The EU Competition Rules on Cartels

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

SLAUGHTER AND MAY

March 2006
1. INTRODUCTION

2. ANTI-CARTEL LEGISLATION AND ENFORCEMENT
   Article 81 and national competition laws
   The National Competition Authorities
   International cooperation

3. INVESTIGATIONS
   Dawn raids
   Information requests
   Additional investigative tools
   Rights of defence

4. SANCTIONS AND SENTENCING
   Fines
   Guidelines on the method for setting fines
   Ascertaining overall exposure to sanctions
   Criminalisation of cartels

5. LENIENCY
   Overview of the Commission’s leniency programme
   Substantive conditions under the Commission’s leniency programme
   Procedural conditions under the Commission’s leniency programme
   Leniency policy in the UK
   Multi-jurisdictional considerations

6. JUDICIAL REVIEW
Appendices

Appendix 1 - Statistics on European Commission cartel enforcement
Appendix 2 - Overview of the EU and UK rules applicable to cartels
Appendix 3 - Developing a strategy for handling cartel investigations
Appendix 4 - Establishing and maintaining an antitrust compliance policy
Appendix 5 - Dealing with a dawn raid
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 reaffirmed various times 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 is increasing 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) and the judicial review process (Part 6). Finally, it addresses particular issues arising from the increasingly international nature of cartel enforcement which leaves international corporations potentially exposed to penalties in multiple jurisdictions (Part 7). A comparison of the EU and UK rules applicable to cartels is provided at Appendix 2.

1.3 By providing guidance on the application of the European competition rules on cartels, this publication further aims to assist companies in formulating a strategy for dealing with cartel investigations. Appendix 3 provides additional guidelines on how to develop a focused strategy for handling cartel investigations in the event that a company is alerted to possible concerns. The effectiveness of such a strategy will, however, also 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 guidelines on how to deal with a dawn raid.

---

1 The current 25 EU Member States are Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom. Bulgaria and Romania are set to join in 2007. 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 EC 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 81 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 81 of the EC Treaty.

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 81 can apply to agreements between undertakings located outside the EU if they may 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 81 and 82 (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 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.
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 81. 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) are 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.

> 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 cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Australia, Japan and Switzerland. These agreements can help the Commission to obtain information and evidence located outside the EU territory.

2.9 The most significant of these cooperation agreements are the 1991 and 1998 EU/US Agreements which 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; the conclusion of such agreements is not expected in the short term.

2.11 Competition authorities are also cooperating in the context of international organisations and networks. Albeit rather loose forms of cooperation, 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 80 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.

2.12 Also, in the context of the World Trade Organisation (“WTO”), there are proposals to negotiate and conclude a Multilateral Agreement on Trade and Competition. Following the Doha Ministerial Conference, the Declaration of which highlights the significance of outlawing hard-core cartels, a clear commitment remains to pursue such negotiations in the future.
3. INVESTIGATIONS

3.1 The Commission and NCAs have wide powers of investigation under Regulation 1/2003. Commission investigations may be triggered as a result of:

> one or more of the parties to a cartel or anti-competitive agreement approaching the Commission, e.g. as a “whistleblower” under the Commission’s leniency programme;

> a third party making a complaint, e.g. customers, competitors, consumers or any other party with information;

> an NCA referring a case with a cross-border element to the Commission within the context of the ECN; or

> the Commission launching an inquiry of its own initiative.

3.2 Once a case comes to its attention, the Commission will collect further information, either informally or using its formal powers of investigation laid down in Regulation 1/2003 (e.g. Article 18 information requests 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 81 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 will generally lead to the Commission formally addressing a written “statement of objections” (or “SO”) to the parties setting out the Commission’s case. The parties are then allowed to examine the documents on the Commission’s file (“access to the file”) and to respond to the SO (in a written “reply” and at an “oral hearing”). The Commission’s final decision is then taken by the full College of Commissioners and is notified to the undertakings concerned.

3.4 It is difficult to generalise about the timing of cartel cases. However, 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. 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. Community Courts have confirmed that Commission officials are only empowered to require explanations in respect of specific questions arising out of the books and business records which 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 usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCA assisting the Commission in its investigation. They will be acting pursuant to either a formal decision or an authorisation; in either case, the document must specify the subject-matter and purpose of the investigation and the penalties for non-compliance or incomplete information. The company is only required to cooperate if the Commission has taken a formal decision. 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 guidance on how to deal with a dawn raid, see Appendix 5 to this publication.

The Commission can also request that the ESA conduct a dawn raid in respect of undertakings located in the EFTA States, in cases also investigated by the Commission under Articles 53 and/or 54 of the EEA agreement. Information thus obtained by the ESA is transmitted to the Commission (which usually also takes part in such raids).
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 apply (under national procedures) for a warrant allowing their officials to use force to gain entry. 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 European 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 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. Article 18 requests 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, thus, may be burdensome for their addressees. There is, however, some possibility for negotiating with the Commission reasonable limitations in the scope of information requests. Generally, it is advisable for companies to respond to the Commission’s information requests 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 for information; 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 requests for information 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 information request 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 information request 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 letters requesting information (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 useful information in the course of its cooperation with the NCAs and other foreign enforcement agencies. Likewise, the Commission is able to supply useful 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 81 and 82. At international level, the Commission has also concluded cooperation agreements with the United States, Canada and Japan (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).

It follows that the extent of the privilege is 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

3.17 Community Courts have also recognised a privilege against self-incrimination, albeit narrow in scope. The precise scope of the privilege is not clearly defined. Community 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 Community 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 Community Courts have confirmed that the Commission has wide discretion in setting the level of fines on companies, within the limits of Regulation 1/2003. 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 European 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 In 1998 the Commission published Guidelines on the Method of Setting Fines (the “Guidelines”). The flowchart at the end of this Part 4 describes the steps taken by the Commission in setting fines:

> **Gravity:** The Guidelines state that the Commission will start by classifying any infringement as “minor”, “serious” or “very serious” in order to establish an amount determined for gravity. In assessing the gravity of the infringement, account is taken of its nature, its actual impact on the market, and the size of the relevant geographic market. Very serious infringements, such as price-fixing or market-sharing cartels affecting at least a substantial part of the EU, are likely to attract fines in excess of €20 million;

> **Duration:** The amount determined for gravity is adjusted for duration. For infringements lasting from one to five years the fine will be increased by 50%, while infringements of longer duration will be subject to an increase of up to 10% per year. The amount that emerges at the end of this calculation is the “basic amount”;

> **Aggravating/attenuating circumstances and other adjustments:** The amount is also adjusted to reflect a variety of possible aggravating or attenuating circumstances.

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.
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 allowed to the Commission in setting fines, in practice it can be difficult to assess with any certainty the basic amount or final (payable) amount in cartel cases. The Commission’s reluctance to introduce a more transparent process 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 follow the Guidelines and aims at exercising 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 Community 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 personal fines and imprisonment in jurisdictions outside the EU (e.g. in the United States) 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 in different EU Member States. Overall, there are notable impediments to pursuing such damages claims in Europe. In the absence of Community 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 rare and undeveloped in the EU compared with the US. 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 Community level. Notwithstanding these impediments, exposure to civil claims before national courts (including in foreign jurisdictions such as the United States) 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 Community 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 (most notably the US outside the EU) 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).

4.11 A cartel for this purpose 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 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 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 below 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 ongoing 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**

### GRAVITY OF THE INFRINGEMENT

Account is taken of the specific nature of an infringement, its impact on the market, the size of the geographic market affected by the cartel and the capacity of the participants to cause significant damage to others (in particular consumers). Also the level of fine should ensure it has a sufficient deterrent effect and may take account of the fact that large companies are usually in a position to be aware of the consequences of antitrust violations.

- **Minor infringements** ➔ €1,000 - €1 million
- **Serious infringements** ➔ €1 million - €20 million
- **Very serious infringements** ➔ €20 million

### DURATION OF THE INFRINGEMENT

- **Short (< 1 year)** ➔ no increase
- **Medium (1 – 5 years)** ➔ increase up to 50%
- **Long (> 5 years)** ➔ increase up to 10% per year

### BASIC AMOUNT (= GRAVITY + DURATION)

<table>
<thead>
<tr>
<th>A. INCREASED FOR ANY AGGRAVATING CIRCUMSTANCES</th>
<th>B. REDUCED FOR ANY ATTENUATING CIRCUMSTANCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>• repeated infringement of the same type by the same undertaking</td>
<td>• exclusively passive or “follow-my-leader” role</td>
</tr>
<tr>
<td>• refusal to cooperate with or attempts to obstruct the Commission</td>
<td>• non-implementation in practice of the offending agreements or practices</td>
</tr>
<tr>
<td>• role of leader or instigator of the infringement</td>
<td>• termination of the infringement as soon as the Commission intervenes</td>
</tr>
<tr>
<td>• retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement</td>
<td>• existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement</td>
</tr>
<tr>
<td>• need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount</td>
<td>• infringements committed as a result of negligence or unintentionally</td>
</tr>
<tr>
<td>• other aggravating circumstances</td>
<td>• effective cooperation outside the scope of the Leniency Notice</td>
</tr>
</tbody>
</table>

### ADDITIONAL ADJUSTMENTS DUE TO "OBJECTIVE" FACTORS

- Specific economic context
- Economic or financial benefit derived
- Specific characteristics of the undertakings in question
- Real ability to pay in a specific social context

### ADJUSTED AMOUNT

May not exceed 10% of undertaking’s worldwide turnover

### APPLICATION OF LENIENCY NOTICE

**Full immunity (amnesty)**
- For evidence enabling Commission to carry out “dawn raid” or enabling Commission to find an infringement of Article 81
- For one applicant only

**Leniency (reduction of fine)**
- For "significant added value"
  - 1st = 30-50% reduction
  - 2nd = 20-30% reduction
  - 3rd etc. = 0-20% reduction

**No Leniency**

### NO FINE

### FINAL (PAYABLE) AMOUNT

**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 confirmed that any percentage increases or reductions to reflect aggravating or mitigating circumstances must be applied to the basic amount of the fine set by reference to the gravity and duration of the infringement, not to any increase already applied for the duration of the infringement or to the figure resulting from any initial increase or reduction to reflect aggravating or mitigating circumstances. An example would be a case when the gravity of the infringement results in a figure of €100 million, with a 50% increase for duration, a further 20% increase for aggravating circumstances and a 10% decrease for attenuating circumstances; the resulting fine would therefore be (100 + 50 + 30 – 15 = €165 million (and it would be wrong to apply the adjustments only to the increase for duration, e.g. 100 + (50 + 10 - 5) = €115 million).
5. **LENIENCY**

5.1 Leniency applications have become – and will continue to be – one of the principal drivers of cartel investigations undertaken by competition enforcement agencies around the world. The table at the end of this Part 5 identifies those NCAs within the EU which have leniency programmes of their own in place; it also identifies key jurisdictions outside the EU with leniency programmes in place. 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.

**Overview of the Commission’s leniency programme**

5.2 The Commission adopted its current Leniency Notice in February 2002. The 2002 Leniency Notice takes account of the Commission’s experience which had shown that the effectiveness of the Commission’s previous 1996 Leniency Notice would be improved by enhancing transparency and by introducing an automatic total exemption from fines (amnesty or immunity) for the first whistleblower.

5.3 The Leniency Notice is essentially based on two principles: first, that the earlier companies contact the Commission, the higher the reward; second, that the reward will depend on the usefulness of the materials supplied. Compared with the previous 1996 Leniency Notice, it introduced some significant new features:

- The Commission can give conditional “up front” assurance of immunity in writing (to the first company to cooperate with the Commission);
- The Commission can confer immunity even to instigators and leaders of a cartel; and
- The Commission can grant full immunity even after an investigation has been initiated.

**Substantive conditions under the Commission’s leniency programme**

*Amnesty – full immunity from fines (Section A)*

5.4 Under the Leniency Notice (Section A, 8(a) and 8(b)), full immunity will be granted to either:

- The first company to provide the Commission with sufficient evidence to enable the Commission to take a decision to carry out a “dawn raid”; or
- The first company to submit evidence enabling the Commission to find an infringement of Article 81 EC Treaty.

---

8 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.

9 Commission Notice of 14 February 2002 on immunity from fines and reduction of fines in cartel cases (as amended in 2006 in particular by the addition of an annex with a procedure for corporate statements: see para. 5.11). This replaced an earlier 1996 Notice (on the non-imposition or reduction of fines in cartel cases).
5.5 These options are mutually exclusive so only one undertaking can qualify for full immunity. To obtain full immunity, a company must also:

> put an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

> 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 have taken steps to coerce other undertakings to participate in the cartel.

5.6 In contrast to the 1996 Leniency Notice, a company is no longer required to provide “decisive evidence” for a grant of full immunity, nor is it automatically excluded if it had acted as an instigator of, or played a determining role in, the cartel.

_Leniency - reduction of fines for “significant added value” (Section B)_

5.7 Under the Leniency Notice (Section B), favourable treatment is also available to companies 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 company 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 company to provide “significant added value”;

> 20-30% for the second company to provide “significant added value”; and

> 0-20% for any subsequent companies to provide “significant added value”.

5.8 The amount received within these bands depends upon the time at which they started to cooperate, the quality of evidence provided and the extend of cooperation throughout the proceedings. Overall, the scale of reduction bands has moved significantly in comparison with that provided for under the 1996 Leniency Notice.

5.9 Although firms 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

5.10 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.10

5.11 The Commission will seek to establish its case on the basis of documentary proof. If no documentary evidence exists (e.g. notes of meetings) a written or oral statement of a company representative may be sufficient (a so-called “corporate statement”). In practice, companies applying for amnesty or leniency usually provide such a statement in which they give their own description of the cartel activity and assist the Commission in understanding any related evidence (e.g. internal notes, minutes of meetings, etc.).

5.12 Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file.11 In practice, the Commission does not 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

5.13 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, a company 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 company is further required to list the evidence it proposes to disclose at a later agreed date. This descriptive list should accurately reflect - to the extent feasible - the nature and content of the evidence. The applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met. This procedure - sometimes described in both the US and the EU as “putting down a marker” (to save a company’s place in the queue) - allows a company to form an idea of whether or not it satisfies the conditions for immunity before disclosing its identity to the Commission.

10 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).

11 According to the Commission’s Notice on Access to the File (1997), 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.
5.14 In an attempt to increase legal certainty, for full immunity cases the Commission will now 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, starting from the day the evidence is provided. Hypothetical applications take about twice as long 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, immunity applicants should be informed speedily about their situation and, if they meet the substantive criteria, conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final Decision.

Application for fine reduction

5.15 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 of the specific band within which any reduction will be determined, at the latest on the day of adoption of a Statement of Objections. The specific amount to be imposed will be finalised in the Commission’s Decision.

Leniency policy in the UK

5.16 In price-fixing and market-sharing cases, the OFT is prepared to offer leniency treatment to undertakings which come forward with information. The UK leniency programme may take the form of total immunity or a significant reduction of fines.

5.17 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. Reductions of up to 50% of the penalty are available for firms that provide evidence of the existence and activities of a cartel but are not the first to do so. The cartel leader is also eligible for a reduction.

Multi-jurisdictional considerations

5.18 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 recent convergence between the EU and US leniency rules, it is nowadays easier for companies to apply simultaneously in both the US and Europe.

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

> Risk of the authorities being on the track already;

> The danger that another participant will get in first. If an undertaking wishes to benefit from full immunity, it needs to tell the Commission as soon as it has gathered evidence of the cartel’s existence, sufficient for the purposes of the Leniency Notice. Otherwise, it runs an increased risk that one of the other cartelists may blow the whistle first;

> The jurisdictions in which liability to sanctions may arise;

> The exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty. Although at the Community 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.

5.20 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 discovery rules in US proceedings, in particular 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 US civil proceedings. The Commission has been willing to assist in efforts to protect leniency applications from disclosure in the following ways:

• Asserting in the Leniency Notice that any written statement made vis-à-vis the Commission in relation to the leniency application forms part of the Commission’s file and may not, as such, be disclosed or used for any other purpose than the enforcement of Article 81;
• Intervening in pending US civil proceedings by means of *amicus curiae* where discovery of leniency corporate statements is at stake. The Commission has intervened in this way in a number of cases;

• Modifying its practice by accepting oral corporate statements ("paperless submissions").

5.21 In international cartel cases it may be advisable to make a paperless leniency application to the Commission via 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.

**NATIONAL LENIENCY PROGRAMMES (AS AT MARCH 2006)**

### A. EU COUNTRIES

<table>
<thead>
<tr>
<th>EU MEMBER STATES</th>
<th>LENIENCY PROGRAMME</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>✓</td>
<td>A leniency programme (broadly modelled on Commission’s Notice) established in 2006</td>
</tr>
<tr>
<td>Belgium</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2004</td>
</tr>
<tr>
<td>Cyprus</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2003</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2001</td>
</tr>
<tr>
<td>Denmark</td>
<td>No</td>
<td>A programme is under consideration</td>
</tr>
<tr>
<td>Estonia</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) established in 2004</td>
</tr>
<tr>
<td>Finland</td>
<td>✓</td>
<td>A leniency programme (broadly modelled on Commission’s Notice) introduced in 2004</td>
</tr>
<tr>
<td>France</td>
<td>✓</td>
<td>Leniency programme (closely mirroring Commission’s Notice) introduced in 2001</td>
</tr>
<tr>
<td>Germany</td>
<td>✓</td>
<td>Leniency programme (closely mirroring Commission’s Notice) introduced in 2001</td>
</tr>
<tr>
<td>Greece</td>
<td>✓</td>
<td>A leniency program (broadly modelled on Commission’s Notice) established in 2005</td>
</tr>
<tr>
<td>Hungary</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2001</td>
</tr>
<tr>
<td>Ireland</td>
<td>✓</td>
<td>Leniency programme introduced in 2001</td>
</tr>
<tr>
<td>Italy</td>
<td>No</td>
<td>A programme is under consideration</td>
</tr>
<tr>
<td>Country</td>
<td>Leniency Programme</td>
<td>Remarks</td>
</tr>
<tr>
<td>------------------</td>
<td>-------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Latvia</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2003</td>
</tr>
<tr>
<td>Lithuania</td>
<td>✓</td>
<td>Leniency is possible through the application of the general provisions in the Competition Act</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>No</td>
<td>A leniency programme is under consideration</td>
</tr>
<tr>
<td>Netherlands</td>
<td>✓</td>
<td>Leniency programme (broadly mirroring the EC system) introduced in 2002</td>
</tr>
<tr>
<td>Poland</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on Commission’s Notice) introduced in 2004</td>
</tr>
<tr>
<td>Portugal</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on the EC system) introduced in 2001</td>
</tr>
<tr>
<td>Slovenia</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>No</td>
<td>A leniency programme is under consideration</td>
</tr>
<tr>
<td>Sweden</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on EC Notice) introduced in 2002</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>✓</td>
<td>Leniency programme introduced in 2000</td>
</tr>
</tbody>
</table>

**B. OTHER JURISDICTIONS**

<table>
<thead>
<tr>
<th>SIGNIFICANT OTHER JURISDICTIONS</th>
<th>LENIENCY PROGRAMME</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>✓</td>
<td>Leniency programme (broadly modelled on US system) introduced in 2003</td>
</tr>
<tr>
<td>Brazil</td>
<td>✓</td>
<td>Leniency programme introduced in 1994</td>
</tr>
<tr>
<td>Canada</td>
<td>✓</td>
<td>Leniency programme updated in 2000</td>
</tr>
<tr>
<td>Israel</td>
<td>✓</td>
<td>Leniency programme has been introduced in 2004</td>
</tr>
<tr>
<td>Japan</td>
<td>✓</td>
<td>Leniency programme has been introduced in 2006</td>
</tr>
<tr>
<td>New Zealand</td>
<td>✓</td>
<td>Leniency programme has been introduced in 2004</td>
</tr>
<tr>
<td>Norway</td>
<td>✓</td>
<td>Leniency programme introduced in 2004</td>
</tr>
<tr>
<td>South Africa</td>
<td>✓</td>
<td>Leniency programme has been adopted in 2004</td>
</tr>
<tr>
<td>South Korea</td>
<td>✓</td>
<td>Leniency programme updated in 2005</td>
</tr>
<tr>
<td>Switzerland</td>
<td>✓</td>
<td>Leniency programme has been adopted in 2004</td>
</tr>
<tr>
<td>Turkey</td>
<td>No</td>
<td>A programme is under consideration</td>
</tr>
<tr>
<td>United States</td>
<td>✓</td>
<td>Original 1978 programme updated in 1993</td>
</tr>
</tbody>
</table>
6. JUDICIAL REVIEW

6.1 Commission decisions can be appealed to 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 CFI 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. CFI judgments may be appealed (on points of law only) to the European Court of Justice (“ECJ”).

6.2 Companies do not necessarily have to pay their fine immediately, if they lodge an appeal before the CFI. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest.
APPENDIX 1: STATISTICS ON EUROPEAN COMMISSION CARTEL ENFORCEMENT

In the last few years, the European Commission has noticeably stepped up its enforcement activity, sending a forceful message that cartel activity will be dealt with severely. While the figures at Tables A and B indicate that the number of Commission decisions imposing fines on cartels has declined since 2001, this does not take account of the large number of pending cartel cases. Most of those pending cases have been initiated as a result of leniency applications.

A. Number of Commission cartel decisions by year

B. Total Commission fines imposed on cartels by year (€ millions)
## C. Commission cartel decisions by year

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>-</td>
</tr>
</tbody>
</table>
| 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 | -    |
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) |
<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
</tr>
</thead>
</table>
| 2002 | Austrian Banks (Lombard Club) (11 June 2002)  
      | Methionine (2 July 2002)  
      | Dutch Industrial Gases (24 July 2002)  
      | Fine Arts Auction (30 October 2002)  
      | Plasterboard (27 November 2002)  
      | Methylglucamine (27 November 2002)  
      | Concrete Reinforcing Bars (17 December 2002)  
      | Speciality Graphites (17 December 2002)  
      | Nucleotides (17 December 2002) |
| 2003 | French Beef (2 April 2003)  
      | Sorbates (1 October 2003)  
      | Electrical and Mechanical Carbon and Graphite Products (3 December 2003)  
      | Organic Peroxides (10 December 2003)  
      | Industrial Copper Tubes (16 December 2003) |
| 2004 | Copper plumbing tubes (3 September 2004)  
      | French beer (29 September 2004)  
      | Spanish raw tobacco (20 October 2004)  
      | Haberdashery products (26 October 2004)  
      | Choline chloride animal feed additive (9 December 2004) |
| 2005 | Monochloroacetic acid (19 January 2005)  
      | Industrial thread (14 September 2005)  
      | Italian raw tobacco (20 October 2005)  
      | Industrial bags (30 November 2005)  
      | Rubber chemicals (21 December 2005) |

D. Commission cartel cases with highest overall fines (€ millions)
E. Highest individual fines in cartel cases

<table>
<thead>
<tr>
<th>Party</th>
<th>Fine</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hoffman-La Roche</td>
<td>€462.0m</td>
<td>Vitamins (2001)</td>
</tr>
<tr>
<td>BASF</td>
<td>€296.2m</td>
<td>Vitamins (2001)</td>
</tr>
<tr>
<td>Lafarge</td>
<td>€249.6m</td>
<td>Plasterboard (2002)</td>
</tr>
<tr>
<td>Arjo Wiggins Appleton</td>
<td>€184.3m</td>
<td>Carbonless Paper (2001)</td>
</tr>
<tr>
<td>BPB</td>
<td>€138.6m</td>
<td>Plasterboard (2002)</td>
</tr>
<tr>
<td>Degussa</td>
<td>€118.1m</td>
<td>Methionine (2002)</td>
</tr>
<tr>
<td>Hoechst</td>
<td>€99.0m</td>
<td>Sorbates (2003)</td>
</tr>
<tr>
<td>Knauf</td>
<td>€85.8m</td>
<td>Plasterboard (2002)</td>
</tr>
<tr>
<td>Akzo Nobel</td>
<td>€84.4m</td>
<td>Monochloroacetic Acid (2005)</td>
</tr>
<tr>
<td>SGL Carbon</td>
<td>€80.2m*</td>
<td>Graphic Electrodes (2001)</td>
</tr>
</tbody>
</table>

* reduced on appeal to €69.1m
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.

<table>
<thead>
<tr>
<th>EU level</th>
<th>UK level</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substantive law</strong></td>
<td><strong>UK level</strong></td>
</tr>
<tr>
<td>Articles 81(1) and 81(3) Treaty of Rome apply if cartel:</td>
<td>Chapter I of the Competition Act 1998 (modelled on Article 81 EC Treaty) applies if cartel:</td>
</tr>
<tr>
<td>– has object or effect of preventing, restricting or distorting competition within the EU; and</td>
<td>– has object or effect of preventing, restricting or distorting competition within the United Kingdom; and</td>
</tr>
<tr>
<td>– may affect trade between Member States</td>
<td>– may affect trade within the United Kingdom</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EU level</th>
<th>UK level</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Key additional legislation/rules</strong></td>
<td><strong>UK level</strong></td>
</tr>
<tr>
<td></td>
<td>Human Rights Act 1998</td>
</tr>
<tr>
<td><strong>Enforcement authorities</strong></td>
<td><strong>EU level</strong></td>
</tr>
<tr>
<td>-----------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>• European Commission (DG Competition)</td>
<td></td>
</tr>
<tr>
<td>• National Competition Authorities (NCAs) in each of the 25 EU Member States may apply and enforce Article 81 in its entirety by virtue of Regulation 1/2003 (and indeed must apply Article 81 in parallel with national competition legislation to a cartel affecting trade between Member States).</td>
<td></td>
</tr>
</tbody>
</table>

**NB:** This EU checklist focuses on European Commission’s powers; for NCAs’ powers when applying Article 81, 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 81.

<table>
<thead>
<tr>
<th><strong>Fines for substantive infringement</strong></th>
<th><strong>EU level</strong></th>
<th><strong>UK level</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>European Commission may impose fines of up to 10% of worldwide group turnover.</td>
<td></td>
<td>OFT may impose fines of up to 10% of worldwide group turnover</td>
</tr>
<tr>
<td>• Highest individual fine in cartel case: €462 million (Hoffman La Roche in Vitamins, 2001)</td>
<td></td>
<td>• Highest individual fine in cartel case: £17 million (Argos in Argos Littlewoods and Hasbro, 2003)</td>
</tr>
<tr>
<td>EU level</td>
<td>UK level</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
<td></td>
</tr>
<tr>
<td><strong>Powers of inspection</strong> (<em>&quot;dawn raids&quot;</em>)</td>
<td><strong>Premises:</strong> 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.</td>
<td></td>
</tr>
<tr>
<td><strong>Powers to enter:</strong> 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.</td>
<td><strong>Premises:</strong> 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 require warrant under new proposals).</td>
<td></td>
</tr>
<tr>
<td><strong>Powers to seal:</strong> Officials may seal premises to prevent tampering (e.g. overnight before returning to continue search).</td>
<td><strong>Powers to enter:</strong> 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). 2 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).</td>
<td></td>
</tr>
<tr>
<td><strong>On-the-spot oral statements:</strong> Commission may require on-the-spot explanations of documents/information it finds in the course of an inspection visit.</td>
<td><strong>Powers to seal:</strong> Available for a maximum time period of 72 hours.</td>
<td></td>
</tr>
<tr>
<td><strong>Right to legal representation:</strong> 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.</td>
<td><strong>On-the-spot oral statements:</strong> 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.</td>
<td></td>
</tr>
<tr>
<td><strong>Right to legal representation:</strong> 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).</td>
<td><strong>Right to legal representation:</strong> 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).</td>
<td></td>
</tr>
<tr>
<td>EU level</td>
<td>UK level</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
<td></td>
</tr>
<tr>
<td><strong>Other investigatory powers</strong></td>
<td><strong>Requests for information:</strong> Commission may require companies or individuals (by Article 18 request or decision) to supply information in their possession or under their control  &lt;br&gt; <strong>Requests for oral evidence:</strong> Commission has no power to require individuals to make statements or provide evidence under oath, but may take statements on a voluntary basis  &lt;br&gt; <strong>Covert surveillance:</strong> 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</td>
<td><strong>Requests for information:</strong> OFT may require companies or individuals (by Section 26 Notice) to supply information in their possession or under their control  &lt;br&gt; <strong>Requests for oral evidence:</strong> 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  &lt;br&gt; <strong>Covert surveillance:</strong> OFT has the power to carry out covert surveillance (e.g. bugging of business or residential premises) in the context of criminal investigations. New RIP Orders allow OFT to conduct directed surveillance (essentially monitoring of people’s movements) and to use informants in both criminal and civil investigations</td>
</tr>
<tr>
<td><strong>Privilege against self-incrimination</strong></td>
<td>Recognised - although precise scope not clearly defined. No absolute right to silence. However, Commission cannot compel a company to provide oral or written answers which would involve an admission of the existence of an infringement. Community courts draw distinction between:  - requests intended to secure purely factual information; and  - requests relating to the purpose of actions taken by the individual/company</td>
<td>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</td>
</tr>
<tr>
<td><strong>Legal professional privilege</strong></td>
<td>Recognised for written advice and communications between a company and its EU-qualified external lawyers (not for in-house lawyers)</td>
<td>Recognised for written advice and communications between a company 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</td>
</tr>
<tr>
<td>EU level</td>
<td>UK level</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
<td></td>
</tr>
</tbody>
</table>
| **Leniency programme** | Developed system (under Commission Leniency Notice) enables cartel participants to seek leniency by applying to the Commission. This includes:
  - **Full immunity**: available at the discretion of the Commission if the participant provides Commission with sufficient information (a) to take a decision to carry out a “dawn raid” or (b) to find an infringement of Article 81, provided the participant:
    - is “first in the door”; i.e. no other undertaking has reported the activity to the Commission;
    - puts an end to its involvement in the cartel no later than the time it discloses the cartel;
    - cooperates fully with the Commission on a continual and expeditious basis; and
    - has not taken steps to coerce other undertakings to participate in the cartel | 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:
  - **Full immunity for companies**: 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:
    - 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)
  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, and provided the same conditions as above are satisfied |
<table>
<thead>
<tr>
<th>EU level</th>
<th>UK level</th>
</tr>
</thead>
</table>
| • *Reduction of fines*: when a participant provides evidence representing “significant added value” and immediately withdraws its involvement, 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:  
  - 30-50% for first undertaking;  
  - 20-30% for second undertaking; and  
  - 0-20% for subsequent undertakings |
| • *Reduction of fines*: an undertaking which provides evidence of the existence and activities of cartel activity before written notice of a proposed infringement decision is given, but is not the first to come forward, or does not qualify for total immunity, may be granted a reduction in the level of financial penalties of up to 50% at the discretion of the OFT, provided it:  
  - 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). |
<p>| • <em>Additional reduction or “Leniency Plus”</em>: 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 |</p>
<table>
<thead>
<tr>
<th>EU level</th>
<th>UK level</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• 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 leniency is granted to the undertaking for Competition Act purposes, the OFT will normally also be prepared to issue no-action letters to individual employees</td>
</tr>
<tr>
<td>Liability for individuals</td>
<td>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)</td>
</tr>
<tr>
<td></td>
<td>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 (NB: This cartel offence came into force on 20 June 2003 and to date there have been no prosecutions)</td>
</tr>
<tr>
<td></td>
<td>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</td>
</tr>
<tr>
<td>EU level</td>
<td>UK level</td>
</tr>
<tr>
<td>----------</td>
<td>----------</td>
</tr>
</tbody>
</table>
| Civil actions | For: Third parties who suffer loss as a result of cartel behaviour in breach of Article 81 can sue for damages before the national courts (see e.g. UK checklist);  
Class actions/punitive damages/Direct-indirect purchasers: Rules on procedure, admissibility and quantification of damages vary between Member States (see e.g. UK checklist) | For: Third parties who suffer loss as a result of cartel behaviour in breach of Article 81 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 81)  
Direct/indirect purchasers: 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)  
Class actions: Representative bodies are able to bring damages actions before the Competition Appeal Tribunal on behalf of groups of named and identifiable consumers  
Punitive damages: No special rules apply. Plaintiff must prove causation and quantify damages |
When considering actual or potential cartel proceedings, it is important to pay careful attention to the wider context and 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 active 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 company’s own legal department and senior management – a strategy tailored to the needs of the particular company. 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 company and the different risks to which the company 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 a company’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 marketplace (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 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/destuction 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.
Introduction and key principles

This Note 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;
- 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. 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 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 production**

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 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.

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: DEALING WITH A DAWN RAID

Introduction and checklist of Do’s and Don’ts

This Note provides practical advice for the effective handling of surprise inspection visits, whether by the European Commission (DG Competition) or the national competition authorities (NCAs).14

Subject to the limits set out below, a company faced with a surprise investigation is generally under a duty actively to cooperate throughout the investigation. Failure to cooperate may result in punitive action being taken against the company (and sometimes even against individuals within the company). The company does, however, enjoy certain fundamental rights of defence during the investigation.

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 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 of where you are and your telephone contact details so they can reach you)

☑ be aware that anything you say to the officials may be used against the company and possibly yourself

☑ identify which of the officials is the team leader. Ask to see, and check carefully, the written authorisation/decision providing the basis for the investigation. You are entitled to a copy. It should state the purpose and scope of the investigation. Find out as precisely as you can what it is the officials are looking for

☑ if asked, secure documents or equipment while the officials wait to proceed with their inspection

☑ check and copy the identity documents of the officials (or ensure that someone has already done so)

☑ try to arrange for each official to be assisted/shadowed by a member of staff and, if possible, also a lawyer

☑ keep as full a record as you can of what the officials ask for and inspect, of questions asked and answered, and of any other discussions

☑ take your own copy of all documents copied by the officials (including CD-ROMs) and of their document inventory

14 The powers of officials carrying out Commission investigations are explained at Part 3 of the main publication. There are some differences in the scope of the investigatory powers of the Commission and the NCAs, as indicated at Appendix 2, which compares the Commission’s powers with those of the Office of Fair Trading.
seek immediate legal advice if at any stage you are uncertain as to your rights and responsibilities

remain calm and courteous throughout the visit

DON'T

refuse admission or keep the officials waiting unduly

tell any person outside the company (except the company’s external lawyers) what is happening

delay in seeking to contact any executive (however senior or wherever they may be) the officials ask to see

destroy or delete any records, paper or electronic

appear unhelpful or obstruct the investigation

sign anything at the officials’ request without legal advice

Initiation of the investigation

The officials are likely to ask to see a person or persons whom they will identify by name or rank and whom they will have chosen as being both sufficiently senior and likely to be able to satisfy the requirements of the investigation. This may, for example, be the CEO, company secretary, legal director, sales director, a senior sales manager or the head of a relevant department. They may also ask to see a senior member of the company’s IT staff in order to safeguard data held electronically on the company’s computer system. Often, the officials will be unwilling to disclose to reception staff their identities or the nature of their business (other than perhaps to say that they are there on official or governmental business).

Officials conducting Commission inspection visits typically arrive at the company’s premises between 9 am and 10 am. Where an investigation involves visits to more than one company, they will normally be simultaneous. In the case of coordinated raids involving different time zones (e.g. the US and/or Japan), this will affect the timing of the visit.

Commission officials have no power of forcible entry. However, if an investigation were obstructed, the relevant NCA could make use of a warrant to enable the Commission and accompanying officials to enter and search the premises (if necessary using force to gain entry - but not against any persons). The NCA will usually obtain such a warrant as a matter of course in any event in case it may be needed.

The officials should be treated courteously. It may make sense to receive them in the office of the person they have asked to see, in the office of someone identified by the company
slaughter and may

(preferably ahead of any visit) as having overall responsibility in the event of an inspection visit or in a convenient meeting room which is not visible to other visitors. That said, the officials will generally not accept being kept waiting in a reception area for more than a few minutes. While the team leader waits to be introduced to the company representative they have identified, the other officials on the team may take up positions in corridors or waiting areas to observe what is going on (e.g. to be sure that no attempts are being made to destroy evidence).

On being received by the company representative, the inspection team leader should present (i) their identity documents (which you should check and copy) (ii) a copy of the authorisation or decision pursuant to which they are acting (which you should also check and copy) and (iii) a note setting out the powers of the investigating officers and informing you of your rights to take legal advice. The authorisation will usually only state in general terms the subject of the inspection.

Once there is a clearer understanding of the purpose of the investigation, it should be possible to start putting together the full team to represent the company during the visit.

The company’s in-house counsel should generally attend as soon as possible. External lawyers should also be instructed to help coordinate the company’s response to the investigation and ensure that the company’s interests are protected during the inspection visit. In the case of Commission investigations, the company is entitled to take legal advice - provided the investigation is not unduly delayed whilst it is procured. Generally, officials should be prepared to allow up to an hour for legal advice to be obtained, provided they are allowed to enter and wait in the offices they want to search. Where, however, a company has in-house lawyers, the officials will usually not be prepared to delay their inspection for the arrival of external lawyers. Variations in practice do exist under national rules. Even if the inspection is delayed pending the arrival of lawyers, the officials are likely to require assurances that the company will not in the meantime remove any documents from the premises, destroy documents (including materials held electronically) or warn third parties of the inspection. Generally, the company should agree to, and respect, these assurances; it is vital to ensure that employees understand these rules. The company may also need to take steps to suspend external e-mail. While waiting for the lawyers to arrive, the time can usefully be spent informing the inspection team about the company’s organisational structure and office lay-out.

**General conduct of the investigation**

After the general introductory matters described above, the officials are likely to split up and each will go to the office of a different individual whose name they may well have ascertained before arrival. They will not be prepared to sit in a room and have materials brought to them, but will want instead to see the materials *in situ*. They may also want to check secretarial bays and central filing records.

---

15 In the UK for example, although the applicable rules do not expressly give the company the right to legal representation during inspection visits, the Office of Fair Trading will, on request, allow a "reasonable time" for legal advisers to arrive before proceeding with their inspection (but they are unlikely to extend a greater latitude than is given by Commission officials).
Ideally, the company should arrange for each official to be “assisted” or “shadowed” throughout the investigation by someone from the company (if possible a lawyer). This person can then keep a note of what the official is looking at and asking to see, of questions asked and answered (see further “oral explanations” and “official note”), and, more generally, ensure that the officials do not overstep the bounds of their authority. This can help the company to try to ascertain more precisely what it is the officials are looking for and what grounds they already have to suspect the company may also be implicated. Shadowing is particularly important when the officials are searching the e-mail system which might contain materials which are outside the scope of their authority or are privileged. Otherwise they might open the e-mail and obtain privileged advice.

DG Competition and the NCAs generally take the view that it is for them to decide whether or not a particular document is relevant to their investigation. Accordingly, the officials will not be content to allow the company to vet materials before handing them over for inspection. The sorts of materials which the inspectors will typically look at include:

> Financial, sales and production records;
> Price lists;
> Files on imports/parallel traders;
> Customer correspondence;
> Management meeting minutes;
> Trade association minutes;
> The contents of briefcases;
> Diaries;
> Travel records;
> Telephone/fax print outs; and
> E-mails.

Where information is held electronically and password-protected it will be necessary to supply the passwords. The Commission will request access to the company’s e-mail, and may want to freeze certain e-mail accounts and copy their contents onto a CD-ROM. As for paper documents, remember that e-mail exchanges between the company and its lawyers, including attachments,
are privileged (see section on “privileged documents” in this Note). While the officials cannot require disclosure of certain exchanges between the company and its lawyers, it is not possible to refuse to disclose documents simply on the basis that they contain business secrets.

The officials will identify those documents which they wish to copy, e.g. by putting a Post-It sticker on the document (identifying the number of pages to be copied). They will ask for access to a photocopier. They will be prepared to pay reasonable copying charges. In practice it is sensible for the company to undertake the photocopying and take extra copies, since the company will need to make sure that it and its legal advisers have copies of the materials the officials take away.

Under no circumstances should anyone destroy any documents (including e-mail, or other information held on computer) which may be relevant to the investigation.

Where a dispute over relevance does arise:

> It may be sensible to suggest that the document is put to one side, and the issue revisited at the end of the day. Sometimes, investigating officers will be prepared to concede that a document - although in their view relevant - is not so significant that it is worth arguing over, and they will agree not to take a copy;

> Where a disagreement as to the relevance of particular documents cannot be resolved during the inspection visit, the officials may agree that the disputed documents will be put into the possession of external or in-house lawyers (or conceivably an individual lawyer among the inspection team) pending a further view on the position from the case officers. Those charged with evaluating the document should not include the case officers; once the latter have had a chance to consider the issue, their position may change;

> If the dispute cannot be resolved, the company may be left with no choice but to hand over the documents in question, while ensuring that the company’s objections are clearly made known to the Commission or NCA. This should be done in liaison with the company’s lawyers.

It is usual in Commission investigations for the officials concerned to prepare an inventory listing the documents of which they are taking copies (generally including a short description of the document, the number of pages and where it was found). This provides a useful record for the company; you are entitled to a copy. At the end of the inspection, the schedules should be checked against the copy documents for discrepancies.

It is polite for someone from the company to offer to lunch with the officials. They are, however, unlikely to discuss the investigation in substance over lunch. In Commission investigations carried out across a number of sites, officials may contact each other (by mobile telephone) during the course of the day if they uncover information which may be relevant to inspectors at other sites. Typically inspection visits take place over two days (often a Tuesday and Wednesday); this is so that they can compare notes at the end of the first day, and return the next day if there are
specific points to follow up. In two-day inspection visits, the Commission may require that all laptops are locked in sealed cupboards overnight.

Privileged documents

Investigating officials cannot require the disclosure of certain exchanges between a company and its lawyers. The scope of legal privilege is discussed in Part 3 of the main publication. A few practical points are noteworthy:

> The onus is in practice on the company to satisfy the officials that documents are privileged. In practice, officials will often be satisfied that a document is privileged if, for example, this is obvious on the face of the document (e.g. a law firm’s letterhead), or if the company gives a brief explanation of the nature of the document and the circumstances of its creation. In principle, any e-mails from or to the company’s external lawyers should automatically be considered as privileged;

> As a general matter, it will reduce the risk of improper disclosure if the company has maintained separate files for lawyers’ advice. Likewise, legal advice and requests for advice should be clearly marked as legally privileged and confidential;

> If there is a difference of view between the company and the investigating officials as to whether or not a document is privileged, it may be sensible to suggest that (as with disputes over relevance) the document is put to one side, and the issue of privilege revisited at the end of the day. Sometimes investigating officers will be prepared to concede that a document - although in their view not privileged - is not so significant that it is worth arguing over and they will agree not to take a copy;

> Where a dispute over privilege cannot be resolved during the inspection visit, the disputed documents can be put into the possession of external or in-house lawyers pending a further view on the position from the case officers. Once the latter have had a chance to consider the issue, their position may change.

Oral explanations

The scope of the power to ask for on the spot oral explanations is addressed at Part 3 of the main publication, but is also considered in some detail below. There are, first, some general points which it is sensible to try to observe:

> As a rule of thumb, the officials can insist that the company’s representatives explain handwriting, technical terms, abbreviations, figures and obscure references in documents; Likewise, they could ask for explanations such as “Who is this person referred to here?”, or “Can you provide a copy of the document mentioned here?”. However, if they ask for explanations beyond that, the company can first insist on taking legal advice;
Company representatives should be careful not to give misleading or inaccurate explanations. If unsure of the answer to a question (for example, if it relates to a period during which the individual was not with the company), then this should be explained. Thus, it is perfectly acceptable to qualify answers by saying “so far as I am aware” or to say “I don’t know” (perhaps offering to see whether anyone else knows and to reply later in writing). Where a question is unclear, it is acceptable to ask for clarification before replying.

Company representatives should avoid the temptation to “chat” or volunteer unsolicited information during the inspection. If staff are “over-cooperative” there is even a danger that the company will compromise its ability to make a successful leniency application following the inspection visit.

The officials may produce their own written note of questions asked and answers, and ask a representative of the company to sign it to confirm that it is an accurate record. It will generally be advisable to discuss with the company’s legal advisers before signing.

**Official note**

At the conclusion of the inspection visit, the officials should prepare a note or summary of the visit or of certain points arising and ask a representative of the company to sign it. It should not be signed unless it is accepted as an accurate record; any differences can be made clear on the face of the note. The officials may record any particular points of dissatisfaction that arose and the company is entitled to do likewise.

Where possible, the terms of the official note should be agreed with the company’s lawyers before it is signed by the representative of the company, especially where questions have arisen as to whether particular documents are covered by privilege, or fall outside the scope of the authority.

**Use of information**

The competition authorities draw a distinction between confidential information in general and business secrets (as an especially sensitive category of the former). Business secrets cannot be disclosed without the consent of the undertaking to which they relate. Other confidential information may be disclosed, if necessary for the proper conduct of the investigation. Following the inspection, the company should consider, in liaison with its lawyers, whether there are any business secrets in the material taken by the officials.

The competition authorities may use information obtained to establish the existence of any infringements of the competition rules. In particular, they do not regard themselves as precluded from using information obtained on a raid on Firm A, which happens to disclose the existence of some unlawful activity by Firm B, to spark off a separate investigation or infringement finding in relation to that second firm. DG Competition and the NCAs should not allow the information obtained on inspection visits to be used for other unrelated purposes, such as investigations by other authorities dealing with tax matters.
SLAUGHTER AND MAY EUROPEAN COMPETITION LAW WORKING GROUP

The Slaughter and May Competition Group has established particularly close ties with the competition practices of five other leading European law firms, so that the participating firms can provide a coordinated high-quality service to clients covering the leading European jurisdictions.

FRANCE
Bredin Prat
130 Rue du Faubourg Saint-Honoré
Paris 75008
T +33 1 44 35 35 35
F +33 1 42 89 10 73

ITALY
Bonelli Erede Pappalardo
Via Barozzi 1
Milan 20122
T +39 02 77 1131
F +39 02 77 113260
www.beplex.com

GERMANY
Hengeler Mueller
Benrather Strasse 18-20
40213 Düsseldorf
T +49 211 8304-0
F +49 211 8304-170
www.hengeler.com

SPAIN
Uría Menéndez
c/ Príncipe de Vergara 187
28003 Madrid
T +34 91 586 0400
F +34 91 586 0403/4
www.uria.com

SWEDEN
Mannheimer Swartling
Norrmalmstorg 4
Box 1711
11187 Stockholm
T +46 8 505 765 00
F +46 8 505 765 01
www.mannheimerswartling.com