Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Cartels 2024

Definitive global law guides offering comparative analysis from top-ranked lawyers

EU: Law & Practice

Andrzej Kmiecik, Richard Burton and Catherine Gordley
Van Bael & Bellis

EU

Law and Practice

Contributed by:
Andrzej Kmiecik, Richard Burton and Catherine Gordley
Van Bael & Bellis

Contents

Van Bael & Bellis is a leading independent international law firm, headquartered in Brussels with offices in London and Geneva. Competition law (EU, EU member state and UK) is one of our core areas of expertise. Our multilingual team – among the largest in Brussels, including nine partners and six counsel – acts for global clients on the full range of competition matters, including merger control, foreign direct investment, compliance, distribution and business conduct, IP-related issues, state aid and subsidies, competition litigation, abuse of dominance and cartels. Our longstanding cartel defence experience covers all aspects of cartel investigations, from the collection of evidence to leniency and settlement advice, full contested proceedings, and appeals. Notable EU investigations that we have handled, many involving both administrative proceedings and appeals, include airfreight, occupant safety systems, power cables, car battery recycling, automotive bearings, bananas, DRAM, LCD, polyurethane foam, woodpulp (I & II) and smart card chips.

Authors

Andrzej Kmiecik is a senior partner and co-head of the EU competition practice at Van Bael & Bellis. He focuses on all aspects of competition law, with particular expertise in cartel cases, merger control proceedings, distribution and licensing cases, and abuse of dominance matters. Andrzej represents clients before the European Commission, the EU courts and in national competition law proceedings. He has acted as defence counsel in the EU cartel investigations into newsprint, amino acids (also on appeal), carbonless paper (also on appeal), publication papers, fine papers, semiconductor packaging, occupant safety systems (and other car parts), woodpulp and end-of-life vehicles.

Richard Burton is a senior counsel at Van Bael & Bellis who specialises in EU and UK competition law. He advises on a wide variety of competition law matters, including cartels, distribution agreements, pricing and other abuse of dominance issues, merger control and IP licensing. Richard has substantial experience in representing clients in cartel defence cases, including involvement in internal compliance investigations, representation before the European Commission, leniency applications and appeals before the European courts. His experience in EU cartel cases includes acting as defence counsel in the airfreight, DRAM, smart card chips, automotive bearings and other car parts investigations.

Catherine Gordley is a counsel at Van Bael & Bellis who specialises in EU competition law. Her practice includes advising clients in EU and multi-jurisdictional merger proceedings, and in antitrust and abuse of dominance investigations. Catherine's experience spans a range of sectors, with particular expertise in life sciences, including advising pharmaceutical companies on matters related to distribution, pricing, denigration and generic/biosimilar market entry. Catherine is a contributing author to numerous publications, including Van Bael & Bellis's sixth edition of "Competition Law of the European Union" and the first practitioner handbook on the EU Foreign Subsidies Regulation.

Van Bael & Bellis

Glaverbel Building
Chaussée de la Hulpe
166 Terhulpsesteenweg
B-1170 Brussels
Belgium

Tel: +32 0 2 647 73 50
Fax: +32 0 2 640 64 99
Email: brussels@vbb.com
Web: www.vbb.com

1. Basic Legal Framework

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

Public enforcement actions regarding cartels are primarily governed by Article 101 of the Treaty on the Functioning of the European Union (TFEU) (Consolidated version: OJ 2010 C 83/47), as well as by Article 53 of the European Economic Area (EEA) Agreement and its related Protocols 21 and 23 (OJ 1994 L 1). These provisions contain a general prohibition against anti-competitive agreements and collusion between undertakings.

Regulation 1/2003 (OJ 2003 L 1/1) sets out the powers of the European Commission and its relationship with national competition authorities and national courts in the EU with regard to the enforcement of EU competition law. Further procedural rules concerning competition proceedings are set out in Regulation 773/2004 (OJ 2004 L 123/18) and are complemented by the Commission's Best Practices Notice (OJ 2011 C 308/6). In addition, the Commission has more detailed notices which further describe its relationship with (i) the European Network of Competition Authorities (OJ 2004 C 101/43); and (ii) the courts of the EU member states (OJ 2004 C 101/54, as amended). The Commission is currently undertaking an evaluation of Regulation 1/2003 and the related procedural framework and is expected to release a staff working document containing the results of its evaluation, which may include proposed changes, in the course of 2024.

The EU leniency programme is set out in the Commission's 2006 Leniency Notice (OJ 2006 C 298/17). In addition, the European Competition Network's (ECN) Model Leniency Programme has been used to promote convergence between the leniency policies of EU member states.

The EU settlement procedure for cartels is regulated by Regulation 622/2008 (OJ 2008 L 171/3), modifying Regulation 773/2004. These provisions are elaborated in the Settlement Notice (OJ 2008 C 167/1).

Finally, the Commission's methodology for setting fines is explained in its 2006 Fining Guidelines (OJ 2006 C 210/2).

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

Enforcement Agencies and Their Jurisdiction

The European Commission enforces the EU competition rules together with the national competition authorities of the EU member states. These rules also apply in the EEA (ie, the 27 EU member states together with Norway, Iceland and Liechtenstein).

The relevant enforcement authority depends upon which authority is best placed to act, according to the principles set out in the Commission's Notice on Co-operation Within the Network of Competition Authorities. Generally, the Commission is considered the best-placed authority to act where a cartel meets any of the following criteria:

- it has an effect in three or more member states;
- it raises issues that are closely linked to other EU rules that may be exclusively or more effectively applied by the Commission;
- EU interest requires the Commission to develop competition policy in relation to a new competition issue; or
- it will ensure effective enforcement.

At EU level, the Directorate-General for Competition ("DG Comp") is the service within the Commission responsible for cartel enforcement.

If a national competition authority acts, it is obliged to apply EU competition law (in addition to its national competition law) if the conduct at issue affects trade between EU member states.

At EU level, the prohibition of anti-competitive agreements is enforced as an "administrative" breach of EU law, such that the Commission carries out the investigation, decides on whether there was an infringement and imposes fines. However, in some member states, the national competition authority is required to prosecute cartel cases before a national court.

In 2018, the EU adopted a new Directive to better harmonise and strengthen the powers of the ECN, an information network comprised of the Commission and national competition authorities (OJ 2019 L 11/3). In respect of cartels, the ECN Directive requires member states to put in place leniency programmes to enable national competition authorities to grant firms immunity from fines, or a reduction in fines, to encourage such applications. In addition, national competition authorities must accept summary applications in cases where a parallel leniency application has been made to the Commission.

Potential Liability and Scope of Penalties

Under EU law, competition law infringements are regarded as "administrative" in nature and are only subject to fines, although these may be significant. Regulation 1/2003 provides that the Commission may impose fines of up to 10% of an undertaking's total annual worldwide turnover in relation to any one infringement. The Commission has set out detailed criteria for determining the level of fines in its 2006 Fining Guidelines; see **4.1 Imposition of Sanctions**.

1.3 Private Challenges to Cartel Behaviour/Effects

Under EU law, any natural or legal person who has suffered harm caused by an infringement of Article 101 of the TFEU can claim compensation for the harm suffered where there is a causal relationship between that harm and the infringement. In particular, this private right of action is now enshrined in the Damages Directive (OJ 2014 L 349/1); see **5. Private Civil Litigation Involving Alleged Cartels**.

1.4 Definition of "Cartel Conduct"

Article 101(1) of the TFEU prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". This prohibition covers anti-competitive agreements and collusion of both a horizontal and vertical character.

There is no legal definition of "cartel conduct" under EU law, although the term is commonly used to describe the most serious forms of anti-competitive horizontal agreements and concerted practices (such as price fixing, output restriction and market sharing), which have severe potential adverse effects on competition and no potential pro-competitive effects. In addition, the European Commission has published guidelines on the assessment of horizontal co-operation agreements, the most recent version of which dates from June 2023 (OJ 2023 C259/1) which assist in distinguishing lawful forms of joint action between competitors from joint actions that risk being considered to amount to cartels. More

particularly, the guidelines address common lawful forms of joint action between competitors, including by means of research and development agreements, production agreements including subcontracting and specialisation agreements, purchasing agreements, commercialisation agreements, standardisation agreements including standard contracts, sustainability agreements and information exchange. Compared to earlier versions, the 2023 guidelines introduce new guidance on the assessment of sustainability agreements, provide further detailed guidance on the exchange of information between companies, and clarify the application of Article 101 to relations between a joint venture and its parent companies.

1.5 Limitation Periods

The European Commission's power to impose fines for infringements of EU competition law is subject to a limitation period of five years, except for infringements of procedural provisions (ie, those concerning requests for information or the conduct of inspections), in which case the limitation period is reduced to three years.

This limitation period is interrupted, and starts running afresh, whenever at least one of the undertakings concerned is notified of any action taken by the Commission or a national competition authority for the purpose of an investigation or proceedings regarding the infringement. However, any fine will be time-barred where twice the limitation period – ie, ten years (or six years in the case of procedural infringements) – has passed since the end of the infringement.

1.6 Extent of Jurisdiction

The European Commission has jurisdiction to apply the EU competition rules in relation to any anti-competitive agreement or collusion that is – at least in part – implemented within the EU, even if it originates outside of the EU. This was confirmed by the CJEU in the Woodpulp I case. For instance, direct sales in the EU of goods subject to a cartel will be regarded as implementation of the cartel in the EU, irrespective of whether the companies concerned are established outside of the EU or whether the cartel is organised and orchestrated outside of the EU.

On several occasions, the Commission has also sought to rely on an effects-based test to establish jurisdiction over conduct which occurred in foreign jurisdictions. The so-called "qualified effects test" allows the application of EU competition law under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the EU. Although the application of the qualified effects test is not without controversy, the CJEU suggested in the Intel case that it may also be used to determine the Commission's jurisdiction under both Article 101 and 102 of the TFEU.

1.7 Principles of Comity

The European Commission has recognised the importance of respecting the interests of non-EU countries in the application of its competition rules, in accordance with the principle of negative comity. The CJEU has also recognised the principle of non-interference in matters within the jurisdiction of foreign competition authorities. However, the CJEU has not issued any clear ruling on whether the principle of comity is applicable under EU law.

Under the principle of positive comity, the Commission and a non-EU state may act to the advantage of one another in cases where anti-competitive activities carried out in the territory of one of the parties adversely affect important interests of the other party. The Commission has often advocated co-operation with other

competition authorities in order to co-ordinate their work under these principles. These principles have also been endorsed in the dedicated bilateral co-operation agreements in competition matters that the Commission has entered into on behalf of the EU with foreign competition authorities in the USA (1991), Canada (1999), Japan (2003), South Korea (2009) and Switzerland (2013). The Trade and Cooperation Agreement between the EU and the UK (2020) also makes provision for co-operation and co-ordination between the EU and UK's competition authorities post-Brexit, although a detailed agreement implementing this provision has yet to be concluded.

1.8 Changes in the Regulatory Environment Affecting Competition Regulation

There are not expected to be major changes in cartel enforcement policy and practice in the EU in the near future. While a new European Commission, including a new competition commissioner, will be appointed in the course of 2024, it remains to be seen what immediate impact this will have on the Commission's cartel enforcement priorities. The new Commission can be expected to continue to investigate potential cartels across a wide variety of business sectors.

2. Procedural Framework for Cartel Enforcement – Initial Steps

2.1 Initial Investigatory Steps

Cartel investigations are typically triggered in one of four ways:

- a customer or competitor may complain to the European Commission;
- the Commission may open an investigation on its own initiative (ex officio investigation);
- the Commission may be tipped off by an individual "whistle-blower"; or
- a participant in the cartel may submit a leniency application (see **2.11 Leniency and/or Immunity Regime**).

Once an investigation is opened, the Commission has wide powers of investigation and fact-finding under Regulation 1/2003. It may request information from undertakings and also has the power to carry out unannounced inspections (so-called "dawn raids"). Following its investigation, if the Commission wishes to prosecute a case, it issues a Statement of Objections (SO) to the cartel participants (see **2.4 Role of Counsel**) and provides the addressees of the SO with an opportunity to be heard. Ultimately, the Commission issues a decision which can be subject to appeal before the EU courts.

2.2 Dawn Raids

The European Commission can carry out unannounced inspections at companies' or company employees' premises.

Procedure

Inspections may be conducted under a simple authorisation from the European Commission, which gives undertakings the right to refuse to submit voluntarily to inspection. However, an inspection may also be conducted under a formal Commission decision, which means that undertakings must submit to inspection.

The Commission is empowered to enter not only the company's main premises but also, according to Regulation 1/2003, "any other premises, land and means of transport", including the homes of the undertaking's employees. However, the inspection of these "other premises" can be carried out only following a formal Commis-

sion decision and with the authority of a court in the relevant EU member state.

Officials of the national competition authority of the EU member state in whose territory the inspection is to be conducted must, at the request of the Commission, actively assist the Commission in its inspection, in particular, where an undertaking refuses to submit to an inspection under a Commission decision.

If the Commission conducts an inspection, the company being inspected should request a copy of the Commission officials' mandate and review it, paying particular attention to whether its scope is sufficiently defined as to subject matter and timeframe. The company's external lawyers should be called immediately, and officials should be asked to wait until the lawyers are present (although the officials may not wish to comply). Companies being inspected are strongly advised to co-operate with any Commission inspection, as obstruction of the inspection can lead to the imposition of significant fines.

Where the Commission has not finished collecting relevant documents during an inspection, the Commission may decide to continue the inspection at its premises. In this case, a copy of the documents or data still to be searched is placed in a sealed envelope or container. The Commission may then open the sealed envelope or container and examine the contents at its premises in the presence of representatives of the undertaking concerned.

Examined Materials

The Commission is entitled to examine the books and other records related to the business, regardless of the medium on which they are stored. The Commission may take electronic or paper copies of these records and ask the company's representatives or staff for explanations as to any facts or documents related to the investigation.

In practice, this means that the Commission can access not only paper documents but also network servers, computers, external hard drives, cloud computing services, USB keys, CD-ROMs and DVDs, as well as employees' personal devices used for professional purposes. The Commission may choose to examine the IT environment and storage media by using built-in search tools (eg, by conducting a keyword search), but it may also use its own forensic IT tools.

The European Commission is not empowered to seize original documents or data, though it can copy or take extracts of documents or data containing information which is directly or indirectly related to the subject matter and purpose of the investigation. The company is entitled to receive a copy of all the documents and data copied, and may request a signed list of items copied during the inspection.

Explanation of Documents/Interviews

Under its power to conduct unannounced inspections, the European Commission may request any representative or member of staff of the undertaking on site at the company's premises to provide explanations of facts or documents relating to the subject matter and purpose of the inspection. An undertaking may be fined if it refuses to provide such explanations or provides incorrect or misleading information.

Under its power to take statements, the Commission may conduct interviews with any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of the investigation.

In both cases, the Commission must inform the national competition authority of the EU member state in whose territory the interview is conducted. The national competition authority may request that its officials assist the Commission in conducting the interview.

There is no limitation concerning where the Commission may or may not conduct interviews. As long as the interviewee agrees, interviews may be conducted at the Commission's premises. Interviews may also be conducted by telephone or by electronic means.

Due to the voluntary nature of interviews, company employees can decline to be interviewed.

2.3 Spoliation of Information

In the event of an inspection by the Commission, it is of the utmost importance that no documents or other evidence are destroyed. Any such destruction of evidence may be regarded as obstruction of the inspection and can lead to the imposition of significant fines.

To prevent spoliation of evidence, during a physical on-site investigation, the European Commission is empowered to seal any business premises containing books or records that may be relevant to its investigation. Should the Commission decide to seal any part of the premises as part of its inspection, clients are strongly advised to ensure that the seal is not broken, either intentionally or by accident, as this can result in a substantial fine.

Where the Commission has not finished collecting relevant documents during an inspection, a copy of the documents or data still to be searched is placed in a sealed envelope or container. The Commission may then open the sealed envelope or container and examine the contents at its premises in the presence of representatives of the undertaking concerned.

More generally, based on the case law of the EU courts, the Commission considers that it is incumbent on undertakings, at least from the time they have received a first request for information from the Commission in an antitrust investigation, to act with "greater diligence" and to take "all appropriate measures" in order to preserve relevant evidence. While the Commission does not have the power to impose sanctions in this respect, once a company receives a request for information from the Commission, it is generally advisable to take the steps necessary to preserve all potentially relevant evidence (eg, through suspending any regular document retention/destruction policy that the company operates).

2.4 Role of Counsel

Role of Company Counsel

Issues relating to individual legal representation are potentially not as common in the EU as in other jurisdictions as there is no personal liability for cartel conduct under EU law.

Although the right to legal representation is not specifically stipulated in the legislative framework, in practice, the European Commission permits an interviewee to be accompanied by a person of their choice, including external outside counsel. To the extent that a company's legal counsel attends and assists during an interview of an employee, it is permissible for counsel to recommend that the employee only provide answers on matters directly related to the subject matter of the investigation and only within the employee's direct knowledge.

However, in interviews conducted in the course of unannounced inspections, the company's

employees may potentially subject the company to a risk of fines if they decline to respond to, or fail to provide complete and correct answers to, any requests for explanations of facts or documents relating to the subject matter and purpose of the inspection. In such circumstances, the Commission is not prohibited from questioning the employee in the absence of a lawyer.

Separate Counsel for Individuals

There is no personal liability for cartel conduct under EU law, so it is not typically required for an individual to obtain separate counsel. However, given that certain jurisdictions within the EU (eg, Ireland) provide for separate individual criminal sanctions for competition law violations, it may be necessary for individuals suspected and/or closely involved in cartel conduct to instruct legal counsel separate from the counsel advising the company.

Initial Steps to Be Taken by Defence Counsel

At the outset, clients should put in place a prearranged policy that is ready to be implemented in the event the European Commission (or a national competition authority) conducts an on-site surprise inspection. For example, reception staff should be provided with a list of contact details so as to allow them to notify internal senior management, IT staff, in-house counsel and external counsel immediately in the event of an investigation.

On arrival, officials should be asked to wait until the company's counsel are present (although the officials may not wish to comply). If the Commission conducts an inspection, clients should request a copy of the Commission officials' mandate and review it, paying particular attention to whether its scope is sufficiently defined as to subject matter and time. At the beginning of the investigation, employees should be notified to co-operate with the Commission and to ensure that no documents or data are deleted or destroyed and that any seals the Commission places remain intact. An internal "shadow team" should be ready to carefully take note of all the items and information that are subject to investigation.

2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

In addition to the possibility of seizing information during on-site surprise inspections, the European Commission may issue requests for information to companies, either by simple request or by formal decision. In the case of a simple request, the company is not legally obliged to respond, but if it does so it must provide full and correct information. In the case of a request made by formal decision, the company is legally obliged to respond to the request.

As regards testimony, Regulation 1/2003 empowers the European Commission to conduct interviews with any natural or legal persons (ie, an individual representing a company) provided the person in question consents. During an inspection, the Commission may also ask for explanations of facts or documents relating to the subject matter of the investigation.

2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions

Although this is not yet beyond doubt, the European Commission regards itself as empowered to require a company located in the EU to provide evidence located outside of the EU where that information is available at or from the premises of that entity (ie, the target of the investigation has the power to procure it). In particular, the Commission considers itself empowered to search the IT environment (eg, servers, desktop computers, laptops, tablets and other mobile

devices) and all storage media (eg, CD-ROMs, DVDs, USB keys, external hard disks, backup tapes and cloud services) of a company.

Furthermore, the Commission considers it has the power to issue requests for information to companies located outside the EU and regularly does so in practice. If a request for information is issued by formal decision, the Commission may impose fines if the requested information is not supplied within the specified timeframe, or if the reply is incorrect, incomplete or misleading.

However, as a matter of EU law, it is not settled whether and how the Commission could enforce any such request or fine. In practice, where possible, the Commission will address such requests to both the foreign company and any subsidiary it has in the EU.

2.7 Attorney-Client Privilege

External Lawyers

Under EU law, communications between a company and an external lawyer entitled to practise in one of the EU member states benefit from legal privilege. This protection extends to internal company documents summarising advice from an external lawyer, as well as to internal preparatory documents drawn up for the purpose of seeking external legal advice. Recent case law from the CJEU has reaffirmed and strengthened the protection afforded to attorney-client privilege under EU law, making clear that such privilege rests on the right to privacy (as well as the right to a fair trial) and that it covers all communications between an external lawyer and their client (irrespective of whether these are exchanged after an investigation has been initiated or are related to the subject matter of the investigation).

In-House Lawyers

Under EU law, legal privilege does not extend to communications between a company and its in-house lawyers, irrespective of whether the in-house lawyers are entitled to practise in one of the EU member states.

Documents

In practice, where a company invokes legal privilege over a document during an inspection, it may be required to provide European Commission officials with the information on which its privilege claim rests (eg, identification of the author and the purpose or the context of the document). In that case, officials may take a cursory look to verify that the document is indeed of a privileged nature, unless the company argues that even this passing glance may reveal the contents of the document.

Should there be a dispute between the company and the officials as to whether a document is legally privileged, the document should be placed in a sealed envelope or container pending the resolution of the dispute. The Commission must then take a decision, enabling the company to refer the matter to the EU courts.

Self-Incrimination

With regard to other privileges, such as protection against self-incrimination, EU competition law only provides an undertaking with a very limited right to refuse to answer questions from the European Commission. Essentially, a narrow privilege exists, which allows a company to refuse to answer a question which might lead to it directly admitting to having infringed the EU competition rules. However, companies must provide the Commission with the documents or information that the Commission requests even if that information can then be used to establish

the undertaking's participation in an infringement of EU competition rules.

2.8 Non-cooperation With Enforcement Agencies

In a small number of cases, undertakings have successfully resisted overly broad requests for information from the European Commission. According to case law, such requests for information must not be "excessively succinct, vague or generic".

The Commission is empowered to fine a company subject to a request for information up to 1% of its worldwide turnover where it supplies incorrect or misleading information. Daily penalty payments of up to 5% of a company's average daily turnover in the preceding business year may be imposed on a company that has failed to supply complete and correct information.

2.9 Protection of Confidential/Proprietary Information

Confidential information or proprietary information is not subject to protection from disclosure to the European Commission in the course of an investigation.

However, where a target of enforcement action can demonstrate to the Commission that such information constitutes "business secrets" or "other confidential information" within the meaning of the Commission's guidance in its Notice on Access to the File (OJ 2005 C 325/7 (as amended)), that information may be protected from further disclosure to third parties. According to the Notice on Access to the File, information about a firm's business activity, the disclosure of which could result in serious harm to the firm, may constitute a "business secret" – this may include, for example, technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market share, customer and distributor lists, marketing plans, cost and price structure and sales strategy. However, "other confidential information" refers to types of information which, if disclosed, would significantly harm a firm – this may include information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers.

Similarly, personal data is not subject to protection from disclosure to the Commission in the course of an investigation. However, the Commission must process any personal data collected in compliance with applicable EU data protection law.

2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Formally, the first opportunity the target of a cartel investigation has to raise legal and factual arguments to persuade the European Commission to forgo taking action, or modify its prospective action, occurs when the Commission issues its SO. At this stage, defence counsel may raise legal and factual arguments to persuade the Commission to forgo taking action through submitting a formal reply to the SO as well as in the course of an oral hearing before the Commission. However, in practice, the defence counsel for the target of a cartel investigation is typically in close contact with the Commission from the outset of an investigation and it may submit correspondence to the Commission to outline its views on the scope and conduct of an investigation at an early stage.

2.11 Leniency and/or Immunity Regime

The framework of the EU leniency programme is very clearly set out in the Leniency Notice. This framework, together with the existing body of precedent concerning leniency cases, provides a high degree of legal certainty for potential leniency applicants.

Immunity

The European Commission will grant immunity from fines to an undertaking that discloses to the Commission its participation in a cartel affecting the EU if this undertaking is the first to provide evidence and information that, in the Commission's view, will allow the Commission to conduct a targeted dawn raid or find an infringement of Article 101 of the TFEU in connection with the cartel. Immunity from fines will only be available if the Commission does not already have sufficient evidence to decide to carry out an inspection or to find an infringement of Article 101 of the TFEU, and as long as the Commission has not already carried out an inspection and no undertaking has been granted conditional immunity from fines in connection with the cartel.

Information

An application for immunity should contain, to the extent known to the applicant at the time of the submission, the following information.

- A detailed description of the alleged cartel – notably touching upon:
  - (a) the cartel's aims;
  - (b) the cartel's activities and functions;
  - (c) the cartel's geographic scope;
  - (d) the cartel's duration;
  - (e) the product or service concerned;
  - (f) the estimated market volumes affected by the cartel;
  - (g) the specific dates, locations, participants in and contents of cartel contact/communication; and
  - (h) any relevant explanations concerning the evidence submitted in support of the application.
- The names and addresses of the applicants and all the other participants in the alleged cartel.
- The names, positions and office locations (and, when necessary, home addresses) of all individuals involved in the cartel.
- Information on whether the applicant has submitted, or may potentially submit in the future, any leniency applications to other competition authorities in relation to the alleged cartel.

Applicants must also submit to the Commission any evidence in connection with the cartel that they have in their possession or that is available to them at the time of the submission, including, in particular, evidence contemporaneous to the alleged infringement.

Availability

Immunity applicants must also co-operate fully, genuinely, expeditiously and on a continuous basis with the Commission. In practice, an immunity applicant will have to:

- provide the Commission with all relevant information and evidence concerning the cartel that is available to it or that comes into its possession;
- promptly answer any request from the Commission that may contribute to the establishment of the facts and make sure that current (and, if possible, former) directors and employees remain available to be interviewed by the Commission;
- refrain from concealing, falsifying or destroying relevant information concerning the cartel; and

- refrain from disclosing the existence or contents of its immunity application before the Commission has issued an SO.

In order to obtain immunity, undertakings are expected to end their involvement in the cartel immediately following their immunity application (unless the Commission requests them to act otherwise in order to preserve the integrity of inspections).

Immunity will not be available to undertakings that have concealed, falsified or destroyed relevant information or evidence concerning the cartel. Undertakings that have coerced other undertakings to join the cartel or to remain in it are not eligible for immunity from fines, although applicants for immunity that have acted as coercers can still obtain a reduction in the fines if they meet the conditions to qualify for a reduction.

Markers

Companies applying for immunity from fines may be able to obtain a marker at the discretion of the Commission, which preserves their position in the queue of leniency seekers pending the provision of the full information necessary to qualify for immunity. Markers are not available for companies applying for a reduction in fines.

An application for a marker must contain information on the applicant's name and address, the parties to the cartel, the affected products, the affected territories, the duration of the cartel and the nature of the cartel conduct. Applicants must provide information on any past or potential future leniency applications to any other competition authorities in relation to the cartel. They must also state the reasons why they consider that the grant of a marker is necessary (eg, because the applicant needs to carry out further investigation).

If a marker is granted, the applicant will have to perfect it by supplying the information and evidence necessary to secure immunity before the deadline set by the Commission. This information and evidence will be deemed to have been submitted on the date when the marker was granted. The deadline to perfect the marker is very short (typically under a month). The applicant can formally request for a marker to be extended. However, in practice, such requests are not always granted.

Leniency

Any company that does not qualify for immunity can still benefit from a reduction in the fine if it provides the Commission with evidence of the cartel that represents significant added value in regard to the evidence that the Commission has already obtained. Evidence will be considered to be of significant added value when it enhances the Commission's ability to prove the existence of the alleged cartel. The Commission will consider that contemporaneous written evidence in direct connection with the cartel has greater added value than later evidence that relates to the cartel only indirectly. The Commission will also consider the degree of corroboration from other sources that is necessary to rely on the evidence provided, in order to determine its added value.

Leniency applicants must also co-operate fully, genuinely, expeditiously and on a continuous basis with the Commission.

In order to obtain a reduction in the level of fines, undertakings are required to end their involvement in the cartel immediately following their immunity application (unless the Commission requests them to act otherwise in order to preserve the integrity of inspections).

Leniency will not be available to undertakings that have concealed, falsified or destroyed relevant information or evidence concerning the cartel. Leniency applicants must refrain from disclosing the existence or contents of their leniency application (except to other competition authorities). The Commission may grant reductions in fines to qualifying applicants within the following bands:

- the first undertaking that provides evidence of significant added value will obtain a reduction of 30–50%;
- the second undertaking that provides evidence of significant added value will obtain a reduction of 20–30%; and
- subsequent undertakings that provide evidence of significant added value will obtain a reduction of up to 20%.

The Commission has discretion to decide the exact reduction to be granted within each of these bands on the basis of when the applicant submits the evidence and the extent to which this evidence represents significant added value relative to the evidence already in the Commission's possession.

Under EU law there is no provision either to increase fines for failing to disclose the company's involvement in another, unrelated cartel, nor to reduce fines related to one cartel by disclosing involvement in another, unrelated cartel.

Leniency applications may be made in writing or in the form of an oral submission to the Commission, supported by the relevant contemporaneous evidence. In March 2019, the Commission launched an online "eLeniency" tool to make it easier for companies to securely submit leniency statements and documents. According to the Commission, leniency statements submitted via eLeniency are protected against discovery in civil litigation, in the same way as oral submissions.

2.12 Amnesty Regime

As there is no personal liability for cartel conduct under EU law, there is no separate amnesty regime at EU level.

3. Procedural Framework for Cartel Enforcement – When Enforcement Activity Proceeds

3.1 Obtaining Information Directly From Employees

The European Commission is empowered to question company staff and employees directly. The Commission may request that staff provide explanations on facts or documents relating to the subject matter and purpose of the inspections, and can also conduct interviews of broader scope where the staff consent (see **2.2 Dawn Raids** and **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**). The Commission usually permits staff to be accompanied by external counsel (see **2.4 Role of Counsel**).

3.2 Obtaining Documentary Information From the Target Company

The European Commission may seek documentary information directly from a company subject to investigation. The Commission may request information by simple request (ie, response is voluntary) or by formal Commission decision (ie, response is mandatory); see **2.2 Dawn Raids** and **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony**.

3.3 Obtaining Information From Entities Located Outside This Jurisdiction

The European Commission considers it has the power to issue requests for information to companies located outside the EU and regularly does so in practice. If a request for information is issued by formal decision, the Commission may impose fines if the requested information is not supplied within the specified timeframe, or if the reply is incorrect, incomplete or misleading (although whether it may impose fines in the case of companies outside the EU is subject to controversy). In particular, the Commission has jurisdiction to apply the EU competition rules to any anti-competitive agreement or collusion that is (at least in part) implemented within the EU (see **2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony** and **2.6 Obligation to Produce Documents/Evidence Located in Other Jurisdictions**).

3.4 Inter-agency Co-operation/Co-ordination

EU Member States

The European Commission co-operates with the national competition authorities of the EU member states through the European Competition Network (ECN). ECN members can exchange information and use the information received from other ECN members under certain conditions, as provided by the Commission's Notice on Co-operation Within the Network of Competition Authorities (see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**).

The ECN Directive, adopted in 2018, is designed to strengthen the operation of national competition authorities, and includes express provisions for mutual legal assistance among national competition authorities. In particular, a national competition authority must be empowered to search businesses, summon staff for interviews, request information and enforce decisions imposing fines on behalf of another national competition authority.

Non-EU Competition Authorities

The Commission often co-operates with non-EU competition authorities. In the case of information submitted in the context of leniency, information exchanges between the Commission and non-EU competition authorities will only take place provided that leniency applicants provide the Commission with waivers of their confidentiality rights in relation to other competition authorities to which the undertaking concerned has applied for leniency.

The EU has concluded dedicated competition co-operation agreements with Canada, Japan, Korea, Switzerland and the USA. These agreements govern exchanges of information between the parties' competition authorities.

The Trade and Cooperation Agreement between the EU and the UK (2020) also makes provision for co-operation and co-ordination between the EU and UK's competition authorities post-Brexit, including the exchange of information between them to the extent permitted by each party's law. However, a detailed agreement implementing this provision has yet to be concluded.

3.5 Co-operation With Foreign Enforcement Agencies

Co-operation between the European Commission and other competition authorities has been centre stage of several cartel cases that have developed across multiple jurisdictions. For instance, between 2013 and 2020, the Commission issued decisions in numerous cartel cases involving automotive parts, which had ramifications over several jurisdictions and involved co-

operation between the Commission and non-EU competition authorities, including the Japan Fair Trade Commission and the US Department of Justice.

3.6 Procedure for Issuing Complaints/ Indictments in Criminal Cases

EU law does not provide for criminal sanctions in respect of infringements of EU competition law.

3.7 Procedure for Issuing Complaints/ Indictments in Civil Cases

Under the EU competition rules, it is the European Commission (rather than a court) that is empowered both to investigate and decide upon cartel matters, subject to the review of the EU courts. Following an investigation, and where the Commission intends to find a cartel infringement, it must first formally initiate proceedings. At this point, national competition authorities lose their concurrent jurisdiction in favour of the Commission. Next, the Commission must issue an SO to the target company to notify it of the Commission's objections to the agreement or practice and set out the supporting facts and legal reasoning. As the SO is only a preparatory document, it may not be challenged before the EU courts. The SO provides the target of the Commission's investigation with an opportunity to respond to the case against it. Furthermore, the target of the Commission's investigation will also have an opportunity to access the file of the Commission in order to review the evidence against it.

3.8 Enforcement Against Multiple Parties

Typically, the European Commission brings enforcement proceedings against all parties involved in a cartel in a single proceeding. However, for reasons of administrative efficiency, in some cases the Commission may open a single case with an overall common theme or subject matter, which covers multiple cartel infringements involving different participants in each individual cartel. A further exception to this general principle may occur where the Commission opens so-called "hybrid settlement" cases (see **4.2 Procedure for Plea Bargaining or Settlement**). In particular, such cases may arise where the Commission seeks to close a cartel proceeding by way of the settlement procedure where certain parties have admitted their involvement in the cartel but other alleged participants contest their involvement. In such cases, the Commission may open both a settlement procedure against the settling parties and a standard infringement procedure against the party or parties contesting their involvement in the cartel.

3.9 Burden of Proof

The European Commission bears the burden of proving the key elements of the infringement alleged against a company subject to investigation. According to various formulations emerging from the case law of the EU courts, the Commission must support its case with "sufficiently precise and coherent proof" or a "firm, precise and consistent body of evidence" that gives "grounds for a firm conviction that the alleged infringement took place". This requirement is not satisfied "where a plausible explanation can be given for those alleged infringements which rules out an infringement of Community rules on competition". In relation to cartel cases, where the Commission has established that a company attended obviously anti-competitive meetings, the burden of proof shifts to the company under investigation to provide an alternative explanation for such meetings.

3.10 Finders of Fact

In cartel cases, the European Commission acts as the finder of fact and applies EU competition law to those facts.

3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

Regulation 1/2003 provides that information collected by the European Commission during the course of an investigation may only be used for the purpose for which it was acquired.

3.12 Rules of Evidence

Under EU case law establishing the principle of "unfettered evaluation of the evidence", the Commission is entitled to rely on any relevant evidence that it considers probative of its case, provided that evidence has been lawfully obtained.

3.13 Role of Experts

In cartel cases, the European Commission does not generally identify in its decisions the level of harm caused by a cartel, such that economists or other experts are most likely to be involved in any follow-on actions for damages before national courts in order to assist claimants with efforts to quantify the damage caused to direct and indirect purchasers of the cartel product or service.

3.14 Recognition of Privileges

Only documents subject to legal professional privilege are recognised as protected against disclosure.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

Generally, conduct involving the same or related facts will be subject to a single enforcement proceeding. For example, where the same or related facts are subject to investigation at both national and European level, the Commission is empowered to relieve national competition authorities of their jurisdiction when it formally opens an investigation. At the same time, conduct involving the same or related facts may be subject to multiple enforcement proceedings at national level in different EU member states. As described in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, the Commission's Notice on Co-operation Within the Network of Competition Authorities sets out the procedures as to how co-operation is organised between the Commission and the competition authorities of the EU member states.

4. Sanctions and Remedies in Government Cartel Enforcement

4.1 Imposition of Sanctions

The European Commission may impose sanctions itself without having to bring an action against the companies concerned before the EU courts. However, Commission decisions are subject to appeal before the EU courts.

Regulation 1/2003 provides that the Commission may impose fines of up to 10% of an undertaking's total annual worldwide turnover in relation to any one infringement. The Commission has set out detailed criteria for determining the level of fines in its 2006 Fining Guidelines.

Fining Guidelines

Under the Fining Guidelines, fines may be based on up to 30% of the company's annual sales in the EEA of the goods or services to which the infringement relates (the "relevant value of sales"), or a proxy in certain specified circumstances, multiplied by the number of years of the company's participation in the cartel. In cartel cases, the Commission typically takes into

account 15–25% of the relevant value of sales. Additionally, in cartel cases, an additional "entry fee" of 15–25% of the relevant value of sales will usually be added to the fine irrespective of the duration of the infringement.

Aggravating and Mitigating Factors

Aggravating factors (eg, recidivism, refusal to co-operate with or obstruction of the Commission's investigation, instigating or playing a leading role) and mitigating circumstances (eg, negligence, limited involvement, co-operation with the Commission outside the scope of the Leniency Notice, or state encouragement) will also have an impact on the calculation of a fine. The impact of these factors on the final level of the fine can be considerable; for instance, recidivism may lead to an increase in the fine of up to 100% for each prior finding of infringement against the undertaking concerned. Furthermore, the Commission can specifically increase the fine for companies with a particularly large turnover outside of the cartel product or service, in an effort to ensure a deterrent effect. The Commission also reserves the right to depart from the above methodology and limits, where appropriate in a particular case, which it has done in respect of cartel facilitators.

The Commission may not impose any sanctions other than pecuniary ones.

4.2 Procedure for Plea Bargaining or Settlement

The EU cartel settlement procedure may be used by the European Commission when cartel members agree to admit to the Commission's objections, acknowledging their participation in a cartel and accepting their liability for this conduct. Through settlement discussions, the Commission reaches a "common understanding" with the settling parties on the relevant facts, as well as on the scope of the Commission's objections in the case.

The settlement procedure allows the Commission to achieve procedural efficiencies by speeding up the adoption of a cartel decision through a quicker and shorter administrative process. The settlement procedure also reduces the number of grounds for appeal against Commission decisions.

In return for agreeing to settle, undertakings receive a 10% reduction in the fine, while benefiting from the reduced costs that the simplified settlement procedure entails, as opposed to the much more considerable costs associated with regular cartel proceedings. They are also given an opportunity to know in advance and even discuss the Commission's potential findings concerning their participation in the infringement and the level of the fines that the Commission intends to set. It should be noted that the Commission enjoys broad discretion regarding whether to pursue settlements and can decide to discontinue the process if it considers that it is unlikely to lead to procedural efficiencies.

4.3 Collateral Effects of Establishing Liability/Responsibility

The Commission may not impose any sanctions other than pecuniary ones.

4.4 Sanctions and Penalties Available in Criminal Proceedings

The Commission may not impose any sanctions other than pecuniary ones.

4.5 Sanctions and Penalties Available in Civil Proceedings

The European Commission may impose fines on companies. No sanctions can be imposed on company employees under EU law. The Com-

mission can order a company to cease engaging in a certain business practice. Furthermore, cartel decisions typically oblige the addressees to end the cartel and to refrain from such conduct in future.

4.6 Relevance of "Effective Compliance Programmes"

The adoption of an antitrust compliance programme is not considered a mitigating factor by the European Commission when it sets a fine for a cartel infringement. However, the Commission has pointed out that an effective competition compliance programme may benefit a company by enabling that company to detect and cease its involvement in a potential cartel, and thereby minimise its exposure to a fine.

4.7 Mandatory Consumer Redress

The European Commission does not have the power to order compensation to be paid by companies to direct or indirect purchasers subject to harm caused by a cartel.

4.8 Available Forms of Judicial Review or Appeal

Undertakings to which the European Commission has addressed a cartel decision may appeal against that decision before the General Court. The General Court is empowered to review the Commission's findings of fact and law. Typically, the General Court will only intervene in relation to the Commission's findings of fact where it can be shown that the Commission has made a manifest error of assessment of the evidence before it. A further appeal to the CJEU is possible, but on points of law only.

The EU courts have unlimited jurisdiction on fines, which means they may annul, reduce or increase the sanctions imposed.

5. Private Civil Litigation Involving Alleged Cartels

5.1 Private Right of Action

Under EU case law, any victim of a breach of EU competition law has a right to claim compensation for harm suffered where there is a causal relationship between that harm and the infringement. This right is enshrined in the Damages Directive.

The Damages Directive harmonises the conditions under which actions for damage may be brought before national courts and has been transposed into national law in each of the 27 EU member states. In short, the Damages Directive aims to preserve the effectiveness of antitrust enforcement tools by ensuring, inter alia, that:

- those harmed by cartels enjoy a right to full compensation;
- claimants benefit from minimum standards of disclosure of evidence;
- final decisions of the European Commission or national competition authorities are, as a matter of evidence, legally presumed to have occurred;
- a minimum limitation period of five years is established in each member state;
- cartelists may be held jointly and severally liable for cartel infringements; and
- national courts may estimate the rate of passing-on and quantify the harm caused by a cartel.

Private actions for damages are brought before national courts. The Damages Directive gives evidential value to administrative decisions of the Commission and a national competition authority. The findings made by the Commission in any infringement decision are binding on national courts. Moreover, a final infringement decision of

a national competition authority is binding on the national court of that member state or serves as prima facie evidence of the infringement before the national courts of another member state. As a result, most private actions are brought after a final cartel decision and are known as "follow-on" actions, rather than "standalone" actions. The conditions precedent to bringing such a follow-on action include, inter alia:

- a cartel decision which identifies the material, personal, temporal and territorial scope of the cartel;
- a causal relationship between the harm suffered by the claimant and the activity of the cartel; and
- an estimation of the harm caused to the claimant by the cartel.

5.2 Collective Action

While the Damages Directive harmonises national rules to the extent necessary to ensure victims of EU competition law infringements have effective mechanisms to obtain redress for harm suffered, it does not require member states to introduce collective redress mechanisms. Therefore, in the absence of EU rules, damage claims arising from an infringement of EU competition rules are dealt with by the national courts in each EU member state in accordance with national procedural rules.

5.3 Indirect Purchasers and "Passing-On" Defences

The Damages Directive requires all member states to allow indirect purchasers to claim damages for harm caused by a cartel infringement.

Member states must also recognise the passing-on defence in actions for damages. For example, if price increases caused by a cartel have been "passed on" along the distribution chain, the compensation payable by an infringer to its direct customers may be reduced by the amount passed on. A cartelist bears the burden of proving that a claimant passed on the overcharge. By contrast, a claimant who is an indirect purchaser enjoys a rebuttable presumption that indirect customers suffered as a result of a price increase caused by a cartel. The share of the overcharge that was passed on is to be estimated by the relevant national court.

5.4 Admissibility of Evidence Obtained from Governmental Investigations/ Proceedings

The Damages Directive prohibits the disclosure of leniency statements and settlement submissions by the European Commission or a national competition authority at any time. Where the Commission or a national competition authority has adopted a cartel decision, a national court may order the disclosure of:

- information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- settlement submissions that have been withdrawn.

Claimants may also seek to obtain other information from government investigations or proceedings by relying on the general right of access to the documents of the EU institutions under Article 15 of the TFEU and Regulation 1049/2001 (OJ 2001 L 145/43). However, the Commission may refuse access to a document where disclosure would undermine the protection of commercial interests of natural or legal persons, court proceedings and legal advice, or the purpose of inspections, investigations and

audits, provided that there is not an overriding public interest in favour of disclosure.

Although there are some instances where private claimants have gained access to cartel evidence (for instance, in the CDC and Austrian banks cases), the Commission generally rejects applications for access to evidence by relying on the exception for the protection of the commercial interests of third parties or on the exception for the protection of the purpose of investigations.

5.5 Frequency of Completion of Litigation

Private actions for damages are litigated under national law. As a result, the frequency of completion of follow-on litigation arising from a cartel decision of the European Commission depends on various factors at national level.

5.6 Compensation of Legal Representatives

Private actions for damages are largely governed by national law. Compensation for the attorneys of successful claimants is governed by applicable professional rules at national level.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Private actions for damages are largely governed by national law. As a result, the degree to which claimants are obliged to cover defence costs and other fees associated with an unsuccessful claim are governed by applicable costs rules at national level.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

Private actions for damages are largely governed by national law. Appeals against a decision of a national court are governed by national law. A national court may refer a question on the interpretation of the Damages Directive or any other matter of EU law to the CJEU.

6. Supplementary Information

6.1 Other Pertinent Information

There is no other information that is pertinent to an understanding of the process, scope and adjudication of claims involving alleged cartel conduct in the EU.

6.2 Guides Published by Governmental Authorities

The European Commission has published a variety of guides and documents relating to cartel investigations, the leniency programme and settlements. These are available on its website.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com