European Union

John Boyce and Dimitri Loukas
Slaughter and May
Hans-Jörg Niemeyer and Boris Kasten
Hengeler Mueller

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Within the European Union member states (and by virtue of the 1992 EEA Agreement, Iceland, Liechtenstein and Norway), both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is article 81 of the EC Treaty. Council Regulation 1/2003 contains the implementing rules regarding enforcement procedures. This replaced Council Regulation 17/1962 and significantly changed the way in which European competition law is enforced with effect from 1 May 2004. The main changes relevant to cartel proceedings are as follows:

- where a national competition authority (NCA) within the EU uses domestic competition law to investigate a cartel, if that cartel affects trade between member states, it must also apply article 81;
- there is increased cooperation between the European Commission (the Commission) and the NCAs of the member states, including exchange of confidential information, within the framework of the European Competition Network (ECN) being established between the Commission and the NCAs;
- the Commission has increased powers of inspection, including the power to take statements, search private premises and seal premises or business records;
- substantially increased fines for breaches of the procedural rules are available, eg, failure to provide information;
- the Commission has the power to impose structural remedies (eg, divestments) as well as fines for breaches of article 81.

The Commission has also adopted an implementing Regulation further clarifying the proceedings under Regulation 1/2003. This lays down rules concerning the initiation of proceedings and the conduct of investigations by the Commission as well as the handling of complaints and the hearing of the parties concerned.

In addition, the Commission has published various notices providing guidance for the application of article 81 under the new system. Notices have been adopted inter alia on cooperation within the ECN, cooperation between the Commission and the courts of EU member states, on the handling of complaints, and on the effect on trade concept contained in articles 81 and 82 of the EC Treaty.

The principal enforcement agency in the EU remains the EC Commission, with DG Competition being the service responsible for the enforcement of the competition rules. As part of the modernisation regime introduced by Regulation 1/2003, NCAs are also required to apply the EU competition rules when investigating cartels which have an effect on trade between member states. Article 81 can also be applied by national courts.

The Commission's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the Commission intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the Commission began to impose much heavier fines in landmark cases such as *Polypropylene* (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the Commission has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years the Commission has reaffirmed various times its commitment to detecting and punishing 'hard-core' cartels, increasing the number and intensity of its investigations and imposing record fines.

2 What is the substantive law on cartels in the jurisdiction?

Article 81(1) of the EC Treaty provides that "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 common market" are prohibited. Article 81(1) provides a non-exhaustive list of prohibited practices (eg, price fixing, output restrictions, and market sharing). Both horizontal and vertical restraints fall within article 81(1).

Article 81(2) provides that agreements prohibited by article 81(1) shall be automatically void and unenforceable, without there being a need for a prior finding by the Commission that the agreement breaches article 81. Article 81 is also capable of enforcement before the national courts and NCAs in the EU member states.

As a matter of practice, any agreement which fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of article 81(1). The Commission's view is that these types of restriction are 'hard-core' and may be presumed to have negative market effects.

According to article 1(2) of Regulation 1/2003, agreements which satisfy the conditions of article 81(3) are not prohibited, no prior decision to that effect being required. This requires that the efficiencies flowing from the agreement outweigh the anti-

competitive effects. It is almost inconceivable that a hard-core cartel agreement could qualify for such an exemption. As regards vertical restraints, article 4 of Regulation 2790/1999 (vertical agreements block exemption) provides a 'blacklist' of agreements to which the block exemption will not apply (eg, where the object of the agreement is to impose a fixed or minimum resale price or an export ban).

3 Are there any industry specific offences/defences?

There are no industry-specific offences or defences. There are special rules governing the application of article 81 to the agricultural and transport sectors.

4 Does the law apply to individuals or corporations or both?

Article 81 applies only to undertakings, not to individual employees or officers of undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in an economic or commercial activity (whether or not it is profit-making). It covers, for instance, limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and non-profit-making bodies. National legislation within some member states may, however, provide for criminal sanctions where individuals participate in infringements of article 81 (see for example the chapter on the United Kingdom).

5 Does the regime extend to conduct that takes place outside the jurisdiction?

Article 81 can apply to agreements concluded between undertakings located outside the EU but which have an effect on competition within the EU. The Community Courts have recognised that it is not necessary that companies involved in the alleged cartel activity have their seat inside the EU or that the restrictive agreement was entered into inside the EU or that the alleged acts were committed or business conducted within the EU. In *Wood Pulp I* (1988), the European Court of Justice found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented. Where parties established in third countries implement a cartel agreed outside the EU with respect to products sold directly into the EU, the cartel will be subject to investigation under article 81. Overall, according to the 'effects doctrine', the application of competition rules pertaining to cartels is justified under public international law whenever it is foreseeable that the relevant anti-competitive agreement or conduct will have an immediate and substantial effect in the Community (see also Commission Notice of 27 April 2004 on the effect on trade concept contained in articles 81 and 82 EC Treaty, paragraph 100). Recent cases in which the Commission assumed jurisdiction over cartel members based exclusively outside the EEA were *Food Flavour Enhancers* (2002) and *Lysine* (2000).

6 Are there any current proposals for change to the regime?

The EU competition law regime has recently been substantially changed by Regulation 1/2003, which entered into force on 1 May 2004.

Investigation

7 What are the typical steps in an investigation?

Investigations may be triggered as a result of one or more of the parties to an agreement or a concerted practice approaching the Commission (as a 'whistleblower' under the Commission's leniency programme), a third party making a complaint, an NCA raising the matter with the Commission or the Commission launching an inquiry of its own initiative.

If complainants wish to make formal complaints, they are required to use a Form C. However, the Commission may dispense with a complainant's obligation to provide all the information and documents required by Form C where it considers that this information is unnecessary for the examination of the case. The form must be provided in triplicate and, if possible, an electronic version should be sent to the Commission (see article 5 of Regulation 773/2004).

Once a case comes to its attention, the first step is for the Commission to collect further information, either informally or using its formal powers of investigation (including 'dawn raids', see question 8) to decide whether to take action on the complaint. Following the initial fact-finding, if the Commission considers that there is evidence of an infringement of article 81 that should be pursued, it will decide to open formal proceedings.

The next formal step in the proceedings is usually for the Commission to serve a statement of objections on the parties setting out the Commission's case. The parties are then allowed to examine the documents in the Commission's file ('access to the file') and to respond to the statement of objections, in writing and at a hearing (see article 27 of Regulation 1/2003 and articles 10 et seq of Regulation 773/2004).

Before the Commission takes its final decision it must consult the Advisory Committee Committee on Restrictive Practices and Monopolies, which consists of officials from each of the member states' competition authorities. The final decision is taken by the full College of Commissioners and then notified to the undertakings concerned (see article 14 of Regulation 1/2003).

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition they usually take several years.

8 What investigative powers do the authorities have?

The Commission's principal powers of investigation under Regulation 1/2003 are the power to require companies to provide information (article 18) and the power to conduct voluntary or mandatory on the spot investigations (dawn raids) on company premises (article 20) and to inspect employees' homes and cars, etc (article 21). It also has the power to take voluntary statements for the investigation from natural or legal persons under article 19.

Generally, the Commission has a wide discretion as it may collect any information that it considers necessary. The Commission may also request a member state's national competition authority to undertake any investigation or other fact-finding measure on its behalf (article 22). These powers are, however, subject to the general principles of proportionality and the rights of the defence. Certain documents will be protected by the principle of lawyer–client confidentiality, although what this covers is limited and is ultimately for the courts to decide.

Information requests

Information requests ('article 18 requests' under Regulation 1/2003) are widely used by the Commission as a means of obtain-

ing all necessary information from undertakings and associations of undertakings. A company that is the subject of an investigation can receive several such requests. Information requests may also be addressed to third parties, such as competitors and customers. These requests are addressed in writing to the companies under investigation and must set out their legal basis and purpose, as well as the penalties for supplying incorrect or misleading information.

The Commission can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. With respect to non-EU companies, the Commission is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

Undertakings or associations of undertakings who supply incorrect or misleading information in reply to a simple information request or incorrect, misleading or incomplete information to a formal decision or who do not supply information within the time limit set by a formal decision are liable to fines that may amount to up to 1 per cent of their total annual turnover. These fines are significantly higher than those formerly available under Regulation 17/1962.

The Community Courts have recognised a privilege against self-incrimination, albeit limited in scope. In *Orkem* (1989), the European Court of Justice held that undertakings are obliged to cooperate actively with the Commission's investigation. The Court also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove. In this respect, the Court distinguished between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members, on the other hand. Whereas the former type of questioning is generally permitted, the latter infringes the undertaking's rights of defence. The approach taken in *Orkem* was confirmed by the Court in *Mannesmannröhren-Werke* (CFI 2001) and *Tokai Carbon* (CFI 2004, ECJ 2006). The Court has refused to acknowledge the existence of an absolute right to silence, as claimed by the applicants by virtue of article 6 of the European Convention on Human Rights. However, the Court held in *Tokai Carbon* (2004) that the Commission may not request undertakings to describe the object and the contents of meetings when it is clear that the Commission suspects that the object of the meetings was to restrict competition. The same applies to requests for protocols, working documents, preparatory notes and implementing projects relating to such meetings. However, in *Tokai Carbon* (2006), the ECJ held that undertakings subject to a Commission investigation must cooperate and may not evade requests for production of documents on the grounds that by complying with the requests, they would be required to give evidence against themselves.

Dawn raids

Dawn raids may be conducted under two grounds: (i) pursuant to a written authorisation only (article 20(3) of Regulation 1/2003) and (ii) pursuant to a formal Commission decision (article 20(4)). In an investigation made pursuant to a decision, the company must permit the investigation to proceed and fines may be imposed for refusal to submit to the investigation whereas if the investigation is by request only, the company is not obliged to comply but is asked to submit to the investigation voluntarily.

When carrying out a surprise inspection visit (or 'dawn raid'), Commission officials can (i) enter the premises, land and means of transport of undertakings or an association of undertakings, (ii) examine the books and other business (including computer) records of the company falling within the scope of their investigation, (iii) take copies from books and records and (iv) require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection. The Commission may also seal any business premises and books or records for the time necessary for the investigation. It can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there.

Commission officials have no power of forcible entry under Regulation 1/2003. They may, however, rely on the cooperation of member states' authorities who may use force to enter premises according to national procedural law. Forcible entry may require a court warrant under the applicable national law. In practice, officials will have obtained such a warrant before conducting the search. Under Regulation 1/2003, a national court called upon to issue such a warrant cannot call into question the legality of the Commission's decision or the necessity of the inspection. It may only assess whether the Commission decision is authentic and verify that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. To that end, it may ask the Commission for detailed explanations in particular on the grounds the Commission has for suspecting infringement of article 81, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. It cannot demand that it be provided with the information contained in the Commission's file.

The Commission team conducting a dawn raid usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two or three officials from the relevant NCAs assisting the Commission in its investigation

As is the case for information requests, the company is only required to cooperate if the Commission has taken a formal decision. The Commission usually issues such a decision in the case of a dawn raid. Apart from relying on the cooperation of national authorities to gain forcible entry, the Commission may also impose periodic penalty payments in case the undertaking does not submit to an inspection ordered by a Commission decision. These penalty payments may amount to up to 5 per cent of the average daily turnover in the preceding business year.

The Commission has the power to ask for on-the-spot oral explanations on facts or documents relating to the subject matter and purpose of an inspection from any representative or member of staff of a company and to record the answers. The company must cooperate actively and ensure that the most appropriate staff of sufficient seniority and knowledge of operations are available to deal with the enquiries. The Commission may also compel an undertaking to provide copies of pre-existing documents and factual replies.

As is the case for information requests, a company has certain fundamental rights of defence during a dawn raid, including (i) the right not to be subject to an unauthorised investigation, (ii) the right to legal advice, (iii) the right not to be required to produce legally privileged documents (limited to correspondence with EU-qualified external counsel) and (iv) the right not to be required to incriminate itself.

Power to take statements

In addition, the Commission has the power to take statements from any natural or legal person on a voluntary basis only (ie, such persons cannot be summoned to testify). This power is not to be confused with the Commission's power to ask for on-the-spot oral explanations during a dawn raid.

International cooperation

9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

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

The most significant of these cooperation agreements are the 1991 and 1998 EU/US Agreements envisaging the exchange of information and establishing positive comity between the Commission and US antitrust authorities. They provide for the Commission and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anti-competitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been growing cooperation between the EU and the United States in cartel matters recently (eg, in the *Lysine*, *Graphite Electrodes* and *Vitamins* cases). These cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations.

Obviously, the Commission also cooperates extensively with the NCAs in the EU member states. Regulation 1/2003 increases the scope of this cooperation within the framework of the ECN (European Competition Network), which encompasses all member states' competition authorities as well as the Commission. The members of the ECN closely cooperate in the application of the Community competition rules. One authority may ask another authority for assistance by collecting information on its behalf. When an authority is seized with a case, it may be decided to reallocate that case to another competition authority within a framework which is better placed to deal with it. The Commission may decide to take up a case, which will end the NCA's competence to apply article 81. The members of the ECN can also exchange information, even confidential information, for the purpose of applying article 81 or for parallel national proceedings under national competition law. Information so exchanged may only be used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information or where the information was collected respecting the same level of rights of defence as in the receiving State and where the sanction does not involve imprisonment. The Commission has already issued a Notice further setting out the details of case-allocation and cooperation within the ECN.

10 How does the interplay between jurisdictions affect the investigation, prosecution and sanction of cartel activity in the jurisdiction?

It is increasingly the case that a cartel investigation in the United States may lead to the Commission launching an investigation in the EU. This raises a particular problem in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the United States and could increase exposure to civil damages (see question 29 below).

As regards the interplay between the EU and the NCAs in the member states, the work allocation between the different authorities is regulated within the framework of the ECN (see question 9 above). There is generally cooperation between the different authorities to decide which authority pursues a case. Once the Commission decides to initiate proceedings, the NCAs lose their competence to apply article 81. However, there is no formal rule on avoiding double sanctions in the event that there are multiple investigations by several authorities. Nevertheless, the European Court in its *Walt Wilhelm* judgment (1969) recognised a general principle of natural justice that any previous punitive decision must be taken into account in determining any sanction which is to be imposed. By contrast, the Commission "does not consider that fines imposed elsewhere [outside the EU], especially in the United States, have any bearing on the fines to be imposed for infringing European competition rules. Nor does the possibility that undertakings may have been obliged to pay damages in civil actions have any relevance" (*Lysine*). The Court of First Instance has confirmed this view (*Lysine*, 2003).

Adjudication

11 How is a cartel matter adjudicated?

The Commission both investigates and adjudicates on cartel matters. At the end of an investigation by the officials of DG Competition, the final decision is taken by the College of Commissioners.

12 What is the appeal process, if any?

Commission decisions can be appealed to the Court of First Instance in Luxembourg. The Court of First Instance has jurisdiction to review the legality of and reasons for Commission decisions and the procedural propriety of the decision and to assess the appropriateness of the amount of the fines imposed. The Court may cancel, reduce or increase the fine. From the Court of First Instance, appeals lie on points of law to the European Court of Justice in Luxembourg.

Companies do not necessarily have to pay their fine immediately, if they lodge an appeal before the Court of First Instance. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest.

13 With which party is the onus of proof?

The burden of proof lies with the Commission to establish the facts and assessments on which its decision is based.

Sanctions

14 What criminal sanctions are there for cartel activity? Are there maximum/minimum fines/sanctions?

EU law sanctions only undertakings, not individuals. National legislation within some member states may, however, provide for criminal sanctions where individuals participate in infringements of article 81 (see for example the chapter on the United Kingdom). For penalties on undertakings, see next question.

15 What civil or administrative sanctions are there for cartel activity?

The sanction available to the Commission is the imposition of fines on the undertakings or associations of undertakings concerned. In general, the Community Courts have confirmed that the Commission has wide discretion in setting the level of fines within the limits of Regulation 1/2003. The fines imposed can in theory be up to 10 per cent of worldwide group turnover in the preceding business year where an undertaking or association of undertakings has, either intentionally or negligently, infringed article 81. The European Court of Justice has recently confirmed that fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling (*Pre-insulated Pipe Cartel Appeals*, 2002). Regulation 1/2003 states that these fines are not of a criminal nature. However, given the size of the potential fines, there are strong arguments as to why, pursuant to the European Convention on Human Rights (ECHR), the fines should be characterised as criminal or quasi-criminal (with the higher level of procedural protection this involves under article 6 of the ECHR). The issue was raised by the applicant in *Mannesmannröhren-Werke* (2001) but the Court of First Instance held that the ECHR cannot be directly invoked before the Community Courts.

The Commission also has a power to require the parties to terminate the infringement and may require the parties to undertake action necessary to ensure their conduct in future is lawful. For this purpose, it has in some circumstances the power to impose structural remedies and to accept binding commitments. The Commission also has a power to take interim measures in relation to infringements of article 81. Such measures are intended to preserve the position before the parties entered into the agreement in question. Performance of such orders can be compelled by means of periodic payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day.

16 Are private damage claims or class actions possible?

Third parties (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour in breach of article 81 can sue for damages before the national courts. The precise rules of standing, procedure and quantification of damages vary in the different EU member states.

17 What recent fines or other penalties are noteworthy? What is the history of fines? What is the number of times fines have been levied? What is the maximum fine possible and on what basis are fines calculated?

Fines for substantive infringements may be up to 10 per cent of group worldwide turnover for the preceding business year where an undertaking or association of undertakings has, intentionally or negligently, infringed article 81. In practice, fines have tended to be significantly lower than that but are still substantial. There is a clear trend towards increasing fines for hard-core cartels in recent years. In November 2001, the Commission fined eight companies a total of €855 million for participating in eight distinct secret market-sharing and price-fixing cartels affecting vitamin products; the largest individual fine imposed in this case amounted to €462 million. In November 2002, the Commission fined another four companies a total of €478 million for their participation in the *Plasterboard* cartel case, the second highest total amount ever imposed after the *Vitamins* cartel case. In May 2006, the Commission fined nine companies a total of €388 million for participating in cartels in the bleaching chemicals 'hydrogen peroxide and perborate markets' and four companies a total of about €345 million for operating in the *Acrylic Glass* cartel. In September 2006, the Commission also imposed fines totalling €315million on 30 companies, within 11 corporate groups, for infringing article 81(1) of the EC Treaty by fixing prices, discounts and rebates, coordinating price increases, allocating customers and exchanging confidential information in the *Copper Fittings* cartel. In 2005, the Commission fined 16 firms a total of €291 million for operating a cartel in the plastic industrial bags market. Also in 2005, the Commission imposed fines on three companies a total of €217 million for operating a cartel in the market for monochloroacetic acid (MCAA), a chemical intermediate. The fines on two of these companies were increased substantially as both had previously been fined for similar behaviour. Other recent examples of large fines include *Carbonless Paper* (total amount of €313 million), *Dutch Road Bitumen* (fourteen companies fined a total of about 267 million) and *Copper Plumbing Tubes* (eight companies fined a total of nearly €222 million).

The Commission has also imposed substantial fines for vertical restraints, such as export bans and resale price maintenance (eg, a fine of €149 million imposed on Nintendo in October 2002).

Sentencing

18 Do sentencing guidelines exist?

In assessing the amount of the fine, Regulation 1/2003 requires the Commission to have regard to the duration and gravity of the infringement, as well as to any aggravating or mitigating circumstances. The calculation also takes account of the market share held by the cartelists on the relevant market and their overall size, to ensure that the fine reflects each company's capacity to harm consumers and can act as a deterrent.

On 1 September 2006 the Commission's new Guidelines on the method of setting fines (the Fining Guidelines) were published in the Official Journal, replacing its previous guidelines adopted in 1998. The revised Fining Guidelines apply where the Commission issues a statement of objections after 1 September 2006.

Once the Commission has established an infringement, the first stage in calculating a fine involves determining the basic level of the fine. The Commission will apply a percentage of the undertaking's value of sales in the market affected by the infringement. This percentage may be up to 30 per cent, depending on the seriousness of the infringement. Cartels will generally be regarded as very serious infringements.

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

The third stage is the inclusion of a sum (entry fee) between 15 per cent and 25 per cent of the infringer's value of sales in

cartel cases and hard-core infringements to deter undertakings from participating in cartels. This entry fee may also be applied in other cases.

The fourth stage involves taking into account mitigating and aggravating circumstances. The Fining Guidelines place an increased emphasis on recidivism as an aggravating factor and the Commission may increase a fine up to 100 per cent for each similar prior infringement (as found either by the Commission or by a national competition authority applying article 81 or 82 of the EC Treaty).

The Commission may increase the fine as a deterrent, for instance where undertakings have a particularly large turnover beyond the sale of goods or services to which the infringement relates. It may also take into account the need to increase the fine to exceed the amount of gains improperly made as a result of the infringement, where this amount can be estimated.

On the other hand, the basic amount may be reduced where the Commission finds that mitigating circumstances exist. Such circumstances are, for example, providing evidence that the infringement was terminated as soon as the Commission intervened, was committed as a result of negligence or was substantially limited. Further mitigating circumstances are effective cooperation with the Commission and authorisation of the anti-competitive conduct or encouragement in this regard by public authorities.

19 Are sentencing guidelines binding on the adjudicator?

The Court of First Instance stated in *Lysine* (2003) that the Commission is obliged to follow the fining guidelines it has imposed on itself when exercising its discretion in setting the fines under Regulation 1/2003. However, even when applying these guidelines, the Commission retains wide discretion when setting the fine. It has become increasingly difficult to assess with certainty the basic amount for gravity in hard-core cartel cases (which has often been significantly higher than the minimum of €20 million under the 1998 Guidelines). The Commission also has substantial discretion in increasing the basic amount on the basis of aggravating circumstances.

Leniency/immunity programmes

20 Is there a leniency/immunity programme?

The Commission adopted a Leniency Programme in February 2002 (Commission Notice of 14 February 2002 on immunity from fines and reduction of fines in cartel cases, the 2002 Leniency Notice). It replaced the former Leniency Notice of 18 July 1996. The 2002 Leniency Notice takes account of the Commission's previous experience which had shown that the effectiveness of the 1996 Leniency Notice would be improved by enhancing transparency and by introducing an automatic total exemption from fines (amnesty) for the first whistleblower. It also replicates in many ways the US leniency rules. This makes it easier for companies to apply simultaneously in both the United States and Europe, creating ground for further cooperation between the US antitrust agencies and the Commission.

On 7 December 2006, the Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice). The amendments are in line with the ECN Model Leniency Programme, launched on 29 September 2006. The Leniency Notice replaces the 2002 Leniency Notice in all cases where an undertaking has not made an application for leniency before 8 December 2006 (the date on which the Leniency Notice was published in the Official Journal). However, the provisions relating to corporate statements apply from the moment of publication to all pending and new leniency applications.

21 What are the basic elements of a leniency/immunity programme, if one exists?

The Leniency Notice is essentially based on two principles: first, that the earlier companies contact the Commission, the higher the reward (see questions 22 and 23 below); second, that the reward will depend on the usefulness of the materials supplied (see 23 and 26 below).

22 What is the importance of being 'first in' to cooperate?

Under the Leniency Notice (part II, section A, 8(a) and 8(b)), full immunity will be granted:

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

To receive immunity, the Leniency Notice provides that the applicant must provide a corporate statement including a detailed description of the alleged cartel arrangement and explanations of the evidence provided as well as full details of the applicant and the other members of the cartel and information on which other competition authorities have been or will be approached; and all other evidence relating to the alleged cartel where no inspection has yet been conducted.

Only one undertaking can qualify for full immunity. To obtain full immunity, a company must, in addition, cumulatively satisfy the following conditions:

- put an end to its involvement in the illegal activity no later than the time at which it discloses the cartel, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the Commission inspection;
- cooperate genuinely, fully, on a continued basis and expeditiously, with the Commission – the company is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not have taken steps to coerce other undertakings to participate in the cartel.

The Leniency Notice explains that full cooperation also entails:

- providing the Commission promptly with all relevant information and evidence that comes into the undertaking's possession or is available to it;
- remaining at the Commission's disposal to respond to any request promptly;
- making current and, if possible, former employees and directors available for interview;
- not destroying, falsifying or concealing evidence of the cartel, nor disclosing any information, except to other competition authorities; and
- unless otherwise agreed, not disclosing the fact or any content of the application before a statement of objections has been issued.

In contrast to the 1996 Leniency Notice, a company is no longer required to provide 'decisive evidence' for a grant of full immunity, nor is the company automatically excluded for having acted as an instigator of or for having played a determining role in the cartel. Full immunity may also still be available after an investigation has been initiated.

Companies that have recently benefited from full immunity under the 2002 Leniency Notice include Bayer in *Synthetic Rubber*, Mueller in *Copper Fittings*, Degussa in *Acrylic Glass* and *Bleaching Chemicals* (all in 2006), as well as British Polythene Industries PLC and Combipac BV in *Plastic Industrial Bags*, Clariant in *Monochloracetic Acid*, and Flexsys NV in *Rubber Chemicals* (all in 2005).

A noteworthy case in 2005 concerned the Italian raw tobacco market. The immunity applicant, Deltafina, had been granted conditional immunity at the beginning of the procedure under the terms of the 2002 Leniency Notice. However, the final decision withheld such immunity due to a breach by Deltafina of its cooperation obligations: Deltafina had revealed to its main competitors that it had applied for leniency with the Commission before the Commission could carry out surprise inspections.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

Under the Leniency Notice (part III), favourable treatment is also available to companies that do not qualify for immunity, but provide evidence representing 'significant added value' to that already in the Commission's possession and terminate immediately their involvement in the cartel activity. Provided these conditions are met, the cooperating company may receive up to a 50 per cent reduction in the level of fine that would have been imposed had it not cooperated. The envisaged reductions are split into three bands:

- 30 to 50 per cent for the first company to provide 'significant added value';
- 20 to 30 per cent for the second company to provide 'significant added value'; and
- 0 to 20 per cent for any subsequent companies to provide 'significant added value'.

The amount received within these bands depends upon the time at which they started to cooperate and the quality of evidence provided.

Some companies that have recently benefited from a reduction of their fines include Dow (40 per cent reduction) in *Synthetic Rubber*, IMI, Delta and Frabo (50, 20 and 20 per cent reductions respectively) in *Copper Fittings*, Total/Elf Aquitaine/Arkema/Altuglas/Altumax and Lucite (40 and 30 per cent reductions respectively) in *Acrylic Glass*; Akzo Nobel/Akzo Nobel Chemicals Holding/EKA Chemicals AB, Total/Elf Aquitaine/Arkema and Solvay (40, 30 and 10 per cent reductions respectively) in *Bleach Chemicals*; Crompton, Bayer, Quimica and Repsol (50, 20 and 10 per cent reduction respectively) in *Rubber Chemical*; Trioplast (30 per cent), Bischof+Klein and Cofira-Sac (20 per cent) in *Plastic Industrial Bags*; Atofina and Akzo (40 and 25 per cent reductions respectively) in *Monochloracetic Acid*; Carbone Lorraine and SGL (40 and 33 per cent reduction respectively) in *Carbon and Graphite Products*; as well as Mindo and Transcatab (50 and 30 per cent respectively) in *Italian Raw Tobacco*.

24 What is the best time to approach the authorities when seeking leniency/immunity?

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

- risk of the authorities being on the track already;
- the danger that another participant will get in first and 'slam the door';
- the jurisdictions in which liability to sanctions may arise;
- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty;
- the consequences in terms of civil liability, including punitive or triple damages in some jurisdictions; and
- the implications of an approach to the Commission in terms of document disclosure requirements in other jurisdictions.

Recent cases have shown that international cartels are highly likely to result in an exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as sensibly possible and, where appropriate, simultaneously. If an undertaking wishes to benefit from full leniency, it needs to tell the Commission as soon as it has gathered evidence of the cartel's existence, sufficient for purposes of the Leniency Notice. Otherwise, it runs the risk that one of the other cartelists may blow the whistle first.

Within the ECN (see question 9), an application for leniency to a given authority is not considered as an application for leniency to any other authority. When an undertaking decides to seek immunity, it is therefore in its interest to apply for leniency to all competition authorities that are competent to apply article 81 and which may potentially deal with the case under the work allocation rules within the ECN.

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place, the Commission is particularly well placed to deal with the case in accordance with the Notice on cooperation within the ECN and the NCA authority might be well placed to act. Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity.

25 What confidentiality is afforded to the leniency/immunity applicant and any other cooperating party?

Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file. According to the Commission Notice on Access to the File (December 2005) no access will be granted to the following categories of documents contained in the Commission's file: internal documents of the Commission or of NCAs (including correspondence between the Commission and NCAs or between NCAs and the internal documents received from such authorities); and documents containing business secrets, and other confidential information (which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking). The Commission's notes of meetings with leniency applicants are

classified as internal documents. Where, however, the leniency applicant has agreed the minutes, such minutes will be made accessible to third parties after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the Commission's evidence in the case.

The Leniency Notice further provides that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used by the Commission for any other purpose than the enforcement of article 81 of the EC Treaty. The Commission also stresses that normally documents received in the context of the Leniency Notice will not be disclosed under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations. In the VKI case (2004), the Court of First Instance held that exceptions from disclosure under Regulation 1049/2001 require a concrete and individual examination of each document, as opposed to an abstract, general exception for categories of documents. In practice, the Commission does not reveal the name of the whistleblower as long as the investigations continue. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final Commission Decision.

As regards anonymity for individual whistleblowers, in the *Stanley Adams* case (1985), the European Court of Justice held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity, if the Commission accepts such information, it is bound to comply with such a condition.

Parties to international cartels need to bear in mind that written submissions to the Commission may be subject to US civil discovery rules in US proceedings regarding damages claims. In the interest of its leniency policy, the Commission has attempted to address these concerns by amending both the new 2002 notice and its overall practice as regards US civil proceedings (see question 29 below). In such cases, it may be advisable to make a paperless application to the Commission via external lawyers benefiting from legal privilege.

26 What is needed to be a successful leniency/immunity applicant (or other cooperating party)?

Under the Leniency Notice, a company is not required to provide 'decisive evidence' (which was perceived as a high and uncertain standard for purposes of a leniency policy under the previous 1996 Leniency Notice). To qualify for full immunity, a company has to provide sufficient information to allow the Commission either to order a dawn raid or to find an infringement of article 81 of the EC Treaty (see question 22 above). To qualify for a fine reduction, a company would have to provide material contributing 'significant added value' to what the Commission already has (see question 23 above).

The Commission will seek to establish its case on the basis of documentary proof. If no documentary evidence exists, eg, minutes of meetings, a written statement of a company representative may be sufficient (the so-called 'corporate statement'). The Leniency Notice expressly allows oral corporate statements, which will be recorded and transcribed at the Commission's premises. The company will either have to confirm that the statement is correct within a set time period or, if they waive their rights to do so, it will be deemed approved. The undertaking will need to verify the accuracy of the statement by listening to the recording and checking the accuracy of the transcript at the Commission's premises within a given time period. Failure to do so will be seen as lack of cooperation, which could result in the loss of immunity/leniency. Members of international cartels are often concerned that such corporate statements may be subject to US civil discovery rules in US proceedings regarding damages claims. The Commission has attempted to address these concerns both in the Leniency Notice and its overall practice as regards US civil proceedings (see question 29 below).

27 What is the effect of leniency/immunity granted to a corporate defendant on employees of the defendant?

Not applicable at the Community level, as the Commission cannot impose penalties on individuals pursuant to the EU rules. However, there may be implications for criminal proceedings against individuals which may arise under national legislation (see for example the chapter on the United Kingdom).

28 What guarantee of leniency/immunity exists if a party cooperates?

In an attempt to increase legal certainty, the Commission will grant conditional leniency up front, as in the United States. In particular, immunity applicants will be informed speedily on their situation and, if they qualify, conditional immunity will be granted to them in writing. If companies comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision. Leniency applicants will be informed of the amount of reduction they can expect at the latest on the day of adoption of a statement of objections.

Under the Leniency Notice, an undertaking may initially present information (via its external legal advisers) in hypothetical terms to enable it to clarify with the Commission whether it is in a position to qualify for immunity from any fine. This procedure (often described in both the United States and the EU as 'putting down a marker' to save a company's place in the line or queue), allows a company to form an idea of whether or not it satisfies the conditions for immunity before disclosing its identity to the Commission. An applicant for a marker must provide information about (i) the parties to the alleged cartel, (ii) the affected products and territories, (iii) the duration of the cartel, (iv) the alleged illegal conduct and (v) any other leniency applications. The Commission will give the applicant a specified period in which it must complete its full application. If it fails to do so, the next applicant in the queue may be granted immunity instead.

29 What are the practical steps in dealing with the enforcement agency?

In general, the procedure applicable to cartel investigations is the standard one for all antitrust cases as provided for by Regulation 1/2003 (see questions 1, 6 and 8 above).

If an undertaking wishes to take advantage of the leniency programme, it should contact DG Competition, primarily through the following dedicated and secure fax number: +32 2 299 4585 (or, exceptionally, via the following dedicated telephone numbers: +32 2 298 4190 or +32 2 298 4191). Only persons empowered to represent the enterprise for that purpose or intermediaries acting for the enterprise, such as legal advisers, should take such a step.

Application for immunity (part II of the Leniency Notice)

Following initial contact, the Commission will immediately inform the applicant if immunity is no longer available for the infringement in question (in which case the applicant may still request that its application be considered for a reduction of fines, under part III of the Notice). If immunity is still available, a company has two ways to comply with the requirements for full immunity. It may choose:

- either to provide the Commission with all the evidence of the infringement available to it; or
- to initially present this evidence in hypothetical terms, in which case the company is further required to list the evidence it proposes to disclose at a later agreed date. This descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence. The applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.

In either of the two scenarios, immunity applicants will be informed speedily about their situation and, if they meet the substantive criteria, conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

Application for reduction of a fine (part III of the Leniency Notice)

Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed of whether the evidence submitted at the time of their application passed the 'significant added value' threshold, as well as of the specific band within which any reduction will be determined, at the latest on the day of adoption of a statement of objections. The specific amount to be imposed will be finalised in the Commission's decision.

In practice, companies applying either for immunity or reduction of fines provide a written statement (sometimes referred to as the 'corporate statement') for the purposes of the leniency application, in which they give their own description of the cartel activity and assist the Commission in understanding any related evidence (eg, internal notes, minutes of meetings, etc). Given the broad scope of US civil discovery rules, producing such documentary evidence may expose EU leniency applicants in the event of US civil litigation (in particular, regarding claims for treble damages), where US plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. To avert the undermining of its leniency policy, the Commission is now wishing to protect leniency applications from disclosure, through the following ways:

- asserting in the Leniency Notice that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 81 of the EC Treaty;
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of amicus curiae (the Commission has intervened in this way in a number of cases); and
- accepting oral corporate statements (paperless submissions).

In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, with a view to avoiding admission of misconduct with effects in the United States.

30 Are there any ongoing or proposed leniency/immunity policy assessments or policy reviews?

On 1 September 2006 the Commission's new Fining Guidelines were published in the Official Journal and apply where the Commission issues a statement of objections after 1 September 2006 (see question 18).

Moreover, on 8 December 2006, the Commission's new Leniency Notice was published in the Official Journal. This includes new provisions relating to the information to be provided by a leniency applicant and the Commission's procedures for handling applications. The Leniency Notice replaces the 2002 Leniency Notice for all cases in which no company has made an application for leniency at the time that the new Leniency Notice was published in the Official Journal. However, the provisions relating to corporate statements apply from the moment of publication to all pending and new leniency applications (see questions 20 to 22).

In addition, on 29 September 2006 the ECN published its Model Leniency Programme, setting a framework that ECN members have committed to try to follow in their national programmes. The framework set out in the Model Programme is essentially the same as that contained in the new Leniency Notice. However, it additionally provides for the provision of 'summary applications' to national authorities where a full application for immunity has been made to the Commission (see question 24).

Defending a case

31 Can counsel represent employees under investigation as well as the corporation? Do individuals involved require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

As individuals cannot be penalised for breach of the EU competition rules, this is not generally a concern at the EU level. However, the issue of separate representation may arise where, for instance, the employee may be subject to disciplinary measures pursuant to his or her contract of employment or in the event of possible criminal proceedings under relevant national legislation.

32 Can counsel represent multiple corporate defendants?

Conflicts of interest are governed by the relevant bar rules in each member state. Conflicts of interest arise fairly regularly between alleged parties to a cartel.

33 Can a corporation pay the legal costs of and/or penalties imposed on its employees?

Not applicable as penalties cannot be imposed on individual employees.

Getting the fine down

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

The Commission's leniency programme has led to a significant change in the defence strategy of companies involved in cartel cases. Whereas in the past undertakings accused of being part of a secret cartel tended to present a joint defence based on denial and silence, today such an approach is rare given the advantages that can be obtained from cooperation with the Commission.

The Commission has repeatedly emphasised its willingness to give companies the chance to get off the hook if they cooperate actively at the earliest possible opportunity. At the same time, it has made clear that companies that do not seize this chance must be aware of the responsibilities they will face. If the company decides to cooperate it is therefore crucial to develop as early as possible a cooperation strategy tailored to the particular case and with the aim of providing the Commission with as much evidence as possible, as soon as possible.

Slaughter and May

Contacts: John Boyce and Dimitri Loukas

Avenue de Cortenbergh 118
1000 Brussels
Belgium

Tel: +32 2 737 9407
Fax: +32 2 737 9401
Website: www.slaughterandmay.com

Hengeler Mueller

Contacts: Hans-Jörg Niemeyer and Boris Kasten

Avenue de Cortenbergh 118
1000 Brussels
Belgium

Tel: +32 2 788 5500
Fax: +32 2 788 5599
Website: www.hengeler.com