# Cartel Regulation 2021

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LEXOLOGY
Getting The Deal Through

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# Cartel Regulation 2021

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Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Neil Campbell of McMillan LLP, for his continued assistance with this volume.

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# European Union

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## LEGISLATION AND INSTITUTIONS

### Relevant legislation

1 | What is the relevant legislation?

Cartels that have an effect on trade between member states of the European Union are prohibited under article 101 of the Treaty on the Functioning of the European Union (TFEU), which applies to all agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market. The European Commission (EC), which is primarily in charge of enforcing article 101 TFEU at the European level, issued specific guidelines in 2011 to help undertakings self-assess their horizontal cooperation agreements under EU competition law (Guidelines on the applicability of article 101 TFEU to horizontal cooperation agreements, 2011/C 11/01). Although these guidelines are not intended to provide guidance as to what does or does not constitute a cartel, it nonetheless contains several references to cartels as well as a specific chapter on the competitive assessment of information exchange that, depending on the circumstances and type of information exchanged, may be fined as cartels.

### Relevant institutions

2 | Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

Pursuant to Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003), the EC has exclusive jurisdiction to both investigate – through its Directorate-General for Competition (DG Competition) – and sanction cartels at the European level. Its decisions can then be appealed to the General Court of the European Union (GCEU) and, ultimately, the European Court of Justice (ECJ).

### Changes

3 | Have there been any recent changes, or proposals for change, to the regime?

Except for the temporary framework communication adopted by the EC on 8 April 2020 to address the challenges resulting from the coronavirus outbreak, there have been no recent changes to the EU cartel regime.

However, it is worth recalling that two sets of rules of interest in cartel matters were adopted in 2018 and 2019, regarding the development of private enforcement actions and the powers of national competition authorities (NCAs) to better implement the provisions of Regulation No. 1/2003.

On 9 August 2019, following the transposition by all member states of Directive No. 2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of member states and of the European Union (the Damages Directive), which establishes a framework to facilitate damages actions by victims of competition law infringements, the EC released guidelines for national courts on how to estimate the passing-on of cartel overcharges to indirect purchasers.

On 11 December 2018, the European Parliament and the Council adopted Directive No. 1/2019 to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive). Member states have until 4 February 2021 to transpose it. The ECN+ Directive seeks to harmonise the enforcement of competition law by NCAs by providing resources, fining tools and guarantees of independence. The ultimate aim of the ECN+ Directive is to ensure that competition law is applied effectively and consistently throughout the European Union, and that the application of national competition laws by NCAs does not lead to a different outcome than the one that would have been reached under EU law.

### Substantive law

4 | What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU prohibits:

> *[All] agreements between undertakings, decisions by associations of undertakings and concerted practices that 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.*

A non-exhaustive list of prohibited practices is set out in this provision and includes agreements, decisions and concerted practices which, directly or indirectly, aim to:

- fix prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply; and
- apply dissimilar conditions to equivalent transactions or making the conclusion of contracts subject to acceptance of supplementary obligations.

Depending on the conduct, it may be considered as having either an anticompetitive object or, in the alternative, an anticompetitive effect. Object restrictions are those which, by their very nature, entail a sufficient degree of harm to competition so that there is no need to examine their effects (see ECJ, 2 April 2020, *Gazdasági Versenyhivatal c/ Budapest Bank Nyrt. e.a*, C–228/18). In order to determine whether an agreement or concerted practice has an anticompetitive object, regard must be had to the content of the agreement, its objectives, and the economic and legal context of which it forms part. In practice, certain

collusive behaviours, including information exchanges, are deemed by object restrictions, such as price-fixing or market sharing.

Under article 101(2) TFEU, agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the EC that they breach article 101(1) TFEU.

However, article 101(3) TFEU provides that agreements whose efficiencies outweigh the anticompetitive effects can be exempted, provided they meet certain criteria, and notably that they contribute to economic progress to the benefit of the end-consumer, without foreclosing competition. It is nonetheless extremely rare that cartels qualify for such exemption.

**Joint ventures and strategic alliances**

5 To what extent are joint ventures and strategic alliances potentially subject to the cartel laws?

If a joint venture is not deemed a 'concentration' within the meaning of the EU merger control regulation, it will be considered as a cooperation agreement, which must therefore be examined under article 101 TFEU. In practice, this will be the case of all non-full function joint ventures, (ie, those where the joint venture does not have sufficient resources to operate autonomously from its parent companies), which are therefore deemed parties to a cooperation agreement.

While joint ventures may have pro-competitive effects, those which directly or indirectly organise or facilitate price-fixing, market sharing or limitation of output may be assessed under cartel laws.

While they can bring benefits to final consumers and are generally exempt under article 101(3) TFEU, strategic alliances – such as the ones in the air transport or food retail sectors – can also give rise to competition concerns and be sanctioned under article 101(1) TFEU. The EC has, for example, recently opened an investigation targeting two French supermarkets chains for possible collusion on sales activities as part of a buying alliance they set up in 2014 (case AT.40466).

## APPLICATION OF THE LAW AND JURISDICTIONAL REACH

**Application of the law**

6 Does the law apply to individuals, corporations and other entities?

Article 101 of the Treaty on the Functioning of the European Union (TFEU) only applies to undertakings. The notion of 'undertaking' has been defined broadly in European Union case law, as any entity engaged in an economic activity (ie, the sale of goods or provision of services), regardless of its legal status and the way in which it is financed (European Court of Justice (ECJ), 1991, *Höfner and Elser*, C-41/90). Accordingly, in addition to individual companies operating in a market, the following entities have been considered as undertakings within the meaning of competition law:

- professional orders;
- trade unions and professional associations;
- public agencies that do not exercise the prerogatives of a public authority;
- sports federations and associations; and
- entities working in the social sector.

In practice, this means that individuals can only be subject to competition law provisions if they themselves are an undertaking, ie if they sell goods or services on their own behalf. However, article 101 TFEU does not apply to individuals acting as employees of an undertaking. Please note that the national legislation of some member states provides for criminal sanctions or administrative fines for employees that participate in an infringement of competition law.

**Extraterritoriality**

7 Does the regime apply to conduct that takes place outside the jurisdiction (including indirect sales into the jurisdiction)? If so, on what jurisdictional basis?

Yes. Article 101 TFEU has an extra-territorial reach insofar as any conduct which has effects in the EU territory, irrespective of the nationality of the infringer and the country in which sales are booked, falls within the jurisdiction of the European Commission (the EC).

In this respect, according to the Guidelines on the method of setting fines imposed pursuant to article 23(2)a of Regulation No. 1/2003 (the Guidelines on the method of setting fines), the EC usually calculates the fine imposed on an undertaking on the basis of 'the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area' within the European Economic Area (EEA) (paragraph 13). By way of exception, however, the EC may 'assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA)' (paragraph 18) to reflect both the aggregate size of the sales concerned in the EEA and the relative weight of each undertaking in the infringement. Thus, on several occasions, the EC took into account sales made by participants in the cartel outside the EEA in order to reflect their participation when they had little or no sales within the EEA. This was notably the case in the *Power Cables* decision (EC, 2 April 2014, *Power Cables*, case AT.39610), where the EC's approach to take into account the sales made by the Japanese companies participating in the cartel was recently validated by EU courts (General Court of the European Union (GCEU), 2018, *Viscas*, T-422/14; ECJ, 2019, *Viscas*, C-582/18 P).

**Export cartels**

8 Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

There is no such exemption or defence under EU law.

**Industry-specific provisions**

9 Are there any industry-specific infringements? Are there any industry-specific defences or exemptions?

There are no industry-specific infringements. However, specific regulations or guidelines exist in some sectors that the EC wishes to encourage. This is the case for instance in the maritime transport sector, where Regulations No. 246/2009 of 26 February 2009 and No. 906/2009 of 28 September 2009 exempt joint-service agreements between liner shipping companies aimed at rationalising their operations by means of technical, operational and/or commercial arrangements (described in shipping circles as 'consortia'). Exemptions also apply in the agriculture sector, where Regulation No. 2017/2393 provides for a derogation for some activities of producer organisations, such as joint sales.

Specific regulations used to apply in other sectors, such as insurance or air transport, but they expired or were repealed.

**Government-approved conduct**

10 Is there a defence or exemption for state actions, government-approved activity or regulated conduct?

There is not, as such, a defence or exemption for a cartel that has been approved or encouraged by a state. For instance, in a 2008 preliminary ruling about a scheme under which some beef processors undertook to leave the processing industry the ECJ considered that even if the scheme resulted from a study carried out at the request of the Irish government, it amounted to a restriction of competition by object (ECJ, 20 November 2008, *Beef Industry Development Society*, C-209/07).

However, the Guidelines on the method of setting fines provide that the basic amount of the fine imposed on undertakings that infringed article 101 TFEU may be reduced to take into account mitigating circumstances, such as where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation.

In 2017, following the GCEU annulling its first decision on procedural grounds, the EC readopted a cartel decision against 11 air cargo carriers that were found to have infringed article 101 TFEU by operating a price-fixing cartel. They were all granted a 15 per cent reduction in fines on the ground that they had been encouraged to concert on prices with their competitors by the applicable regulatory regime (see EC, 9 November 2010 and 17 March 2017, *Airfreight*, AT.39258).

## INVESTIGATIONS

### Steps in an investigation

11 | What are the typical steps in an investigation?

#### Initiation of the proceedings

The European Commission (the EC) may take up a matter on its own initiative or be contacted by any natural or legal person with a legitimate interest (eg, competitor, victim, or even co-perpetrator within the context of leniency). The EC may also launch a sector inquiry, which can subsequently give rise to individual investigations (eg, the case of the pay-for-delay investigations launched against Lundbeck and Servier, that followed the EC's sector inquiry in the pharmaceutical sector). Please note that the EC enjoys full discretionary prosecution powers, and can choose not to investigate a complaint, for instance, if it lacks interest from a European perspective or if it is already examined by a national competition authority (NCA).

#### Investigation

The proceedings are carried out by the investigation services of the EC. They can request oral or written information from the undertakings concerned, carry out on-site inspections at their premises, as well as seal premises or business records. The companies investigated are under a duty of cooperation, meaning that they are required to respond to the investigation services' questions, and to abide by the decisions authorising dawn raids, at the risk of sanctions. The EC can also hear other persons than the companies being investigated. Such interviews are not mandatory; however, after the subject has agreed to testify, he or she must cooperate and provide the EC with accurate information.

#### Adversarial phase of the procedure

The undertakings concerned receive a statement of objections in which the EC presents the objections raised against them, as well as the factual evidence and legal arguments behind its analysis. The undertakings are then able to examine all elements contained in the EC's investigation file, to file observations in response to the statement of objections and to request an oral hearing to present their comments on the case. Please note that, where applicable, discussions regarding a potential settlement procedure will be initiated by the EC before the undertaking receives the statement of objections. If the undertaking accepts to settle, it will have to send a settlement proposal to the EC, to which the latter will respond by sending a statement of objections setting out the content of the proposal.

#### Decision

If it concludes to the existence of an infringement of article 101 of the Treaty on the Functioning of the European Union (TFEU), the EC will adopt a grounded decision prohibiting the conduct and imposing a fine and/or specific remedies. While in certain antitrust cases the EC may deem appropriate to close its investigation with a commitment decision, in which case there is no finding of infringement, commitment decisions are not appropriate for cartel cases.

There is no legal deadline for the EC to complete cartel inquiries. Though it is difficult to make general assumptions about the timing of cartel cases, such proceedings usually last for several years.

### Investigative powers of the authorities

12 | What investigative powers do the authorities have? Is court approval required to invoke these powers?

Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition (Regulation No. 1/2003) sets out the main investigative powers of the EC. In particular, it has the power to

- issue requests for information (under article 18);
- take voluntary statements from natural or legal persons (under article 19);
- carry out on-site inspections at the premises of the undertakings concerned (under article 20); and
- where the circumstances require it, inspect the employees' homes and cars (under article 21).

The EC may collect any information it deems necessary for the proper conduct of its investigation. In addition, the EC may itself conduct the inspection on the territory of a member state, or request an NCA to carry out the inspection on its behalf.

#### Request for information

Requests for information are the most common means used to carry out an investigation and can be issued by the EC at any stage of the procedure. The EC may require the information either by simple request or by decision.

Simple requests must be imperatively motivated and state the legal basis and the purpose of the request, the information requested, which must be necessary to establish a violation of article 101 TFEU, the time limit to provide the information (generally two to three weeks), and the sanctions in case false or misleading information is provided (which can reach up to 1 per cent of the total turnover of the undertakings concerned).

Decisions forcing the provision of information may be adopted only when, following a simple request, no information or incomplete information was supplied within the time limit fixed by the EC. It shall contain the same information, and remind the addressee of its privilege against self-incrimination. If the undertaking fails to provide the requested information, the EC may impose periodic penalty payments not exceeding 5 per cent of the undertaking's average daily turnover in the preceding business year per day.

#### Power to receive statements

The EC can interview representatives of the undertakings concerned, as well as third parties. Interviews with third parties are conducted on a voluntary basis.

The EC has a wide discretion in the conduct of interviews. It shall only, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview. In practice, the interview is always recorded. The presence of a lawyer is permitted. The officials of the relevant NCA can assist the EC.

Undertakings which are subject to an investigation do not normally have a right to question witnesses testifying against it. In this respect, the European Court of Justice (ECJ) ruled that:

> *[As] the procedure before the Commission is purely an administrative procedure, the Commission is not required to afford*

*the undertaking concerned the opportunity to cross-examine a particular witness and to analyse his statements at the investigation stage.*

ECJ, 7 January 2004, *Aalborg*, joined cases C–204/00, C–205/00, C–211/00, C–217/00 and C–219/00)

**On-site inspections**

On-site inspections may be conducted on two grounds: pursuant to a written authorisation or pursuant to a formal EC decision (a dawn raid). The undertaking concerned is only obliged to accept the investigation when it is carried out pursuant to a formal decision. However, in practice, should the undertaking refuse an inspection, the EC will then generally order a dawn raid pursuant to a formal decision and may request the support of officials of the member state within which the inspection is to be conducted.

Whether on the basis of a written authorisation or of a decision, the EC must specify the subject matter and purpose of the inspection, as well as the relevant penalties provided for in Regulation No 1/2003. In case of a formal decision, the EC must also specify the date on which it is to begin as well state the right of the undertaking to have the decision reviewed by the ECJ.

When carrying out an inspection, either on the basis of a written authorisation or a decision, the EC may:

- enter any premises, land and means of transport of undertakings and associations of undertakings;
- examine the books and other records related to the business, irrespective of the medium on which they are stored and not limited to documents already identified by the EC;
- take or obtain in any form copies of or extracts from such books or records;
- seal any business premises and books or records for the period and to the extent necessary for the inspection; and
- ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Companies facing an inspection are under a duty to cooperate and may be sanctioned if they fail to do so. In practice, the company is under the obligation to give access to all professional documents requested by the investigators stored in any medium or device (eg, PCs, laptops, smartphones, USB drives), including electronic messages (eg, WhatsApp). EC officials can take copies of the documents, including by transferring data on their computers. Usually, the EC selects the documents that are relevant to the subject matter of its investigation directly on the company's premises. However, when the circumstances do not allow the EC to complete its inspection on-site, it may make copies of documents in order to examine them later in Brussels (ECJ, 16 July 2020, *Nexans*, C–606/18).

The officials also have the power to ask oral questions and to request 'explanations on facts or documents relating to the subject matter and purpose of the inspection', as well as to record the answers.

The rights of defence of the undertakings concerned are limited during dawn raids, and mostly include:

- the right not to be subject to an unauthorised inspection, or to refuse inspections conducted pursuant to simple authorisations;
- the right to be assisted by a lawyer, although the inspection can start before a lawyer arrives;
- the right not to be required to produce legally privileged documents (limited to correspondence with external lawyers admitted by the bar of a member state of the European Union); and
- the right not to be required to incriminate themselves.

Finally, breaching a seal is considered a violation of the undertakings' duty to cooperate and can result in a significant fine. In 2012, the ECJ upheld the €38 million fine imposed by the EC on a German company for a broken seal (see ECJ, 22 November 2012, *E.ON Energie AG*, C–89/11).

Please note that although the EU courts confirmed that the EC has extensive powers of investigation, these powers are not unlimited and due account must be given to the fundamental rights of the undertakings being investigated. In 2015, the ECJ clarified the scope of the EC's ability to use the information it found during a dawn raid. In particular, it cannot go on 'fishing expeditions', which means that the information obtained during the investigation must not be used for purposes other than those indicated in the inspection warrant or decision (see ECJ, 18 June 2005, *Deutsche Bahn*, C–583/13 P). More recently, the General Court of the European Union (GCEU) recalled that the EC needs sufficiently strong evidence to reasonably suspect an infringement of competition law to justify a dawn raid. In exercising its powers, the EC must therefore give due account to the rights of the undertakings being raided and cannot, without sufficient evidence, order an inspection that is, by its very nature, extremely intrusive (see GCEU, 5 October 2020, *ITM*, T–254/17 and Casino, T–249/17).

## INTERNATIONAL COOPERATION

**Inter-agency cooperation**

13 | Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, such cooperation?

Cooperation between the European Commission (EC) and other competition authorities takes place at two levels: bilateral and multilateral.

At the bilateral level, the European Union has signed cooperation covenants with a number of countries, based on dedicated competition agreements, be they simple memoranda of understanding whereby the authorities can discuss legislation, share non-confidential information and request assistance from one another (eg, with Brazil, China, India or Russia), or wider agreements for the enforcement of competition law including cooperation provisions, notification obligations with respect to enforcement activities that may affect each other's interests and exchanges of confidential information (eg, with Canada, Japan, Mexico, Switzerland, South Korea or the US); and general trade agreements including competition provisions, (eg, with the UK in the context of Brexit, Chile, Colombia, Egypt, Israel, Jordan, Morocco and Ukraine).

At the multilateral level, the EC participates in the work of international organisations where competition issues are discussed, such as the International Competition Network, which aims at providing antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern. The EC also contributes to the work of the European Economic Area (EEA), the OECD and the World Trade Organization.

The EC also cooperates extensively with national competition authorities (NCAs) within the European Competition Network (ECN), which aims at creating an effective mechanism to counter companies which engage in cross-border practices restricting competition. In accordance with Regulation No. 1/2003, it 'transmit[s] to the competition authorities of the member states copies of the most important documents it has collected' (article 11) and at the request of an NCA, it 'shall provide it with a copy of other existing documents necessary for the assessment of the case'. Conversely, governments and competition authorities 'shall provide the Commission with all necessary information to carry out the duties assigned to it by [Regulation No. 1/2003]' (article 18).

Furthermore, according to the 2004 EC Notice on Cooperation within the Network of Competition Authorities, ECN members in charge of a case may refer a case to another NCA best placed to handle it.

Although in most instances the authority that receives a complaint or starts an ex officio procedure will remain in charge of the case, reallocation can indeed be envisaged at the outset of a procedure. Reallocation to the EC itself will also usually occur for cases involving more than three member states.

**Interplay between jurisdictions**

14 | Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

The most significant interactions of the EC in cross-border cases are with NCAs of member states. Cooperation between the EC and NCAs, with regard to the distribution of powers regarding investigations, prosecutions and fining, is specifically provided for in Regulation No 1/2003 (article 11) and relationships are organised by the 2004 EC Notice on Cooperation within the Network of Competition Authorities. It was used for instance in the *Prestressing Steel* case, where the EC cooperated with the German competition authority, which provided it with documents, including statements and audited reports that helped it prove the involvement of one specific undertaking in the cartel (EC, 30 June 2010, *Prestressing Steel*, COMP/38.344).

There is also significant interplay between the NCAs themselves, within the framework of the ECN network. For instance, the French competition authority (FCA) recently issued a decision sanctioning a cartel in the fruit-compotes sector, after dawn raids conducted in France and in the Netherlands in coordination with the Dutch competition authority, under article 22 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, which led to the finding of additional evidence to that already provided by the leniency applicant (FCA, 17 December 2019, *Fruit-compotes*, 19–D–24).

The EC also often cooperates with the US Federal Trade Commission and Department of Justice, through two agreements signed in 1991 and 1998, which provide that both competition agencies notify each other when proceedings initiated by one competition authority are likely to affect the other's important interests. These agreements also provide for exchanges of information, and mutual assistance when they have an interest in doing so and whenever their laws and resources enable them to do so.

Above all, the 1998 agreement introduces the principle of 'positive comity', under which one party may request the other party to remedy anticompetitive behaviour which originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. Please note that positive comity provisions are rarely used in practice, as complainants usually prefer to directly address the competition authority they consider to be best suited to deal with the alleged infringement.

## CARTEL PROCEEDINGS

**Decisions**

15 | How is a cartel proceeding adjudicated or determined?

The European Commission (the EC) both investigates and adjudicates on cartel matters. The final decision is taken by the EC's College of Commissioners.

**Burden of proof**

16 | Which party has the burden of proof? What is the level of proof required?

Pursuant to article 2 of Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules of competition, the burden of proof rests on the EC, which must establish the existence and duration of the alleged infringement to competition law with sufficient evidence. The principle of legal certainty requires that, absent evidence directly establishing the duration of the infringement, the EC must rely on evidence relating to facts sufficiently close in time so that it can reasonably be assumed that the infringement was continuous and uninterrupted between two specific dates.

It is then up to the undertaking being investigated to demonstrate that its conduct does not violate article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It may also decide to invoke a possible exemption which requires it to prove that it meets the conditions of article 101(3) TFEU.

There is no specification as to the level of proof required. In practice, while the EC is not bound by an obligation to adduce proof of an infringement beyond reasonable doubt (General Court of the European Union (GCEU), 8 July 2008, *BPB*, T–53/03), the GCEU indicated that:

> *[Any] doubt in the mind of the Courts of the European Union [. . .] must operate to the advantage of the undertaking to which the decision finding the infringement was addressed.*
> GCEU, 24 March 2011, *Viega*, T–375/06

**Circumstantial evidence**

17 | Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

It is well-established in case law that direct evidence is rather scarce in cartel cases. The EC can therefore rely on a 'body of evidence', (ie, a set of concurring elements to support its thesis). If, for example, a document refers only to certain facts mentioned in other elements of evidence, it is not sufficient to compel the EC to set it aside. The GCEU held that:

> *[In] most cases, the existence of an anticompetitive 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.*
> GCEU, 12 July 2018, *ABB*, T–445/14

**Appeal process**

18 | What is the appeal process?

The decisions of the EC may be appealed to the GCEU, which has the power to annul the decision, dismiss the appeal, or adjust the fines. The decisions of the GCEU are themselves subject to appeal before the ECJ, which rules on points of law only.

Undertakings that have lodged an appeal against the decision must either pay the fine provisionally or provide a bank guarantee equivalent to the amount of the fine plus interest, enforceable upon first call. The former vice-president of the EC, Joaquín Almunia, recalled in a 2010 information note that, though the management of fines guarantees and their safekeeping imposes an administrative burden on the EC that does not exist in the case of provisional payments, article 85a of the implementing rules for the Financial Regulation grants the undertakings the right to choose between these two options.

The duration of proceedings before the GCEU depends on the complexity of the case. They generally last between 32 and 36 months,

with an additional 12 to 18 months in the case of an appeal to the ECJ. Please note that the EC may incur a financial liability in cases excessively lengthy proceedings, where such a length was unjustified and caused damage to the undertakings concerned. In the *Gascogne* case, for instance, the applicants, which were convicted for their participation in a cartel in the industrial bags sector, brought an action for damages before the GCEU against the EU for the excessive duration of the proceedings, which lasted almost six years. The judges ruled in favour of the applicants at the lower court (see GCEU, 10 January 2017, *Gascogne Sack Deutschland*, T-577/14), but the decision was overturned by the ECJ, which found that there was no sufficiently direct causal link between the violation of the reasonable time limit for judgment and the loss allegedly suffered by the companies as a result of the payment of bank guarantee fees, during the period by which that time was exceeded (ECJ, 13 December 2018, *Gascogne Sack Deutschland*, C-138/17 and C-146/17).

## SANCTIONS

### Criminal sanctions

19 | What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity at the EU level. However, criminal sanctions might be imposed at the national level.

### Civil and administrative sanctions

20 | What civil or administrative sanctions are there for cartel activity?

The EC derives its power to impose fines from article 23(2) of Regulation No. 1/2003, which grants it a wide latitude in setting the amount of the fine, the only limit being that it shall not exceed 10 per cent of the undertaking's total turnover in the preceding business year. In this respect, it should be noted that this maximum limit applies to the undertaking's group turnover and not only to the entity that participated in the infringement.

Please note that there has been a clear increase in the amount of fines in the recent years. The record-breaking total fine imposed in a single case is €3,807 billion in the *Trucks* decision (2016/2017), where Daimler also received the highest individual fine ever of €1 billion for a cartel infringement.

### Guidelines for sanction levels

21 | Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

The EC first adopted its Guidelines on the method of setting fines in 1998 and then updated them in 2006. They are self-binding on the EC, which must therefore follow them, but do not bind EU or national courts nor national competition authorities (NCAs).

In practice, in setting the amount of a fine the EC first determines the basic amount of the fine, taking into account the value of the undertaking's sales to which the infringement directly or indirectly relates in the relevant geographic area, to which it applies a percentage usually ranging from 0 per cent to 30 per cent depending on the egregiousness of the infringement (in practice, this percentage has varied between 15 per cent and 18 per cent for cartels in the last five years), and a multiplying factor reflecting its duration. In cartel cases, the EC also applies an additional percentage ranging from 15 per cent to 25 per cent to this basic amount, to ensure the deterrent effect of the fine.

The EC then adjusts this basic amount downwards or upwards, to take into account aggravating and mitigating circumstances for each undertaking. Aggravating circumstances include the undertaking instigating or leading the cartel, or it being previously sanctioned for infringements of competition law. On the other hand, mitigating circumstances include the undertaking's cooperation with the investigation or the fact that the infringement was encouraged or authorised by public authorities or legislation.

Once adjusted, the EC verifies that the amount of the fine does not exceed the legal maximum, (ie, 10 per cent of the undertaking's worldwide turnover in the preceding business year).

Finally, where applicable, the amount of the fine is further decreased to take into account leniency proceedings (full immunity for the first undertaking that came forward to the EC, and reductions of up to 50 per cent for the subsequent ones) or settlement proceedings (a fine reduction of 10 per cent).

### Compliance programmes

22 | Are sanctions reduced if the organisation had a compliance programme in place at the time of the infringement?

The EC does not have to take into account compliance programmes put in place by an undertaking concerned when it sets the fine. In 2014, the GCEU clearly excluded that a compliance programme be regarded as a mitigating circumstance. Indeed:

> *[The] mere adoption by an undertaking of a programme of compliance with the competition rules cannot constitute a valid and definite guarantee of future and continuing compliance by that undertaking with those rules, and consequently the mere existence of such a programme cannot compel the Commission to reduce the fine on the ground that the objective of prevention pursued by the fine has already been at least partly achieved.*
> GCEU, 14 May 2014, *Donau Chemie*, T-406/09

### Director disqualification

23 | Are individuals involved in cartel activity subject to orders prohibiting them from serving as corporate directors or officers?

There is currently no EU legislation prohibiting individuals involved in cartel activity from serving as corporate directors or officers.

### Debarment

24 | Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements?

While Regulation No. 1/2003 does not list debarment from government procurement procedures as a possible sanction, Directive No. 2014/24 on EU Public Procurement provides for a combination of mandatory and facultative debarment when public authorities have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition, which can be qualified as 'grave professional misconduct'. The time period for debarment due to anticompetitive conduct is subject to national law and fixed at a maximum of three years by Directive 2014/24. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability. The debarment rule is seldom enforced throughout the EU.

**Parallel proceedings**

25 Where possible sanctions for cartel activity include criminal and civil or administrative penalties, can they be pursued in respect of the same conduct? If not, when and how is the choice of which sanction to pursue made?

Cartels are subject to both administrative penalties, which can exclusively be imposed by the EC, as well as potential civil damages, which can be decided by any national court. In this respect, public enforcement and private enforcement are considered as being complementary one to another, and together act as a deterrent tool to cartel infringements.

## PRIVATE RIGHTS OF ACTION

**Private damage claims**

26 Are private damage claims available for direct and indirect purchasers? Do purchasers that acquired the affected product from non-cartel members also have the ability to bring claims based on alleged parallel increases in the prices they paid ('umbrella purchaser claims')? What level of damages and cost awards can be recovered?

Any third party – being a direct purchaser or indirect purchaser – who has suffered loss as a result of a cartel can sue one or several of its participants for damages before the national courts of member states.

This right is enshrined in EU case law, which has long recognised that, where there is a causal link between the infringement of competition law and the harm suffered, the victim may seek compensation for that harm (ECJ, 20 September 2001, *Courage and Crehan*, C–453/99). The ECJ clarified that in the absence of EU rules governing the matter, it was for the domestic legal systems of each member state to prescribe the detailed rules governing the exercise of that right, provided that the principles of equivalence and effectiveness are observed (ECJ, 13 July 2006, *Manfredi*, joined cases C–295/04 to C–298/04).

Victims are entitled to full compensation of their damage, which includes actual loss as well as loss of profits, plus the payment of interest. However, there is no such thing as punitive or multiple damages under EU law.

To ensure an effective system of private enforcement throughout the European Union, the European Parliament and the Council adopted Directive No. 2014/104 of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (the Damages Directive), which aims at facilitating private enforcement actions by victims of competition law infringements.

In particular, the Damages Directive sets forth several presumptions to facilitate the compensation of victims of cartel infringements, such as a presumption that prohibition decisions constitute irrevocable evidence of a wrongdoing or that cartels cause harm. In addition, while recognising the passing-on defence, the Damages Directive reverses the burden of proof that now lies on the infringer: with respect to direct purchasers, the Damages Directive establishes a presumption that cartel overcharges have not been passed on to the indirect purchasers; conversely, with respect to indirect purchasers, it establishes a presumption that overcharges have been passed on to them.

Although the Damages Directive may have seemed to take particular account of 'follow-on' actions, its provisions are also applicable to 'standalone' actions, brought in the absence of any prior decision by the EC or an NCA.

**Class actions**

27 Are class actions possible? If so, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

The Damages Directive does not provide for class actions. However, the EC issued a recommendation in 2013 inviting member states to adopt measures at the national level by 26 July 2015 favouring recourse to class action mechanisms. As class actions are still not available everywhere throughout the European Union, the EC issued a draft directive on 11 April 2018 as part of its 'New Deal for Consumers' initiative, which, if adopted, will introduce a European class action mechanism for damages claims related to anticompetitive behaviours. The European Parliament and the Council reached a provisional political agreement regarding the proposal on 22 June 2020.

According to the planned mechanism, only qualified entities designated in advance by member states or created on an ad hoc basis for a specific action will be entitled to bring damages claims class actions, provided that they comply with strict obligations regarding the source of their funding. The draft directive provides that member states should be able to choose between opt-in and opt-out mechanisms to best respond to their legal tradition.

## COOPERATING PARTIES

**Immunity**

28 Is there an immunity programme? If so, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The EC 2006 Notice on Immunity from fines and reduction of fines in cartel cases (the Leniency Notice) provides for a leniency mechanism under EU law.

To benefit from full immunity from fines (and softening of liability in damages claims), an undertaking must be the first to denounce the cartel and must provide evidence allowing the EC to 'carry out a targeted inspection in connection with the alleged cartel; or find an infringement of article 81 EC [now 101 TFEU] in connection with the alleged cartel' (paragraph 8). The undertaking must also cooperate with the EC throughout the procedure, and in particular should supply it with accurate information. In addition, the company must terminate its participation in the alleged cartel without delay. It must not have destroyed, falsified or concealed evidence of the cartel, nor have disclosed its intention to apply for leniency or the contents of its application (except to an NCA). Finally, a company may be deprived of immunity if it has forced one or more others to join or remain in the cartel.

In addition, the EC has introduced whistleblowing mechanisms. In 2017, it put in place an online anonymous whistleblowing form allowing any individual to sound the alert about the existence of a cartel. Furthermore, Directive No. 2019/1937 on the protection of whistleblowers, adopted in 2019, provides for the creation of reporting channels within companies and administrations, a hierarchy of internal and external communication channels, the protection of a large number of profiles (eg, employees, including civil servants, shareholders, volunteers, trainees, etc) and measures to protect whistleblowers from reprisals. Please note that member states have until 17 December 2021 to transpose this Directive.

**Subsequent cooperating parties**

29 Is there a formal programme providing partial leniency for parties that cooperate after an immunity application has been made? If so, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Undertakings that do not qualify for full immunity may still be granted a reduction to their fine. They must provide evidence that has an 'added value with respect to the evidence already in the Commission's possession', (ie, that strengthens by its nature and/or degree of precision the EC's ability to establish the existence of the alleged cartel). In terms of cooperation, subsequent applicants must satisfy the same level of cooperation as the first-in. The reduction ranges from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others. There is currently no 'immunity plus' or 'amnesty plus' option.

**Going in second**

30 How is the second cooperating party treated? Is there an 'immunity plus' or 'amnesty plus' treatment available? If so, how does it operate?

Second cooperating parties must satisfy the same level of cooperation as the first-in. They may benefit from reductions in the fine ranging from 30 per cent to 50 per cent for the second undertaking, 20 per cent to 30 per cent for the third and up to 20 per cent for the others, provided that they bring additional compelling evidence with significant added value. There are no 'immunity plus' or 'amnesty plus' treatments available under EU law.

**Approaching the authorities**

31 Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

The leniency applicant should contact the Directorate-General of Competition (DG Competition) before the statement of objections has been issued. However, in practice, most leniency applications seeking an immunity from a fine (which is only available to the first leniency applicant) are made either before the EC starts an investigation (in which case they form the basis for initiating an investigation) or upon the initiation of an investigation.

The undertaking must submit a formal application for immunity including relevant statements and evidence. According to the Leniency Notice, it can also present this information in hypothetical form, 'in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date' (paragraph 16).

Please note that the EC has set up a marker system 'protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence' (paragraph 15). The marker system is typically used during dawn raids or at the very beginning of an investigation, insofar as it allows the undertaking to file for leniency without having to immediately provide supporting evidence. If the undertaking provides all the documents within the deadline set by the EC, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

**Cooperation**

32 What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties that are seeking partial leniency?

All immunity applicants, regardless of their rank, must provide compelling evidence to the EC and fully cooperate with the EC's investigators throughout the procedure. The EC will grant immunity from fines to the first leniency applicant, provided that it submits evidence and information which, in the EC's view, will enable it to carry out a targeted inspection in connection with the alleged cartel or to find an infringement of article 101 TFEU. Any subsequent applicant must bring additional evidence with significant added value.

Applicants must also terminate their participation in the alleged cartel without delay, and refrain from disclosing their intention to apply for leniency or their application to anyone, except to an NCA.

Applicants that have destroyed, falsified or concealed evidence of the cartel, or forced one or more others to join or remain in the cartel, will not be eligible for leniency.

**Confidentiality**

33 What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Information and documents communicated to the EC under the Leniency Notice are confidential. In practice, the following will be deemed confidential:

- documents containing business secrets;
- documents that would significantly harm a person or an undertaking if they were to be disclosed; and
- internal documents of the EC or of NCAs, such as minutes of meetings with leniency applicants.

Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to files (ie, after deletion or replacement of business secrets and other confidential information, as provided for by the Notice on the rules for access to the Commission file of 22 December 2005).

The Leniency Notice further provides that any written statement made to the EC in relation to the leniency application forms part of the EC's file and may not, as such, be disclosed or used by the EC for any other purpose than the enforcement of article 101 TFEU. Therefore, they may not serve as evidence in matters of private enforcement.

**Settlements**

34 Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement, deferred prosecution agreement (or non-prosecution agreement) or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

Following an extensive public consultation, in 2008 the EC adopted Regulation No. 622/2008 in order to set up a European settlement procedure, as well as a Communication to clarify its application. Under the settlement procedure, parties which admit having participated in a cartel infringement can obtain a 10 per cent reduction in the fine. The settlement procedure can be combined with a leniency application.

In practice, while undertakings may express their interest for a settlement, the initiative rests with the EC, which has a discretionary power to decide whether a case is suitable or not for settlement. When it considers having recourse to the settlement procedure, the EC sends a letter to all parties informing them of its decision to consider a potential settlement and requesting them to express their interest in such a procedure.

Each party has a period of at least two weeks to decide whether or not to enter into the settlement procedure, without this implying any admission of having participated in an infringement or of being liable for it at this stage. If the party decides to enter into the settlement procedure, bilateral discussions open with the EC. Please note that a party that wishes to enter into such procedure and at the same time to apply for leniency must do both within the same deadline.

If the discussions are fruitful, the party will be granted at least 15 working days to submit a conditional settlement proposal to the EC, in which it acknowledges and explains in detail its responsibility in the implementation of the infringement. Upon the party's request, the EC may allow those settlement submissions to be provided orally. In such cases, settlement submissions will be recorded and transcribed at the EC's premises. In response, the EC sends a streamlined statement of objections endorsing the party's proposal, to which the latter will have at least two weeks to reply, confirming that it reflects its submission.

Finally, the College of Commissioners of the EC adopts the settlement decision, which is generally a lighter version of a decision adopted pursuant to the normal procedure, in that it contains far fewer elements than a full probe decision. The EC can terminate the settlement procedure at any time and retains the right to change its position until the final decision is made.

Although the settlement procedure was initially scarcely used, there have now been 34 cartel settlements. By way of example, the last five decisions of the EC imposing sanctions relating to article 101 TFEU infringements involved settlement proceedings.

Lastly, if the settlement procedure is not subject to the agreement of all of the undertakings involved, the EC is faced with a hybrid procedure, whereby certain undertakings settle while others decide to defend themselves. This was notably the case in the *Trucks* cartel case, where one participant to the cartel was prosecuted under the standard procedure (EC, 27 September 2017, *Trucks*, AT.39824), while the others settled with the EC (EC, 19 July 2016, *Trucks*, AT.39824). In 2017, the GCEU held that in such cases the EC must take all necessary measures to guarantee the presumption of innocence of the undertaking which has decided not to enter into a settlement. To do so, it must take the necessary measures when:

> *[It] is not in a position to determine the liability of the undertakings participating in the settlement without also taking a view on the participation in the infringement of the undertaking which has decided not to enter into a settlement [including] possible adoption on the same date of several decisions relating to all the undertakings concerned by the cartel.*
> GCEU, 10 November 2017, *Icap*, T–180/15

**Corporate defendant and employees**

35 | When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

The EC does not impose penalties on individuals, there is thus no such immunity.

**Dealing with the enforcement agency**

36 | What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

The immunity applicant and subsequent leniency applicants must contact the DG Competition before the statement of objections has been issued, and submit a formal application including relevant statements and evidence. They can also present this information in hypothetical form, 'in which case the undertaking must present a detailed descriptive list of the evidence it proposes to disclose at a later agreed date' (paragraph 16 of the Leniency Notice).

The undertaking must, without delay, terminate their participation in the alleged cartel and cooperate fully with the EC's investigation team and supply it with relevant information.

## DEFENDING A CASE

**Disclosure**

37 | What information or evidence is disclosed to a defendant by the enforcement authorities?

The information disclosed to the defendant depends upon the type of procedure: standard or settlement procedure.

Under the normal procedure, the statement of objections must be issued in writing and contain all the factual and legal elements that the EC intends to use in its decision. Thus, the nature, geographical area, gravity and duration of the infringements identified by the investigators, as well as the liability of each company, must be specified. However, the EC does not have to mention the range of potential fines. Each undertaking concerned must be able to understand clearly the infringement with which it is charged and may have access to the case team's file, but not to internal documents and documents containing confidential information or relating to business secrets.

Conversely, under the settlement procedure the parties are informed in advance of the objections that the EC intends to raise against them, as well as of the maximum amount of the potential fine that may be imposed on them. They have access to all the elements on which the EC intends to rely during the procedure. The parties may be granted access to the file if the statement of objections does not correspond to the content of their submissions.

**Representing employees**

38 | May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice or representation?

The EC does not impose fines on individuals.

**Multiple corporate defendants**

39 | May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Conflicts of interests are dealt with at the national level, in accordance with each country's laws.

This principle was recalled by the ECJ in 2018, in a case where the GCEU allegedly erred in law by dismissing a breach of a 'principle of prohibition of double representation'. According to the applicant, the GCEU should have declared the evidence submitted by one party inadmissible, since its lawyers had a conflict of interest in respect of one of their other clients in the same case. The ECJ ruled that:

> *[The] question whether a lawyer has complied with his obligations under national law and rules governing conduct in agreeing to represent a client in a case liable to give rise to a conflict of interest in respect of another client does not fall within the scope of the competence conferred on the Commission for the purposes of applying articles 101 and 102 TFEU.*
> ECJ, 1 February 2018, *Schenker*, C-263/16

A counsel may therefore represent multiple corporate defendants if their interests are aligned and if there is no risk of conflict in the future. However, in practice, unless they form part of the same group, each investigated company is usually represented by its own counsel.

**Payment of penalties and legal costs**

40 | May a corporation pay the legal penalties imposed on its employees and their legal costs?

The EC does not impose fines on individuals.

**Taxes**

41 | Are fines or other penalties tax-deductible? Are private damages payments tax-deductible?

Tax consequences of fines and other penalties are dealt with at the national level, as are private damages payments. Please note however that the EC published amicus curiae observations in 2012, stating that allowing these fines to be tax-deductible would deprive them of their deterrent effect (EC, 8 March 2012, written observations in Case No. 5285, *Tessenderlo Chemie*).

**International double jeopardy**

42 | Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

In principle, the EC does not take into account penalties imposed in non-member states' jurisdictions when determining sanctions for a cartel. The ECJ recalled in 2015 that neither the principle non bis in idem nor any other principle of law obliges the EC to take account of proceedings and penalties to which an undertaking has been subject in non-member states (see ECJ, 9 July 2015, *InnoLux*, C-231/14).

**Getting the fine down**

43 | What is the optimal way in which to get the fine down?

The leniency procedure is the best option available to the parties to obtain a reduction in the fine, which can go up to full immunity for the first applicant. The settlement procedure is the other option available to the parties, allowing them to benefit from a 10 per cent reduction of their fine in exchange for their cooperation and recognition of liability, which allows the EC to achieve procedural gains.

## UPDATE AND TRENDS

**Recent cases**

44 | What were the key cases, judgments and other developments of the past year?

On 17 October 2019, the European Court of Justice (ECJ) upheld a decision of the General Court of the European Union (GCEU) dismissing a request for the suspension of a European Commission (EC) investigation and the annulment of an on-site inspection, on the ground that the inspectors examined documents marked as legally privileged (ECJ, 17 October 2019, *Alcodis/Alcogroup*, C-403/18).

On 7 November 2019, the GCEU found that the EC had wrongfully sanctioned Campine for a single and continuous infringement that lasted three years, while it had not established its participation in the cartel for two 11-months periods (GCEU, 7 November 2019, *Campine*, T-240/17).

On 12 December 2019, the ECJ ruled that any legal person, including a local authority (in this case, an Austrian Land) is able to validly claim compensation, provided it establishes it has suffered damage resulting from a cartel (ECJ, 12 December 2019, *Otis GmbH*, C-435/18).

On 2 April 2020 a preliminary ruling of the ECJ (as well as the 5 September 2019 opinion of Advocate General Bobek), recalled and clarified the criteria applicable for determining whether an agreement can be considered a restriction of competition by object (ECJ, 2 April 2020, *Gazdasági Versenyhivatal c/ Budapest Bank Nyrt. e.a*, C-228/18).

On 14 May 2020, the ECJ partly annulled the GCEU's judgment dismissing NKT Verwaltung's appeal against the €3.8 million fine imposed on it by the EC for its participation in the 'cable' cartel. The ECJ found that NKT's rights of defence had been breached, insofar as the EC indicated in the statement of objections that it would exclude from the scope of the infringement activities relating to certain sales in non-EU or non-EEA countries, but nonetheless took account of them for the calculation of the fine (ECJ, 14 May 2020, *NKT Verwaltung*, C-607/18).

On 16 July 2020, the ECJ ruled that the EC may make copies of documents during a dawn raid in order to examine them later in Brussels (ECJ, 16 July 2020, *Nexans*, C-606/18).

On 5 October 2020, the GCEU partially annulled decisions adopted by the EC to authorise dawn raids at the premises of two French supermarkets chains, on the grounds that it lacked sufficiently strong evidence to reasonably suspect an infringement to competition law and justify on-site inspections (GCEU, 5 October 2020, *ITM*, T-254/17 and *Casino*, T-249/17).

On 28 October 2020, the ECJ dismissed an applicant's challenge to a GCEU decision that upheld the EC's Power Cables cartel decision of 2014, ruling that the undertaking failed to rebut the presumption that it exercised decisive influence over its subsidiary. The GCEU recalled that the EC can presume 'decisive influence' and thus liability, where a parent company holds all or almost all of the shares in its subsidiary (ECJ, 28 October 2020, *Pirelli*, C-611/18).

Moreover, the most recent cartel decisions issued by the EC include decisions in the sectors of closure systems (EC, 29 September 2020, AT.40299), ethylene (EC, 14 July 2020, AT.40410) and canned vegetables (EC, 27 September 2019, AT.40127), where it imposed fines totalling €18 million, €260 million and €31.6 million respectively. These decisions have not yet been made public.

**Regime reviews and modifications**

45 | Are there any ongoing or anticipated reviews or proposed changes to the legal framework, the immunity/leniency programmes or other elements of the regime?

No.

**Coronavirus**

46 What emergency legislation, relief programmes, enforcement policies and other initiatives related to competitor conduct have been implemented by the government or enforcement authorities to address the pandemic? What best practices are advisable for clients?

On 8 April 2020, the EC published a Notice on a Temporary Framework (the Temporary Framework Notice) to provide guidance on anticompetitive practices for companies cooperating to respond to emergency situations related to the current coronavirus pandemic. This Temporary Framework Notice allows competing undertakings to coordinate their actions in order to address shortages of essential products, whether or not they are used directly in the treatment of coronavirus patients, provided they do not go beyond what is strictly necessary to address the difficulties raised by the current health situation.

The EC thus stated that it would deem admissible, provided that they are accompanied by sufficient guarantees to prevent exchanges of commercially sensitive information, direct or indirect cooperation aimed at:

- coordinating the transport of input materials;
- contributing to the identification of essential medicines for which there is a risk of shortage;
- aggregating information on production capacities; or
- forecasting demand at the level of a member state.

However, such exchanges must be accompanied by sufficient safeguards to prevent, for example, companies sharing commercially confidential information.

In addition, the EC temporarily reinstated the mechanism of comfort letters, which were issued before 2003 but had since been abandoned in favour of a self-examination by companies of the compatibility of their behaviour with competition law. A first comfort letter was issued on 8 April 2020, concerning a cooperation project between pharmaceutical companies to increase and optimise the production of several specialities necessary for the treatment of coronavirus patients.

The EC made clear that there would be no relaxation of competition law enforcement during the pandemic, and that it would not tolerate any behaviour taking advantage of the crisis or using it as a cover to set up anticompetitive collusion, in particular by setting prices above market level or limiting production. Finally, the EC indicated that such relief would not protect undertakings against private litigation, whereby a claimant would seek to recover losses suffered as a result of competition law violations.

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# Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

| **European Union** | |
|---|---|
| Is the regime criminal, civil or administrative? | The procedure before the EC is administrative. The EC enjoys wide powers of investigation (eg, to request information, take statements and conduct on-site inspections). If it establishes an infringement to competition law, it has the power to impose significant fines on undertakings. EC decisions may be appealed before EU courts. |
| What is the maximum sanction? | Pursuant to article 23(2) of Regulation No. 1/2003, the EC may impose fines of up to 10 per cent of an undertaking's total turnover in the business year preceding the decision. |
| Are there immunity or leniency programmes? | The EC's leniency programme is detailed in its 2006 guidelines. The first company that denounces the cartel and actively cooperates with the EC can be granted full immunity from a fine. Provided that they bring sufficient added value to the EC, other companies can then benefit from reductions of fines that range from 30 per cent to 50 per cent for the second company that denounces the infringement, 20 per cent to 30 per cent for the third company, and up to 20 per cent for subsequent ones. |
| Does the regime extend to conduct outside the jurisdiction? | The Commission's jurisdiction extends to conduct outside of the EU, provided that such conduct has an effect in the EU. In the context of a cartel with a global scope, the EC may decide to include in its calculation of the value of sales, sales made outside the EEA, if sales made within the EEA alone do not adequately reflect the weight of each participant in the infringement. |
| Remarks | The EC does not impose fine or criminal sanctions on individuals, but such penalties exist at the national level in several member states. |

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