Cartels: EU law and practice

A Practice note considering the application of Article 101(1) to cartels, reviewing the European Commission’s investigation procedure and its policy for imposing fines and granting leniency and looking at practical issues that may arise. See also Summary of EU cartel cases.

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The European Commission has identified cartels as one of the worst manifestations of anti-competitive conduct by competing companies. One of its primary policy objectives is to uncover and outlaw secret cartels, to punish cartel participants and to deter such activity in the future. "Cartel busting" has therefore been allocated higher priority and greater resources within the Commission in recent years. The Commission created a separate division within DG Competition dealing exclusively with cartel investigations in order strengthen its “fight” against cartels. This resulted in a greater number of cases being actively pursued and prosecuted.
Further, since 1 May 2004, the Commission has been freed from one aspect of its previous competition enforcement role, namely the review of agreements notified to it for exemption (the Modernisation Regulation, Regulation 1/2003 OJ 2003 L1/1). The Commission anticipated that it would, therefore, be able to dedicate even greater resources to the investigation of serious EU-wide infringements of competition law and, in particular, cartels.

This note considers the Commission’s application of Article 101 to cartel activity, the way such cases are investigated and how fines are calculated. It contains practical guidance on factors to bear in mind when advising a company about the consequences of its involvement in cartel activity.

Overview

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 81 of the EC Treaty) prohibits agreements, decisions and concerted practices between or amongst undertakings which have as their object or effect the restriction, distortion or prevention of competition within the EU and which affect trade between EU member states.

Arrangements which infringe Article 101(1) are void and unenforceable. In addition, participants in such arrangements are exposed to damages claims from third parties who have been detrimentally affected, can be fined up to a maximum of 10% of their total worldwide turnover in the preceding financial year by the Commission and/or can be fined by member states (the level of fines will be established by national legislation, but in most cases this follows the general EU position).

It is worth noting that an infringement decision by the Commission or by a member state authority can be used as evidence in damages actions brought before national courts, which is becoming increasingly common and may well increase as a result of the new directive on competition damages actions, adopted in November 2014 (see Legal update, Commission welcomes Council adoption of antitrust damages directive (www.practicallaw.com/7-587-5926)).

The application of Article 101(1) is considered in more detail in the Practice note, Article 101 (www.practicallaw.com/A14484).

Even if an arrangement restricts or distorts competition under Article 101(1) it may meet the criteria for exemption from the prohibition by virtue of the application of Article 101(3). Article 101(3) will apply if the arrangement contributes to improving the production or distribution of goods or services or promoting technical or economic progress, provided that the results will benefit consumers and the benefits outweigh any adverse effect caused by the restrictions. Further, the restrictions must not be greater than is reasonably needed to achieve these benefits (see further the Practice note, Article 101: Exemption under Article 101(3) (www.practicallaw.com/0-107-3707)).

The term cartel is generally used to describe an informal association or arrangement involving two or more competing companies whereby the members discuss and exchange information about their businesses or reach agreements about their future conduct, with the intention of limiting competition between them and increasing their own prices or profitability. Cartels are generally conducted covertly and will inevitably involve one or more of the so-called "hard core" restrictions of competition law, such as price-fixing, bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market-sharing. As such, the actions of a cartel will infringe Article 101(1) of the TFEU.

Not all arrangements between competitors are viewed as illegal cartels or give rise to a serious infringement of Article 101(1). For example, competitors often enter into joint research and development agreements or industry standard agreements. Such agreements are usually formalised in writing, are conducted openly and often receive some publicity. In so far as they may involve any restriction of competition, it is quite possible that they would meet the criteria for exemption under Article 101(3) (see further the Practice note: EU Collaborative arrangements (www.practicallaw.com/A14478)).

By contrast, cartels, in the sense discussed in this note, are conducted secretly. Secret cartels will almost inevitably have the object, as well as the effect, of raising or maintaining prices and increasing the participating members’ profits beyond what would be possible in a fully competitive market. They will therefore almost certainly be found to have a negative effect on consumers and on the industry as a whole and to have no countervailing benefits. Therefore, even where the arrangements are formalised in written agreements (which is very rarely the case) there would be no scope for arguing that the arrangements are exempt from the application of Article 101(1).

Classic cartel cases rarely give rise to novel issues of law in terms of the application of Article 101(1) to the facts. The practices engaged in by cartel members are almost always prima facie infringements of Article 101(1), leaving little or no debate as to whether the law has been breached once the facts have been proven. However:

• Cartel cases raise procedural issues relating to the way in which the Commission obtains information and evidence. Given the covert nature of cartels, the Commission needs to conduct a thorough investigation to obtain sufficient evidence. In most cases it will conduct a surprise investigation (dawn raid) at the premises of suspected cartel members and request significant volumes of information. Issues such as legal privilege, confidentiality and the rights of the defence are therefore significant.

• A high proportion of Commission decisions in cartel cases are appealed to the European General Court (and then in turn to the European Court of Justice (ECJ)). Appeals often challenge the way in which the Commission has interpreted the evidence it has uncovered, whether in terms of the activities of the cartel as a whole or a particular company’s involvement. Appeals are also often
based on claims that the companies’ rights of defence have been breached or that the Commission has committed other procedural
breaches invalidating the decision. In most cases the appeal will challenge the level of any fine imposed and the way in which the
Commission has calculated it. A number of recent appeals have also challenged the Commission's decision to attribute liability to the
parent company(ies) of the direct cartel participant for the cartel (see Practice note, Attribution of liability for cartel fines in EU
law (www.practicallaw.com/6-575-8305)).

• There are practical and strategic issues for companies to consider when they are, or may be, guilty of an infringement. In particular,
involvement in cartels potentially exposes a company to very significant fines. How to minimise liability by co-operating with a
Commission investigation, or even by initiating one, is a very important question.

All Commission decisions in relation to cartel cases since 2000 are summarised in Summary of EU cartel
cases (www.practicallaw.com/A30483).

Application of Article 101 to cartels

The most common forms of cartel activity are:

• **Price-fixing.** This may involve an agreement to set minimum or target prices for particular customers or for sales in general. There
may be co-ordination of the timing and level of price increases. Absolute price levels may be fixed in an attempt to drive prices up
and prevent price competition between the participants. Price-fixing and other pricing infringements of Article 101(1) are discussed in
detail in the Practice notes, EU Pricing: Price-fixing (www.practicallaw.com/9-107-3699) as well as EU Co-operation between

• **Market-sharing.** This may involve an agreement to allocate particular customers or territories to individual cartel members. Market-
sharing across national boundaries is likely to have the effect of preventing imports or exports between countries (see also EU Co-
operation between competitors: Agreements dividing markets (www.practicallaw.com/5-107-3700)).

• **Limiting output or sales.** Sales or production quotas are often used as a means of controlling the market position of the cartel
participants and maintaining higher prices (see also EU Co-operation between competitors: Agreements limiting
production (www.practicallaw.com/5-107-3700)).

• **Bid-rigging.** This is another form of market-sharing and may contain elements of price-fixing. It arises where companies agree the
outcome of a tender process amongst themselves either by deciding in advance which company will bid or who will bid the best
price. Bid-rigging eliminates fair competition from a tender process and so removes the customers’ free choice. It will almost
certainly lead to the customer paying higher prices (see EU Co-operation between competitors: Collusive
tendering (www.practicallaw.com/5-107-3700)).

• **Information exchange.** The members of a cartel often agree to share confidential and commercially sensitive information about
their sales, prices and customers. This information may be used as a way of monitoring or enforcing compliance with other
arrangements, but exchanges of information of this kind are very likely to breach Article 101(1) in their own right (see EU Co-
operation between competitors: Exchanges of information (www.practicallaw.com/5-107-3700)).

When prosecuting a cartel the Commission must analyse whether the activities of the cartel satisfy each of the necessary elements of
an infringement of Article 101(1):

• Whether there is an agreement or concerted practice between undertakings (for the definition of "undertaking" see Practice note,
Article 101: Undertaking (www.practicallaw.com/0-107-3707)).

• Whether there is an effect on trade between EU member states.

• Whether the agreement or concerted practice has the object or effect of restricting, distorting or preventing competition in the EU.

• Whether the effect on competition is appreciable.

Agreement or concerted practice

Article 101(1) applies whether or not any agreement is formalised, documented or expressly confirmed by the parties (see further the
Practice note, Article 101: Agreement, decision or concerted practice between undertakings (www.practicallaw.com/0-107-3707)). This
can be of particular relevance in cartel cases where there is no written document setting out the agreement between the parties and the
infringement of Article 101(1) arises from practices that have developed on an informal basis.

By way of example, one cartel may operate under a written code, which has been expressly endorsed by each party and which sets out
each party’s obligations and penalties for non-compliance. This would clearly be an agreement under Article 101(1). However, the
companies in another cartel may not have reached any formal agreement. They may, however, hold regular meetings during which they

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The concept of "concerted practices" was included within the Article 101(1) prohibition to catch informal co-operation between competitors. Concerted practices fall short of an actual agreement but consist of direct or indirect communication or co-operation between companies, the object or effect of which is to influence the conduct of competitors on a market.

Whether particular conduct is technically an "agreement" or a "concerted practice" is not always clear. These are not wholly distinct concepts. Taking the example above, the discussion of target prices could be seen to be an agreement if there was sufficient evidence of the parties' shared understanding and intentions. Alternatively, it would almost certainly be found to be a concerted practice as there would be evidence of contact between the parties and the intention behind the pricing discussion, and/or its effect, to influence the pricing policies of the individual companies.

A common form of concerted practice, falling short of an actual agreement, is the exchange of sensitive business information. If the Commission discovers evidence that competitors have been meeting and discussing prices or other sensitive market information then, in the absence of any innocent justification, the Commission is likely to presume that there has been an illegal concerted practice. This will be the case even if there is no evidence of an actual agreement to act on the information or of subsequent parallel conduct. The Commission's view is likely to be that the companies involved will have eliminated the uncertainty about the actions of other market participants and they will generally be assumed to have taken this into account when determining their own policies. Depending on the nature of the information exchanged this will be an infringement of Article 101(1).

Parallel behaviour by industry participants, such as simultaneous price increases, creates a suspicion of the existence of a concerted practice. In the Wood Pulp II case (Case C-129/85 [1988] ECR 5193) the ECJ confirmed that parallel behaviour is not in itself conclusive evidence of a concerted practice, unless there is no other possible explanation (such as increased price of a major raw material) for the behaviour. However, where there has been parallel conduct over a long period, or on a regular basis, this is likely to be particularly damning and may give rise to a rebuttable presumption that this is the result of a concerted practice.

The ECJ has recognised that it is normal for cartel activities to take place clandestinely, for meetings to be held in secret and for there to be minimal associated documentation. Therefore, even if the Commission discovers evidence explicitly showing unlawful contact between traders, this will normally be only fragmentary and sparse, such that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland and Others v Commission [2004] ECR I–123).

Cartels generally operate over a period of time and they therefore involve a number of individual infringements of Article 101(1), whether individual agreements or separate concerted practices. The infringement of Article 101 will usually be analysed as a single continuing infringement comprising the series of acts over the time frame in which the cartel operates. However, it is worth noting that, in a recent case, the ECJ ruled that the presumption of a causal connection between a concerted action (information exchange) and conduct on the market can apply even if the concerted action is the result of a single meeting between the undertakings (Case C-9/08 T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit; see Legal update, ECJ ruling on whether a concerted practice arising from a single meeting has an anti-competitive object (www.practicallaw.com/7-386-2851)).

Effect on trade between member states

Where a cartel involves companies from more than one member state then the cartel's effect on trade between member states can be demonstrated easily. Even national cartels (such as Luxembourg Brewers, (COMP/37.800, OJ 2002 L253/37) German Banks (COMP 37.919, OJ 2003 L15/1) and Dutch Industrial Gases (COMP/36.700, OJ 2003 L84/1) have been found to have an effect on member state trade where the cartel has an impact on the imports into and exports from the country in question.

Cartels involving only companies based outside the EU/EEA will be caught by Article 101(1) where the products of the parties are sold in the EU/EEA and there is therefore a knock-on effect on the EU/EEA market(s).

For example, the Lysine cartel (Amino Acids - COMP/36.545, OJ 2001 L152) involved US, Korean and Japanese companies only. However, the Commission had no problem in finding that there was an appreciable effect on trade between EU/EEA member states on the basis that the market was characterised by inter-state trade. There was only one manufacturer based in the EEA with plants in France and Italy. All lysine used elsewhere in the EEA therefore had to be imported from France or Italy, from outside the EEA or from the EEA country into which the product was first imported. All the parties to the cartel imported products into the EEA and the cartel therefore affected a very substantial part of all EEA trade in the product.

The impact of the cartel in the European market may also be significant in setting fines. In considering appeals against the Lysine cartel decision, the General Court held that the Commission had erred in the basic level of the fine by using the worldwide turnover of the parties rather than the turnover in relation to the sale of lysine in the EEA. The General Court found that by failing to consider the turnover of the sales in the market concerned by the infringement the Commission had not considered the specific weight and real

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impact of the infringement committed by each of the undertakings (see Cases T-220/00, Cheil Jedang v Commission, T-223/00 Kyowa Hakko Kogyo v Commission, T-224/00 Archer Daniels Midland Company v Commission and T-230/00 Daesang Corp and Sewon Europe GmbH v Commission).

The gas insulated switchgear cartel involved both European and Japanese companies. As part of this cartel, it was agreed that Japanese companies would not sell in Europe and European companies would not sell in Japan. European tenders were allocated according to cartel rules and European projects won by members of the cartel outside their home countries were included in agreed global cartel quotas. Even though the Japanese companies are almost totally absent from the European market, they have nevertheless found to have infringed Article 101(1) because their agreement not to bid on the European market contributed to the restriction of competition in the EU. In July 2011, the General Court upheld the Commission's decision in this respect (see PLC Legal update, General Court further judgments in gas insulated switchgear cartel appeal (www.practicallaw.com/3-506-8470)).

Object or effect of restricting, distorting or preventing competition

Cartel activities are generally "hard-core" infringements of competition law. They will almost certainly fall within the non-exhaustive list of examples given in Article 101(1) of the types of agreements that restrict or distort competition (see Article 101: Prevention, restriction or distortion of competition within the EU (www.practicallaw.com/0-107-3707)

It would be very difficult for a member of a secret price-fixing or market-sharing cartel to establish that the arrangement had neither the object nor the effect of restricting competition. The parties involved in a cartel often believe that what they are doing is simply pursuing a sensible commercial strategy by, for example, preventing a commercially damaging price war, ensuring market stability and maximising their own profits. However, such objectives are not achievable in co-operation with competitors without there being some restriction, prevention or distortion of the normal competitive influences in the market. Attempts to achieve such objectives will almost inevitably have a negative effect on customers, suppliers and competitors who are not part of the arrangement.

In such cases, the Commission will generally presume that the object of the arrangement is to restrict competition and it will not generally find it necessary to consider its effect.

Restrictions of competition "by object" are those that by their very nature have the potential to restrict competition. These are restrictions which in the light of the objectives pursued by the EU competition rules have such a high potential for negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) to demonstrate any actual or likely anti-competitive effects on the market. This is due to the serious nature of the restriction and experience showing that such restrictions are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EU competition rules.

The Commission has issued guidance on identifying "restrictions by object" (see Legal update, Commission adopts revised competition de minimis notice and guidance on restrictions "by object" (www.practicallaw.com/8-572-4654)). This confirms that the following, are generally considered to be "by object" restrictions in agreements between competitors:

- **Price-fixing.** Restrictions whereby competitors agree to fix prices of products which they sell or buy are, as a matter of principle, restrictions by object (it being sufficient if the parties agree on certain parameters of price composition, such as customer rebates).

- **Market-sharing.** Any arrangement by which competitors allocate markets or customers is considered a restriction by object if it takes place in the context of a pure market-sharing agreement between competitors (that is to say, a cartel not linked to any wider cooperation between the parties).

- **Output restrictions.** Competitors agreeing to restrict the volume of their supply or production capacity (either for one or both of the parties) is a restriction of output, which is considered a restriction by object.

- **Bid-rigging.** Bid-rigging occurs when two or more companies agree that, in response to a call for bids or tenders, one or more of them will not submit a bid, withdraw a bid or submit a bid at artificially high prices arrived at by agreement. This form of collusion (a form of price-fixing and market allocation) is generally considered to restrict competition by object.

- **Collective boycott agreements.** A collective boycott, when a group of competitors agree to exclude an actual or potential competitor, generally constitutes a restriction by object.

- **Information sharing – future prices and quantities.** Information exchanges between competitors of individualised data regarding intended future prices or quantities are considered a restriction by object. Where information exchange is part of a monitoring or implementation mechanism for an existing cartel it will be assessed as part of that cartel.

The fact that the objects of a cartel are not achieved and that the cartel is unsuccessful, with no perceptible effects on the market, does not prevent there from being an infringement of Article 101(1). Lack of compliance by members of a cartel and the limited actual impact on the market, may, however, have a mitigating factor on the level of fines imposed.
For example, in the Luxembourg Brewers case (COMP/37.800, OJ 2002 L253/37), for example, the various companies were found to have entered into an agreement which was, amongst other things, intended to prevent foreign penetration into the Luxembourg market. The agreement contained provision for companies that infringed the agreement to be sanctioned. The argument was put to the Commission that the arrangement had no effect on the Luxembourg market as during the relevant period the volume of foreign imports actually increased. The Commission also found no evidence that the restriction in relation to foreign trade was implemented. This did not prevent the Commission from finding that there existed an arrangement which had the object of restricting competition between Luxembourg and foreign brewers.

The General Court confirmed this assessment (Cases T-49/02, T-50/02 and T-51/02, Brasserie nationale SA, Brasserie Jules Simon et Cie SCS, and Brasserie Battin SNC v Commission, judgment dated 27 July 2005). The lack of effect of the arrangement was, however, taken into account by the Commission in considering the gravity of the infringement for the purpose of setting the basic level of the fines imposed on the parties (see Luxembourg brewers).

**Appreciable effect on competition**

There is generally no doubt that cartel arrangements will be found to have an appreciable effect on competition in the affected market. Cartels often involve a number, if not all, of the companies who operate on a particular market. The cumulative market shares of the parties are likely to be significant.

In any event, price-fixing and market-sharing arrangements are hard-core restrictions of competition law that prevent the application of the Commission’s notice on agreements of minor importance (the de minimis notice), even if the combined shares of the parties fall below the de minimis threshold for horizontal agreements of 10% market share. A 2014 revision of the de minimis notice clarified that it will not apply to agreements which have as their object the prevention, restriction or distortion of competition within the internal market (see Article 101: Appreciable effect (www.practicallaw.com/A14484)).

In the Luxembourg Brewers case (above) some of the parties claimed that the arrangements did not have an appreciable effect on competition and, in particular, that they fell within the definition of “small or medium sized enterprises” and so should be regarded as being de minimis. The Commission rejected this argument on the basis that the market-sharing elements in the infringing practices prevented the application of this principle. The General Court upheld this position.

**The Commission's investigation**

**Launching an investigation**

The Commission will launch an investigation when it has been provided with, or obtained, information that indicates that there are grounds for suspecting that there has been an infringement of Article 101(1). Suspicions may be raised in one of the following ways:

- A third party, whether a customer, a competitor or a supplier complains to the Commission about the practices of one or more companies.

- Another competition authority informs the Commission that it has received information, has started an investigation or is bringing a prosecution, and it believes that the alleged offence also falls within the Commission’s jurisdiction. For example, a member state competition authority may receive a complaint about an alleged cartel that, on investigation, appears to have an EU-dimension, affecting competition in a number of member states, so the Commission is the best placed authority to deal with it. Further, the EU and US competition authorities have agreed to inform the other about illegal activities which affect their respective jurisdictions. A number of the global cartels prosecuted by the Commission were the subject of earlier investigations in the US, for example the Vitamin Cartel (COMP 37.512, OJ 2003 L6/1) and Citric Acid Cartel (COMP/36.604, OJ 2002 L239/18).

- One of the participants in a cartel "blows the whistle" and provides the Commission with information in order to apply for immunity from fines (see Fines and Leniency).

- The Commission has independently been monitoring a market which it believes have features that make it susceptible to cartel activity, for example a concentrated market involving a commodity product with transparent pricing.

The Commission has broad powers to obtain information about a suspected infringement of Article 101. Under Article 105 of the TFEU the Commission is required to investigate cases of suspected infringement of the competition rules. Regulation 1/2003, which replaced Regulation 17/62 (Regulation 17) (OJ 1962 L13/204) on 1 May 2004, gives the Commission powers to obtain all necessary information (Article 18 of Regulation 1/2003, previously Article 11 of Regulation 17) and to undertake all necessary investigations (Article 20 of Regulation 1/2003, previously Article 14 of Regulation 17). Regulation 1/2003 extended the Commission’s powers, including a power to enter and search non-business premises (Article 21 of Regulation 1/2003) and to take statements (Article 19 of Regulation 1/2003).

The Commission’s powers to request information and conduct investigations are discussed in more detail in the Practice note: EU
Procedures, Negotiation and Enforcement: Powers to obtain information.

The Commission can use its powers under Regulation 1/2003 to gain evidence to validate or dispel a suspicion. In a written request for information, the Commission is required to state the legal basis and purpose of the request (Article 18(2) of Regulation 1/2003). It is also required to state the subject matter and purpose of the investigation in the authorisation or decision authorising an investigation under Article 20 (Article 20(4) of Regulation 1/2003). It is unlikely to be possible for the Commission to state the purpose of the investigation or request, or deem what information is necessary without some basic idea of the suspected infringement. The Regulation 1/2003 powers should not, therefore, be used by the Commission to conduct a general fishing expedition for evidence of any infringement by a company, but should focus on a particular suspicion.

Further, the Commission’s resources are limited and it is obliged to allocate its available resources on a priority basis. It is entitled to give priority to cases that involve matters of political, economic or legal significance for the Community (Cases T-24 and 28/90 Automec II [1992] ECR 2223).

Therefore, before allocating significant resources to an investigation the Commission will satisfy itself that there are reasonable grounds for suspecting that a serious infringement with significant community interest has taken place. For example the following types of prima facie evidence may attract the Commission’s attention:

- Certain companies within an industry seem to raise prices by similar amounts and/or at similar times.
- Prices are high or have suddenly increased.
- There is a lower level of cross border trade than could be expected and this does not appear to relate to objective factors such as high transport costs.
- The industry in question is of European-wide significance.

Since Regulation 1/2003 came into force, member states have an enhanced role in the enforcement of Articles 101 and 102 TFEU. This has led to increased co-operation between the Commission and member states in relation to case allocation and information provision. The Commission may decide that where an apparent infringement is confined to a single member states (even if it falls within Article 101), a member state authority is better placed to deal with it. Alternatively, a member state may discover after an initial investigation that an infringement has an effect in a number of member states and a significant impact on the wider Community interest. As such, the Commission may consider that it is the best placed authority and so assume responsibility for investigating the case. The principles of case allocation under the modernised enforcement regime established by Regulation 1/2003 are considered further in the Practice note, **Co-operation between the European Commission and national competition authorities** (www.practicallaw.com/5-422-5178).

The conduct of an investigation

In deciding how to proceed with a particular case the Commission will balance the method of investigation against the evidence that it already has, the apparent gravity of the alleged infringement and its nature, the priority the case has in policy terms, and the resources that it has available. Due to the covert nature of cartels, the gravity of the potential infringements and concerns that the parties may destroy evidence if they anticipated an investigation, the first step in the Commission’s investigation in cartel cases is often a surprise visit ("dawn raid") at the premises of the suspected companies under Article 20 of Regulation 1/2003 or other premises (including homes of the staff of the companies) under Article 21 of Regulation 1/2003.

Assuming that information discovered during the dawn raid has not allayed its suspicions, the Commission will next send the parties one or more requests under Article 18 of Regulation 1/2003 (Article 18 request) asking for specified information. These may ask for clarification of information that the Commission obtained during the dawn raid and request the production of further documentation. For example, the documents obtained from one company during a dawn raid may refer to several suspicious meetings with competitors. The Commission may subsequently use an Article 18 request to require production of the diaries and travel expense records of key individuals in the other suspect companies to try to establish their attendance at the meetings. The Commission’s review of all the information it has obtained from a dawn raid and/or Article 18 request may take many months or years. It must use the information it obtains to try to piece together the existence and activities of the cartel and the involvement of every alleged participant. Its investigation will obviously be assisted if one or more of the parties to the alleged infringement comes forward to volunteer information and evidence about the cartel, its activities and its participants (see **Application of the Leniency Notice**). Even in such cases, however, it is likely that this investigation process will take several months.

Once the Commission believes that it has sufficient evidence to back up an allegation of an infringement it will commence proceedings. This is largely an internal step, and usually involves the Commissioner signing a statement reporting the fact that a formal investigation has begun. Proceedings may be initiated at any time, but no later than the issuance of a Statement of Objections. In cartel cases, the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections other than in settlement cases (see below).
One significant impact of the formal commencement of proceedings is that this brings the Article 101 investigation solely within the jurisdiction of the Commission and prevents member states from launching their own investigations into the same alleged infringement (Article 11(6), Regulation 1/2003). In addition national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings that it has initiated.

The Commission has introduced a new settlement procedure, to be conducted after the initiation of proceedings and prior to the issuance of a Statement of Objections (see Settlement procedure). If settlement discussions are not entered into under this procedure, however, the first action of real significance for the parties following initiation of proceedings will be the issuance of a Statement of Objections to all the alleged participants.

The Statement of Objections sets out the Commission’s preliminary factual assessment and its provisional legal assessment of those facts. The Commission is required to specify all the facts and information upon which it bases its objections and to allow the parties to whom the Statement of Objections is addressed to have access to that information. Accordingly, the evidence and supporting documents relied on by the Commission will be provided to the parties. The parties will also be given access to the Commission’s file, other than business secrets, confidential information and the Commission’s internal documents and working papers. The Commission will usually issue a press release announcing the fact that it has issued a Statement of Objections, although the Statement of Objections itself will not be made public.

The parties to whom the Commission has addressed the Statement of Objections must be given the opportunity to submit their comments on all the objections that the Commission proposes to take into account in its decision. The Statement must be sufficiently clear and precise in order to allow the parties to identify the conduct to which the Commission is objecting. The Commission sets a time limit (which must not be less than four weeks) for responses to the Statement of Objections and must have regard when doing so to the time required to respond fully, as well as to the urgency of the case. The Commission usually sets an initial period of two to three months, though in very complicated cases this may be as much as six months. The parties should prepare a confidential and a non-confidential version of their response to the Statement of Objections to ensure that all business secrets are deleted from copies which may be given to third parties.

If further information, which the Commission intends to rely on, comes to light after the Statement of Objections has been issued then the Commission must give the parties the opportunity to respond to this in the same way as the original Statement. It is therefore quite common for the Commission to issue a supplementary Statement of Objections.

In addition to responding to the Statement of Objections and commenting on documents in the Commission’s file, the parties will be invited to an oral hearing at which they can present evidence and put their case. Parties will wish to take advantage of this opportunity if they are contesting any aspect of the Commission’s findings, whether on an issue of fact or law.

It should be noted that if the investigation was triggered by a third party complainant then the complainant will have locus standi to be treated as a party to the investigation. This means that they will be given a confidential version of the Statement of Objections and the parties’ responses, can request access to the Commission’s file, other than business secrets, confidential information and the Commission’s internal papers, and may be invited to the oral hearing. Any third party with sufficient interest has a right to give their views (if they have either made a formal complaint or have requested to be involved) and may also be invited to the oral hearing. A sufficient interest for these purposes will be satisfied if the third party has made a formal complaint and/or has an economic or legal interest which might be detrimentally affected by the infringement (see also the Practice note, Complaints under EU Competition law (www.practicallaw.com/A29378)).

If the Commission ultimately finds that it does not have enough evidence to reach an infringement decision or no longer wishes to pursue the investigation on policy grounds then it may issue a press release stating that it is closing its file on a particular case. For example, it announced in August 2000 that it was opening a formal procedure against various Dutch and German banks (Commission press release IP/00/908). The Commission announced in May 2001 that it was closing its file in relation to most of the banks (Commission press releases IP/01/634 and IP/01/690) as they had ceased the alleged infringement. In December 2001, however, the Commission fined five German banks (see German banks (www.practicallaw.com/A30634)).

Article 9 of Regulation 1/2003 introduced a procedure for the Commission to accept legally binding commitments from companies in cases where it would otherwise be likely to issue an infringement decision. The Article 9 commitments procedure is not, however, used by the Commission in cases where it would intend to impose a fine: cases involving hard-core infringements. Therefore, it is difficult to anticipate a situation in which it would be used in cartel cases.

Prior to issuing an infringement decision, the Commission must place the draft decision and primary documents before the Advisory Commission on Restrictive Practices and Monopolies. The decision must not make any allegations that have not been previously communicated to the parties. A decision finding an infringement in a cartel case will usually order the termination of any infringement that is still persisting and order payment of fines. The fact of the decision and the fines imposed will be announced in a Commission press release. A summary of the formal decision will ultimately be published in the L series of the Official Journal. This can take several months from the actual date of the decision to allow for the deletion of confidential information and translation. A non-confidential version of the decision, in its original language, may be published on the Commission’s website in the interim.
The rights of defence of the companies concerned are protected throughout the investigation by case law and also by the Commission’s practice. A large number of appeals against cartel decisions have been based on procedural errors by the Commission or breaches of the rights of defence. This has resulted in Commission decisions being annulled in whole or in part in several cases.

Commission Regulation 773/2004 (OJ 2004 L123/18) sets out the procedures that the Commission must follow in Article 101 and Article 102 cases to give the parties a fair hearing. These are summarised in the box, Defendant’s right to be heard: key points).

Further information on the Commission’s use of the powers under Article 18 and Article 20 of Regulation 1/2003 and its conduct of investigations is contained in the Practice note: Procedure, negotiation and enforcement (www.practicallaw.com/A14486). The processes and practical considerations connected with Commission dawn raids are set out in detail in the Practice note, Dawn Raids (www.practicallaw.com/A14489). These notes also contain information on the confidentiality of documents taken by the Commission and a company’s right to have access to the Commission’s file.

The Practice note, Legal Privilege (www.practicallaw.com/A14491) contains advice on the rights to refuse to disclose documents that are protected by attorney/client privilege.

Settlement procedure

Following consultation in October 2007, the Commission adopted on 30 June 2008 a new settlement procedure for cartel cases. This procedure is intended to simplify the administrative procedure for the investigation, to reduce litigation in cartel cases and to free up the Commission’s resources so that it can pursue more cases. The procedure will apply in cases where the Commission has initiated proceedings with a view to adopting an infringement decision and imposing fines, but before it has issued a Statement of Objections (a company may, however, indicate its willingness to explore settlements at an earlier stage, for example, when applying for leniency). Key elements of the proposed procedure include:

• **Commission's discretion.** The Commission will have the discretion to determine which cases may be suitable for settlement and with whom it wishes to explore the possibility of settlement. The parties do not have a right to enter into settlement discussions. In considering whether a case is suitable, the Commission may consider whether it is probable that it will be able to reach a common understanding, within a reasonable time scale, as to the scope of the possible objections. It will take into account factors such as the number of parties, possible conflicts of views as to liability, the extent to which facts are contested and the possibility of achieving procedural efficiencies.

• **Exploration of interest and initiation of proceedings.** In cases which it considers to be suitable, the Commission may explore the parties’ interest in engaging in settlement discussions. The Commission’s request will set a time limit of no less than two weeks for the party in question to declare their wish to engage in settlement proceedings. The Commission may only engage in settlement discussions upon the written request of the parties concerned. An indication by a company that it wishes to engage in settlement discussions does not imply an admission of participation in the infringement or any liability for it.

• **Confidentiality.** The parties to the proceedings may not, without the Commission's consent, disclose to any other undertaking or third party the content of any settlement discussions with the Commission or the documents to which they have been given access. Breach of such confidentiality may result in the end of the settlement discussions and will be treated as an aggravating circumstance for the purposes of setting a fine.

• **Leniency.** Leniency applications (see below) will not be possible once settlement discussions have commenced (once the deadline for submitting desire to engage in settlement discussions has past).

• **The settlement discussions and disclosure of information.** The Commission retains its discretion as to whether or not to actually enter into settlement discussions, following receipt of an expression of interest. It has discretion to determine the appropriateness and pace of those discussions and the sequence in which it will hold discussions with various cartel participants.

The discussions will cover the alleged facts, their classification, the gravity and the duration of the infringement and the liability of the company. They will also cover the potential maximum fine, net of any reduction. However, the Commission has emphasised that companies do not have the right to negotiate as to the existence of the infringement or the fine. The Commission will not bargain about evidence or its objections, but will hear the parties arguments.

During the discussions, the Commission will disclose some information from its file (this would not normally be done until after the statement of objections) on reasoned request of the parties. However, it will retain discretion as to the timing of this. The Hearing Officer will resolve any disputes about access to documents.

• **Settlement submission.** If a common understanding is reached between the Commission and the company as to the scope of the potential objections and the range of likely fines, the Commission will set a time limit (of at least 15 working days) for the company to submit a final settlement submission. This may be done orally and such an oral statement will be transcribed by the Commission. The statement must contain:

  • A clear and unequivocal acknowledgement of the parties’ liability for the infringement as regards its object, implementation, legal qualification, duration of participation and the main facts.
• An indication of the maximum amount of the fine that the parties foresee being imposed by the Commission and which the parties would accept.

• Confirmation that the parties' have been sufficiently informed of the Commission's objections and have had sufficient opportunity to be heard.

• Confirmation that the parties do not envisage requesting access to the file or an oral hearing (unless the Commission does not reflect their settlement submission in the statement of objections and the decision).

• Agreement to receive the statement of objections and final decision in a given official language of the EU.

The parties commit to follow the settlement procedure on the condition that the Commission's decision reflects the contents of the settlement submission and does not set a higher fine than that foreseen. If the settlement submission is not reflected in the statement of objections or in the final decision, the parties acknowledgements will be deemed to be withdrawn and cannot be used against them.

• Statement of objections. As it is a mandatory step prior to issuing an infringement decision, the Commission will also issue a Statement of Objections in a settlement case. This Statement of Objections will effectively reflect the views of the undertaking and will draw on the settlement statement. If the Statement of Objections does endorse the position in the settlement statement, the company will have at least two weeks to reply to it by simply confirming that it corresponds to the settlement submission and that the company remains committed to the settlement procedure. The Commission can then proceed directly to a decision, after consultation with the Advisory Committee. There will be no oral hearing or further access to the file. If the Commission decides to depart from the settlement submission in the Statement of Objections (as it remains entitled to do) then normal administrative procedures will be followed.

• Final decision. Despite endorsing the settlement in the Statement of Objections, the Commission may nevertheless adopt a final decision which departs from this position. This may be due to arguments provided by the Advisory Committee or the views of the College of Commissioners (which is ultimately autonomous). In such an event, the Commission must issue a new statement of objections prior to issuing its final decision and the normal procedural protections would apply.

• Fine. The co-operation of the company during the administrative procedure will be indicated in the decision in the normal way. Should the Commission decide to reward the company for settlement, the fine will be reduced by 10% in accordance with the Fining Guidelines (see below). A specific increase for deterrence will not exceed a multiplier of two. Reductions under the Leniency Notice will be applied in the same way as at present and the total reduction in the fine will, therefore, be the sum of the leniency reduction and the settlement reduction.

• Appeals. A decision taken following application of the settlement procedure is still subject to judicial review before the General Court and ECJ. In addition, the settlement procedure does not affect the Courts' unlimited jurisdiction to review fines.

This settlement procedure came into force following publication of Commission Regulation 622/2008, amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases, was published in the Official Journal on 1 July 2008 (OJ 2008 L171/3). The Commission Notice explaining the settlement procedure was published in the Official Journal on 2 July 2008 (OJ 2008 C167/1).

The first decisions involving the application of the settlement procedure were reached in 2010. In the first case (the DRAM cartel (www.practicallaw.com/9-502-3209)) all the parties participated in the settlement procedure and received the additional 10% settlement reduction. In the second case (the animal feed phosphates (www.practicallaw.com/4-502-8520) cartel), all but one of the parties participated in the settlement procedure. One party withdrew from the settlement procedure after the Commission informed it of the fines that it was intending to impose. The normal full administrative procedure was, therefore, applied in relation to that company and it did not receive the additional 10% reduction.

The settlement procedure has also been used in a number of cases since 2010 (as at June 2014 14 cartel decisions have been reached using the cartel settlement procedure). In six cartel decisions reached in the first half of 2014, all but one used the settlement procedure.

For further information on the settlement procedure see the Practice note, European Commission settlement procedure in cartel cases.

Fines and Leniency

Fining policy

As explained above, the Commission considers that cartels are the most pernicious form of infringement of Article 101. Consequently it has used its powers to impose significant fines on companies. The aim of these fines is both to punish the guilty and also to deter others from such activities. The levels of fines imposed has been increasing progressively.
In 2001, the Commission imposed total fines of EUR 855.2 million on participants in the Vitamins Cartel case (COMP/37.512, OJ 2003 L6/1) with individual fines of EUR 462 million and EUR 296.16 million imposed on Hoffmann la Roche and BASF respectively (the total fines were reduced to EUR 790.5 million on appeal) (see Legal update, CFI reduces vitamin cartel fines imposed on BASF and Daiichi (www.practicallaw.com/5-202-0999)).

In January 2007, the Commission imposed fines totalling EUR 7,512,500 on eleven groups of companies for infringing Article 101(1) by participating in illegal collusive tendering in the Gas Insulated Switchgear Cartel This was followed, in February 2007, by a then record fine imposed by the Commission for cartel violations. The Commission fined five groups of companies EUR 992,312,200 for operating a series of cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands between 1995 and 2004. The Lifts and Escalators Cartel also held the record for the highest individual fine for an Article 101 infringement (ThyssenKrupp was fined EUR 479,669,850), however this was surpassed in November 2008 when the Commission imposed a fine of EUR 896,000,000 on Saint-Gobain for its participation in the Car Glass Cartel. The total fines imposed on the four cartel participants was a record EUR 1,383,896,000. This was surpassed by the 2012 TV and computer monitor tubes cartel in relation to which total fines of EUR 1,470,515,000 were imposed (with two companies, Philips and LG Electronics being fined about EUR 700 million).

During 2010, the Commission imposed total fines of about EUR 3 billion (on 69 undertakings), the second highest for an individual year (the highest being EUR 3.3 billion (on 45 undertakings) in 2007). However, the amount imposed during 2011 was considerably less, just over EUR 614 million, but there were was a significant increase in 2012 and 2013 (with fines totalling EUR 1.8 billion in both years).

Under Regulation 1/2003, the Commission has power to impose fines of no more than 10% of a company’s turnover for the preceding business year where it has intentionally or negligently infringed Article 101(1). The Commission is required to have regard to the gravity and duration of the infringement when setting the fine. The relevant turnover for the purposes of assessing the maximum level of the fine is the total worldwide turnover of the company for all products and services, and not just those affected by the infringement.

The Commission set out a revised policy for calculating the levels of fines in its 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 (the Fining Guidelines) (OJ 2006 C210/2). These are aimed at deterring undertakings further from participating in infringements of EU competition law. The revised Fining Guidelines, which replace an earlier 2002 version, apply where the Commission had issued a Statement of Objections after 1 September 2006. Under these Fining Guidelines, the calculation of the basic amount of the fine is now based on a proportion of value of sales and repeat offenders can face much larger increases in fines than previously.

Once the Commission has established that the infringement was either intentional or negligent (neither of which are likely to be difficult hurdles in the case of secret cartel activity) the Commission will first determine the basic level of the fine and then make adjustments to this basic fine to reflect various factors. The first stage in calculating the basic level of the fine involves consideration of the gravity of the offence. The Commission will apply a percentage of the undertaking’s value of sales in the market affected by the infringement. This will usually be between 1% and 30% depending on the seriousness of the infringement.

The Commission has discretion in this respect, but typically it takes into account factors such as the nature of the infringement, the combined market share of all of the undertakings concerned, the size of the geographic market and whether or not the infringement has been implemented. Infringements involving cartel activity such as horizontal price-fixing, market-sharing and output limitation are among the most harmful restrictions of competition and, as a matter of policy are likely to be heavily fined. The Fining Guidelines state that, in these cases, the percentage volume of sales taken into account in setting the fine will be at the top end of the 1% to 30% scale.

The second stage involves increasing the fine by reference to the duration of the infringement. The amount determined by the proportion of the value of sales is multiplied by the number of years the undertaking participated in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as one year.

The third stage in determining the basic amount of the fine is the addition of a sum of between 15% and 25% of the value of sales in order to deter undertakings from participating in cartels. The Commission will use the same factors as it did in setting the proportion of volume of sales at the first stage in setting the proportion to be added at this point.

Having established the basic fine, in accordance with these three stages, the next stages involve taking into account mitigating and aggravating circumstances, including application of the Leniency Notice. The revised Guidelines place an increased emphasis on recidivism as an aggravating factor, and state that the Commission may increase a fine up to 100% for the same or similar prior infringements (as found either by the Commission or by a national competition authority applying Article 101 or 102).

The Court’s have held that both the increases for aggravating factors and the reductions for mitigating factors should be applied to the basic level of the fine (established in accordance with the Guidelines) in order to ensure equal treatment between the various undertakings participating in the same cartel.

The Commission does not treat the fact that the cartel participants have already been fined for the same cartel infringement in another jurisdiction as a mitigating factor. The Commission’s view is that the fines that it is imposing reflect the harm done on the EEA market and, therefore, the fact that the company has already received fines for the harm done by the offence elsewhere is not relevant.
The Courts have supported the Commission's position. The General Court found that the procedures initiated and the fines imposed by the Commission and by a non-member state authority pursued different objectives. There is no principle of Community or public international law that prevents the authorities or courts of different states from trying and convicting the same person on the same basis of facts. Although principles of fairness require the Commission to consider penalties that may already have been imposed by a member state, no such obligation requires the Commission to take into account fines imposed in non-member states (see for example, Kyowa Hakko Kagya v Commission (T-223/00), Archer Daniels Midland Company v Commission (T-224/00), judgments of 9 July 2003).

In addition to the increase for deterrence applied in determining the basic amount, the Commission can add a specific increase for deterrence as an aggravating factor, for instance where undertakings have a particularly large turnover beyond the sale of goods or services to which the infringement relates. It can also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement, where this amount can be estimated.

The Commission may consider the company’s ability to pay and the general market conditions, however it tends to take a fairly hard line in this respect. The 2006 Fining Guidelines set out that the Commission will only reduce a fine based on an undertaking's ability to pay where there is objective evidence that the fine would irretrievably jeopardise the economic viability of the undertaking concerned. In a number of cases under the previous guidelines parties tried to claim that account should be taken of the difficult economic situation faced by manufacturers. The Commission has stated that "to take account of the mere fact of an undertaking’s loss making situation due to general market conditions or changes in the company’s corporate structure would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market."(see Graphite electrodes (www.practicallaw.com/A30645)). This reflects the approach that has been endorsed by the General Court (for example, in the specialty graphite cartel appeals: Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, Tokai Carbon, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission, judgment of 15 June 2005).

If an undertaking wishes the Commission to consider its ability to pay a fine, the undertakings making such a request should be prepared to provide, detailed and up-to-date financial information to support their request. When considering an undertaking's ability to pay, the Commission looks in particular at the financial statements for recent years and forecasts for the current and coming years; at ratios measuring the financial strength, profitability, solvency and liquidity; and the undertaking's relations with outside financial partners and with shareholders. The Commission also examines the specific social and economic context of each undertaking.

Further examples of the aggravating and mitigating factors taken into account are set out in the Fining Guidelines (see the Practice note, Procedure, negotiation and enforcement: Assessing fines: examples of aggravating and mitigating circumstances).

The final stage in setting the fine is the final adjustment to ensure that the fine is within the maximum level of 10% of turnover. After this the fine will be adjusted to reflect any reductions under the Leniency Notice and possibly under the settlement procedure (see Application of the Leniency Notice and Settlement procedure).


The question of how the Commission has attributed liability for fines imposed (as between parent companies and subsidiaries, which form part of the same "undertaking" and in situations when the cartel participant has been acquired or ceases to exist) is often a contentious issue. This is discussed in the Practice note, Attribution of liability for cartel fines in EU law (www.practicallaw.com/6-575-8305).

**Application of the Leniency Notice**

Given the difficulty of discovering secret cartels and the inherent problems in obtaining conclusive evidence about their covert activities, the Commission has developed a policy of lenient treatment for cartel members who confess to the infringement of Article 101 and provide evidence that assists the Commission with its investigation.

The most recent version of the Leniency Notice is the 2006 Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C298/17). This notice replaces an earlier 2002 version (OJ 2002 C45/3) and reflects the experience that the Commission gained in applying this and an earlier 1996 notice. The 2006 Leniency Notice is designed to encourage earlier application for leniency, to reward only companies that have added real value to the Commission’s investigation, to clarify the procedure used by the Commission and to give companies greater certainty about whether or not they will benefit from the Leniency Notice.

The Leniency Notice provides for both full immunity from fines and for reduction of the fine that would otherwise be imposed (see box, Leniency Notice: Key points).

**Immunity**

The Commission will grant full immunity from any fine to the company that is:
• The first to submit evidence which, in the Commission’s view, will enable it to adopt a decision to carry out a "targeted" investigation. At the time of the request for immunity the Commission must not already possess information which would already be sufficient to justify a decision to take action. The Commission considers that there is per se value in the provision of information about a suspected cartel, even if the information is not itself sufficient to prove an infringement; or

• The first to provide evidence, which in the Commission’s view, will enable it to find an infringement of Article 101 in connection with an alleged cartel provided that the Commission does not already possess sufficient evidence at that time (this must always be before a Statement of Objections is issued). The company must be the first to provide contemporaneous, incriminating evidence of the alleged infringement. This alternative only applies if no company has already provided evidence to enable the Commission to carry out an investigation (as in the first alternative) and so obtained conditional immunity.

In either case, the company must provide the Commission with a "corporate statement" which includes a detailed description of the cartel arrangement (including its aims, duration, markets affected, and precise dates and locations of contacts between cartel members) and explanations of the evidence provided. In addition, it must provide full details of the applicant and the other members of the cartel as well as information on which other competition authorities (EU or non-EU) have been or will be approached. A corporate statement may be made orally or in the form of a written statement signed on behalf of the undertaking.

In either case, the immunity will only be granted if all of the following apply:

• The company co-operates fully, on a continuous basis and expeditiously throughout the investigation. This includes:
  • Providing the Commission with all evidence that comes in to its possession or is available to it.
  • Remaining at the Commission's disposal to answer promptly any request that may contribute to the establishment of the facts.
  • Making current and if possible former employees and directors available for interview.
  • Not destroying, falsifying or concealing relevant information or evidence.
  • Not, unless otherwise agreed, disclosing the fact or any content of the application before a statement of objections has been issued.

• The company’s involvement in the suspected infringement ended no later than the time at which it made its application, except for what would, in the Commission’s view be reasonably necessary to preserve the integrity of the inspections.

• The company did not take steps to coerce other companies to participate in the infringement.

• The company did not destroy, conceal, or falsify any evidence when contemplating making the application and it has not disclosed the cartel or the content of its application, except to other competition authorities.

Reduction of a fine
A company, which is not eligible for complete immunity, may have its fine reduced if it provides the Commission with evidence of the suspected infringement that represents significant added value over and above any information which the Commission already had (the Commission has the discretion to ignore any such application which is made after a Statement of Objections has been issued). Further, the company must have terminated its involvement in the suspected infringement no later than the time at which it submits its evidence. It must also co-operate fully, expeditiously and fully with the Commission, and not have falsified its evidence when contemplating the application or disclosed its contemplated application (as above).

The first company to meet these conditions will receive a reduction of 30-50% from the fine that would otherwise be imposed. The second will be eligible for a reduction of 20-30% and subsequent companies a reduction of up to 20%. The Commission will take into account the time at which the information was provided and the extent to which it represents added value at that time. It may also take into account the extent to which the company continues to co-operate with the Commission after submission of its evidence.

Evidence that has "added value" for these purposes is that which, either because of its nature or the detail in which it is provided, strengthens the Commission’s ability to prove the facts of the case. Contemporaneous written evidence that is directly relevant to the facts will carry most weight. Information provided is likely to have a greater "added value" where it is incriminating evidence, directly relevant to the facts in question and where there is corroborating evidence from other sources. "Compelling evidence" will be attributed greater value than uncorroborated statements. (see box, The information to provide when whistle-blowing).
The Leniency Notice states that if a company provides evidence of facts which are previously unknown to the Commission, but which have a direct bearing on the gravity or duration of the suspected cartel (and therefore on the level of the fine) then the Commission will not take these into account when setting the fine for that company. This provision is intended to encourage full disclosure and to provide reassurance that even though a company does not have full immunity it can not make the position worse for itself by providing evidence which shows that the infringement is more serious than the Commission originally thought.

**Commission procedure for granting immunity and reduction of a fine**

The Commission will observe the following procedure when a company applies for immunity or reduction of fines under the Leniency Notice:

### For immunity:

- The company must apply for immunity to the Directorate General for Competition. There is a dedicated and secure fax number: (+32 2) 299 45 85. There also two dedicated telephone number (+32 2) 298 41 90 or (+32 2) 298 41 91. The Commission recommends that before sending the actual submission by fax, it is advisable to seek assistance from one of the Commission officials involved in leniency by calling the dedicated telephone numbers.

- The company may initially either apply for a "marker" or immediately proceed to a formal application.

- The Commission may, at its discretion, grant a marker protecting the applicant’s place in the queue for a specified period (to be determined on a case-by-case basis). An applicant for a marker must provide information about the parties to the alleged cartel, the affected products and territories, the duration of the cartel, the alleged illegal conduct, and any other leniency applications. The Commission will give the applicant a specified period in which it must perfect its full application. If it fails to do so, the next applicant in the queue may be granted immunity instead.

- Other than where a marker is sought, the company may provide the evidence in hypothetical terms by setting out a list describing in detail the nature of the evidence that it intends to provide (for example: the type of document, date, information contained). Expurgated versions of documents are also useful. This allows the company to find out whether immunity will be available without disclosing its identity. However, even in a hypothetical application, the product or service affected by the alleged cartel and its geographic scope and estimated duration must be clearly identified.

- The Commission will acknowledge the application confirming the date and, as appropriate, the time, on which the evidence was received (this will be the time at which a marker was requested, if the marker is perfected within the time set by the Commission).

- The Commission will review the evidence received and if the conditions for immunity appear to be satisfied then it will confirm in writing that conditional immunity has been granted. Where only hypothetical information has been provided, the Commission will confirm that, on the basis of the hypothetical information provided, it appears that the conditions for immunity would be satisfied. The Commission and the company will agree a date for its disclosure of the full evidence. The Commission will not grant full immunity until the full evidence has been provided.

- Where it becomes clear that the evidence provided is not sufficient to meet the conditions for immunity then the company may withdraw the evidence or request that it be considered for a reduction of the fine instead.

- The Commission will only consider one application for immunity at a time.

- Immunity will formally be granted in the Commission’s final decision provided that the company has met the conditions of on-going co-operation, has shown that it brought its involvement in the cartel to an end and there is no evidence that it coerced other companies to participate in the cartel.

### For reduction of the fine:

- The evidence should be provided to the Commission. The same dedicated fax line can be used.

- The Commission will acknowledge receipt.

- The Commission will take any decisions on immunity applications that it is considering before deciding on leniency applications.

- The Commission will reach a preliminary conclusion that the evidence provides added value and that it intends to apply the leniency notice no later than the day on which the Statement of Objections is sent out. The company will be informed which band of reduction the Commission intends to apply.

- The final position on leniency will be contained in the Commission’s final decision.
Protection of corporate statements

The Leniency Notice sets out the Commission's policies and procedures relating to the treatment of corporate statements (a voluntary presentation by or on behalf of an undertaking setting out the undertaking's knowledge of a cartel and its role in it):

- Companies may make their corporate statements orally. In such cases, the Commission will record the statement and prepare a transcript of it. The company must either confirm that the statement is correct within a set time period or, if they waive their rights to do so, it will be deemed to have been approved. The undertaking must verify the accuracy of the statement (as amended) by listening to the transcript at the Commission's premises. Failure to do so will be seen as lack of co-operation which could result in the loss of immunity/leniency.

- Access to a corporate statement is only to be granted to the addressees of a statement of objections (on condition that it will not be copied or used for any other purpose, as for access to the Commission's file generally). Access will not be granted to complainants.

- The use of the corporate statement for any purpose other than the proceedings before the Commission will be regarded as lack of co-operation resulting in withdrawal of the benefit of the Leniency Notice. Further, if use is made of the corporate statement after the Commission has issued an infringement decision, in any subsequent proceedings before the EU courts, the Commission may ask for the fine imposed to be increased. Any other use of the corporate statement by outside counsel could result in the Commission seeking disciplinary action before the national bar.

- National competition authorities will only be granted access to the corporate statement provided that the protection against disclosure is equivalent to that of the Commission.

These procedures are intended to address concerns about the risk of discovery in civil damage proceedings, in particular in third country jurisdictions, of corporate statements made to the Commission under the Leniency Notice. The Commission recognised that the effectiveness of the Leniency Notice in encouraging the voluntary co-operation of companies could be jeopardised if companies were ordered to produce statements (in which they confess details of their cartels) in civil damages proceedings or if such statements could be relied on in other jurisdictions.

Practical application of the Leniency Notice

The previous 2002 Leniency Notice applied to all new cases brought after 14 February 2002. For cases that were under investigation prior to that date and where an application had been made for leniency under the 1996 notice, the 1996 notice continued to apply. For any cases where the Commission had started investigations prior to 14 February 2002, but no company had sought leniency at that date, any subsequent leniency application was considered under the 2002 Notice.

The 2006 Leniency Notice replaced the 2002 Leniency Notice for all cases in which no company had made an application for leniency as at 8 December 2006. However, the provisions relating to corporate statements applied from that date to all pending and new leniency applications.

There is considerable precedent for the application of the 1996 notice and the first cases involving the 2002 Notice reached the decision stage during 2005 and 2006. A number of cases involving the application of the 2006 Leniency Notice have now also reached decision stage, and have been subject to proceedings before the General Court and the ECJ.

For further discussion of the application of the 2006 Leniency Notice see Practice note, The European Commission's leniency policy (www.practicallaw.com/3-502-0341).

Leniency in other member states

Under Regulation 1/2003, member states and the Commission have parallel competences in relation to the enforcement of Article 101 and 102 of the TFEU. This means that in principle, an alleged infringement could be investigated by a number of member state authorities at the same time. Accordingly, the Commission has established principles for case allocation between members of the European Competition Network (the Commission and the member states). This is designed to ensure that cases are investigated by the best placed authority (see Launching an investigation). The Commission has published a Notice on co-operation within the network of competition authorities (OJ 2004 C101/43).

However, an application under the Leniency Notice does not give an applicant the benefit of any leniency application that is in place in a member state in relation to Article 101 or national competition law. Similarly, a leniency application to any member state competition authority does not have any binding effect on any other national competition authority or the Commission. Therefore an applicant should seek leniency in every appropriate member state, including at least those that may be considered to be well placed to consider a case, although, as explained below, a summary application may be possible. Almost all member states operate leniency programmes (see the box, Member states with leniency programmes).
Where an national competition authority initiates a case as a result of information obtained in a leniency application, it must inform the Commission and other national competition authorities, but this information should not be used by another member state to commence an investigation. Further, information provided voluntarily by an applicant for leniency should not be sent to other member states without the consent of the undertaking, unless the national competition authority has also received a leniency application or the national competition authority has given a written commitment not to use the information. This stance on leniency is expected to lead to difficulties in practice.

Information relating to cases initiated as a result of leniency applications and which has been provided to the Commission (as required under Article 11(3) of Regulation 1/2003) or initiated by the Commission will only be provided to national competition authorities that have signed a written declaration acknowledging the principles set out in the Notice. A form of written declaration is annexed to the Notice, by which member state competition authorities declare that they intend to abide by the principles in the Notice, in particular in relation to the handling of leniency applications. The relevant competition authorities of all member states have now signed this declaration.

In September 2006, the European Competition Network (ECN) published a Model Leniency Programme. The aim of this is to ensure that potential leniency applicants are not discouraged from applying as a result of discrepancies between the existing leniency programmes within the ECN. It also aims to alleviate the burdens associated with multiple filings. The Model Programme is not binding on ECN members but they committed to use their best efforts to align their national programmes to the Model. All but one of the 28 EU member states (Malta) now have leniency programmes, and there is a high level of convergence with most aspects of the Model Programme. In November 2012, the ECN published a revised version of the Model Programme to provide further clarifications and to reflect enforcement experience (see Legal update, Revised ECN Model Leniency Programme published (www.practicallaw.com/8-522-5868)).

The framework set out by the Model provides that:

• Full immunity for the first undertaking to come forward, if it meets the specified conditions, where it provides the evidence either to enable targeted inspections to be carried out or to enable an infringement to be established.

• A reduction of fines will be available for undertakings which do not meet the conditions for full immunity but provide significant added value. Such reductions should not exceed 50%.

• The conditions for immunity/leniency are: ending involvement, genuine and full co-operation and not destroying evidence or disclosing the fact or content of the application.

• Full immunity should not be granted, or can be withdrawn, where the undertaking acted as a coercer.

• The information to be provided should be specified. The procedures applied should allow for the provision of initial submission on an anonymous basis and, at the discretion of the competition authority, whether or not to grant markers. Oral evidence may also be accepted, where certain safeguards are in place.

In addition, the Model Programme provides for summary applications to be made to national competition authorities (NCAs) in situations where:

• The Commission is particularly well placed to deal with the case in accordance with the Notice on co-operation within the ECN (the cartel has an affect on markets in more than three member states).

• The national competition authority might be well placed to act.

Prior to its 2012 revision the Model Programme only provided for summary applications where the company had applied to the Commission for immunity, being the first to provide information to enable the carry out targeted investigations. Under the 2012 revision, summary applications can be made for any type of immunity or leniency application (regardless of whether the Commission already has information to enable it to conduct an inspection or where the conditions for immunity are not satisfied).

A summary application (which can be made orally) should have an identical substantive scope to the respective leniency application to the Commission and should include a short description of the applicant, the other members of the cartel, the affected products and territories, the duration of the cartel, the alleged cartel conduct, the member states where evidence is likely to be located, and information on other past or possible leniency applications in relation to the cartel. The ECN has published a new template (available on the Commission’s website) in English that applicants may use when preparing a summary application.

Having received a summary application, the recipient NCA should acknowledge receipt and grant the applicant a summary application marker based on the data and time when the information was provided to the NCA. The NCA will confirm whether the applicant is the first applicant in relation to the alleged cartel at that NCA.
The applicant should provide the NCA promptly with any specific further information that the NCA requests. If the NCA decides to act on the case it will set a period of time for the applicant to make a full leniency application. If an immunity applicant submits this information within the required time, the information will be deemed to have been provided on the date when the summary application marker was granted. Application for a fine reduction will be assessed in the order created by summary application marker. Where the NCA requests the applicant to make a full leniency submission, it must submit all the information and evidence relating to the cartel (normally the same evidence supplied to the Commission), subject to the requirements of the specific national leniency programme.

Summary applications, therefore, allow the applicant to secure its place in the queue before the NCA. The NCA will not decide on granting conditional immunity/leniency until it decides to pursue the case and it receives a full application. Until the NCA decides to pursue the case, the applicant is under no duties of continuous co-operation (these apply only in relation to the Commission). However, if an applicant has received a summary application marker application from an NCA, and it subsequently provides information and evidence to the Commission which indicates that the alleged cartel is significantly different in scope than reported to the NCAs in its summary applications, the applicant should consider updating the NCAs in order to ensure that the scope of the protection with the NCAs is the same as at the Commission. Duties relating to not destroying, falsifying or concealing evidence and not disclosing the application do apply to the NCA that received the summary application.

A list of member state competition authorities that will accept summary applications under the ECN Model Leniency Programme, and whether they will accept such applications in English, is set out in the box, Member states accepting summary leniency applications.

Protection of leniency in civil damages actions

The documents disclosed by parties in the context of a leniency application clearly provide very useful evidence of the undertaking's acknowledgement of its participation in an illegal cartel. As such, leniency documents would provide valuable evidence to third parties who bring actions before national courts, based on a Commission infringement decision, to seek damages for losses suffered as a result of an illegal cartel. However, the Commission is concerned that such potential disclosure of specially prepared leniency documents (the corporate statement) could act as a deterrence to companies making leniency applications (and so disclosing cartels).

In June 2011, the ECJ handed down a judgment on a reference from a German court regarding third party access to documents provided under a leniency programme. The Court held that the relevant provisions of Regulation 1/2003 must not be interpreted as precluding a person who has been adversely affected by a breach of EU competition law from being granted access to documents relating to a leniency application by the perpetrator of the breach.

The ECJ held that is for the courts and tribunals of member states to determine, on the basis of their national law, whether access to the documents must be permitted or refused by balancing the interests protected by EU law. That jurisdiction must, however, be exercised in accordance with EU law and must not jeopardise the effective application of Articles 101/102 of the TFEU. The national court must balance, on a case-by-case basis, the interests in favour of disclosure (given the importance of damages actions in contributing to the maintenance of effective competition) and those in favour of protecting the information provided voluntarily by a leniency applicant (given the usefulness of leniency as a competition enforcement tool (Case C-360/09 Pfleiderer AG v Bundeskartellamt; see ECJ judgment on third party access to leniency documents (www.practicallaw.com/6-506-4852)).

Given the importance that the Commission places on the need to protect corporate leniency statements (which are especially prepared for the purposes of the leniency application), as opposed to other pre-existing documents, the Commission proposed to legislate to clarify the interrelation of private actions with public enforcement by the Commission and national competition authorities, in particular, as regards the protection of leniency programmes. In June 2013, the Commission published a proposal for a directive on rules governing antitrust damages actions (see Legal update, Commission proposes directive on antitrust damages and makes recommendations on collective redress (www.practicallaw.com/1-531-6881)). The directive has been adopted by the European Parliament and was formally adopted by Council in November 2014. Member states will have two years to implement the directive into national law.

The directive on antitrust damages actions includes rules relating to the disclosure of evidence. While recognising the difficulties faced by claimants in obtaining sufficient evidence to establish a breach of competition law and show damages, the Commission proposed limits on disclosure in damages actions in order to prevent the disclosure of evidence jeopardising the public enforcement of competition rules. Under the directive, three types of information from a competition authority's file are identified:

- **The black list**: national courts cannot at any time order a party or a third party to disclose leniency corporate statements or settlement submissions. Member states must ensure that such evidence is either deemed inadmissible or otherwise protected in order to ensure full effect of the limits on use of such evidence.

- **The grey list**: the following evidence may only be disclosed after a competition authority has closed its proceedings:
  - information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
  - information that the competition authorities have drawn up and sent to the parties in the course of its proceedings;
  - settlement submissions that have been withdrawn.
• White list: disclosure of evidence in the file of a competition authority that does not fall into either the grey list or the black list may be ordered in actions for damages at any time. Such evidence may, however, only be used for the purposes of the damages action.

In addition, in the meantime, the ECN has issued a resolution explaining the joint position of all ECN competition authorities on the importance of appropriate protection of leniency material in the context of civil damages actions, considering that such protection is fundamental for the effectiveness of anti-cartel enforcement (see Legal update, ECN resolution on protection of leniency material in the context of civil damages actions (www.practicallaw.com/5-519-6141)). The resolution stresses that the ECN competition authorities are "determined" to defend the effectiveness of leniency programmes in order to ensure a high level of anti-cartel enforcement. Such effectiveness heavily depends on the incentives that the leniency programmes offer to potential leniency applicants to come forward and co-operate with competition authorities, the most important of these incentives being the immunity from penalties (or the reduction of penalties) that would otherwise have been imposed.

Although, the ECN recognises that civil damage actions can make a very significant contribution to the maintenance of effective competition in the EU, considering that civil damage claims and leniency programmes are complementary tools to enforce competition law and deter further infringements, at present, civil damage claims in cartel cases in the EU mostly rely on public enforcement follow-on actions. Therefore, appropriate protection of leniency material is necessary to ensure the effectiveness of leniency programmes and to enable the authorities to uncover and terminate cartels as well as to document and establish their existence and the participation therein of the companies up to the requisite legal standard.

The resolution notes that an equivalent standard of appropriate protection of leniency material across the EU facilitates opportunities for constructive co-operation among competition authorities, as well as the effective allocation of cases and resources and contributes to the effectiveness of their enforcement tools. Therefore, as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, competition authorities take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes.

Practical considerations when advising in cartel cases

The following are four situations in which a competition lawyer may be asked to give specific cartel related advice:

- The company wishes to adopt a competition compliance programme to prevent future infringements. These are discussed in detail in the Practice note, Compliance Programmes (www.practicallaw.com/A14492).

- The company believes that its interests are being adversely affected by the actions of competitors, customers or suppliers and believes that there may be a cartel in operation. The company therefore wants to review its options and to consider the best way to bring the action to an end and claim damages. Issues connected with making a complaint and bringing third party actions are discussed in the Practice note, Complaints under EU competition law (www.practicallaw.com/A29378).

- The company uncovers evidence of its involvement in a cartel but no competition authority has yet taken any action. This may be as a result of compliance training or a competition compliance audit. The company needs advice on its next steps. In particular, it wishes to consider whether it should take advantage of the Leniency Notice and blow the whistle on the existence of the cartel. Issues to consider are discussed at Key considerations when involvement in a cartel has been revealed but the Commission has not yet launched an investigation.

- A company finds itself to be the subject of a Commission investigation, either following receipt of an Article 18 request or a surprise dawn raid on its premises. Considerations that should be borne in mind when planning the company’s response are set out at Key considerations when a company has become the subject of a Commission investigation.

Key considerations when involvement in a cartel has been revealed but the Commission has not yet launched an investigation

Where a company suspects that it has been involved in a cartel it will probably require advice on whether there has been an infringement, and if so the level of its potential exposure and how to mitigate that exposure.

Audit

To assess these issues a necessary first step is to investigate the facts by conducting an internal audit. The purpose of this is to try to establish:

- What has actually been going on and in relation to which products or services?

- Where the cartel has had an impact - in just one country, in the EU, worldwide?
• For how long has the cartel existed, or the company been involved?

• Who is involved internally?

• Who are the other participants in the cartel?

• How did it start - was the company a lead participant?

The procedure for conducting an internal audit may involve:

• A mock dawn raid whereby the internal or external legal advisers ask for sight of files and records without prior warning.

• An audit of the files and papers of key individuals.

• Interviews with key individuals.

If the investigation reveals evidence of participation in a cartel then the company is exposed to the risk of a lengthy investigation resulting in significant fines. Further, if the illegal activity affects other jurisdictions, in particular the US, then management and other employees could be at risk of criminal prosecution.

Risk of discovery

The risk of discovery is likely to be key to a decision as to how to proceed next, in particular:

• Is the company aware of any complaints or suspicions being expressed by third parties who may be affected by the cartel?

• Are the other members of the cartel aware that what they have been doing is a breach of competition law - has this been discussed?

• What is the relationship like with the other cartel members? Does the company believe that there is a risk that one of the other members would whistleblow?

• Are there any ex-employees who would know about the company’s participation in the cartel who may be tempted to whistleblow, possibly any one who left the company on bad terms?

• Have any questions ever been asked by any competition authority (national or international) about the operation of the relevant market whether on a formal or informal basis or in the context of other dealings, for example, a merger investigation.

Whistleblowing

The only way for the company to obtain immunity from potential fines is to try to take advantage of the Leniency Notice (and leniency programmes in other member states (see box: Member states with leniency programmes) by being the first to blow the whistle on the cartel. Given the potential severity of any fines following a Commission/ member state investigation this is something that should be considered very carefully even if the risk of discovery seems low. If the risk of discovery seems high then the need to take immediate action becomes more pressing. The following factors may be relevant to the decision whether to apply under the Leniency Notice or not:

• Is the company eligible for immunity in any event? If there is any evidence that it was the lead participant and was involved in coercing other companies to join the cartel then it will not be eligible for immunity.

• May another company already have contacted the Commission? Is so then immunity will not be available. However, if someone else has already taken advantage of the Leniency Notice to obtain conditional immunity then it can be assumed that the Commission will commence an investigation shortly. In which case the company would, in any event, need to consider co-operation in order to obtain the maximum possible reduction to a potential fine.

• Putting together evidence for the Commission and being involved in an investigation will take a considerable amount of management time and legal expense. This fact could be balanced against the risks of discovery. These expenses would, however, also arise if the Commission instigated an investigation.

• The ongoing relationships with the other members of the cartel should be considered. Are there serious risks of commercial retaliation that could have wider implications for the company? Although this must be balanced against the level of any potential fine. The company may be concerned about confidentiality. Any business secrets it provides will benefit from confidentiality but its identity as the whistleblower will ultimately be discovered if it receives the benefit of the Leniency Notice.
• Providing information to the Commission about a cartel will ultimately bring its existence into the public domain. Application of the Leniency Notice does not protect the company from a private action by a third party to claim damages for losses suffered as a result of the cartel. Therefore finding of facts against the company in a Commission infringement decision, even if the company is granted immunity from Commission fines, can be used as evidence in damages actions brought by third parties in the EU. This is particularly an issue if there is a risk of documents prepared in the context of a leniency application being disclosed in national court proceedings (see Protection of leniency in civil damages actions).

• Information about the application will be passed to member state competition authorities, not all of whom have leniency programmes, potentially prompting parallel investigations or referral from the Commission to another better placed authority.

• If the cartel affects jurisdictions outside the EU disclosure to the Commission increases the chances of investigations being started elsewhere (e.g. in the US). There are co-operation agreements in place between the EU and the US which mean that the US and EU authorities have a duty to inform each other about illegal activity of which they become aware and which affects the important interests of the other. There is no concept of double jeopardy as between the US and the EU preventing a company from being fined twice for participation in a global cartel. It is therefore necessary to consider the application of leniency programmes in other territories and to co-ordinate a strategy for applying for leniency elsewhere.

• The risk of individuals within the company being prosecuted under the criminal law of the US, UK or other jurisdictions is significant. Again it is necessary to consider the extent to which leniency applications can be co-ordinated.

• The infringement must be brought to an end.

Next steps

Even if the company decides not to take immediate action to inform the Commission of the cartel, then it should be advised of steps that may help to mitigate fines should the cartel ever be discovered. This may include:

• Taking steps to bring its involvement in the cartel to an end. This is very important. The company should be warned that continuing with the cartel after it has come to the attention of senior management and/or legal counsel would be very prejudicial in the event of an investigation and may prevent reliance on the leniency programmes operating in some jurisdictions (e.g. the US). The best way to evidence the withdrawal of the company from a cartel is to expressly notify the other parties. However, if this is done in writing then this will result in the creation of document recording the existence of the cartel, which, if the company does not intend to seek leniency, could potentially be very damaging.

• Disciplining those employees who were involved in the cartel. This may need to be balanced against the possible risk that a disgruntled employee, or one that felt itself at risk of individual sanctions, (e.g. criminal sanctions in the US or UK) would decide to blow the whistle.

• Increasing and improving compliance training and procedures.

An internal audit may uncover documents, disclosure of which would be prejudicial to the company. The question whether these documents should be retained is likely to arise. Under competition law a company has no general duty to retain documents (although disposal of documents that are the subject of an existing Article 18 information request or Article 20 investigation can give rise to penalties). On discovery of involvement in a cartel the company may be tempted to dispose of all evidence. Aside from any other legal obligations the company may be subject to in relation to document retention, there are risks in doing this:

• Disposal of documents other than in accordance with the company’s normal document retention procedure has a very suspicious appearance. It would be indicative of a lack of co-operation by the company. In any cartel case there are likely to be number of companies involved. There will never be any guarantees that the documents destroyed will not be discovered elsewhere.

• Without documents it would be very difficult for the company to provide conclusive evidence to the Commission should it become subject to an investigation and wish to seek immunity or leniency.

Any documents discovered as part of the internal investigation that provide evidence of the cartel (for example, contemporaneous notes), should be gathered and retained. It may be appropriate for these documents to be removed for storage at the premises of outside counsel. This has the advantage of ensuring that the documents are accessible should they ever be needed but would prevent them from coming into the wrong hands.

Key considerations when a company has become the subject of a Commission investigation

A company will probably require advice on:

• What to do in the aftermath of an investigation.
Whether to provide just the information requested in an Article 18 request or to volunteer further information.

Whether to make a full confession and whether to enter into settlement discussions, should the Commission consider that the case is suitable for this (see Settlement procedure).

Following the first contact from the Commission, whether by dawn raid or information request, it is sensible for the company to carry out an internal investigation to establish whether there is anything behind the Commission’s suspicions (see Audit). The following may be useful:

- If there has been a dawn raid, review the documents taken by the Commission carefully.
- If there has not yet been a dawn raid, consider carrying out a mock dawn raid to see what might be uncovered.
- The scope and purpose of the investigation will be stated in the request or authorisation. Carry out an internal audit of all related papers and all key individuals to try to establish a full picture of whether there is any substance to the Commission’s suspicions.

If the internal investigation reveals evidence of an infringement then, to a large extent, the considerations discussed above in the case of a company that has discovered the infringement itself are also relevant (see Whistleblowing). In addition the following points may be useful:

- It is clear that the Commission already has some information. The company will not know, though it may suspect, whether this is from a third party complainant or a whistleblower within the cartel. Under the procedure in the Leniency Notice, the Commission will inform the company straight away whether or not full immunity is still available (see Commission procedure for granting immunity and reduction of a fine).
- Even if full immunity is not available, the best way to obtain a reduction of a fine is to co-operate with the investigation.

- The other members of the cartel will also be on notice that an investigation is under way and will be considering their own position. The Leniency Notice has a first mover advantage. If a decision is taken to co-operate fully then it is sensible to act as quickly as possible to ensure maximum advantage. After a dawn raid, the company may be tempted to delay taking any action until it is clear whether the Commission is going to progress with the matter, for example by sending an information request. However, if another company volunteers information in the meantime then this will deprive the company of the opportunity of obtaining the maximum possible reduction of any future fine (see Leniency Notice: key points).
- Simply co-operating with the Commission without volunteering any additional information may earn a low level of credit when it comes to the final assessment of fines but it will not be sufficient to earn a reduction of fines under the Leniency Notice.

If the internal investigation does not reveal any grounds for apparent concern then the company does not need to take any direct action (although it is always sensible to review compliance procedures and policies). If, however, it should become apparent that the Commission is pursuing an interest in the case it would be sensible to put together a defence package. What this will involve will depend on the nature of the Commission’s allegations. For example, if the Commission appears to suspect that there has been collusion about price levels and subsequent parallel conduct then it would be sensible to put together any evidence of the way in which the company actually sets its prices. The aim would be to demonstrate that this is done independently and on an objective basis without reference to the actions of any third party.

The information to provide when whistle-blowing

Once a company has decided that it is going to take advantage of the Leniency Notice it is under an obligation to provide the Commission with full and detailed information. It must provide all the evidence and supporting materials in relation to the alleged cartel that are available to it or that becomes available to it (as part of its duty of continued co-operation).

In order to satisfy the Leniency Notice conditions in relation to immunity, the company must provide the required corporate statement. In addition, where the immunity applicant is seeking to provide the Commission with information sufficient to find an infringement of Article 101, then it must provide "incriminating contemporaneous evidence". The Commission has found from experience that, in order to find an infringement against all suspected cartel participants (and not just the applicant), the applicant must provide incriminating evidence originating from the time of the infringement.

In the case of an application for a fine reduction, the information must provide "added value" by providing "compelling evidence". This should be conclusive, stand-alone and corroborated evidence of the infringement.

http://uk.practicallaw.com/6-107-4520
In all circumstances, the most weight will be given to any information that provides direct evidence of the existence of the cartel and its operations. Contemporaneous notes and documents are the most useful form of evidence. It is usually sensible to accompany these with a written submission that sets out the chain of events and explains the context of the documents provided. Even if contemporaneous evidence does not exist, a written testament of the facts, admitting participation, will have some value.

Examples of the type of information and documentation which a company should try to provide to the Commission include:

• A description of the alleged cartel, including its aims, activities and function, the product or service and geographic market concerned, the cartels duration and market volumes affected by it.

• Dates and location of the cartel meetings and other contacts between cartel participants.

• Details of the attendees at the various meetings. The corporate statement should provide their names, positions, office locations and, where necessary, home addresses of all individuals who are or have been involved in the alleged cartel. This will enable the Commission to conduct dawn raids at business or non-business premises.

• Copies of any contemporaneous notes of meetings or telephone conversations.

• Copies of any notes, e-mails or faxes exchanged between the parties which originated because of the cartel arrangements or which refer to the cartel arrangements.

• Copies of any internal documents (memos, e-mails, telephone notes etc), which refer to the cartel arrangements.

• Where the cartel involves price-fixing; details of the actual prices charged by the company over the relevant time. If possible the price lists of other parties to the cartel should be provided.

• Where the cartel involves an agreement to co-ordinate price increases; details of the price increases announced by the company, and if possible, any other company over the relevant period.

• Where the cartel involves any agreement to fix sales quotas or to maintain market shares; details of the parties’ sales over the relevant period, if possible with estimates of the sales of the other parties.

• Copies or examples of any documents exchanged between the parties showing prices, terms of trading or customer information.

Care should be taken to ensure that any information provided that is considered to be commercially sensitive and confidential should be marked as such so that it is not disclosed to other parties when the Commission’s file is opened during the formal proceedings.

Defendant’s right to be heard: key points

The following are the main procedural protections contained in Commission Regulation 773/2004:

• The Commission shall hear the parties before sending its decision to the Advisory Committee for approval

• The Commission decision shall only deal with objections in respect of which the parties have been given the opportunity to make their views known.

• The Commission shall put its objections in writing to the parties (Statement of Objections) and the parties shall be able to respond to such objections in writing, providing corroborating evidence by a stated date, which shall not be less than four weeks.

• The Commission shall also set a deadline by which the parties can provide a non-confidential version of their responses and set a deadline of at least two weeks within which they can substantiate their confidentiality applications.

• Parties shall give the parties the opportunity to have an oral hearing, if they so request it.

• The Hearing Officer shall conduct hearings.

• Parties may be represented by legal advisers at the hearing.

• Oral hearings shall not be held in public

• Statements made at an oral hearing shall be recorded and made available on request, with business secrets deleted.
The Hearing Office may allow the parties to ask questions at the hearing.

The Commission shall take measure to allow access to the file, taking due account of the need to protect business secrets, internal Commission documents and other confidential information.

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**Leniency Notice: key points**

Key points to note about the application of the 2006 Leniency Notice:

- Only one company involved in a suspected cartel can ever obtain complete immunity.

- If a company has provided evidence which enables the Commission to conduct a dawn raid, and the other conditions are met, that company will obtain full immunity regardless of the fact that a subsequent company later provides decisive evidence of the existence of the cartel. The second company can only receive a maximum reduction of 50%.

- Continued co-operation and full disclosure is essential. Therefore in a case such as that described above the first company would lose its full immunity if it subsequently transpires that it could have provided at the outset the information that the second company later provided. The second company may then become eligible for immunity if it was the first company to provide evidence that would enable the Commission to find an infringement and the other conditions are met.

- In all cases the company seeking immunity or leniency must be able to demonstrate that it has brought its involvement in the suspected cartel to an end, unless required otherwise by the Commission.

- The company must not disclose the fact of its leniency application or the existence of the cartel

- A company has no additional exposure by virtue of providing information that increases the gravity of the offence even where immunity has not been granted.

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**Member states with leniency programmes**

All member states except Malta now have national leniency programmes. The authority that administers the leniency programme in each member state is shown below:

- Austria - Bundeswettbewerbsbehörde (Federal Competition Authority)
- Belgium – Conseil de la Concurrence/Raad voor de Mededinging (Competition Council)
- Bulgaria - Commission on Protection of Competition
- Cyprus - Commission for the Protection of Competition
- Czech Republic – Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition).
- Denmark - Konkurrence - og Forbrugerstyrelsen (Danish Competition and Consumer Authority)
- Estonia - Konkurentsiamet (Estonian Competition Board)
- Finland – Kilpailuvirasto (Finnish Competition Authority)
- France – Autorité de la concurrence (French Competition Authority)
- Germany – Bundeskartellamt (Federal Cartel Office)
- Greece - Hellenic Competition Commission
- Hungary – Gazdasági Versenyhivatal (Hungarian Competition Authority)
- Ireland – The Competition Authority
- Italy - Autorità garante della Concorrenza e del Mercato (Italian Competition Authority)
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<tr>
<th>Country</th>
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<tr>
<td>Latvia</td>
<td>Konkurences padome (Competition Council of the Republic of Latvia)</td>
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<tr>
<td>Lithuania</td>
<td>Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania)</td>
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<tr>
<td>Luxembourg</td>
<td>Conseil de la Concurrence/ Inspection de la Concurrence</td>
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<td>Netherlands</td>
<td>Nederlandse Mededingingsautoriteit (NMa)</td>
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<td>Poland</td>
<td>Urząd Ochrony Konkurencji i Konsumentów (Office of Competition and Consumer Protection)</td>
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<td>Portugal</td>
<td>Autoridade da Concorrência</td>
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<td>Romania</td>
<td>Coniliul Concurentei (Competition Council of Romania)</td>
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<tr>
<td>Slovakia</td>
<td>Protimonopolný úrad Slovenskej republiky (Antimonopoly Office of the Slovak Republic)</td>
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<tr>
<td>Slovenia</td>
<td>Urad RS za varstvo konkurence (Competition Protection Office)</td>
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<tr>
<td>Spain</td>
<td>Comision nacional de la Competencia (Spanish Competition Authority)</td>
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<td>Sweden</td>
<td>Konkurrensverket (Swedish Competition Authority)</td>
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<tr>
<td>UK</td>
<td>Competition and Markets Authority</td>
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### Member states accepting summary leniency applications and language that can be used

- Austria - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.
- Belgium - will accept summary applications in English only.
- Bulgaria - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.
- Cyprus - will not accept summary applications in English.
- Czech Republic - will accept summary applications in English only.
- Denmark - will accept summary applications in English only.
- Estonia - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.
- Finland - will accept summary applications in English only.
- France - will not accept summary applications in English unless submitted together with official language version.
- Germany - will accept summary applications in English only.
- Greece - will accept summary applications in English only.
- Hungary - will not accept summary applications in English unless submitted together with official language version.
- Ireland - will accept summary applications in English only.
- Italy - will not accept summary applications in English unless submitted together with official language version.
- Latvia - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.
- Lithuania - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.
• Luxembourg - no indication yet as to acceptable language.

• The Netherlands - will accept summary applications in English only.

• Poland - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.

• Portugal - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.

• Romania - will accept summary applications in English followed by a translation in official language, considering them received on date received in official language.

• Slovakia - will accept summary applications in English followed by a translation in official language, considering them received on date received in English.

• Slovenia - will accept summary applications in English followed by a translation in official language, considering them received on date received in official language.

• Spain - will not accept summary applications in English unless submitted together with official language version.

• Sweden - will accept summary applications in English only.

• The United Kingdom - will accept summary applications in English only.

[Relevant authorities as in box above].

Source: DG Competition website.

Resource information

Resource ID: 6-107-4520

Products: Competition, PLC EU Competition Law

This resource is maintained, meaning that we monitor developments on a regular basis and update it as soon as possible.

Related content

Topics

Cartels (http://uk.practicallaw.com/topic1-103-1161)

Practice notes

Attribution of liability for cartel fines in EU law (http://uk.practicallaw.com/topic6-575-8305)

European Commission fining policy in cartel cases (http://uk.practicallaw.com/topic8-384-8529)

European Commission settlement procedure in cartel cases (http://uk.practicallaw.com/topic9-501-3371)

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