forwarding Services</i> (28 March 2012) <i>Window Mountings</i> (28 March 2012) <i>Water Management Products</i> (27 June 2012)* <i>Gas Insulated Switchgear</i> (re-adoption of 2007 decision) (27 June 2012) <i>TV and Computer Monitor Tubes</i> (5 December 2012)	
2013	<i>Automotive Wire Harnesses</i> (10 July 2013)* <i>Shrimps</i> (27 November 2013) <i>Euro Interest Rate Derivatives</i> (4 December 2013)** <i>Yen Interest Rate Derivatives</i> (4 December 2013)**	
2014	<i>Polyurethane Foam</i> (29 January 2014)* <i>Power Exchanges</i> (5 March 2014)* <i>Automotive Bearings</i> (19 March 2014)* <i>Steel Abrasives</i> (2 April 2014)** <i>Power Cables</i> (2 April 2014) <i>Canned Mushrooms</i> (25 June 2014)** <i>Smart Card Chips</i> (3 September 2014) <i>Swiss Franc Interest Rate Derivatives</i> (CHF LIBOR and Bid Ask Spread Infringement) (21 October 2014) <i>Paper Envelopes</i> (11 December 2014)*	
2015	<i>Yen Interest Rate Derivatives</i> (ICAP) (4 February 2015)** <i>Parking Heaters</i> (17 June 2015)* <i>Retail Food Packaging</i> (24 June 2015) <i>Cargo Train Operators</i> (15 July 2015) <i>Optical Disk Drives</i> (21 October 2015)*	Margrethe Vestager (32 cases to date)
2016	<i>Alternators and Starters</i> (27 January 2016)* <i>Canned Mushrooms</i> (6 April 2016)** <i>Steel Abrasives</i> (Pometon) (25 May 2016)** <i>Heat Stabilisers</i> (re-adoption of 2010 and 2011 amending decisions) (29 June 2016) <i>Trucks</i> (19 July 2016)** <i>Euro Interest Rate Derivatives</i> (EIRD) (7 December 2016)** <i>Rechargeable Batteries</i> (12 December 2016)*	
2017	<i>Car Battery Recycling</i> (8 February 2017) <i>Thermal Systems</i> (8 March 2017)* <i>Airfreight</i> (re-adoption of 2010 decision) (17 March 2017) <i>Paper Envelopes</i> (re-adoption of 2014 decision) (16 June 2017)* <i>Lighting Systems</i> (21 June 2017)* <i>Trucks</i> (27 September 2017) <i>Occupant Safety Systems</i> (22 November 2017)*	
2018	<i>Capacitors</i> (12 March 2018)** <i>Maritime Car Carriers</i> (21 February 2018)* <i>Braking Systems</i> (21 February 2018)* <i>Spark plugs</i> (21 February 2018)*	
2019	<i>Concrete reinforcing bar</i> (re-adoption of 2002 and 2009 decisions) (4 July 2019) <i>Occupants Safety Systems II</i> (20 June 2019)* <i>Canned Vegetables</i> (27 September 2019)* <i>FOREX</i> (16 May 2019)*	
2020	<i>Ethylene</i> (14 July 2020)* <i>Closure systems</i> (29 September 2020)* <i>Retail food packaging</i> (re-adoption of 2015 decision) (17 December 2020)	
2021	<i>Rail cargo transport services and blocktrains</i> * (20 April 2021) <i>SSA Bonds</i> (28 April 2021)	

\* Full settlement cases (where all parties settled)

\*\* Hybrid settlement cases (where not all parties agreed to settle)

#### D. Commission cartel cases with highest overall fines (€ millions)<sup>31</sup>



<sup>31</sup> Amounts adjusted for changes following judgments of the GC and CJ.



## E. Top 20 highest individual fines in cartel cases

Party	Fine <sup>29</sup>	Case
Daimler	€1,009m	<i>Trucks</i> (2016)
Scania	€881m	<i>Trucks</i> (2017)
DAF	€753m	<i>Trucks</i> (2016)
Saint-Gobain	€715m	<i>Car Glass</i> (2008)
Philips	€705m <sup>32</sup>	<i>TV and Computer Monitor Tubes</i> (2012)
LG Electronics	€688m <sup>33</sup>	<i>TV and Computer Monitor Tubes</i> (2012)
Volvo/Renault Trucks	€670m	<i>Trucks</i> (2016)
Iveco	€495m	<i>Trucks</i> (2016)
Deutsche Bank	€466m	<i>Euro Interest Rate Derivatives</i> (2013)
Hoffmann-La Roche	€462m	<i>Vitamins</i> (2001)
Siemens	€397m	<i>Gas Insulated Switchgear</i> (2007)
Schaeffler	€371m	<i>Automotive Bearings</i> (2014)
Pilkington	€357m	<i>Car Glass</i> (2008)
E.ON	€320m	<i>French and German Gas Markets</i> (2009)
GDF Suez	€320m	<i>French and German Gas Markets</i> (2009)
ThyssenKrupp	€320m	<i>Elevators and Escalators</i> (2007)
SKF	€315m	<i>Automotive Bearings</i> (2014)
Air France/KLM	€310m	<i>Airfreight</i> (2010)
Chimei Innolux Corporation	€288m	<i>LCD Panels</i> (2010)
RBS	€260m	<i>Yen Interest Rate Derivatives</i> (2013)

<sup>32</sup> Amounts adjusted for changes following judgments of the GC and CJ.

<sup>33</sup> €392m of this fine was imposed jointly and severally on Philips and LG Electronics (due to their JV).

Annex 2: Overview of the EU and UK rules applicable to cartels<sup>34</sup>

	EU level	UK level
<b>Substantive law</b>	<p>Art. 101 TFEU applies if cartel:</p> <ul style="list-style-type: none"> <li>• has object or effect of preventing, restricting or distorting competition within the EU; and</li> <li>• may affect trade between Member States</li> </ul>	<p>Chapter I of the Competition Act 1998 (modelled on Art. 101 TFEU) applies if cartel:</p> <ul style="list-style-type: none"> <li>• has object or effect of preventing, restricting or distorting competition within the UK; and</li> <li>• may affect trade within the UK</li> </ul>
<b>Enforcement authorities</b>	<ul style="list-style-type: none"> <li>• European Commission (DG Competition)</li> <li>• National Competition Authorities (NCAs) in the EU may apply and enforce Art. 101 in its entirety by virtue of Reg. 1/2003 (and indeed <u>must</u> apply Art. 101 in parallel with national competition legislation to a cartel affecting trade between Member States)</li> </ul> <p><i>NB This checklist focuses on the Commission's powers. NCAs cooperate with each other and the Commission through the ECN (European Competition Network) with a view to ensuring consistent application and enforcement of Art. 101</i></p>	<ul style="list-style-type: none"> <li>• Competition and Markets Authority (CMA)</li> <li>• The UK Competition Network (UKCN) is a forum for cooperation between the CMA and those UK regulators that have a specific role to promote and enable competition within their sectors (including concurrent powers to apply the competition rules in specific areas), i.e.: <ul style="list-style-type: none"> <li>- CAA (Civil Aviation Authority)</li> <li>- FCA (Financial Conduct Authority)</li> <li>- NIAUR (Northern Ireland Authority for Utility Regulation)</li> <li>- Ofcom (Office of Communications)</li> <li>- Ofgem (Office of Gas and Electricity Markets)</li> <li>- Ofwat (Water Services Regulation Authority)</li> <li>- ORR (Office of Rail and Road)</li> <li>- PSR (Payment Systems Regulator)</li> <li>- Monitor (regulator for health services - UKCN observer status)</li> </ul> </li> </ul>

<sup>34</sup> This summary is limited to the rules at EU level and in the UK. Slaughter and May, in cooperation with competition specialists at leading law firms in key jurisdictions in the EU and elsewhere, can also provide comparable summaries and information for other jurisdictions.

	EU level	UK level
<b>Powers of inspection (“dawn raids”)</b>	<p><b>Premises:</b> Business premises (including property and means of transport) upon written authorisation or decision by the Commission and - subject to obtaining a court warrant - any other premises (including the homes of directors/ employees); Commission officials are normally assisted by NCA officials</p> <p><b>Powers to enter:</b> Commission officials have no powers of forcible entry, but NCAs may apply (under national procedures) for a warrant to use force, and usually do so</p> <p><b>Powers to seal:</b> Officials may seal premises to prevent tampering (e.g. overnight before returning to continue search)</p> <p><b>On-the-spot oral statements:</b> Commission may require on-the-spot explanations of documents/information it finds in the course of an inspection visit</p> <p><b>Right to legal representation:</b> Party has no absolute right to legal representation during a search, although in practice Commission officials may be prepared to wait up to one hour, if in-house/ external counsel can arrive in that time</p>	<p><b>Premises:</b> Business premises (including property and means of transport) and domestic premises used in connection with an undertaking’s affairs or if an undertaking’s documents are kept there (<i>NB entry into domestic premises requires a warrant</i>)</p> <p><b>Powers to enter:</b> No notice is required in the case of premises occupied by a party under investigation, but investigating officer must produce either a written authorisation and document giving details of the subject matter and purpose of the investigation and the sanctions for non-compliance or a warrant to the same effect (<i>NB A warrant is required for inspection visits in the context of criminal investigations under the Enterprise Act</i>). Two working days’ prior written notice is required for entry without warrant to third-party premises. In the case of entry with a warrant, reasonable force may be used to obtain entry. In addition, the investigating officer can take any other steps necessary to preserve the existence of documents (e.g. take away originals of documents and retain them for three months if copying on the premises is not practicable)</p> <p><b>Powers to seal:</b> Available for a maximum time of 72 hours</p> <p><b>On-the-spot oral statements:</b> CMA has power to require on-the-spot explanations of any document produced and, if a document is not produced, to require a statement as to where it can be found</p> <p><b>Right to legal representation:</b> Party has no absolute right to legal representation during a search, although in practice CMA officials may, on request, give “reasonable time” for legal advisers to arrive before proceeding with their inspection (unlikely to extend more than one hour)</p>

	EU level	UK level
<b>Other investigatory powers</b>	<p><b>Requests for information:</b> Commission may require companies or individuals (by Article 18 request or decision) to supply information in their possession or under their control</p> <p><b>Requests for oral evidence:</b> Commission has no power to require individuals to make statements or provide evidence under oath, but may take statements on a voluntary basis</p> <p><b>Covert surveillance:</b> Commission has no powers to engage in covert surveillance (e.g. tapping phones, faxes, emails or hidden video cameras/microphones), but is able to cooperate with relevant NCAs that have these powers</p>	<p><b>Requests for information:</b> CMA may require companies or individuals (by Section 26 Notice) to supply information in their possession or under their control</p> <p><b>Requests for oral evidence:</b> CMA has power to require any individual who has a connection with the undertaking under investigation to answer questions on any matter relevant to the investigation. It also has power to conduct compulsory interviews in the context of criminal investigations</p> <p><b>Covert surveillance:</b> CMA has power to carry out covert surveillance (e.g. bugging of business or residential premises) in context of criminal investigations. CMA is able to conduct directed surveillance (essentially monitoring of people's movements) and to use informants in both criminal and civil investigations</p>
<b>Privilege against self-incrimination</b>	<p>Recognised, but precise scope not clearly defined. No absolute right to silence. However, Commission cannot compel an undertaking to provide oral or written answers that would involve an admission of the existence of an infringement. European Courts distinguish between requests intended to secure purely factual information; and requests relating to the purpose of actions taken by the individual/undertaking</p>	<p>The privilege against self-incrimination applies vis-à-vis the company when an individual is being interviewed as a representative of that company, but not when the individual is being interviewed as a witness.</p> <p>There is also a risk of self-incrimination vis-à-vis directors in relation to director disqualification orders. Special safeguards are provided for with respect to statements made by a person in response to a requirement imposed by the CMA using its powers of criminal investigation under the Enterprise Act</p>
<b>Legal professional privilege</b>	<p>Recognised for written advice and communications between an undertaking and its EEA-qualified external lawyers (not for in-house lawyers)</p>	<p>Recognised for confidential written advice and oral communications (i) between an undertaking and a professional legal adviser (including an in-house lawyer to seek or obtain legal advice; and (ii) for any document made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings</p>

	EU level	UK level
<b>Leniency programme</b>	<p>Developed system (under the Leniency Notice) enables cartel participants to seek leniency by applying to the Commission. This includes:</p> <ul style="list-style-type: none"> <li>• <b>Full immunity:</b> available at the discretion of the Commission if the participant is the first to submit information and evidence that will enable the Commission: (a) to carry out a “targeted inspection” in connection with the alleged cartel or (b) to find an infringement of Art. 101, provided the participant: <ul style="list-style-type: none"> <li>- cooperates fully with the Commission on a continual and expeditious basis;</li> <li>- puts an end to its involvement in the alleged cartel immediately following its application, except where the Commission views it reasonably necessary to preserve the integrity of the inspections;</li> <li>- does not destroy, conceal, or falsify any evidence and does not disclose the alleged cartel or the content of its application, except to other competition authorities; and</li> <li>- has not taken steps to coerce other undertakings to participate in the cartel</li> </ul> </li> </ul>	<p>Developed system (under the CMA’s Guidance as to the Appropriate Amount of Penalty) enables participants in cartel activity (including, for these purposes, vertical resale price maintenance) to seek leniency by applying to the CMA. This includes:</p> <ul style="list-style-type: none"> <li>• <b>Full (Type A) immunity for companies:</b> available for the first undertaking to come forward with evidence of the existence and activities of cartel activity before an investigation has commenced, provided that the CMA does not already have sufficient information to establish the existence of the alleged cartel activity, and the undertaking: <ul style="list-style-type: none"> <li>- provides the CMA with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity;</li> <li>- maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA arising as a result of the investigation;</li> <li>- has not taken steps to coerce another undertaking to take part in the cartel activity; and</li> <li>- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA)</li> </ul> </li> <li>• <b>Full (Type B) immunity for companies:</b> available at the discretion of the CMA for the first undertaking to come forward with “significant added value” evidence after an investigation has begun, but before written notice of a proposed infringement decision is given, and provided the same conditions as Type A immunity above are satisfied</li> </ul>

EU level	UK level
<ul style="list-style-type: none"> <li>• <b>Reduction of fines:</b> when a participant provides evidence representing “significant added value”, it may receive at the discretion of the Commission up to 50% reduction in the level of fine that would have been imposed had it not cooperated. Reductions are split into three bands: <ul style="list-style-type: none"> <li>- 30- 50% for first undertaking;</li> <li>- 20-30% for second undertaking; and</li> <li>- 0-20% for subsequent undertakings</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Reduction of fines - Type B leniency:</b> available for the first undertaking to come forward with “significant added value” evidence of the existence and activities of cartel activity where the CMA is already investigating the relevant cartel activity (but before written notice of a proposed infringement decision is given). The applicant may be granted a reduction in the level of financial penalties of up to 100% at the discretion of the CMA (although the maximum reduction is usually capped at 50%), provided it: <ul style="list-style-type: none"> <li>- provides the CMA with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity;</li> <li>- maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA arising as a result of the investigation; and</li> <li>- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA)</li> </ul> </li> <li>• <b>Reduction of fines - Type C leniency:</b> available for any subsequent undertakings (which is not the first to come forward) where the CMA is already investigating the relevant cartel activity (but before written notice of a proposed infringement decision is given). The applicant may be granted a reduction of up to 50% at the discretion of the CMA, provided the same conditions as Type B leniency above are satisfied</li> </ul>

EU level		UK level
		<ul style="list-style-type: none"> <li>• <b>Additional reduction or “Leniency Plus”:</b> an undertaking cooperating with an investigation by the CMA in relation to cartel activities in market A may also be involved in a separate cartel activity in market B. If the undertaking obtains total immunity from financial penalties in relation to its activities in market B, it will also receive a reduction in the financial penalty imposed on it that is additional to the reduction that it would have received for its cooperation in market A alone</li> <li>• <b>Immunity from criminal prosecution for individuals:</b> available under the Enterprise Act for individuals who are first in to the CMA with sufficient information to bring a successful prosecution (in the form of “no- action” letters). Where an undertaking is granted Type A or Type B corporate immunity, “blanket” criminal immunity will be granted to all of its current and former employees and directors. Where Type B leniency is granted to the undertaking, “blanket” immunity is not guaranteed; however, if it is in the public interest, the CMA will normally be prepared to issue no- action letters to employees on an individual basis</li> </ul>
<b>Fines for substantive infringement</b>	<p>Commission may impose fines of up to 10% of worldwide group turnover</p> <ul style="list-style-type: none"> <li>• <b>Highest fines in single cartel case:</b> €3.8 billion (<i>Trucks</i>, 2016/2017)</li> <li>• <b>Highest individual fine in cartel case:</b> €1.0 billion (Daimler in <i>Trucks</i>, 2016)</li> </ul>	<p>CMA may impose fines of up to 10% of worldwide group turnover</p> <ul style="list-style-type: none"> <li>• <b>Highest fines in single cartel case:</b> £225 million (<i>Tobacco</i>, 2010) (reduced to £60.8 million following appeals by certain parties)</li> <li>• <b>Highest individual fine in cartel case:</b> £58.5 million (British Airways in <i>Long-haul passenger flights</i>, 2007)</li> </ul>

	EU level	UK level
<b>Liability for individuals</b>	No sanctions on individuals at EU level; however, sanctions may be imposed on individuals at the national level in some Member States (see e.g. UK checklist opposite)	<p>An individual is liable to criminal prosecution if he or she agrees with one or more other persons to fix prices, limit supply or production, share markets or engage in bid-rigging arrangements (cartel offence). The offence carries a maximum custodial sentence of five years, with the possibility of fines being imposed in addition or as an alternative in less serious cases or where there are mitigating circumstances. The offence provision contains a number of exceptions and defences (see <a href="#">paras. 4.12 to 4.14</a>)</p> <p>Criminal sanctions (in the form of fines and imprisonment of up to two years) also exist for frustrating activities in the context of an CMA investigation</p>
<b>Civil actions</b>	<p><b>Forum:</b> Third parties who suffer loss as a result of cartel behaviour in breach of Art. 101 can sue for damages before the national courts;</p> <p><b>Class actions/punitive damages/ Direct-indirect purchasers:</b> Rules on procedure, admissibility and quantification of damages are supposed to be harmonised across the EU under the Damages Directive (see <a href="#">para. 4.9</a>). All Member States have now implemented the Damages Directive through national legislation, although there has been some divergence in their approaches</p>	<p><b>Forum:</b> Third parties who suffer loss as a result of cartel behaviour (in breach of the Competition Act) can bring civil claims before the courts. A claim may be brought before the High Court either before or after an infringement decision has been issued, or before the Competition Appeal Tribunal (CAT) in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition)</p> <p><b>Direct/indirect purchasers:</b> Both direct and indirect purchasers may sue for damages. The passing-on defence has been successfully raised in courts (albeit not in the context of competition law cases)</p> <p><b>Class actions:</b> Representative bodies are able to bring damages actions before the CAT on behalf of groups of named and identifiable consumers</p> <p><b>Punitive damages:</b> In certain very limited circumstances “exemplary” damages may be available for infringements of competition law where it is necessary to punish and deter</p>



### Annex 3: Developing a strategy for handling cartel investigations

When faced with actual or potential cartel proceedings, it is important to pay careful attention to the wider context, including the possibility that multiple investigations and/or court proceedings could be triggered in different jurisdictions. Within the EU, Regulation 1/2003 facilitates the flow of confidential information between the Commission and the NCAs within the framework of the ECN. Cooperation with antitrust authorities elsewhere in the world (notably the US) is particularly close in the cartel field.

**The following common-sense general principles should assist:**

- Rapidly develop, and start implementing, a tailored strategy: Absolute priority must be given to developing - with the undertaking's own legal department and senior management - a strategy tailored to the needs of the particular undertaking. That strategy must:
  - be formulated in view of the surrounding facts and the different issues raised in all potentially relevant jurisdictions; and
  - take account of the various options available to the undertaking and the different risks to which the undertaking may be exposed around the world.

Delay in the implementation of a strategy could have serious consequences (e.g. in terms of priority of leniency applications), as could the implementation of a policy that does not take due account of identifiable risks (e.g. in terms of potential civil actions, follow-on investigations in other jurisdictions, etc.).
- Establish the surrounding facts: Do not rely solely on the initial information supplied (e.g. copies of documentation that may have been removed from an undertaking's premises during a dawn raid). Developing the best strategy involves gaining a good understanding of:
  - Any current or potential investigations: Identify any jurisdictions in which investigations have already been launched or are likely. In particular:
    - seek to establish which companies are believed to be subject to investigation, clarify the scope of those investigations and identify areas of overlap/divergence (e.g. product markets, period of time of the investigation); and
    - develop a fact-finding strategy across the relevant jurisdictions that avoids duplication of effort.
  - The relevant markets: Consider the dynamics of competition in the relevant market-place (e.g. who the competitors are, what history there may have been of antitrust investigations or infringements in the past in any relevant jurisdictions around the world, etc.).
  - Knowledge or involvement of company representatives: Interview senior management and relevant sales or other personnel to ascertain as much background information as possible regarding the matters subject to investigation. In some cases it may be appropriate to inform individuals who are implicated that they may need separate legal advice. Individuals should be told not to destroy any potentially relevant evidence or documentation.
  - The positions of third parties: Identify the likely motives and reactions of other interested parties (potential leniency applicants, defendants in cartel proceedings, direct and indirect customers, etc.).
- Identify all potentially relevant jurisdictions: The strategy must also take account of the risks of investigations and civil proceedings in all relevant jurisdictions where the alleged cartel could be found to have had effects (including, but not limited to, those jurisdictions where investigations have already been launched). It will be necessary to gain access to specialist advice from competition counsel in the key jurisdictions where there could be legal proceedings (administrative or litigious); this may be from the company's usual local lawyers or from suitably experienced lawyers (e.g. as recommended by Slaughter and May). Although the identity of the lead jurisdictions will vary from

case to case, special consideration must always be given to the options and risks that may exist in the following jurisdictions (where cartels are treated as very serious hardcore infringements):

- North America: the US and potentially Canada;
- Europe: the EU (the Commission and the NCAs in the Member States most directly affected by the cartel);
- Other: rest of world jurisdictions that have acquired, or are developing, a reputation for vigorous antitrust enforcement include Australia, Japan, Korea, China and South Africa.
- Identify the various options and risks: The options and risks will vary from jurisdiction to jurisdiction and from company to company. Key issues you should consider as part of developing a strategy include:
  - Possible spillover issues concerning other markets: While an investigation may be initiated in respect of one particular product/geographic market, it is conceivable that closer scrutiny may bring other infringements to light.
  - Pros and cons of leniency applications: Priority must be given to the question of leniency, given the special benefits that generally accrue to the first applicant (and the risks that another company may get in first). This may apply not only to the market that is the main focus of the particular investigation but also to possible spillover markets. Making a leniency application in one jurisdiction could, however, have adverse consequences in other jurisdictions; it is therefore important to coordinate any leniency strategy for all key jurisdictions.
  - Likely level of fines: It is not easy to estimate the level of fines that could be imposed by the different competition authorities. Relevant considerations vary between jurisdictions, but some indication can be provided by recent cases and general guidelines (taking account of the extent and duration of the company's involvement, its market position and business turnover).
  - Likelihood of civil actions: This can have a major impact on the strategy to be followed, particularly where there is a risk of treble damages claims in the US (where class actions are common).
  - Risk of criminal proceedings against individuals: In some cases, individual directors and employees could face personal proceedings. It may be appropriate for them to be separately advised. The extent to which individuals' behaviour may put them in breach of their employment terms and the company's compliance policy, will also need to be assessed.
- Impact on business operations: Where a company becomes subject to investigations, the potential impact on its operations could be varied and wide-ranging. Issues to address include:
  - the impact on existing relations with JV partners, customers, suppliers, competitors;
  - consequences for existing financing arrangements (e.g. possible breaches of loan covenants entitling lenders to demand repayment); and
  - implications for M&A transactions (e.g. as part of due diligence exercises or under antitrust warranties/covenants);
- Changes to existing business practices: Regardless of whether leniency applications may be made, the company is likely to require advice on which activities (if any) should cease and guidance on steps to ensure that its operations are competition law compliant in future. This may require the company to amend or reinforce existing compliance procedures it may already have in place;
- Document retention: It may be necessary to review and amend the company's existing document retention/destruction policy to ensure that potentially relevant materials are preserved (including typed or hand-written correspondence, memoranda, drafts, meeting notes, charts, diaries, travel records, computer disks, microfilms, telephone records and bills, emails and other data held in

electronic form). This needs to take account not only of potential future administrative investigations but also of disclosure/discovery requirements in civil actions that may follow;

- Document creation: In addition, the creation of new documents (and copying/dissemination of existing documents) can raise difficult issues of legal privilege in different jurisdictions. This may necessitate the production of appropriate guidelines for future communications and document production, particularly in cases raising multi-jurisdictional issues. In general, the creation of new documents concerning the subject matter of the investigations should be kept to the absolute minimum and such documents should be created only for the purpose of obtaining legal advice in relation to the potential exposure of the company to claims or further investigations;
- Press and media issues: Bear in mind not only the legal risks faced by the company but also the risks to its corporate reputation. This will involve coordination with the company's internal (and external) PR functions.
- Be sensible and pragmatic: Needless to say, the strategy that is appropriate for one company may not be appropriate for another, even if they are potential co-defendants. Nevertheless, the various broad issues identified above should be addressed, whether one is looking at potential cartel proceedings from the perspective of a potential defendant or a complainant/plaintiff. As the particular case progresses, new facts will come to light and investigations may move in different directions from those initially anticipated. You should take account of these developments and consider appropriate refinements or amendments to the initially agreed strategy.

## Annex 4: Establishing and maintaining an antitrust compliance policy

### Introduction

This Annex provides broad guidance for companies looking to develop a strategy to ensure compliance with EU competition law within their organisation. In line with the guidance provided by competition regulators around the world, companies should consider adopting a risk-based competition law compliance strategy.<sup>35</sup> Such a strategy involves five stages:

- making a commitment to competition law compliance;
- knowing your risks;
- formulating a strategy to address those risks;
- implementing the strategy; and
- reviewing regularly how you are doing.

#### Stage 1 - Making a commitment to competition law compliance

A commitment to competition law compliance must be adopted and implemented from the top of the organisation (i.e. from the executive team) through middle management to the lower ranks. Companies can consider demonstrating commitment in a number of ways, such as:

- assigning responsibility for competition law compliance to a senior executive (the Competition Compliance Director), who provides regular reports to the board/senior management committee. For larger businesses the senior executive may often be supported by, or work alongside, a senior in-house lawyer and/or members of the compliance team;
- allocating adequate resources (e.g. staffing) and an appropriate budget to support the competition law compliance work;
- including a commitment to competition law compliance in a competition law compliance policy statement and/or in an employee code of conduct; and/or
- rewarding employees who are committed to competition law compliance, for example in the company's performance appraisal processes.

#### Stage 2 - Knowing your risks Assessing your risks

To formulate an appropriate strategy for addressing competition law compliance risks, you must first identify and understand the risks faced by your company. These risks will vary depending on a number of factors, such as:

- The nature of the company's business: Is there a history of antitrust infringement in the sector?
- Does the company already have an existing competition law compliance strategy and a culture of compliance?
- The likelihood of "hardcore" cartel activity (price-fixing, market-sharing, bid-rigging and/or output/quota-fixing): Are the company's operations of a type that may be categorised as susceptible to cartelisation - e.g. homogenised products, high levels of market transparency or regular contacts with competitors?

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<sup>35</sup> See, e.g., the Commission's brochure (Compliance Matters (2011)), and the CMA and Institute of Risk Management's guide (Competition Law Risk - A Short Guide (2017)) - available on the DG Competition and CMA websites - which aim to help companies to develop a risk-based competition law compliance strategy.

- Potential for findings of dominance: Are there any specific areas in which the company may be found to hold a dominant position? If so, it will have special responsibilities (which do not apply to non-dominant companies) under antitrust rules not to abuse this position. In such cases it will be prudent to pay particular attention to the company's conduct and terms of business.
- Specific areas of concern: Are there specific concerns about other areas - such as existing competition remedies that apply to the company, JVs or the operation of vertical agreements (e.g. resale price maintenance, online sales restrictions or restrictions on parallel trade)? Or are you concerned that other players in the industry may be breaching competition law?

## Establishing a risk register

Once you have identified these risks, they should be logged in the company's risk register. The information logged should include the nature of the risk, an assessment of the level of risk (e.g. high/medium/low likelihood of the risk occurring) and the responsible person (or "owner") of those risks. The steps taken to address or mitigate these risks (under Stage 3 below) should also be recorded.

## Stage 3 - Formulating a strategy to address those risks

Once you have identified the competition law risks inherent in your company, you will need to formulate a strategy aimed at eliminating or mitigating those risks. This often involves implementing a combination of policies, procedures and employee training targeted at the risks faced by your company. It is sensible to focus your activities on the high/medium risks facing your business and to identify the business units/employees who are most likely to come across these risks.

The Competition Compliance Director should be made responsible for signing off the company's competition compliance strategy and for providing regular updates on it to the company's board/senior management committee.

## Policies

Larger companies often find it helpful to adopt written competition law compliance policies to provide guidance to staff on the approach they should take to competition law compliance issues. To assist in mitigating the risks, the policies must be tailored to the company's business and to the competition law risks that it faces.

Some companies find it useful to have an intranet site with general information on EU competition law and specific guidance in respect of identified risk areas (such as "Dos, Don'ts and Red Flags", "Q&As" or guidance on how to handle a dawn raid). These should be directed at scenarios that are likely to arise in practice.

You could also consider whether it would be beneficial to establish a document creation and retention policy. This could cover requirements around accurate record keeping, guidelines on terminology to use/ avoid, and the importance of maintaining legal professional privilege.

## Procedures

You should consider implementing procedures to ensure that employees or business units that face competition law risks are subject to appropriate supervision and legal/compliance oversight to mitigate the risks identified. For example, this could include requiring sign-off from Legal/Compliance and a senior manager before entering into certain types of transactions. It could also require all new staff (or at least those joining from competitors or joining high risk business units) to undergo competition law compliance training before starting in a front-line role.

If your business has identified a high/medium risk of cartel activity, you may consider requiring any contact between your employees and competitors, for example at trade association meetings, to be authorised in advance and registered. Some companies find it useful to provide employees with clear guidance on what they should and should not do at such meetings to minimise competition law risks before they attend them.

It is also helpful to develop clear internal reporting procedures. These procedures should clearly set out the circumstances in which potential competition law issues should be escalated and reported, to whom (e.g. immediate manager, senior manager or a member of Legal/Compliance) these issues should be reported and what steps should be taken to investigate and address these issues. You should also inform employees whom they should contact with any queries about competition law compliance. Such procedures should be designed to prevent competition law breaches from occurring in the first place or at least to detect any potential issues at an early stage. They can also be used to flag instances where the company may have concerns that another industry player is breaching competition law.

While employees should (ideally) feel comfortable using internal reporting structures to raise awareness about competition law issues, some companies may also find it useful to have a “whistleblower” line available to employees who wish to raise competition law concerns anonymously.

Employees should be made aware of the consequences of non-compliance with your company’s competition law policies and procedures, as well as with competition law more generally. In particular, it may be helpful to highlight to employees that:

- failure to comply with competition law or any associated internal compliance policies/procedures may result in disciplinary proceedings and (if the conduct is serious) may even result in dismissal; and
- employees may face criminal charges in some countries (such as the US and the UK) for engaging in cartel activity.

## Training

Most companies decide to include competition law compliance training as part of their mitigation strategy. The purpose is typically to ensure that all relevant staff have a broad understanding of the types of situations that may be problematic from a competition law perspective and know what to do should they encounter any of them.

You should therefore consider delivering regular targeted competition law compliance training to your employees. The content, extent and frequency of training will vary according to the risks identified, the objectives of the training and the personnel involved. For example, employees in high risk areas (such as those in regular contact with customers and competitors) are likely to require more in-depth training than those in low risk areas (e.g. back office staff). Refresher courses can be useful to ensure that a ‘competition law compliance mentality’ remains a part of the company’s culture.

The training should be tailored to the risks faced by the company, the industry in question and the specific situations that the employees involved are likely to face during their day-to-day responsibilities. For example, employees may be asked to consider scenarios they might encounter and asked how they should react in order to avoid competition law risks arising.

It is often helpful to have senior managers attend and assist with delivering the training. This will help to emphasise to employees the extent of your company’s commitment to compliance, as well as making the training session and scenarios practically relevant to employees.

Many companies find it useful to include a combination of face-to-face training and online resources/e-learning programmes. For example, face-to-face training may be used for high risk employees and/or induction training; e-learning programmes could be used for lower risk employees and/or for employees where it is difficult to schedule face-to-face training.

## Stage 4 - Implementing the strategy

Once you have formulated your competition law compliance strategy, you will need to ensure that it is communicated and implemented throughout your company. This can often be assisted by establishing an intranet page that includes any relevant policies, procedures and training materials/guidance, as well as details of the people to contact with queries.

The Competition Compliance Director should sponsor the communications and emphasise the importance of staff complying with competition law.

Many businesses find it useful to maintain a log of the actions they have taken to ensure competition law compliance, including for example a list of employees who have attended compliance training sessions.

## Stage 5 - Reviewing regularly how you are doing

It will be important to keep your competition law risks and mitigation activities under review after you have implemented a competition law compliance strategy. Ongoing monitoring and auditing of how your compliance strategy is performing can be useful tools to both prevent and detect potential competition law breaches.

### Conduct regular reviews

You should regularly review and update your competition law risk register to reassess the competition law risks that your company faces. The risks may have changed, for example if your company has acquired a new business or has grown the business to such a level that it now might be regarded as holding a dominant position.

At the same time, you should also assess whether your competition law compliance strategy is working effectively to mitigate these risks. This could include, for example, reviewing the potential competition law compliance issues that had been escalated during the period, compliance audits of certain business units or procedures, or the testing of higher risk employees to assess their understanding of competition law risks. Changes should be made to the compliance strategy, including policies, procedures and training as appropriate to address any areas that have not been working well.

You will need to consider the appropriate frequency of these reviews. This may depend on factors such as the nature and seriousness of the risks that your company is facing, whether your company is involved in frequent acquisitions of new businesses or is growing rapidly, and whether your company is subject to ongoing competition law compliance obligations (e.g. commitments given following an antitrust investigation).

### Reporting to senior management

It is important to ensure that senior management is kept informed of how the company is performing from a compliance perspective, as well as any significant competition law issues that have arisen. As such, you should ensure that sufficiently detailed reports are regularly provided to senior management. This may be in the form of a regular update from the Competition Compliance Director who has overall responsibility for the company's compliance strategy.

To this end, you should consider the kinds of information that senior management in your business will need in order to understand fully your company's compliance strategy, the competition law risks it faces, and the mitigations being taken to address such risks. Depending on the situation, this may include providing senior managers with audit and compliance testing reports, specific incident reports and legal advice.



## Annex 5: Dawn Raids - Key dos and don'ts

Officials from the Commission and/or NCAs may make unexpected inspection visits to investigate possible anti-competitive activities. The law entitles them to do this and obliges all undertakings to cooperate.

**Here we set out some of the key “dos” and “don'ts” of how to handle a “dawn raid”.**

### DO

- seek legal advice internally or externally as soon as possible
- refer visitors claiming to be from the competition authorities to your legal department. The officials should accept a short delay before starting to examine documents to allow the company to seek legal advice. You should not be regarded as obstructing the officials if you call the company's in-house or external lawyers for advice and assistance. Give your lawyers clear instructions of where you are and your telephone contact details so that they can contact you
- be aware that anything you say to the competition authorities may be used against the company and, possibly, against you
- identify which of the officials is the team leader. Ask to see, and check carefully, any notice providing the basis for the investigation. Such notice should state the purpose and scope of the investigation. Find out as precisely as you can what it is the officials are looking for and whether the competition authorities are seeking to compel disclosure of information or seeking voluntary assistance with their enquiries
- check and copy the identity documents of the officials
- arrange for the provision of appropriate IT support to allow the officials to conduct their investigation
- secure documents or equipment in the manner requested by the officials. Any employees affected by any IT measures carried out by the officials should be instructed not to interfere in any way
- provide access to electronic or paper copies of any books and records related to the business, irrespective of the medium on which they are stored, including laptops, desktops, tablets, mobile phones, CD-ROMs, DVDs, USB-keys, etc.
- try to arrange for each official to be assisted/shadowed by a member of staff and, if possible, also a lawyer
- keep as full a record as you can of what the officials ask for and inspect, of questions asked and answered, and of any other discussions
- answer any requests during the inspection for explanations of documents, the whereabouts of documents, people's roles etc. truthfully, fully and promptly
- the officials may wish to interview certain individuals and they should make clear whether this is on a compulsory or voluntary basis. If the latter, you should seek legal advice before agreeing to be interviewed. (In the case of an inspection visit by the CMA in the UK, if the CMA suspects you of having committed a criminal offence, they should conduct any interview under caution and you should take legal advice as to whether you should exercise your right to silence)
- assert legal privilege over any documents that you consider to be privileged and which the competition authorities are therefore not entitled to inspect. If there is a dispute about this, you should seek to agree with the officials to have the relevant documents put to one side for later resolution by advising lawyers



- ensure that you have your own copy of all documents copied by the officials (including CD-ROMs) and of their document inventory. The officials may offer to provide a CD-ROM or memory stick containing an index and copies of the electronic documents they have taken
- seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities
- remain calm and courteous throughout any visit

### **DON'T**

- refuse admission or keep the officials waiting unduly
- tell any person outside the company (except the company's external lawyers) what is happening
- interfere in any way with the IT measures carried out by the competition authorities
- delay in seeking to contact any executive (however senior or wherever they may be) the officials ask to see
- destroy or delete any records, paper or electronic
- appear unhelpful or obstruct the investigation
- sign anything at the officials' request without legal advice

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