

The EU Competition Rules on Cartels

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

SLAUGHTER AND MAY

January 2011

Contents

1. Introduction	01
2. Anti-Cartel Legislation and Enforcement	02
Article 101 and national competition laws	02
The National Competition Authorities	02
International cooperation	04
3. Investigations	05
Dawn raids	06
Information requests	07
Additional investigative tools	08
Rights of defence	08
4. Sanctions and Sentencing	10
Fines	10
Guidelines on the method for setting fines	10
Ascertaining overall exposure to sanctions	11
Criminalisation of cartels	12
5. Leniency	16
Overview of the Commission's leniency programme	16
Substantive conditions under the Commission's leniency programme	16

Procedural conditions under the Commission's leniency programme	18
Leniency policy in the UK	20
Multi-jurisdictional considerations	20
6. Settlement	22
Overview of the Commission's settlement procedure	22
Procedural conditions under the Commission's settlement procedure	22
Settlement procedure in the UK	24
7. Judicial Review	25
Appendices	
Appendix 1: Statistics on European Commission Cartel Enforcement	26
Appendix 2: Overview of the EU and National Rules Applicable to Cartels	32
Appendix 3: Developing a Strategy for Handling Cartel Investigations	42
Appendix 4: Establishing and Maintaining an Antitrust Compliance Policy	46
Appendix 5: Dawn Raids – Key Dos and Don'ts	51

1. Introduction

- 1.1 Anti-cartel enforcement has evolved substantially in Europe in recent years. 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 “hard-core” 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 European Union have likewise placed increased emphasis on investigating and pursuing cartels. The vigour of enforcement throughout the enlarged EU has increased further as a result of reforms introduced at the European and national levels on 1 May 2004.¹ Some statistics illustrating trends in the enforcement of the EU cartel rules are provided at [Appendix 1](#).
- 1.2 This publication provides an overview of the competition rules applicable to cartels within the EU.² It explains the relevant legislation and who enforces it (Part 2). It also describes the typical steps involved in an investigation and the investigative powers available to the enforcement authorities (Part 3). It then considers the applicable sanctions (Part 4), the leniency options available to companies (Part 5), the potential for early settlement of cases (Part 6), and the judicial review process (Part 7). A comparison of the EU and UK rules applicable to cartels is provided at [Appendix 2](#).
- 1.3 This publication also aims to assist companies in managing cartel investigations. [Appendix 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 competition compliance programmes; for this purpose, this publication also includes some basic information at [Appendix 4](#) on how to establish an effective antitrust compliance policy. [Appendix 5](#) provides an overview of the key dos and don'ts for handling a surprise inspection by the competition regulators.

¹ The current 27 EU Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. By virtue of the 1992 EEA Agreement, the EU competition rules also extend to 3 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.

² 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 in the UK rules applicable to cartels, see also the Slaughter and May publication: *An Overview of the UK competition rules*.

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 of the Treaty on the Functioning of the European Union (“TFEU”).
- 2.2 Any secret agreement or understanding between competitors which 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 “hard-core” infringements of the competition rules, presumed to have negative market effects. Arrangements involving “hard-core” 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. For an example of a case in which the Commission assumed jurisdiction over a cartel where all the participants were based outside the EU, see *Lysine* (2000).

THE NATIONAL COMPETITION AUTHORITIES

- 2.4 The implementing rules regarding enforcement procedures are contained in Regulation 1/2003. This replaced Regulation 17 of 1962, and significantly changed the way in which EU competition law is enforced, with effect from 1 May 2004.

- 2.5 The principal enforcement agency in the EU remains the European Commission, with the Competition Directorate General ("DG Competition") being the service responsible for the enforcement of the competition rules.³
- 2.6 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). [Appendix 2](#) provides an overview of the enforcement of the competition rules to cartels at the EU level and at UK national level.⁴
- 2.7 Regulation 1/2003 aims to decentralise the enforcement of the competition rules within the EU, so that the Commission can focus its resources on the detection and prosecution of serious competition infringements, including cartels. With this objective:
- If an NCA within the EU uses domestic competition law to investigate a cartel which 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.
 - There is increased cooperation between the European Commission and the NCAs, including exchange of confidential information. As part of the regime established under Regulation 1/2003, the European Commission and NCAs have established a European Competition Network (ECN). The various authorities exchange information and cooperate through the ECN structures with a view to ensuring the efficient allocation of cases. 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 which 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 in order to ensure effective enforcement of the antitrust rules.

³ For cases affecting trade between countries which are not EU members but are covered by the EEA Agreement, an agency known as the EFTA Surveillance Authority ("ESA") enforces competition law. In cases of jurisdictional overlap (i.e. where trade between an 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.

⁴ The summary at [Appendix 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 other key jurisdictions in the EU (and in other countries) also maintain and update comparable summaries and more detailed information for other jurisdictions.

- Regulation 1/2003 has given the Commission increased powers of investigation, including the power to take statements, to search private premises and to seal premises or business records (see also Part 3 of this publication). It also substantially increased the level of fines that may be imposed for breaches of the procedural rules (e.g. failure to provide information).

INTERNATIONAL COOPERATION

- 2.8 The EU has bilateral cooperation agreements with certain non-EU countries, notably the US, Canada, Japan, Korea and Brazil. These agreements can help the Commission to obtain information and evidence located outside the EU territory. 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.
- 2.9 The 1991 and 1998 EU/US Agreements provide for the exchange of information and establish positive comity between the Commission and US antitrust agencies (the Department of Justice and the Federal Trade Commission). They envisage that the Commission and US agencies should provide each other with any significant information coming to their attention about cartel activities which may affect the interests of the other (and, generally, that they should assist each other in their enforcement activities). As a result, there has been growing cooperation between the EU and US in cartel matters over recent years.
- 2.10 Nonetheless, these international cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations (in contrast to the extensive cooperation and disclosure which is possible between the NCAs within the ECN following the implementation of Regulation 1/2003). Due to 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 which would enable the exchange of company confidential information.
- 2.11 Competition authorities are also cooperating in the context of international organisations and networks. These organisations and networks have contributed to an environment in which competition agencies increasingly discuss practical problems and exchange experience 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 has issued *inter alia* recommendations and reports regarding enforcement action against hard-core 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*) within the context 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 which 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 channels 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 (unless the parties avoid this by taking advantage of recently introduced settlement procedures – see Part 6 of this publication). 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.
- 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 aim to coordinate their dawn raids so as to maintain the surprise element. Where appropriate these inspection powers can also be used with warning; this may happen, 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.⁵ They can enter the premises, land and means of transport of a company, examine the company’s books and other business records (including computer records), take copies from books and records and ask for oral explanations on the spot. Regulation 1/2003 also provides for the power to seal premises and records, as well as to 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 which 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 which would require more careful consideration and which 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 any representatives or members of staff of a company 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

⁵ The Commission can also request that the EFTA Surveillance Authority (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 Articles 53 and/or 54 of the EEA agreement. Information so obtained is transmitted to the Commission (which usually also takes part in such raids).

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. Nonetheless, in the context of unannounced on-site inspection visits, the Commission officials are normally acting pursuant to a formal decision and, thus, the company must cooperate. For an overview of the key dos and don'ts for handling a dawn raid, see [Appendix 5](#) to this publication.

- 3.10 Commission officials have no power to force entry; however, where an investigation is obstructed, the NCA 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 national 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. According to the Court of Justice in *Roquette Frères* (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.

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 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 Prior to 1 May 2004, Regulation 17 provided for a two-stage procedure whereby the Commission would make a simple request; this would only be followed by a formal decision demanding compliance if the addressee failed to cooperate and supply the information within the stated deadline. The vast majority of RFIs were answered voluntarily without the need for a formal decision. Nonetheless, Regulation 1/2003 (Article 18) enables the Commission immediately to issue formal decisions. Under Regulation 17, the penalties for refusal to comply with a formal RFI or for providing incorrect information were low (from €100 to €5,000, plus a periodic penalty payment of €50 to €1,000 per day). Regulation 1/2003 has increased these fines significantly – to up to 1% of total annual turnover.
- 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 which belongs to 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.

ADDITIONAL INVESTIGATIVE TOOLS

3.14 Besides acquiring information directly by exercising its formal powers to request information and conduct on-site investigations, the Commission may also obtain information in the course of its cooperation with the NCAs and other foreign enforcement agencies. Likewise, the Commission is able to supply information to these other authorities. Cooperation within the framework of the ECN allows for extremely close liaison and exchange of confidential information for the purposes of enforcing Articles 101 and 102. At international level, the Commission has also concluded a number of cooperation agreements with other national competition regulators (see sections on international cooperation at Part 1 of this publication).

RIGHTS OF DEFENCE

3.15 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 EU-qualified external counsel) and the right not to be required to incriminate itself.

Legal professional privilege

3.16 With respect to the right to legal privilege, the Commission is not entitled to require disclosure of written exchanges between a company and its EU-qualified external lawyers seeking or giving advice on EU antitrust law, 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).

3.17 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 EU-qualified external lawyer), or between a company and an external lawyer qualified outside the EU. Although advice from in-house lawyers or from lawyers qualified outside the EU 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

3.18 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 which might involve an admission of the existence of an infringement which 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 questions 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 on the companies engaging in cartel activities. The Commission has no powers to impose criminal sanctions on individuals involved (in contrast to the position at the national level in some countries, including the UK: see paragraph 4.10 *et seq.* below).
- 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 1/2003.⁶ In fixing the amount of the fine, regard must be had both 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 of the cartelists and their overall size, so as to ensure that the fine reflects each company's capacity to harm consumers and can act as a deterrent.
- 4.3 The fines imposed can in theory be up to 10% of worldwide group turnover in the financial year preceding the decision. The Court of Justice 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

- 4.4 On 1 September 2006 the Commission published new Guidelines on the method of setting fines (the "Fining Guidelines"), replacing its previous guidelines adopted in 1998. The Fining Guidelines apply to all cases in which the Commission has issued a statement of objections after 1 September 2006. The flowchart at the end of this Part 4 describes the steps taken by the Commission in setting fines:
- *Value of sales*: The Commission will start by applying a percentage of the undertaking's value of sales in the market affected by the infringement. The percentage applied in each case will be based on the gravity of the infringement and, as a general rule, will be set at a level of up to 30% of sales. In determining the

⁶ Under Regulation 2988/74, a limitation period may be available to protect a company from fines, provided it has not been involved in the cartel activity for a period of at least five years prior to the Commission taking any steps to investigate the cartel.

proportion of the value of sales, account is taken of the nature of the infringement, its actual impact on the market, and the size of the relevant geographic market;

- *Duration*: In order 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 will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year and periods of longer than six months but shorter than one year will be counted as a full year;
- *Entry fee*: In cartel cases (and other hard-core 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. In determining the level of the entry fee, the Commission will have regard to the same factors as for determining the proportion of the value of sales.
- *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 by an NCA. Additional adjustments are possible on the basis of other "objective factors", such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the companies in question and their real ability to pay in a specific social context;
- *Leniency Notice*: The final (payable) amount is then calculated following the possible application of the Commission's Leniency Notice (see Part 5 of this publication).

4.5 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.

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. For example, in 2003 the UK introduced a criminal offence for individuals who dishonestly engage in cartel activities (see below paras. 4.10 *et seq.*). A number of other Member States also provide for some kind of personal exposure for directors. Furthermore, the prospect of extradition (or "border

watch") resulting in personal fines and imprisonment in jurisdictions outside the EU (e.g. in the US) cannot be disregarded by European executives in international cartel cases.

- 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. The precise rules of standing, procedure and quantification of damages vary between different EU Member States. Overall, there are still notable impediments to pursuing such damages claims in Europe but the Commission and a number of Member States are attempting to address some of these issues. In the absence of any EU-level jurisdiction to award damages on a pan-European scale, it may be necessary to launch parallel actions in a number of jurisdictions, thereby significantly increasing legal costs. Class action litigation is undeveloped in the EU compared with the US (where there is the risk of treble damages). In addition, it may not be possible to rely on Commission decisions to support damages claims before national courts, bearing in mind national statutes of limitations or the fact that it may take several years before cartel cases are finally resolved at the EU-level. Notwithstanding these impediments, exposure to civil claims before national courts (including in foreign jurisdictions such as the US) provide a further reason why companies should seek to ensure that their employees do not engage in cartel activities.
- 4.9 Another important factor to be considered when ascertaining a company's overall exposure is the fact that there are no formal rules on avoiding overlapping sanctions in the event of multiple investigations within the EU and other jurisdictions. However, the European Courts have previously recognised a general principle that any previous punitive decision must be taken into account in determining any sanction which 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

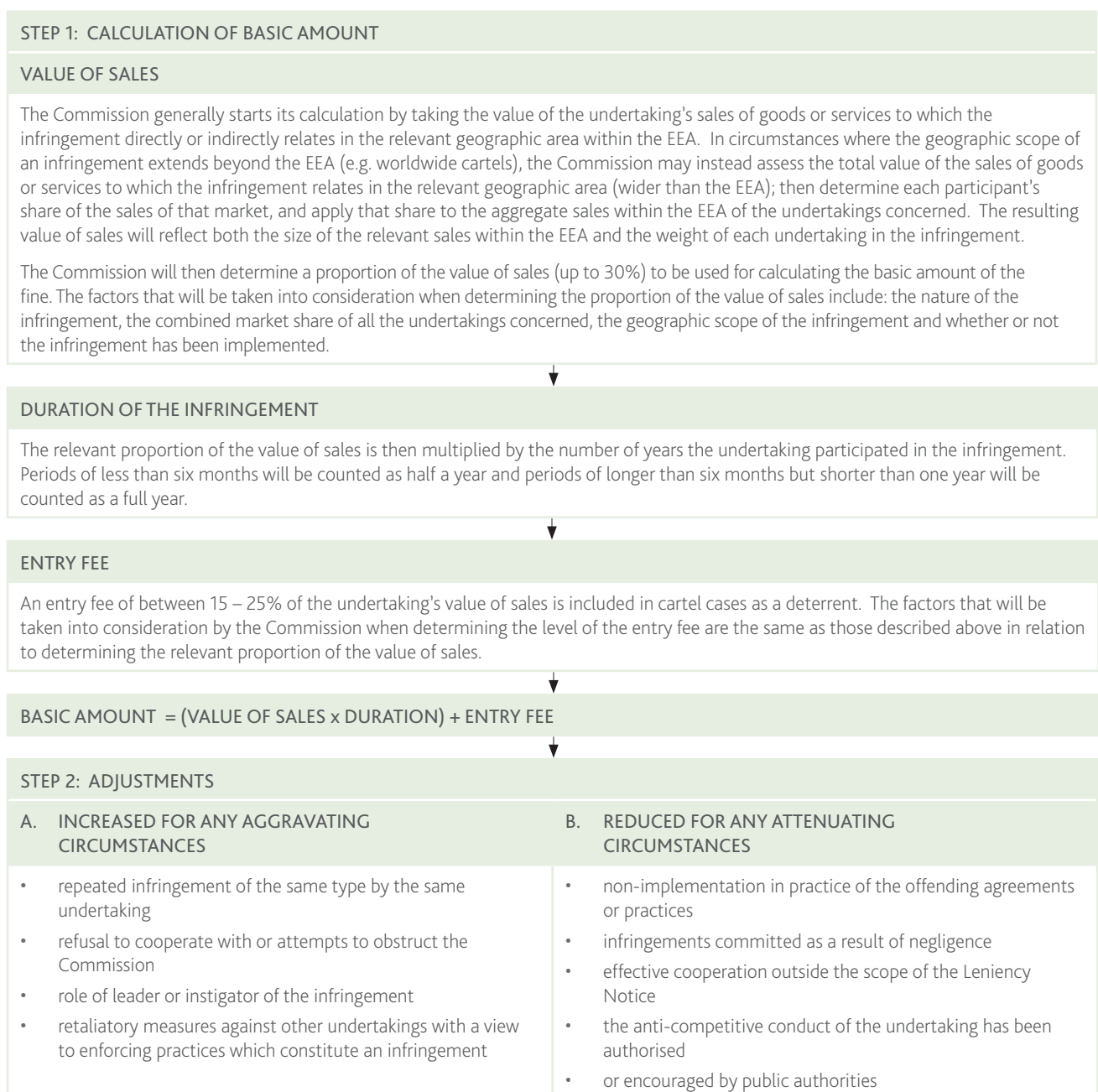
- 4.10 A number of countries provide for criminal sanctions, including fines and imprisonment, for individuals who participate in cartels. In the UK, the Enterprise Act 2002 has made 'dishonest' participation in a cartel a criminal offence, punishable by jail terms or fines (or both). The first criminal convictions for the UK cartel offence were secured in 2008 (when three businessmen were convicted for participating in a cartel that had been running for nearly four years, and were sentenced to terms of imprisonment from two to three years each).
- 4.11 A cartel for these UK criminal purposes is an arrangement between at least two persons which, 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 dishonest participation in an infringement of Article 101 (or the UK Competition Act 1998) that is criminalised; the cartel offence under the Enterprise Act 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

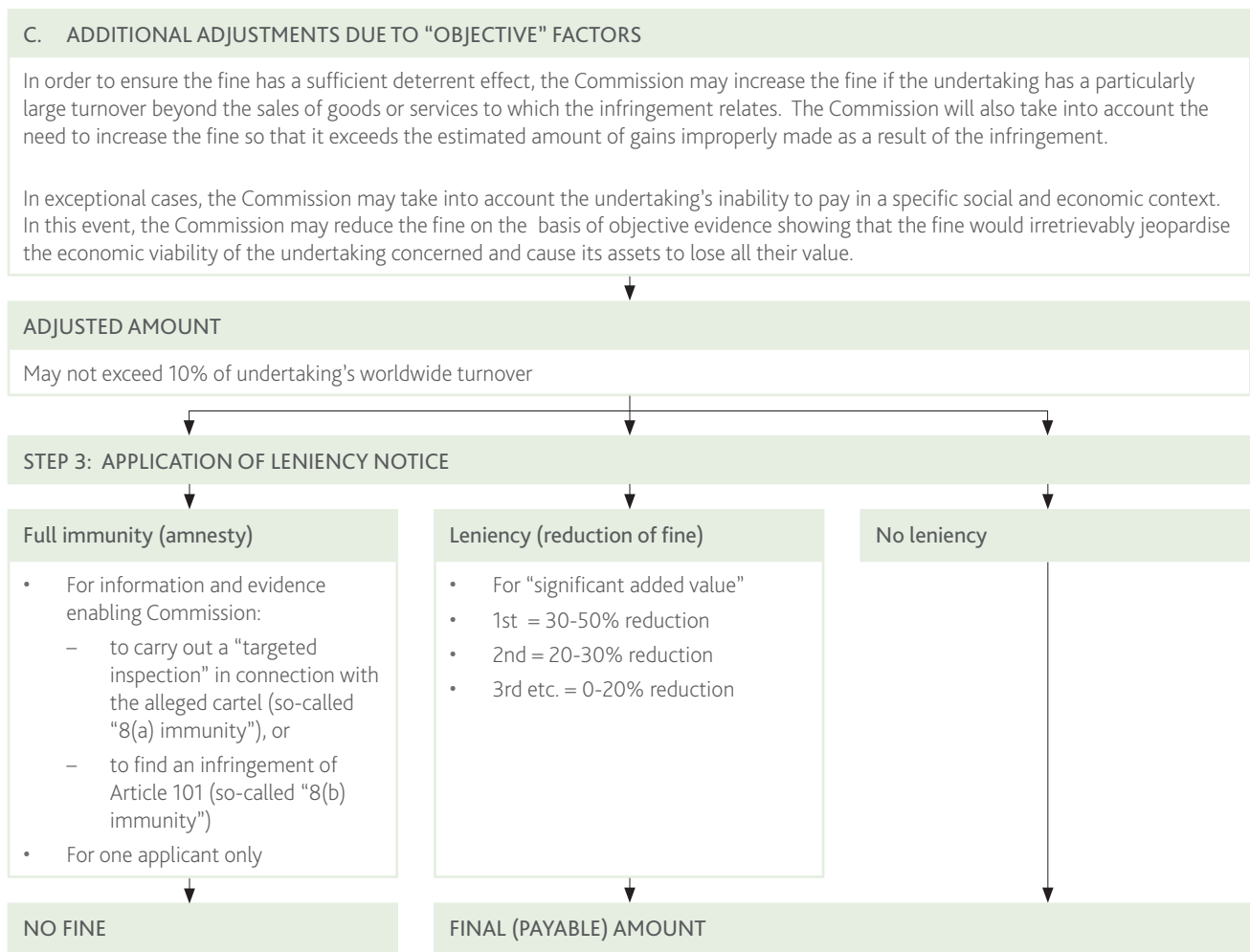
determining whether an offence has been committed. Where the relevant agreement was reached outside the UK, a criminal prosecution can be commenced only if the agreement was also implemented in the UK.

- 4.12 In determining whether or not participation in a cartel was 'dishonest', the appropriate standard is whether the acts alleged to constitute the cartel offence were dishonest by the ordinary standards of honest and reasonable people and whether the defendant had realised that the acts were dishonest by those standards. Use of codenames, participation in secret meetings, or attempts to suppress any evidence of the agreement may be relied upon to prove the requisite degree of dishonesty.
- 4.13 The OFT has indicated in written guidance that the following will not be treated as having acted dishonestly:
- Managers or directors who become aware of a cartel, take steps to end it and report it to the OFT; or
 - Employees aware of the existence (but not involved in the operation) of a cartel, even if they make no efforts to report it or bring it to an end.
- 4.14 Moreover, although they may be considered to have acted dishonestly, the OFT guidance indicates that the following categories of individual are unlikely to be prosecuted:
- Employees with only a peripheral involvement in the cartel activity; and
 - Individuals who are willing to come forward and cooperate at an early stage of their involvement in the cartel activities (see further Part 5 of this publication on Leniency).
- 4.15 The Enterprise Act gives the OFT the power to grant leniency to individuals who would otherwise face prosecution, but who inform the OFT 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 on-going cooperation with the OFT 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.⁷

⁷ Guarantees of immunity from prosecution cannot be given in respect of prosecutions brought in Scotland.

Commission's Method of Setting Fines





Note: In its judgment of 9 July 2003 in Desang and Sevon v. Commission (an appeal against the Commission's decision in Lysine) the CFI (now called the General Court) 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.

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.⁸ Most key jurisdictions outside the EU likewise operate leniency programmes.⁹ For a summary and comparison of the leniency programmes currently operated by the European Commission and the UK Office of Fair Trading, see [Appendix 2](#) to this publication.¹⁰

OVERVIEW OF THE COMMISSION'S LENIENCY PROGRAMME

5.2 In December 2006, the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (the 2006 Leniency Notice).¹¹ The 2006 Leniency Notice takes account of the Commission's previous experience with its 1996 Leniency Notice and the 2002 Leniency Notice. The 2006 Leniency Notice 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).

5.3 The 2006 Leniency Notice is essentially based on two principles: first, that the earlier undertakings contact the Commission, the higher the reward; second, that 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)

5.4 Under the 2006 Leniency Notice, full immunity will be granted to either:

- the first undertaking to provide the Commission with information and evidence to enable the Commission to carry out a “targeted inspection” in connection with the alleged cartel (Part II, Section A, 8(a)); or

⁸ Currently the only exception is Malta (where a programme is under consideration).

⁹ In addition an increasing number of jurisdictions outside the EU also operate leniency programmes. These include countries elsewhere in Europe and the Middle East (e.g. Norway, Switzerland, Israel and Turkey), the Americas (e.g. US, Canada, as Brazil), Asia (e.g. Japan, South Korea), Oceania (Australia, New Zealand) and South Africa.

¹⁰ The summary at Appendix 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 other key jurisdictions in the EU (and in other countries) also maintain and update comparable summaries and more detailed information for other jurisdictions.

¹¹ Commission Notice of 8 December 2006 on immunity from fines and reduction of fines in cartel cases (amending the 2002 Notice, which replaced an earlier 1996 Notice on the non-imposition or reduction of fines in cartel cases).

- the first undertaking to submit information and evidence enabling the Commission to find an infringement of Article 101 TFEU Treaty (Part II, Section A, 8(b)).

5.5 These options are mutually exclusive so only one undertaking can qualify for full immunity. To obtain full immunity, a company 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 company is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not 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.

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

5.6 Under the 2006 Leniency Notice (Part II, Section B), favourable treatment is also available to undertakings which (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 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”.

5.7 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.

- 5.8 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

- 5.9 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.¹²
- 5.10 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. 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.
- 5.11 Information and documents communicated to the Commission under the 2006 Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file.¹³ In practice, the Commission does not publicly reveal the identity of a leniency applicant as long as the investigations continue. Eventually, however, details of the cartel investigation and the applicant's involvement may be made publicly available in the final Commission Decision.

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.

¹² For these purposes, DG Competition operates a dedicated and secure fax number: +32-2 299 4585 (and, if necessary, initial contact can in exceptional cases also be made through the following dedicated telephone numbers: +32-2 298 4190 or +32-2 298 4191).

¹³ According to the Commission's Notice on Access to the File (December 2005), information on the case file which 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.

- 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 in order 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, as in the US, 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 to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final Decision.

Application for fine reduction

- 5.16 Applicants wishing to benefit from a reduction in fine should provide the Commission with their evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed whether the evidence submitted at the time of their application has passed the “significant added value” threshold (as well as the specific band within which any reduction will be determined) at the latest on the day of adoption of a Statement of Objections. The specific reduction to be granted will be finalised in the Commission's Decision.

LENIENCY POLICY IN THE UK

- 5.17 In price-fixing and market-sharing cases, the OFT is prepared to offer leniency treatment to undertakings which come forward with information.¹⁴ 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 OFT has started an investigation. To qualify, the OFT 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 OFT 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 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:
- 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 2006 Leniency Notice. Otherwise, it runs an increased risk that one of the other cartelists may blow the whistle first;
 - The jurisdictions in which liability to sanctions may arise;

¹⁴ Appendix 2 to this publication provides further guidance on the OFT's leniency policy. Slaughter and May, in cooperation with competition specialists at leading law firms in other key jurisdictions in the EU (and in other countries), also maintain and update summaries and information on leniency programmes in other jurisdictions.

- 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);
- 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 written submissions to the Commission, most notably the so-called “corporate statement” (see para 5.11 above), may be exposed to civil disclosure (or discovery) rules in litigation proceedings, in particular US civil litigation regarding claims for treble damages. US 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 made changes in its leniency procedures to take account of the prospect of civil proceedings. The Commission has been willing to assist in efforts to protect leniency applications from disclosure in the following ways:

- Asserting in the 2006 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;
- 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, with a view to avoiding 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 June 2008 the Commission introduced a new procedure for settling cartel cases, which is intended to complement the 2006 Leniency Notice and the Fining Guidelines.¹⁵ 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. Settlements may, however, be explored at an earlier stage if requested by the undertakings under investigation. Pursuant to the settlement procedure, the parties are expected to acknowledge their participation in and liability for the cartel and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with (a) a 10% reduction in fines (cumulative to any leniency reduction) and (b) a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple 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 timeframe 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

¹⁵ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167/1, 02.07.2008) and Regulation 622/2008 (OJ L 171/3, 01.07.2008) amending Regulation 773/2004.

representative to engage in discussions with the Commission on their behalf. This will not, however, prejudice a finding of joint and several liability amongst such undertakings. Following receipt of an expression of interest, the Commission retains its discretion as to 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 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 which 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 language of the EU.
- 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 Part 5 of this publication). Decisions made following the settlement procedure are still subject to judicial review (see Part 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 There is no formal procedure for the settlement of cartel cases in the UK but the OFT has developed a practice of adopting 'early resolution agreements' where the fines may be substantially reduced if the parties admit liability and agree to fully co-operate with the OFT's investigation.
- 6.11 Although the OFT has not published the terms of all the settlements it has agreed to date, the OFT will apply any settlement discount cumulatively to any reduction granted for cooperation under its leniency programme.

7. Judicial Review

- 7.1 Commission decisions can be appealed to the General Court (previously known as the Court of First Instance ("CFI")). The grounds for appeal are: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule relating to its application, or misuse of powers. The General Court 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. General Court judgments may be appealed (on points of law only) to the Court of Justice ("ECJ").
- 7.2 Companies do not necessarily have to pay their fine immediately, if they lodge an appeal before the General Court. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest.

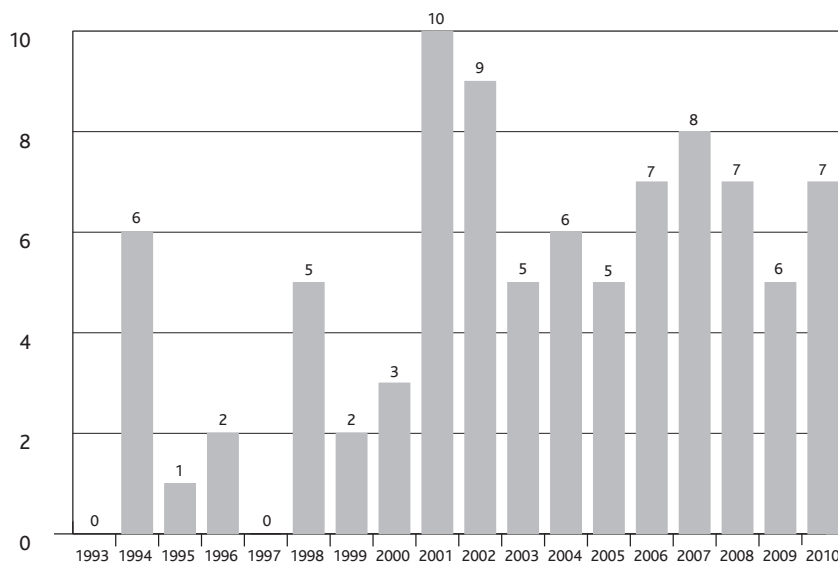
Slaughter and May
January 2011

© Slaughter and May, 2011

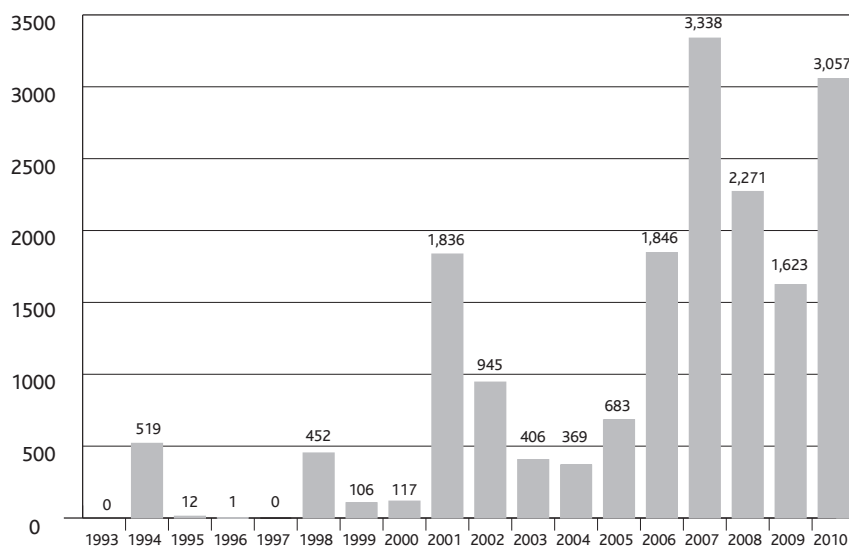
This publication is for general information only. It is not intended to contain definitive legal advice which should be sought, as appropriate, in relation to any particular matter. If legal advice is required, please contact your usual advisor at Slaughter and May or any member of the firm's Competition Group.

Appendix 1: Statistics on European Commission Cartel Enforcement

A. NUMBER OF COMMISSION CARTEL DECISIONS BY YEAR



B. TOTAL COMMISSION FINES IMPOSED ON CARTELS BY YEAR (€ MILLIONS)



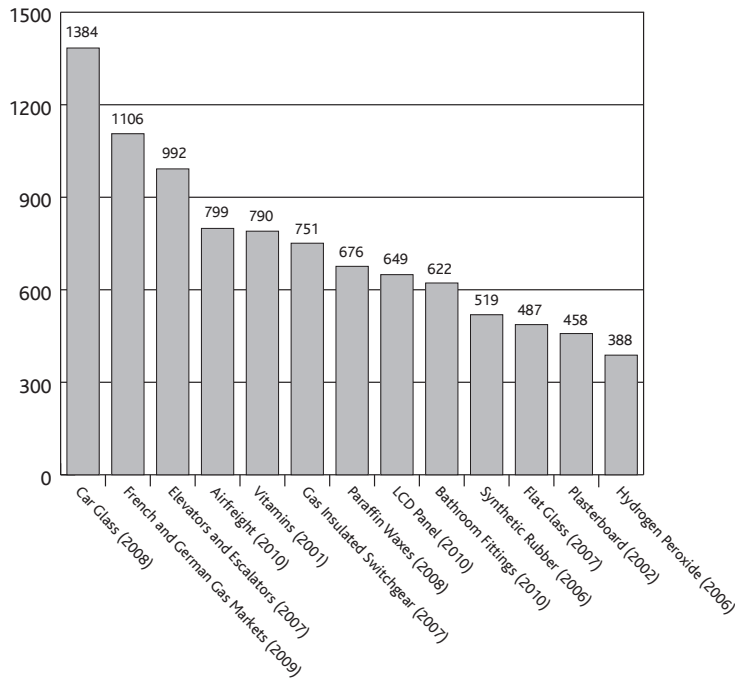
C. COMMISSION CARTEL DECISIONS BY YEAR (1994-2009)

Year	Case
1994	Steel Beams (16 February 1994) HOV SV2/MCN (containers by railways) (29 March 1994) Cartonboard (13 July 1994) PVC (27 July 1994) Cement Producers (30 November 1994) Far Eastern Freight Conference (21 December 1994)
1995	SCK/FNK (Dutch Cranes) (29 November 1995)
1996	Fenex (Expedition Companies) (5 June 1996) Ferry Operators (30 October 1996)
1997	–
1998	Stainless Steel (21 January 1998) Trans-Atlantic Conference Agreement (TACA) (16 September 1998) British Sugar (14 October 1998) District Heating Pipe (21 October 1998) Greek Ferries (9 December 1998)
1999	FEG and TU (26 October 1999) Seamless Steel Tubes (8 December 1999)
2000	FETTSCA (16 May 2000) Lysine (7 June 2000) Soda Ash (13 December 2000)
2001	SAS/Maersk Air (18 July 2001) Graphite Electrodes (18 July 2001) Sodium gluconate (2 October 2001) Vitamins (21 November 2001) Citric Acid (5 December 2001) Luxembourg Brewers (5 December 2001) Belgian Brewers (5 December 2001) German Banks (11 December 2001) Zinc Phosphate (11 December 2001) Carbonless Paper (20 December 2001)

Year	Case
2002	<p>Austrian Banks (Lombard Club) (11 June 2002)</p> <p>Methionine (2 July 2002)</p> <p>Dutch Industrial Gases (24 July 2002)</p> <p>Fine Arts Auction (30 October 2002)</p> <p>Plasterboard (27 November 2002)</p> <p>Methylglucanine (27 November 2002)</p> <p>Concrete Reinforcing Bars (17 December 2002)</p> <p>Speciality Graphites (17 December 2002)</p> <p>Nucleotides (17 December 2002)</p>
2003	<p>French Beef (2 April 2003)</p> <p>Sorbates (1 October 2003)</p> <p>Electrical and Mechanical Carbon and Graphite Products (3 December 2003)</p> <p>Organic Peroxides (10 December 2003)</p> <p>Industrial Copper Tubes (16 December 2003)</p>
2004	<p>Copper plumbing tubes (3 September 2004)</p> <p>French beer (29 September 2004)</p> <p>Spanish raw tobacco (20 October 2004)</p> <p>Haberdashery products (26 October 2004)</p> <p>Choline chloride animal feed additive (9 December 2004)</p>
2005	<p>Monochloroacetic acid (19 January 2005)</p> <p>Industrial thread (14 September 2005)</p> <p>Italian raw tobacco (20 October 2005)</p> <p>Industrial bags (30 November 2005)</p> <p>Rubber chemicals (21 December 2005)</p>
2006	<p>Bleach chemicals (3 May 2006)</p> <p>Acrylic glass (31 May 2006)</p> <p>Dutch road bitumen (13 September 2006)</p> <p>Copper fittings (20 September 2006)</p> <p>Steel beams (Arcelor) (8 November 2006)</p> <p>Synthetic rubber (29 November 2006)</p> <p>Alloy surcharge (Thyssen Krupp) (20 December 2006)</p>

Year	Case
2007	<p>Gas insulated switchgear (24 January 2007)</p> <p>Lifts and escalators (21 February 2007)</p> <p>Dutch brewers (18 April 2007)</p> <p>Fasteners and attaching machines (19 September 2007)</p> <p>Spanish bitumen (4 October 2007)</p> <p>Professional videotape (20 November 2007)</p> <p>Flat glass (28 November 2007)</p> <p>Chloroprene rubber (5 December 2007)</p>
2008	<p>Nitrile butadiene rubber (23 January 2008)</p> <p>International removal services (11 March 2008)</p> <p>Sodium chlorate paper bleach (11 June 2008)</p> <p>Aluminium fluoride (25 June 2008)</p> <p>Paraffin waxes (1 October 2008)</p> <p>Banana importers (15 October 2008)</p> <p>Car Glass (12 November 2008)</p>
2009	<p>Marine hose (28 January 2009)</p> <p>French and German Gas Markets (8 July 2009)</p> <p>Calcium carbide (22 July 2009)</p> <p>Concrete reinforcing bars (30 September 2009)</p> <p>Power transformers (7 October 2009)</p> <p>Heat stabilisers (11 November 2009)</p>
2010	<p>DRAM chips (19 May 2010)</p> <p>Carbonless paper (Bolloré re-adoption) (23 June 2010)</p> <p>Bathroom fittings (23 June 2010)</p> <p>Prestressing steel (30 June 2010)</p> <p>Animal feed phosphates (20 July 2010)</p> <p>Airfreight (9 November 2010)</p> <p>LCD panels (8 December 2010)</p>

D. COMMISSION CARTEL CASES WITH HIGHEST OVERALL FINES (€ MILLIONS)



E. 20 HIGHEST INDIVIDUAL FINES IN CARTEL CASES

Party	Fine	Case
Saint-Gobain	€896m	Car Glass (2008)
E.ON	€553m	French and German Gas Markets (2009)
GDF Suez	€553m	French and German Gas Markets (2009)
ThyssenKrupp	€480m	Lifts and Escalators (2007)
Hoffman-La Roche	€462m	Vitamins (2001)
Siemens	€397m	Gas Insulated Switchgear (2007)
Pilkington	€370m	Car Glass (2008)
Ideal Standard	€326m	Bathroom Fittings (2010)
Sasol	€318m	Paraffin Waxes (2008)

The EU Competition Rules on Cartels

Party	Fine	Case
Air France/KLM	€310m	Airfreight (2010)
Chimei Innolux Corporation	€300m	LCD Panels (2010)
Eni	€272m	Synthetic Rubber (2006)
Lafarge	€250m	Plasterboard (2002)
Arcelor Mittal	€230m	Prestressing Steel (2010)
Otis	€225m	Lifts and Escalators (2007)
Heineken	€219m	Dutch Brewers (2007)
Arkema	€219m	Acrylic Glass (2006)
Air France	€183	Air Freight (2010)
Arjo Wiggins Appleton	€184m	Carbonless Paper (2001)
LG Display	€125	LCD Panels (2010)

Appendix 2: Overview of the EU and National Rules Applicable to Cartels

Note: The summary in this Appendix 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 other key jurisdictions in the EU (and in other countries), also maintain and update comparable summaries and more detailed information for other jurisdictions.

	EU level	UK level
<i>Substantive law</i>	<p>Articles 101(1) and 101(3) Treaty of Rome apply if cartel:</p> <ul style="list-style-type: none"> • has object or effect of preventing, restricting or distorting competition within the EU; and • may affect trade between Member States 	<p>Chapter I of the Competition Act 1998 (modelled on Article 101 TFEU Treaty) applies if cartel:</p> <ul style="list-style-type: none"> • has object or effect of preventing, restricting or distorting competition within the United Kingdom; and • may affect trade within the United Kingdom

	EU level	UK level
<i>Key additional legislation/rules</i>	Council Regulation 1/2003	The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004
	Commission Leniency Notice (2006)	Enterprise Act 2002 (introducing criminal sanctions for individuals who dishonestly engage in hardcore cartels)
	Commission Guidelines on the method of setting fines (2006)	Guidance as to the Appropriate Amount of Penalty (2004) (revising an earlier version of Guidance published in 2000)
	Commission Notice on the conduct of settlement procedures in cartel cases	Guidance on the issue of no-action letters for individuals (2003)
	Commission notice on cooperation within the European Competition Network (2004)	Guidance on the handling of applications (2008)
	Joint Statement of the Council and the Commission on the Functioning of the European Competition Network (2004)	Guidance on Competition Disqualification Order provisions (2003)
		Regulation of Investigatory Powers Act 2000 (RIPA) and 2003 Regulation of Investigatory Powers Orders (as amended in 2005 and 2006)
	Human Rights Act 1998	

	EU level	UK level
<i>Enforcement authorities</i>	<ul style="list-style-type: none"> European Commission (DG Competition) National Competition Authorities (NCAs) in each of the 27 EU Member States may apply and enforce Article 101 in its entirety by virtue of Regulation 1/2003 (and indeed <u>must</u> apply Article 101 in parallel with national competition legislation to a cartel affecting trade between Member States) <p><i>NB: This EU checklist focuses on European Commission's powers; for NCAs' powers when applying Article 101, see e.g. UK checklist opposite. NCAs cooperate with each other and the Commission through the ECN (European Competition Network) with a view to ensuring consistent application and enforcement of Article 101</i></p>	<p>Office of Fair Trading (OFT) and the sectoral regulators for communications (OFCOM), electricity and gas (OFGEM), water and sewerage (OFWAT), Northern Irish utilities (OFREG NI), civil aviation (CAA) and railway services (ORR)</p> <p>The OFT has power to conduct a civil investigation if it has reasonable grounds for suspecting that an undertaking is infringing Articles 101 or 102 or the Chapter I or II prohibitions of the Competition Act 1998. The OFT has power to conduct a criminal investigation only if it has reasonable grounds for suspecting that a cartel offence has been committed under the Enterprise Act 2002 (see <i>Liability for individuals</i> below)</p>
<i>Fines for substantive infringement</i>	<p>European Commission may impose fines of up to 10% of worldwide group turnover</p> <ul style="list-style-type: none"> <i>Highest fines in single cartel case:</i> €1.38 billion (Car Glass, 2008) <i>Highest individual fine in cartel case:</i> €896 million (Saint Gobain in Car Glass, 2008) 	<p>OFT may impose fines of up to 10% of worldwide group turnover</p> <ul style="list-style-type: none"> <i>Highest fines in single cartel case:</i> £225 million (Tobacco manufacturers and retailers, 2010) <i>Highest individual fine in cartel case:</i> £121.5 million (British Airways in Long-haul passenger flights, 2007)

	EU level	UK level
<i>Powers of inspection ("dawn raids")</i>	<p><i>Premises:</i> 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><i>Powers to enter:</i> 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><i>Powers to seal:</i> Officials may seal premises to prevent tampering (e.g. overnight before returning to continue search)</p> <p><i>On-the-spot oral statements:</i> Commission may require on-the-spot explanations of documents/ information it finds in the course of an inspection visit</p> <p><i>Right to legal representation:</i> Party has no absolute right to legal representation during a search, although in practice Commission officials may be prepared to wait up to 1 hour, if in-house/external counsel can arrive in that time</p>	<p><i>Premises:</i> 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 (NB: entry into domestic premises requires a warrant)</p> <p><i>Powers to enter:</i> 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 (NB: A warrant is required for inspection visits in the context of criminal investigations under the Enterprise Act). 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><i>Powers to seal:</i> Available for a maximum time period of 72 hours</p> <p><i>On-the-spot oral statements:</i> OFT 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><i>Right to legal representation:</i> Party has no absolute right to legal representation during a search, although in practice OFT officials may, on request, give "reasonable time" for legal advisers to arrive before proceeding with their inspection (unlikely to extend more than 1 hour)</p>

	EU level	UK level
<i>Other investigatory powers</i>	<p><i>Requests for information:</i> Commission may require companies or individuals (by Article 18 request or decision) to supply information in their possession or under their control</p> <p><i>Requests for oral evidence:</i> 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><i>Covert surveillance:</i> Commission has no powers to engage in covert surveillance (e.g. tapping phones, faxes, e-mails or hidden video cameras/microphones), but is able to cooperate with relevant NCAs that have these powers</p>	<p><i>Requests for information:</i> OFT may require companies or individuals (by Section 26 Notice) to supply information in their possession or under their control</p> <p><i>Requests for oral evidence:</i> Generally, the OFT has no power to require individuals to make statements or provide evidence under oath, but may take statements on a voluntary basis. However, the Enterprise Act grants the OFT the power to conduct "compulsory interviews" in the context of criminal investigations</p> <p><i>Covert surveillance:</i> OFT has the power to carry out covert surveillance (e.g. bugging of business or residential premises) in the context of criminal investigations. OFT is able to conduct directed surveillance (essentially monitoring of people's movements) and to use informants in both criminal and civil investigations</p>
<i>Privilege against self-incrimination</i>	<p>Recognised – although precise scope not clearly defined. No absolute right to silence. However, Commission cannot compel an undertaking to provide oral or written answers which would involve an admission of the existence of an infringement. European courts draw distinction between:</p> <ul style="list-style-type: none"> • requests intended to secure purely factual information; and • requests relating to the purpose of actions taken by the individual/undertaking 	<p>The privilege against self-incrimination as recognised under EU jurisprudence applies (see EU checklist). Special safeguards are provided for with respect to statements made by a person in response to a requirement imposed by the OFT using its powers of criminal investigation under the Enterprise Act</p>

	EU level	UK level
<i>Legal professional privilege</i>	Recognised for written advice and communications between an undertaking and its EU-qualified external lawyers (not for in-house lawyers)	Recognised for written advice and communications between an undertaking and a professional legal adviser (including an in-house lawyer, and whether or not qualified in the EU) and for any document made in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings

	EU level	UK level
<i>Leniency programme</i>	<p>Developed system (under Commission Leniency Notice, 2006) enables cartel participants to seek leniency by applying to the Commission. This includes:</p> <ul style="list-style-type: none"> • <i>Full immunity</i>: available at the discretion of the Commission if the participant is the first to submit information and evidence that will enable the Commission: <ul style="list-style-type: none"> (a) to carry out a “targeted inspection” in connection with the alleged cartel or (b) to find an infringement of Article 101, provided the participant: <ul style="list-style-type: none"> – cooperates fully with the Commission on a continual and expeditious basis; – 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; – 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 – has not taken steps to coerce other undertakings to participate in the cartel 	<p>Developed system (under the OFT’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 OFT. This includes:</p> <ul style="list-style-type: none"> • <i>Full (Type A) immunity for companies</i>: 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 OFT does not already have sufficient information to establish the existence of the alleged cartel activity, and the undertaking: <ul style="list-style-type: none"> – provides the OFT with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity; – maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; – has not taken steps to coerce another undertaking to take part in the cartel activity; and – refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the OFT (except as may be directed by the OFT) • <i>Full (Type B) immunity for companies</i>: available at the discretion of the OFT 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

EU level	UK level
<ul style="list-style-type: none"> • <i>Reduction of fines</i>: 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 if it had not cooperated. Reductions are split into three bands: <ul style="list-style-type: none"> – 30-50% for first undertaking; – 20-30% for second undertaking; and – 0-20% for subsequent undertakings 	<ul style="list-style-type: none"> • <i>Reduction of fines – Type B leniency</i>: available for the first undertaking to come forward with "significant added value" evidence of the existence and activities of cartel activity where the OFT 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 OFT (although the maximum reduction is usually capped at 50%), provided it: <ul style="list-style-type: none"> – provides the OFT with all the information, documents and evidence available to it regarding the existence and activities of the cartel activity; – maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation; and – refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the OFT (except as may be directed by the OFT) • <i>Redaction of fines – Type C leniency</i>: available for any subsequent undertakings (which is not the first to come forward) where the OFT 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 OFT, provided the same conditions as Type B leniency above are satisfied

EU level	UK level
	<ul style="list-style-type: none"> <li data-bbox="842 521 1426 909">• <i>Additional reduction or “Leniency Plus”</i>: an undertaking cooperating with an investigation by the OFT 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 which is additional to the reduction which it would have received for its cooperation in market A alone <li data-bbox="842 949 1426 1435">• Immunity from criminal prosecution for individuals: available under the Enterprise Act for individuals who are first in to the OFT 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 OFT will normally be prepared to issue no-action letters to employees on an individual basis

	EU level	UK level
<i>Liability for individuals</i>	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)	An individual is liable to criminal prosecution if he or she dishonestly 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. Criminal sanctions (in the form of fines and imprisonment of up to 2 years) also exist for frustrating activities in the context of an OFT investigation
<i>Civil actions</i>	<i>Forum:</i> Third parties who suffer loss as a result of cartel behaviour in breach of Article 101 can sue for damages before the national courts (see e.g. UK checklist); <i>Class actions/punitive damages/Direct-indirect purchasers:</i> Rules on procedure, admissibility and quantification of damages vary between Member States (see e.g. UK checklist). Commission is considering a proposed draft Directive on damages actions which would harmonise national rules	<i>Forum:</i> Third parties who suffer loss as a result of cartel behaviour in breach of Article 101 or the Competition Act can bring civil claims before the courts (before the Competition Appeal Tribunal in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition or of Article 101) <i>Direct/indirect purchasers:</i> 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) <i>Class actions:</i> Representative bodies are able to bring damages actions before the Competition Appeal Tribunal on behalf of groups of named and identifiable consumers <i>Punitive damages:</i> No special rules apply. Plaintiff must prove causation and quantify damages

Appendix 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 National Competition Authorities (NCAs) within the framework of the European Competition Network (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
 - must 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 which 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 which 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:
 - determine whether coordinated investigations have been launched in more than one jurisdiction;
 - if so, 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);

- develop a fact-finding strategy across the relevant jurisdictions which 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 appropriate 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 European Union (the European Commission and the NCAs in the Member States most directly affected by the cartel);
 - **Other:** Rest of world jurisdictions which have acquired, or are developing, a reputation for vigorous antitrust enforcement include Australia, Japan, Korea 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 which 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 joint venture 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, e-mails 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 which 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 which 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.

Appendix 4: Establishing and Maintaining an Antitrust Compliance Policy

INTRODUCTION AND KEY PRINCIPLES

This appendix provides broad guidance for companies considering the introduction or updating of an antitrust compliance policy. It outlines measures which can form part of an effective compliance programme and the principal means by which standards of antitrust compliance may be introduced and monitored within a company.

It is common ground among regulators worldwide that the following are essential features of a successful antitrust compliance programme:

- Commitment at the senior executive level;
- Guidelines to employees;
- Ongoing training and education (including in-house or online training);
- Effective monitoring and enforcement.

COMMITMENT AT THE SENIOR EXECUTIVE LEVEL

A policy of compliance must be adopted and implemented from the top down in order to be effective. A recommended starting point is for the company's Board to adopt a compliance statement. This may be a very simple four or five point mission statement, typically no longer than one page, aimed at all employees and especially those having contact with competitors and/or responsibility for key strategic issues such as pricing. It may even be reproduced in credit card-sized form, so that employees may keep it close to hand. There is generally no obligation for a company to publish its compliance statement (in contrast, for example, to corporate governance statements) and indeed it is relatively rare for a company to do so.

A senior executive should normally assume responsibility for execution of the compliance policy. In his or her role as Compliance Officer, the senior executive should typically have direct access on compliance matters to the Chief Executive, Finance Director, Audit Committee or other "independent" authority within the company. He or she should generally be supported by, or work alongside, a senior in-house lawyer. In the case of an antitrust compliance programme covering the entirety of a company's operations worldwide, the Compliance Officer should coordinate compliance globally.

GUIDELINES TO EMPLOYEES

The detail of the company's compliance policy is typically set out in business conduct guidelines or a separate antitrust compliance manual, which should be provided to every employee or executive with input into the company's business operations.

Off-the-shelf or bespoke?

The company has a choice between "off-the-shelf" guidelines or a bespoke policy tailored to its own particular culture and requirements. There is a clear and definite trend towards the latter. The formulation of a bespoke policy requires more prior interaction with company personnel, in order to ascertain those issues of particular relevance to the company which need to be addressed. This preliminary work should, however, result in more focused and less abstract guidelines, potentially reducing the need for further consultation with internal and/or external lawyers as and when issues of compliance arise.

In formulating a bespoke policy, specific consideration should be given to the following:

- *The nature of the company's business*: Is there a history of antitrust infringement in the sector? Does the company already have an existing compliance policy and, more importantly, compliance culture?
- *Any perceived pre-disposition to "hard core" cartel activity (price-fixing, market-sharing, bid-rigging and/or output/quota-fixing)*: Are the company's operations of a type which may be categorised as susceptible to cartelisation – e.g. in light of regular contacts with competitors (through trade associations, etc.) or high levels of market transparency?
- *Potential for findings of dominance*: Are there any specific areas in which there may be scope to argue that the company holds a dominant position? If the company might be said to hold a dominant position, it may be considered to owe specific duties under antitrust rules which do not apply to non-dominant companies. 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 low antitrust awareness/compliance in any other areas – such as operation of vertical agreements (e.g. restrictions on parallel trade)?

The roll-out of the compliance policy will invariably place some administrative burden and time demands on a company's business, and in many cases its key employees. However, the growing trend towards e-learning can reduce the administrative burden of in-house training. In order to determine the appropriate level of compliance activity, including training, it may be appropriate to undertake an audit of the risk (and resulting costs) of non-compliance based on the above factors.

Key features

The antitrust compliance guidelines will typically include the following elements:

- A statement of the policy's objectives;
- An overview of those competition laws applicable to the company's business and the consequences of compliance and non-compliance, not only for the company but also for its employees, both in terms of criminal penalties (e.g. in the UK) and of disciplinary action/dismissal;
- A summary of the investigatory powers available to competition authorities (including powers to search homes);
- A basic list of DOs and DON'Ts – this could be further developed into a "red list" of strict DON'Ts, a "green list" of DOs and an "amber list" of situations where employees should SEEK FURTHER ADVICE;
- Guidelines for business conduct in certain categories of situation (e.g. approaches from competitors, requests for information at trade association meetings, negotiating supply agreements, situations where there is a risk the company may be considered dominant);
- "Q&As" based on possible day-to-day issues faced by the business (these should be modelled on real-life examples);
- Procedures governing document retention and production, seeking further advice and dealing with on-site investigations by a competition authority ("dawn raids").

Document retention and creation

It is particularly important that employees keep accurate records and are aware that all recorded information and communications may be used as evidence in a competition investigation (from e-mails to diaries and travel records). Guidelines typically lay down rules for careful usage of words in memoranda and other written or recorded communications, illustrated by real-life examples of "smoking guns" and "hostages to fortune". They should also stress the importance of maintaining legal privilege in communications with external and (insofar as advice may be privileged) in-house lawyers, and the steps which can be taken to reduce any risk of loss of privilege.

A policy should also include clear and consistent guidelines relating to the retention and non-destruction of documents and records (including computer-stored records such as e-mails), which ideally should take account of the different limitation periods in the various countries where the company does business. Again, employees must be informed of the disciplinary consequences of non-compliance.

The company should also ensure that its document retrieval systems (both physical and electronic) are set up to filter all potentially relevant documentation efficiently and quickly in the event of an investigation by a regulatory

authority. That policy should ensure that all privileged correspondence is stored separately and ideally expressly as "Privileged and Confidential" (this is particularly relevant for e-mails).

Investigations

Relevant staff (including reception staff) should be made aware that the European Commission and NCAs have powers to examine books and business records of the company, take copies of them and ask for oral explanations "on the spot". For more practical guidance on coping with on-site investigations, see [Appendix 5](#). Employees should be provided with standard guidelines for dealing with EU and UK "dawn raids" (unannounced inspection visits). Further training can be provided, including "legal audits" or "mock" dawn raid sessions led by external lawyers (see below). The company may also consider it helpful for shorter-form reference materials based on this area of the guidelines to be produced (e.g. on laminated cards) for guidance to employees in the event of an investigation.

A compliance policy will deliver little unless it is effectively enforced. Accordingly it is not enough for the company to have adopted and communicated a compliance statement. The company must ensure that the policy is respected.

ONGOING TRAINING AND EDUCATION

The company's personnel/human resource department can play an important role in communication of the policy. The department should usually be involved in the induction and training of employees, which may be carried out via online resources in the form of e-compliance programmes.

The extent and frequency of training will vary according to the type of activity and the personnel involved. Employees in regular contact with customers and competitors may need to devote a considerable amount of time to training. Refresher courses should be scheduled to ensure that a "compliance mentality" remains a part of the company's culture in the long term. Training may take the form of talks, presentations and "Q&A" sessions, as well as "mock" dawn raid exercises. Some companies also use PC-based interactive training and quizzes.

For personnel not in the "front line", a simple induction seminar on the basics of the policy, but with relatively little explanation of the rationale, may suffice. A sine qua non is that all relevant staff have a broad understanding of the types of situations which may be problematic and know their first point of contact should they encounter any of them.

EFFECTIVE MONITORING AND ENFORCEMENT

The following are all typical features of an effective internal monitoring and enforcement regime, and should be explained in the policy/business guidelines.

Recording customer/competitor contacts

For cases involving contact with competitors, specific and systematic monitoring may be advisable. This may involve so-called “contact-reporting”, according to which employees are required to complete a short form for each contact, noting the reason for the contact (as well as any potentially anti-competitive behaviour by the other party and any action taken in response). The forms can then be logged centrally as directed by the Compliance Officer. Routine monitoring of trade association activity (and, in particular, any exchange of information or data production that this may entail) is also likely to be critical; in potentially sensitive areas, one option can be for lawyers to attend such meetings to ensure that improper matters are not discussed.

Reporting structures and early warning systems

Employees should know to whom they can refer compliance issues for consultation and further advice. Each employee should be made aware of the reporting route to be followed (e.g. immediate manager, senior manager, Compliance Officer, or in-house legal adviser). The Compliance Officer or in-house legal adviser may then choose whether or not external advice is required (this may be advisable for the purposes of preserving privilege under EU law). It may even be appropriate to set up a “help desk” arrangement according to which the company has a number of alternative points of contact with external counsel if urgent advice or assistance is required. This chain of command is particularly relevant to dawn raids and other antitrust investigations (including written requests for information), where the company will need to have an early warning system in place and be able to respond quickly.

Disciplinary procedures

Staff should be made aware of the consequences of any non-compliance with company policy, i.e. that non-compliance is a disciplinary offence which in serious cases will lead to dismissal (and may also constitute a criminal offence). To that end it is increasingly common, and recommended, for employees in relevant areas (including senior executives) to be required to sign a statement of compliance to the effect that they have read and understood the policy and consequences of non-compliance, and complied with the policy. Those annual returns are then logged centrally as directed by the Compliance Officer. These procedures should also be set out in the employees' handbook.

Appendix 5: Dawn Raids – Key Dos and Don'ts

Officials from National Competition Authorities and/or the European Commission may call unexpectedly 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.

ON ARRIVAL, DO:

- ✓ refer visitors claiming to be on “official government business” to your legal department. You are entitled to a short delay to take legal advice (by telephone if necessary) before allowing an inspection to proceed. You will 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 on where you are and your telephone contact details so they can reach you)
- ✓ identify which of the officials is the team leader. Ask to see, and check carefully, the written authorisation or decision providing the basis for the inspection. You are entitled to a copy. It should state the purpose and scope of the inspection. Find out as precisely as you can what it is the officials are looking for
- ✓ check and copy the identity documents of the officials (or ensure that someone has already done so)
- ✓ if asked, secure documents or equipment while the officials wait to proceed with their inspection
- ✓ arrange separate rooms for distinct teams i.e. the officials, the company's internal and external advisers
- ✓ prepare IT staff to assist with the inspection e.g. arranging access to hard drives, unfreezing e-mail accounts
- ✓ prepare secretarial staff to assist with the inspection e.g. copying of documents
- ✓ coordinate with the legal department with regard to informing staff on site of the inspection and making sure that those informed do not discuss the inspection internally or externally

DURING THE INSPECTION, DO:

- ✓ remain calm and courteous, and polite but firm throughout the visit
- ✓ seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities
- ✓ try to arrange for each official to be assisted/shadowed by a member of staff and, if possible, also a lawyer
- ✓ be aware that anything you say to the officials may be used against the company and possibly yourself
- ✓ clearly identify any documents you believe may be covered by legal privilege (i.e. correspondence between the company and its internal and external lawyers) and seek legal advice before letting the officials see or copy them (put them in a separate pile/folder in the interim)
- ✓ keep as full a record as you can of what the officials ask for and inspect (including search terms), of questions asked and answered, and of any other discussions
- ✓ take your own copy of all documents copied by the officials (including CD-ROMs) and of their signed document inventory
- ✓ coordinate with the legal department before issuing any press release confirming that an inspection has taken place, highlighting the company's policy to conduct its business in compliance with the law and its co-operation with the authorities (this will be especially important if it becomes apparent that news of the inspection has been leaked)

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
- ✗ 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
- ✗ create documents relating to the investigation or matters covered by it without seeking legal advice
- ✗ sign anything at the officials' request without legal advice

LONDON**Slaughter and May**

One Bunhill Row
London EC1Y 8YY
United Kingdom

T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

BRUSSELS**Slaughter and May**

Square de Meeûs 40
1000 Brussels
Belgium

T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

HONG KONG**Slaughter and May**

47th Floor, Jardine House
One Connaught Place
Central
Hong Kong

T +852 2521 0551
F +852 2845 2125

BEIJING**Slaughter and May**

2903/2905 China World Office 2
No.1 Jianguomenwai Avenue
Beijing 100004
People's Republic of China

T +86 10 5965 0600
F +86 10 5965 0650

We have established particularly close ties with the competition practices of several other leading European law firms, so that we can provide a coordinated high-quality service to clients covering the leading European jurisdictions. These include the following four firms from the other large EU Member States, with whom we have co-located our Brussels office (at the above address in the heart of the European Quarter).

FRANCE**Bredin Prat**

130 Rue du Faubourg
Saint-Honoré
Paris 75008
T +33 1 44 35 35 35
www.bredinprat.com

GERMANY**Hengeler Mueller**

Benrather Strasse
18-20
40213 Düsseldorf
T +49 211 8304-0
www.hengeler.com

ITALY**Bonelli Erede Pappalardo**

Via Barozzi 1
Milan 20122
T +39 02 77 1131
www.beplex.com

SPAIN**Uría Menéndez**

c/ Príncipe de Vergara 187
28003 Madrid
T +34 91 586 0400
www.uria.com

