PRACTICAL LAW COMPANY®

PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012

COMPETITION AND CARTEL LENIENCY

The law and leading lawyers worldwide

- Essential legal questions answered in 31 key jurisdictions
- Rankings and recommended lawyers in 54 jurisdictions
- Analysis of critical legal issues
- Top 15 global firms identified

AVAILABLE ONLINE AT WWW.PRACTICALLAW.COM/COMPETITION-MJG
AND WWW.PRACTICALLAW.COM/LENIENCY-MJG

PRACTICAL LAW COMPANY®

European Union

Vincent Brophy and Scott McInnes
Jones Day

www.practicallaw.com/4-517-7020

MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, what is the regulatory framework and what authorities are responsible for merger control?

Regulatory framework

Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation) regulates the EU merger control regime.

Regulatory authority

The European Commission (Commission) is responsible for EU merger control (*see box, The regulatory authority*).

Certain Commission decisions can be appealed to the General Court.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

A transaction requires notification to the Commission if it constitutes a concentration and has a Community dimension (*see below, Thresholds*).

A concentration is deemed to arise where a change of control on a lasting basis results from, for example:

- The merger of two or more previously independent undertakings.
- The acquisition, by one undertaking, of direct or indirect control of another undertaking(s) (for example, by purchase of securities or assets).

Control is defined as the possibility of exercising decisive influence on an undertaking, for example by owning the assets or rights/contracts that confer decisive influence on the composition of the organs of an undertaking.

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (a full-function joint venture) is also considered as a concentration.

Thresholds

A concentration has a Community dimension where either of the following thresholds are met:

Threshold one. The following two conditions are met:

- The combined worldwide turnover of the undertakings is more than EUR5 billion (as at 1 December 2011, US$1 was about EUR0.7).
- The EU-wide turnover of each of the undertakings is more than EUR250 million.

Threshold two. All the following are met:

- The combined worldwide turnover of the undertakings is more than EUR2.5 billion.
- In each of at least three member states, the combined turnover of the undertakings is more than EUR100 million.
- In each of these three member states, the turnover of each of the undertakings is more than EUR25 million.
- The EU-wide turnover of each of the undertakings is more than EUR100 million.

As an exception to both sets of thresholds, if each of the undertakings achieves more than two-thirds of its EU-wide turnover within one and the same member state, the transaction will not have a Community dimension.

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification of a concentration with a Community dimension is mandatory.

Timing

Concentrations with a Community dimension must be notified to the Commission before they are implemented. This is generally referred to as the standstill obligation.

A concentration can be notified to the Commission following conclusion of the agreement or announcement of the public bid, for example. Notification can also be made where the undertakings concerned show to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid.

Formal/informal guidance

Informal guidance before notification consists of pre-notification contact (*see Question 4*).

Responsibility for notification

A merger must be notified jointly by the parties to the merger.

In all other cases, the notification must be effected by the undertaking acquiring control of the other undertaking(s). However, as a practical matter, given the large amount of detailed information required to complete a notification, the buyer and target co-operate to a large extent. Notifications of hostile bids may therefore be much more difficult to complete.

Relevant authority

Notifications are made to the Commission.

The first step, before any (pre-)notification, is to request the allocation of a case team. This is done through a dedicated form, sent to a dedicated e-mail address (*COMP-MERGER-REGISTRY@ec.europa.eu*), indicating the appropriate NACE (economic sector) code.

Certain transactions notified to the Commission may, under certain conditions, be referred (in part or in whole) to the national competition authority of a member state, and vice versa.

Form of notification

Notifications are made by completing a notification form, known as the Form CO.

Filing fee

There is no filing fee.

Obligation to suspend

There is a standstill obligation (*see above, Timing*).

As an exception, the parties can request a derogation from the Commission so that they can implement the transaction before obtaining clearance from the Commission. A derogation can be applied for and granted at any time, before notification or after the transaction. In reviewing such a request, the Commission takes into account several factors, including the effects of the suspension and the threat to competition posed by the concentration. A derogation can be made subject to conditions and obligations designed to ensure effective competition, for example the insurance that voting rights acquired prior to clearance are exercised by an independent trustee (*see for example Schneider/Legrand (Case COMP/M.2283) 2002*). Other cases where the Commission granted a derogation include the following:

- *Mobile/JV Dissolution (Case IV/M.1822) 2000*, where the transaction clearly did not raise any competitive concerns.
- *Orica/Dyno* (*Case COMP/M.4151*) *2006*, where the derogation was deemed appropriate to permit to the parties to implement a transaction in other parts of the world.

Procedure and timetable

4. What are the applicable procedures and timetable?

Pre-notification discussions

Notifying parties are expected to initiate informal and confidential contacts with the Commission at least two weeks before the date of notification. During pre-notification discussions, notifying parties and the Commission can raise issues such as jurisdictional questions as well as potential competitive concerns. Discussions are also intended to determine the scope of information to be submitted to ensure that the notification form is complete. For more information, see the Commission's *Best Practices on the conduct of EC merger control proceedings*, available at *http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf*.

Phase 1

The Commission carries out a substantive examination of the proposed transaction, taking into account:

- Information provided by the parties (the Commission may request parties to provide it with necessary information).
- Publicly available material.
- Third-party views (for example views of customers or competitors of the merging undertakings) (*see Question 6*).

Once the Commission is notified, it has 25 working days to carry out its examination and decide whether to open a Phase 2 investigation. This is extendable by up to ten working days where the Commission receives a request for referral from a member state or where the undertakings concerned offer commitments to obtain clearance.

The Commission adopts one of the following decisions at the end of Phase 1:

- Unconditional clearance.
- Clearance subject to commitments (*see Question 8*).
- Open a Phase 2 investigation.

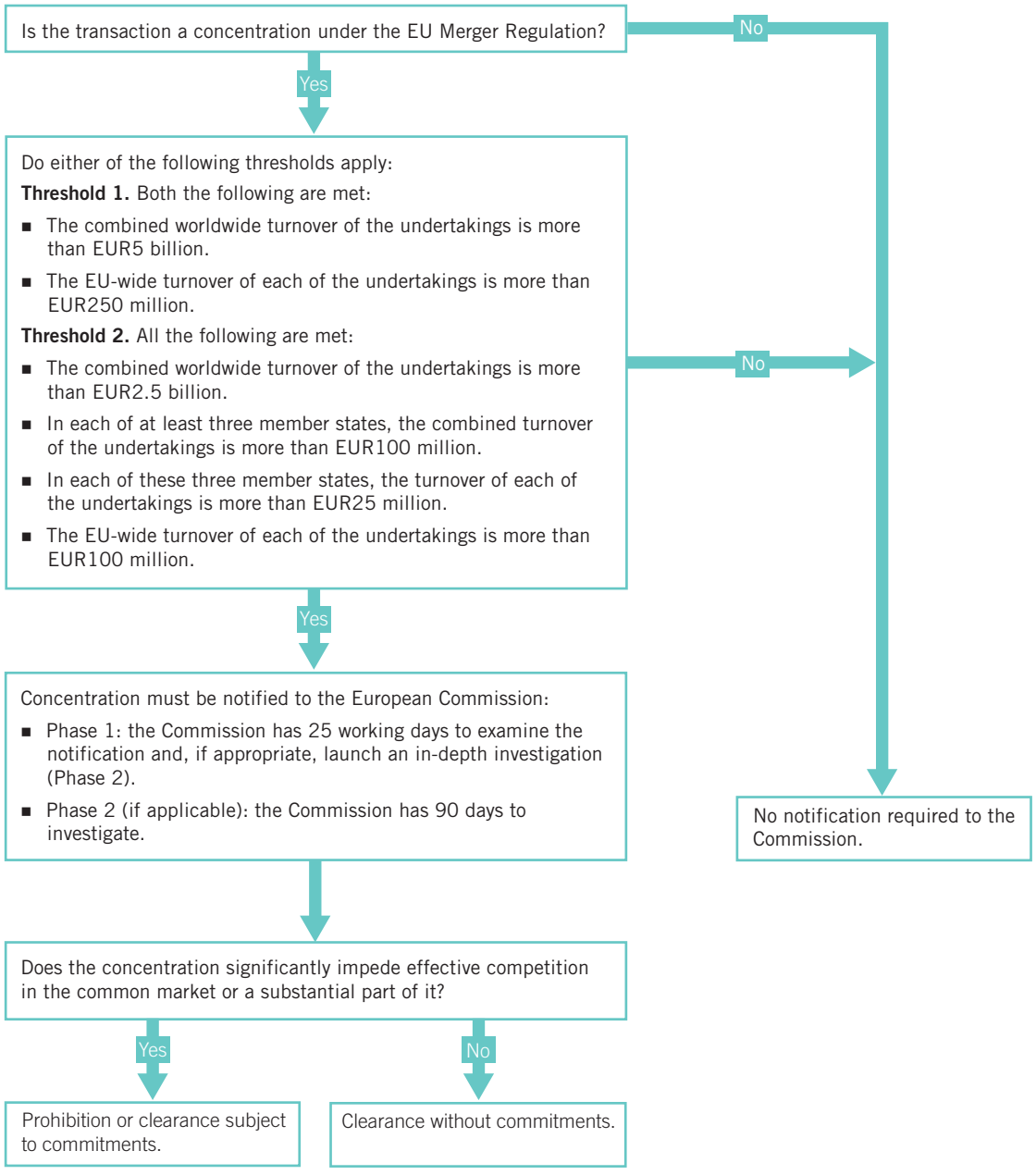
The Commission must start a Phase 2 investigation if it considers that the transaction raises serious doubts about its compatibility with the common market.

If the Commission has not taken a decision before the end of Phase 1, the concentration is deemed to have been cleared.

Phase 2

The Commission has a statutory period of 90 working days to conduct its Phase 2 investigation and adopt its decision. This period can be extended by up to 15 working days where the undertakings concerned offer commitments to obtain clearance, or if the notifying parties request this. Similarly, at any time following initiation of proceedings, the periods for review can be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions during the investigation cannot exceed 20 working days.

EU: MERGER NOTIFICATIONS



The investigation includes:

- A statement of objections from the Commission.
- Written submissions (from the parties to the transaction and interested third parties).
- An oral hearing (with the parties to the transaction and interested third parties).

The Commission must make one of the following decisions at the end of Phase 2:

- Unconditional clearance.
- Conditional clearance subject to commitments (proposed by the merging parties and negotiated with the Commission) (*see Question 8*).
- Prohibition of the transaction.

If the Commission has not taken a decision before the end of Phase 2, the concentration is deemed to have been cleared.

For an overview of the notification process, see flowchart, *EU: merger notifications*.

Country Q&A

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The Commission publishes the following two main announcements during Phase 1:

- The fact of the notification, indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved.
- The end of its examination, announcing clearance or opening of Phase 2, which is followed by the publication of a non-confidential version of its decision.

Once a Phase 2 investigation has been initiated, the Commission will generally make no further announcement until it reaches its final decision. It will issue a press release announcing its decision and will ultimately publish a non-confidential version of its decision.

Procedural stage

Information is published by the Commission at the start, during and at the end of Phases 1 and 2 (*see above, Publicity*).

Automatic confidentiality

Commission officials (as well as National Competition Authority (NCA) officials) have a duty of professional secrecy, that is, not to disclose information acquired or exchanged between them. In addition, information that they obtain during an investigation can only be used for the purpose for which it was acquired.

Confidentiality on request

A party can specify that certain information provided to the Commission constitutes either business secrets or other confidential information, which should not be divulged to any third party.

So far as disclosure of information about an undertaking's business activity could result in serious harm to the same undertaking, the information constitutes business secrets. Examples of business secrets are:

- Methods of assessing costs.
- Production secrets and processes.
- Supply sources.
- Quantities produced and sold.
- Market shares.

Information other than business secrets which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking, is classified as other confidential information. Examples of other confidential information include certain letters received from customers which, if disclosed, may lead to retaliatory measures.

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

Just after notification, the Commission publishes a notice on the Directorate General for Competition (DG Comp) website (*see box, The regulatory authority*) and in the *Official Journal*, allowing ten days for comments. In addition, the Commission generally invites certain classes of third parties (that is, customers, competitors and suppliers) to answer a questionnaire, in order to be able to assess all aspects of the transaction.

Document access

If the Commission decides to launch a Phase 2 investigation, it will issue a statement of objections to the parties involved. The parties have access to the Commission's file for the purpose of preparing their comments.

In the interests of the investigation, the Commission may also, when appropriate, provide third parties that have shown a sufficient interest in the procedure with a summary of the statement of objections, to allow them to make their views known on the Commission's preliminary assessment.

Be heard

The Commission can allow third parties to participate in the oral hearing (*see Question 4, Phase 2*). It can also invite third parties to bilateral meetings or triangular meetings with the notifying parties, if it believes this is necessary for the purposes of the investigation.

Substantive test

7. What is the substantive test?

The substantive test both for opening a Phase 2 investigation and for the Commission's decision is whether a concentration would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

This may be found in particular where the transaction creates or strengthens either:

- Single-firm dominance/market power.
- An oligopolistic situation (that is, co-ordinated or unilateral effects arising through a small number of competitors being reduced still further).

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Commission can accept commitments at the Phase 1 stage instead of opening a Phase 2 investigation (*see Question 4*).

Country Q&A

At Phase 2, the Commission can accept commitments as a condition of clearing a transaction. These are only negotiated and implemented once the Commission finds that the concentration raises serious doubts about its compatibility with the common market.

Undertakings are either:

- Structural (for example, divesting part of the business where overlaps cause competition concerns).
- Behavioural (that is, formal commitments in relation to future conduct). These are less common.

9. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

When parties intentionally or negligently fail to notify a transaction, the Commission can:

- Impose fines of up to 10% of the combined worldwide turnover of the concerned undertakings.
- Take interim measures to restore or maintain effective competition.

Where a notifying party intentionally or negligently provides incorrect or misleading information to the Commission, the Commission can impose fines of up to 1% of the undertaking's worldwide turnover. For example:

- The Commission fined Deutsche BP EUR35,000 for failure to include information in the appropriate form concerning its position on certain vertically affected markets, and for providing misleading information on those markets (*BP/Erdölchemie, Case COMP/M.2624 2002*).
- In the *Tetra Laval/Sidel* case, the Commission fined Tetra Laval EUR45,000 for supplying incorrect and misleading information (*Tetra Laval/Sidel, Case COMP/M.3255, 2004*).

Implementation before approval or after prohibition

A transaction cannot be completed before clearance has been obtained (unless authorised by the Commission). If it is implemented before clearance, the Commission can impose sanctions (*see above, Failure to notify correctly*).

On breach of a prohibition decision, the Commission can:

- Impose fines of up to 10% of the combined worldwide turnover of the undertakings concerned.
- Take interim measures to restore or maintain effective competition.
- Order the undertakings concerned to dissolve the concentration.

Any third party that has suffered loss as a result of implementation can bring an action for damages.

Failure to observe

If a party fails to observe conditions and obligations attached to a clearance decision, the Commission can:

- Impose fines of up to 10% of the worldwide turnover of the undertaking.
- Order the undertakings concerned to dissolve the concentration.

10. Is there a right of appeal against any decision? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal and procedure

The parties involved and interested third parties can appeal a Commission decision to:

- Open or not open a Phase 2 investigation.
- Clear or block a concentration.

Appeals are made to the General Court within two months (plus ten calendar days to take account of distance) of the date on which the decision was notified to the applicant or published, whichever is earlier.

The General Court's judgment can be appealed (on points of law only) to the EU Court of Justice.

Third party rights of appeal

The third party appeal procedure follows the same procedure applicable to merging parties (*see above, Rights of appeal and procedure*).

To be granted standing to appeal, interested third parties (including competitors) must show that the transaction is likely to bring about an immediate change in their situation in the market or markets concerned (*Schlüsselverlag JS Moser GmbH and others v Commission (Case T-170/02) para 27*). In most cases, competitors who actively took part in the notification process are granted standing before the EU courts.

Under certain conditions, the EU courts can grant standing to potential competitors, employees and customers.

Interested third parties can also intervene during a procedure initiated by notifying parties or the Commission itself.

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Notified concentrations are excluded from the prohibition on anti-competitive agreements (*see Question 13*).

Ancillary restrictions also benefit from this exclusion. They are provisions that are subordinate to the merger's main purpose but are directly related and necessary to the implementation of the concentration. An example is restrictive covenants by the seller not to compete with the business transferred within a certain duration and geographical limits. They are assessed as part of the merger review.

The Notice on restrictions directly related and necessary to concentrations (*OJ 2005 C56/24*) applies. It is available at *http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#restraints*.

Regulation of specific industries

12. What industries (if any) are specifically regulated?

For credit institutions and other financial institutions, as well as for insurance companies, in place of the above turnover figures (*see Question 2*), other elements are taken into account to determine if the concentration has a Community dimension (a list of the relevant income items are listed in Article 5(3) of the Merger Regulation).

Further, in relation to certain industries, member states can take appropriate measures to protect legitimate interests, such as public security, plurality of the media and prudential rules. Any such public interest must be communicated to the Commission by the member state concerned and will be assessed by the Commission.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Restrictive agreements and practices

Restrictive agreements and practices are regulated by Article 101 of the Treaty on the Functioning of the European Union (TFEU) (Article 101).

Article 101 prohibits agreements, concerted practices and decisions of an association of undertakings that restrict competition, with the requirement that the agreement has the potential to affect trade between EU member states.

The prohibition applies both to:

- Horizontal agreements (agreements between competitors).
- Vertical agreements (agreements between non-competitors such as a supplier-distributor relationship).

Potentially illegal horizontal agreements include, for example, agreements that:

- Fix prices.
- Allocate geographic markets or customers.
- Unfairly discriminate.
- Provide for competitors to exchange commercially sensitive information.
- Involve exclusivity.
- Distort the competitive process in tenders.

Potentially illegal vertical agreements include, for example, agreements that:

- Restrict the buyer's ability to determine its sale prices (resale price maintenance or RPM).
- Restrict the territory into which, or the customers to whom, the buyer can sell, subject to certain exceptions (in particular, a restriction on active sales to certain territories or customers is permitted, whereas restrictions on passive sales are generally not permitted).
- Impose a direct or indirect obligation on the buyer to buy the large majority (more than 80%) of its requirements from the supplier, when it exceeds five years.

The Commission is primarily responsible for enforcing Article 101. NCAs and national courts also have the duty to apply Article 101.

The Commission is particularly well placed if agreements or practices have effects on competition in more than three member states. Similarly, when a case raises a new competition issue, the Commission is likely to investigate the case to implement its competition policy effectively. The Commission may refuse to investigate a case because it is already investigated by an NCA. On the other hand, when the Commission starts an investigation, it relieves the NCAs of their power to act.

The Commission and NCAs can co-operate to exchange information and evidence when needed.

The Commission has published *Best Practices in proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C308/8)*, which sets out how it conducts investigations into potential breaches of competition law (available at *http://ec.europa.eu/competition/antitrust/legislation/legislation.html*).

For information on sector inquiries, see *Question 27*.

14. Do the regulations only apply to formal agreements or can they apply to informal practices? Are there broad categories of agreements that might violate the law?

Article 101 applies equally to formal and informal agreements, whether legally binding or not, and whether written, oral or tacit.

Exemptions and exclusions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

An agreement that is not excluded (*see Question 16*) can benefit from an exemption if either:

- It meets the terms of an EU block exemption, for example:
  - Regulation (EU) 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices (Vertical Restraints Block Exemption). See also the Commission's Guidelines on Vertical Restraints (available at: *http://ec.europa.eu/competition/antitrust/legislation/vertical.html*);

Country Q&A

- Regulation (EC) 772/2004 on the application of Article 101(3) of the TFEU (formerly Article 81(3) of the EC Treaty) to categories of technology transfer agreements (Technology Transfer Block Exemption Regulation);
- Regulation (EU) 1217/2010 on the application of Article 101(3) of the TFEU to certain categories of research and development agreements (Research and Development Block Exemption); and
- Regulation (EU) 1218/2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements.

- It meets the conditions of Article 101(3), which are the following:
  - it contributes to technical or economic progress, or improves production or distribution;
  - consumers enjoy a fair share of the resulting benefit;
  - the restrictive elements are indispensable to the aim pursued; and
  - it does not give the parties the opportunity to substantially eliminate competition.

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

Certain agreements are automatically excluded from Article 101, including agreements that result in a concentration (*see Question 11*). Agreements which are considered *de minimis* (that is, agreements which are deemed not to have an appreciable effect on competition) are not subject to Article 101. Generally, that is the case for:

- Horizontal agreements: when the parties combined market share does not exceed 10%.
- Vertical agreements: when each of the parties does not have a market share exceeding 15%.

However, if the agreement contains one of the hardcore restrictions listed at paragraph 11 of the Notice on agreements of minor importance (*OJ 2001 C368/13*), the *de minimis* exclusion does not apply.

Statutes of limitation

Infringements of Article 101 and Article 102 of the TFEU (Article 102) are subject to a five year limitation period. Time begins to run on the day on which the infringement ceases.

Any investigative action taken by the Commission or a NCA (for example, a request for information, an unannounced inspection of premises (dawn raid) or a statement of objections) interrupts the limitation period, which means that time starts running afresh.

The limitation period expires at the end of a period equal to twice the limitation period, that is, ten years from when the infringement ceases.

Notification

17. What are the notification requirements for restrictive agreements and practices?

Notification

There is no mechanism for notification of potentially restrictive agreements/practices (*Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation)*). Undertakings must self-assess whether their agreements are subject to Article 101 and, if so, whether they qualify for an exemption or exclusion (*see Questions 15 and 16*).

Informal guidance/opinion

Undertakings must self-assess whether their agreement complies with Article 101 (*see above, Notification*). However, where cases give rise to genuine uncertainty because they present novel or unresolved questions, individual undertakings can seek informal guidance from the Commission (*Recital 38, Modernisation Regulation*).

The Notice on informal guidance relating to novel questions concerning Articles 101 and 102 of the TFEU (*OJ 2004 C101/78*) applies. It is available at: *http://ec.europa.eu/competition/antitrust/legislation/guidance.html*.

Responsibility for notification

Not applicable (*see above, Notification*).

Relevant authority

Not applicable (*see above, Notification*).

Form of notification

Not applicable (*see above, Notification*).

Filing fee

Not applicable (*see above, Notification*).

Investigations

18. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Commission can investigate, on its own initiative, alleged infringements of Articles 101 and 102. NCAs and national courts may also apply Article 101 and 102 (*see Question 13*).

Third parties

Third parties (such as customers, competitors or suppliers) can prompt an investigation by lodging a formal or informal complaint with the Commission (they can also start civil proceedings in the courts).

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

Informal complainant. Any complainant or third party can lodge an informal complaint with the Commission. Correspondence to the Commission that does not comply with the requirements of a formal complaint (*see below, Formal complainants*) is considered by the Commission as general information that, where it is useful, may lead to an own-initiative investigation by the Commission.

This information can be provided on an anonymous basis (the Commission must respect an informant's request for anonymity). This special arrangement enables undertakings or citizens to provide market information to the Commission informally and to prompt the Commission to take action.

Formal complainants. A complainant who submits a written, reasoned formal complaint against an agreement (or a concerted practice) to the Commission must establish a legitimate interest, and use a dedicated complaint form (Form C).

The rejection of complaints can be based on:

- Insufficient grounds for acting (also known as lack of EU interest).
- Lack of competence.
- Lack of evidence to establish the existence of an infringement.

If the Commission, after careful examination of the case, comes to the preliminary conclusion that it should not pursue the complaint for any of these reasons, it will inform the complainant in a meeting or by telephone that it has come to the preliminary view that the complaint will be rejected.

Once informed, the complainant can withdraw the complaint. Otherwise, the Commission will inform the complainant by formal letter, giving the complainant an opportunity to comment in writing. The complainant can request access to the documents on which the Commission based its provisional assessment (however, the complainant cannot access business secrets and other confidential information belonging to other parties involved in the proceedings).

If these comments do not lead to a different assessment of the complaint, the Commission rejects the complaint by decision (this decision can be appealed to the EU courts).

If the Commission decides to pursue the complaint, it will conduct its investigation in accordance with the normal procedure (*see Question 20*).

Document access

If the Commission comes to the preliminary conclusion that it should not pursue the case, a formal complainant can request access to the documents on which the Commission based its conclusion.

If the Commission issues a statement of objections, the formal complainant is usually provided with a non-confidential version of the statement of objections (*see above, Representations: Formal complainants*).

Be heard

The Commission can, where appropriate, give formal complainants the opportunity to express their views at the oral hearing of the parties to which a statement of objections has been issued (*see above, Representations: Formal complainants*).

20. What are the stages of the investigation and timetable?

There is no set timetable for conducting an investigation.

An investigation may result from a (formal or informal) complaint or on the Commission's own initiative.

Generally, the Commission seeks information from the parties to the investigation and/or other interested parties (for example, customers, competitors and suppliers) and/or carries out dawn raids. If, after considering the evidence obtained using its powers of investigation (*see Question 22*), the Commission makes a provisional finding that there has been an infringement, it must issue a statement of objections to the parties. This sets out the basis of its provisional findings and the evidence relied on.

The parties are entitled to the following before the Commission proceeds further (for example, to a supplementary statement of objections, a letter of facts or a final decision):

- Access to the Commission's file (except for business secrets and other confidential information, and internal documents of the Commission/NCAs).
- An opportunity to respond, both in writing and during an oral hearing.

If, after considering the evidence, the Commission does not consider that there has been an infringement, it generally publishes a brief case closure statement.

21. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

When applicable, the Commission generally publishes:

- A press release about the fact that dawn raids have been conducted at the premises of undertakings.
- A press release when opening an investigation and on the issue of a statement of objections in certain high-profile cases.
- A press release on the adoption of a decision (which may impose fines and/or periodic penalty payments).
- A brief case closure statement when it decides not to proceed to a decision.
- A non-confidential version of the final decision (although this may be some time later).

Country Q&A

Automatic confidentiality

Commission officials (as well as NCA officials) have a duty of professional secrecy, that is, not to disclose information acquired or exchanged between them (for a definition of protected information, see *Question 5*). In addition, information that they obtain during an investigation can only be used for the purpose for which it was acquired. However, the Commission can disclose and use information necessary to prove an infringement.

Confidentiality on request

Any party making a submission to the Commission should clearly identify any material which it considers to be a business secret or other confidential information (*see Question 5*), giving reasons, and provide a separate non-confidential version. The Commission has a basic duty to keep this information confidential. If undertakings or associations of undertakings fail to comply with these requirements, the Commission can assume that the documents or statements concerned do not contain confidential information.

22. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Commission has extensive powers to investigate suspected infringements of Article 101, including to:

- Require information to be provided, through a:
  - request for information (to which there is no duty to respond, however fines can be imposed for supplying incorrect or misleading information); or
  - Commission decision (which can result in a fine if incorrect, incomplete or misleading information is supplied, as well as if the information is not supplied within the required time limit).
- Conduct dawn raids where officials can, for example, examine documents, take copies of documents and seal premises, which includes private homes.
- Interview members of staff to obtain explanations of relevant facts or documents (during a dawn raid or at another time during the investigation).
- Exchange information with the competition authorities of member states (and other competition authorities around the world, in particular the US anti-trust authorities).

23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?

There are two ways in which a competition investigation can be settled with the Commission without a formal infringement decision being reached:

- **Informal settlement.** Cases can be settled informally because the Commission has accepted informal assurances, given by the investigated parties, that address the Commission's concerns.
- **Binding commitments.** If the Commission intends to adopt a decision requiring an infringement to be ended, and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission can by decision make those commitments binding on the undertakings. Such a decision can be adopted for a specified period, and will conclude that there are no longer grounds for action by the Commission (*Article 9, Modernisation Regulation (Article 9)*). A decision under Article 9 does not imply any admission of liability from the parties that were being investigated.

  A party can (but is not required to) offer binding commitments at any time during the Commission's investigation, until a decision is made. However, from a practical point of view, the closer the Commission is to reaching a decision, the less likely it is to accept commitments.

  In practice, the Commission does not accept commitments in cases involving hard-core infringement, such as price-fixing, bid-rigging or market-sharing cartels.

  Where the Commission intends to adopt a decision under Article 9, it publishes a concise summary of the case and the main content of the commitments, to allow interested third parties to submit their observations.

  The Commission and the parties can negotiate to finalise the binding commitments. If a binding commitment is accepted, the Commission publishes its decision.

Formal settlement. A competition investigation under Article 101 can also be settled with a formal infringement decision being reached. A settlement can be reached with some of the addressees of a statement of objections. In return for an admission of liability, the Commission imposes lower fines than those which would otherwise have been imposed.

The Commission retains a broad discretion whether to engage in settlement discussions and whether to settle. However, the Commission's choice of the settlement procedure cannot be imposed on the parties.

If the Commission decides to reward a party for settlement, it can reduce the fine by 10%.

The Commission has issued a Notice on the conduct of settlement procedures (*OJ 2008 C167/2.7*) (Settlement Notice), available at: *http://ec.europa.eu/competition/cartels/legislation/settlements.html*.

Early resolution agreements have so far been reached with some of the addressees of a statement of objections in five Commission cartel investigations:

- DRAMs (*Case COMP/38.511*).
- Animal feed phosphates (*Case COMP/38.866*).
- Consumer detergent products (*Case COMP/39.579*).
- Manufacture of glass and glass products (*Case COMP/39.605*).
- Refrigeration compressors (*Case COMP/39.600*).

This reduction of fines can be combined with a reduction of fines due to a leniency application, provided that the conditions for both regimes are met (*see Question 24, Immunity/leniency*).

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The Commission can:

- Order modification or termination of the infringing agreement or practice.
- Order interim measures, in urgent cases due to the risk of serious and irreparable damage to competition, based on a *prima facie* finding of infringement. Such a decision applies for a specified period of time, and can be renewed if necessary and appropriate (*Article 8, Modernisation Regulation*).

Fines

If the Commission concludes that an agreement breaches Article 101(1) and is not exempted under Article 101(3), or is a breach of Article 102, it can impose a fine of up to 10% of the annual worldwide turnover of the offending undertaking's corporate group.

Personal liability

The Commission is not empowered to impose any measures against individual employees or directors of an infringing company. However, the competition laws of some member states provide for such personal liability.

Immunity/leniency

Parties to a restrictive agreement can benefit from a reduction of fines, or even escape up to 100% of fines, by blowing the whistle on unlawful cartel arrangements.

To obtain a reduction of fines (up to 50%), the whistleblower must do all of the following:

- Have ended its involvement in the alleged cartel immediately following its application.
- Not have destroyed, falsified or concealed evidence of the alleged cartel.
- Co-operate genuinely, fully, and on a continuous basis and expeditiously with the Commission.

To benefit from immunity of fines (100% reduction), the whistleblower must also both:

- Be the first to submit information and evidence which, in the Commission's view, will enable it to carry out a targeted inspection in connection with the alleged cartel, or find an infringement of Article 101 in connection with the alleged cartel.
- Not have taken steps to coerce other undertakings to join the cartel or to remain in it.

The Commission Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2006 C298/17*) (2006 Leniency Notice) applies. It is available at: *http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html*.

A reduction of fines based on a leniency application can be combined with a reduction of fines due to a formal settlement process, provided that the co-operation offered by an undertaking qualifies under both the 2006 Leniency Notice and the Settlement Notice (*see Question 23*).

Impact on agreements

Offending provisions of an agreement are void and unenforceable. If, under the relevant national contract law, they are not severable from the agreement, the whole agreement is void. The Commission can also order modification or termination of an infringing agreement (*see above, Orders*).

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

A third party that can show that it has, or is likely to, suffer loss as a result of a prohibited restrictive agreement or practice, can bring a civil action for damages and other civil remedies before the national courts (for example, injunctions). The action can be subsequent to, or independent of, any Commission or NCA investigation.

Special procedures/rules

There are specific mechanisms in some of the member states to facilitate such actions for damages.

Class actions

A harmonised class action procedure does not yet exist under EU law, but the Commission is contemplating its introduction. The Commission published a white paper on the subject in 2008, available at: *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF*.

26. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

Parties to a Commission decision can seek annulment of the Commission decision before the General Court, within two months (plus an approximate ten day extension on account of distance) of the date on which the appellant is notified of the decision. Such an action can be on points of law or fact.

An application for annulment does not suspend the decision (nor the obligation to pay fines, however the Commission generally accepts a bank guarantee instead of paying the fines). The parties can seek a separate order suspending the decision (including payment of the fines) pending proceedings on the merits of the case. However, such orders are rarely granted in practice.

The General Court's powers include:

- Confirming or setting aside the decision (partly or in whole).
- Confirming or amending the level of fines imposed.

A General Court judgment can be appealed, on points of law only, to the EU Court of Justice.

Third party rights of appeal

A third party with sufficient interest in the proceedings can also seek annulment before the General Court (*see above, Rights of appeal and procedure*).

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Abuses of a dominant position

Article 102 prohibits:

- Unilateral conduct which is an abuse by an undertaking with a dominant market position in the internal market or in a substantial part of it.
- The abuse by more than one undertaking of a jointly dominant position, although there is a high threshold to establish this.

Sector inquiries

The Commission can make a sector inquiry where there are reasonable grounds to suspect that any feature or features of the market have the effect of preventing, restricting or distorting competition in the EU.

In a sector inquiry, the Commission has the same powers as in an Article 101 or 102 investigation (*see Question 22*).

Sector inquiries do not result in a prohibition decision and there are no fines (except in relation to information requests), but they can lead to investigations under Articles 101 and/or 102. The Commission generally publishes a report on the results of its sector inquiry and invites comments from interested parties.

For example, the Commission has pursued sector inquiries into the following sectors:

- Roaming.
- Energy.
- Financial services (retail banking and business insurance).
- Pharmaceuticals.

For further information on these sector inquiries, see *http://ec.europa.eu/competition/antitrust/sector_inquiries.html*.

28. How is dominance/market power determined?

A dominant position arises if a company has a position of economic strength which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers (*United Brands v Commission Case C-27/76, [1978] ECR 207, paragraph 65*).

Dominance is assessed by various factors, including:

- Market shares of the alleged dominant company (a market share of over 50% is presumed dominant, but a share of under 40% is unlikely to be dominant) and of other market players, both at a given time and considering market share trends.
- Market structure/number of competitors in the market.
- Barriers to entry/barriers to expansion.
- The degree of countervailing buyer power.

29. Are there any broad categories of behaviour that may constitute abusive conduct?

Abuses are unilateral commercial acts which either:

- Exploit the dominant position by imposing harsh trading terms on customers or suppliers (exploitative abuse), for example:
  - excessive pricing;
  - imposing unfair trading terms and conditions.
- Seek to exclude competition (exclusionary abuse), for example:
  - selling below costs (predatory pricing);
  - rebating policies designed to remove competitors;
  - price/margin squeeze;
  - imposing exclusivity obligations;
  - refusing to supply customers who are downstream competitors (in certain circumstances);
  - bundling/tying.

Exemptions and exclusions

30. Are there any exemptions or exclusions?

There are only very limited exclusions to Article 102, including:

- Conduct by an undertaking operating services of general economic interest.
- Conduct that results in a merger.

There are no formal exemptions. However, certain conduct that would otherwise be an abuse may not be prohibited if the dominant undertaking can show that its conduct is justified. It can do so by showing either that:

- Its conduct is objectively necessary.

THE REGULATORY AUTHORITY

European Commission (Directorate General for Competition (DG Comp))

Head. Joaquín Almunia

Contact details. European Commission
DG Competition
70 Rue Joseph II
1000 Brussels
Belgium
T +32 2 299 96 96
F +32 2 295 01 28
E *comp-greffe-antitrust@ec.europa.eu*
W *http://ec.europa.eu/competition*

Outline structure. The European Commission (Commission) is composed of 27 commissionners, acting as a college. Within the Commission, the Directorate General for Competition (DG Comp) is primarily responsible for enforcing the competition law provisions. DG Comp is headed by Director General Alexander Italianer. An organigram of DG Comp is available at *http://ec.europa.eu/dgs/competition/directory/organi_en.pdf*

The Chief Competition Economist works in DG Comp, reporting directly to the Director General to provide independent economic advice on cases and policy.

The Hearing Officers (at the date of publication Mr Michael Albers and Mr Wouter Wils), are structurally independent of DG Comp, and report directly to the Competition Commissioner. Their mission is to ensure due process, safeguard the parties and procedural rights, and contribute to the quality of the decision-making in EU anti-trust and merger proceedings.

Responsibilities. The Commission's main competition law responsibilities are to:

- Undertake Phase 1 merger investigations and decide whether to submit mergers to Phase 2 investigations.
- Investigate and enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
- Undertake sector inquiries.

Procedure for obtaining documents. The Commission publishes details of notifications, consultations and other competition news. Its website provides detailed information about decisions, and consultations and decisions on mergers and sector inquiries (*see above, Contact details*).

- Its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers.

In this context, the Commission assesses whether the conduct is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking (for example, if a price discrimination policy expands output, or if a rebating policy improves efficiency).

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no formal notification and clearance process. However, there is a possibility to seek informal guidance from the Commission in relation to novel questions (*see Question 17*).

Investigations

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

The procedure is the same as for restrictive agreements (*see Questions 18 to 21* and *23*), except that there are no leniency/immunity or formal settlement procedures with the attached reductions of fines.

33. What are the regulator's powers of investigation?

The regulator's powers are the same as for restrictive agreements and practices (*see Question 22*).

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

Penalties and orders are the same as for restrictive agreements (*see Question 24*), except that there are no leniency/immunity or settlement procedures with the attached reductions of fines. To the extent that an agreement infringes Article 102, it is unenforceable in the courts.

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

The same rules apply as for restrictive agreements (*see Question 25*).

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. How are joint ventures analysed under competition law?

There is no legal definition of joint venture under the EU merger regime. Joint ventures are dealt with under the merger control rules (*see Questions 1 to 12*) or under Article 101 (*see Questions 13 to 26*) depending on the extent to which the joint venture is or is not a full function joint venture.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

In some circumstances, the exchange of information between the Commission and authorities in different jurisdictions is permitted, both within and outside the European Competition Network (ECN) (which consists of the Commission and the NCAs from the various EU member states).

Within the ECN

For the purpose of applying Articles 101 and 102, NCAs and the Commission can exchange and use information including, in some circumstances, confidential information (*Article 12, Modernisation Regulation*). This is subject to a number of restrictions, including that:

- The information can only be used to apply Articles 101 and 102 in relation to the subject matter for which it was originally collected.
- The information cannot be used to impose custodial sanctions on individuals.
- Exchange is subject to the rules of professional secrecy.

Outside the ECN

Effective enforcement of the EU competition rules in a global environment requires co-operation with competition authorities outside the EU, both in relation to concentrations and behavioural (in particular, cartel) activity. The Commission has co-operated with competition authorities in countries outside the EU for many years, both on policy and enforcement issues of mutual interest. The main objective is to promote convergence of competition policy and practices across jurisdictions, and to facilitate co-operation in enforcement. This takes place at both:

- Bilateral level: based on bilateral agreements or memoranda of understanding, for example with the US authorities. The nature of co-operation varies between countries (for example, co-ordination of enforcement action, sharing information on cases of mutual interest and dialogue on competition policy issues).
- Multilateral level: the Commission participates in a number of organisations such as the International Competition Network (ICN), the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organisation (WTO).

PROPOSALS FOR REFORM

39. Are there any proposals for reform of competition law?

On 17 October 2011, the Commission released a:

- Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.
- Decision on the function and terms of reference of the hearing officer in certain competition proceedings.

The adoption of this Notice was undoubtedly a response by the Commission to the pressure it has faced to provide more transparency and due process in its competition investigations. The changes essentially concern:

- Earlier opening of proceedings.
- Earlier access to key documents.
- State of play meetings.
- Triangular meetings.
- Including fines parameters in the statement of objections.
- Publication of the rejection of complaints.

Regrettably, despite what Commissioner Joaquín Almunia had previously announced, no changes were announced to the way oral hearings take place.

In relation to the powers of the hearing officer, the changes concern his earlier involvement in the proceedings, some powers in relation to legal privilege, and powers in relation to enquiries about the procedural status of a case.

Only time will tell whether the announced measures will have a practical effect on the protection of investigated parties' rights of defence and due process (some of the changes may be helpful, but some of them may not have any significance in practice).

In 2011, the Commission held a public consultation on the quantification of harm and, more generally, on actions for damages. Official results of this have not yet been made public by the Commission. In September 2011, Commissioner Joaquín Almunia mentioned in a speech that the Commission would soon publish a communication on the general principles of collective redress. More developments are therefore to be expected in this field.

CONTRIBUTOR DETAILS

VINCENT BROPHY
Jones Day
T +32 2 645 15 35
+44 20 7039 5192
F +32 2 645 14 45
+44 20 7039 5999
E *vbrophy@jonesday.com*
W *www.jonesday.com*

Qualified. Avocat, Brussels Bar, 2004

Areas of practice. Competition and anti-trust law (EU and UK); merger control (EU and UK); financial services regulation; competition litigation.

Recent transactions

- Representing MasterCard in various competition law proceedings, at Commission level, in various EU member states, and before the General Court.
- Representing Dell in relation to a transaction with Foxconn.
- Representing SunPower in relation to a joint venture with Total.
- Representing Deutsche Bank in relation to the Commission investigations into credit derivative swaps.
- Representing Procter & Gamble in its acquisition of The Gillette Company, and the follow-up sale of P&G's SpinBrush business.
- Anti-trust audits/compliance programmes.

SCOTT MCINNES
Jones Day
T +32 2 645 14 10
F +32 2 645 14 45
E *smcinnes@jonesday.com*
W *www.jonesday.com*

Qualified. Avocat, Brussels Bar, 2004

Areas of practice. Competition and anti-trust law; merger control; financial services regulation; competition litigation.

Recent transactions

- Representing MasterCard in various competition law proceedings, at Commission level, in various EU member states, and before the General Court.
- Representing Dell in a transaction with Foxconn.
- Representing Dole in relation to an anti-trust investigation by the Commission.
- Representing Texas Instruments in relation to a transaction with the acquisition of National Semiconductor (NSC).
- Representing Deutsche Bank in relation to Commission investigations into credit derivative swaps.
- Anti-trust audits/compliance programmes.

We Speak Your Language.

In Europe and around the world, Antitrust & Competition Law is our language. With more than 150 antitrust lawyers, located around the globe, we are recognized in professional publications as one of the leading antitrust/competition practices in the world. All countries where we have offices in Europe include teams of antitrust practitioners with local qualifications and working relationships with the national authorities. The resulting strength of those teams (in Belgium, France, Germany, Italy, Spain, and the United Kingdom) in European as well as national competition law matters gives Jones Day and our clients an edge in connection with cross-border competition law proceedings. This network enables Jones Day's competition lawyers to closely cooperate with, and therefore better reflect and serve the needs of, our international clients. For a law firm fluent in the language of competition law around the world, look no further than Jones Day.

JONES DAY® | One Firm Worldwide℠

More than 2500 lawyers in centers of business and finance throughout the world.

www.jonesday.com