



Frequently Asked Questions

Competition Investigations in Europe

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Introduction

Investigations by competition regulators can seem a threatening experience for many companies. For others, the investigations constitute run of the mill litigation in sectors under regular scrutiny. Regardless of your past exposure to competition investigations in Europe, this booklet will prove useful in outlining the process and risks as well as providing tips when dealing with authorities.

This booklet was drafted by Bryan Cave's dedicated European competition and regulatory team and covers investigations by the European Commission, as well as investigations by national competition authorities in the United Kingdom, France, Germany and Italy.

We hope you find it a useful guide.

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Section A: EU Competition Investigations

1. What is EU competition law?

The central objective of EU competition law is to ensure all businesses compete fairly on their individual merits.

The EU competition rules are found in Articles 101 & 102 of the Treaty on the Functioning of the European Union (TFEU). The EU rules apply if there is an appreciable effect on competition and trade between EU Member States.

There are two main prohibitions. The first is Article 101(1) TFEU which prohibits agreements between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition in the EU. This catches price fixing, allocating markets and customers between competitors, as well as a number of restrictive vertical agreements between suppliers and customers.

The second main prohibition is Article 102 TFEU which prohibits any abuse by a company in a dominant position within the EU or a substantial part of it. Such abuse may include predatory or discriminatory pricing, margin squeeze, refusal to supply, tying and bundling or fidelity and loyalty rebates.




2. Who enforces it?

2.1 European Commission

The EU Commission is tasked with principally enforcing the EU competition rules. The Competition Directorate General of the European Commission headed by the Competition Commissioner (usually a politician from an EU Member State appointed by their country to the Commission) referred to commonly as DGComp. This is the investigation and enforcement arm of the Commission charged with investigating breaches of the competition rules and taking any necessary enforcement action. It does so either on its own initiative or as a result of complaints made by third parties. It has considerable powers to order the production of documents and information, undertake inspections of premises and ultimately to accept commitments, impose fines or otherwise sanction offenders.

2.2 Court of Justice of the European Union (CJEU)

The CJEU is the final arbiter of questions of EU law. It is based in Luxembourg and consists of two Court Divisions: the Court of Justice and the General Court. The Court of Justice hears appeals on points of law against judgments and orders of the General Court. The other role of the Court is to give preliminary rulings on EU law referred to it by the national courts of the Member States. The General Court is a court of first instance. This Court hears all first instance appeals by parties against the procedural or substantive aspects of the Commission's competition decisions. The General Court has the power to annul a Commission Decision in its entirety or strike down part of it. It also has the power to reduce, annul or increase any fines imposed.



The EU Commission can fine parties to an anti-competitive agreement or an abusive practice up to 10% of their group's worldwide turnover.

3. What are the consequences of breaking it?

The sanctions for breach of Articles 101 & 102 TFEU are as follows:

3.1 Fines

The EU Commission can fine parties to an anti-competitive agreement or an abusive practice up to 10% of their group's worldwide turnover. There are special rules relating to the assessment of the level of the fine which take into account the duration of the infringement, the benefit derived from the offending conduct and whether the company has previously engaged in such conduct.

It is important to note that parent companies can be held liable for the infringements of their subsidiaries. This can also extend to the liability of investment firms for their portfolio companies.

3.2 Behavioural Remedies

The EU Commission can also impose behavioural remedies which can be either negative or positive. The Commission can demand the party or parties cease to carry out certain behaviour. Alternatively, it can impose positive measures such as ordering the parties to specifically carry out an action. An example of a positive behavioural remedy would be ordering a dominant party to supply a distributor when it has previously ceased to do so.

3.3 Structural Remedies

In cases where behavioural remedies may not be adequate, the Commission can order a restructuring of a certain company or market. An example of a structural remedy would be ordering a company to divest part of its business.



4. What happens if you are investigated?

4.1 Powers of Investigation

The Commission has the power to obtain all necessary information from individuals and companies. The Commission can make inquiries of complainants or competitors of the parties to an agreement or a practice in order to get a better picture of the goods or services in question.

This power can be used at any stage in the Commission's procedure and is not limited to the preliminary fact finding stage.

4.2 Issue of Statement of Objections

The Commission outlines its competition law concerns to the accused in either its Statement of Objections ("SO") which is a formal charge sheet, or in a less formal letter which details the alleged competition law infringements. The letter procedure is usually used when the Commission does not intend to fine the parties, but is taking objection to the conduct concerned. The Commission in the SO or its letter will give the accused a timeframe for which to respond of normally around two months. If the accused wants to settle the case it might at this stage offer commitments to appease the Commission and end the investigation.

4.3 Reply to the SO

The accused's response to the SO is very important as it could either prejudice their defence or alternatively appease the Commission and end the investigation or an aspect of it. Parties should ensure that they strictly adhere to deadlines in their submission of their reply to the SO.

4.4 Access to Commission's File

The Commission is legally bound to grant access to its prosecutorial file to the parties accused. However, there are certain documents in the file to which the accused have no legal entitlement to. These are:

- (a) **Business secrets:** These are the business secrets of any other companies named in the file. This is a wide category and extends from financial information to sales strategy.

- (b) **Internal Commission documents and correspondence with other public authorities:** These are not generally disclosable except in exceptional circumstances where defendants accuse the Commission of a misuse of powers.

The right of the accused to gain access to the file begins as soon as the Statement of Objections is sent. The time limit for the accused to ask for access is usually very short giving the parties only a matter of days to request evidence that the Commission has on file against them.

Parties are therefore advised to move quickly to gain access in these situations. Crucially, corporate statements (being admissions of guilt by other parties) made under the Leniency Notice are not accessible as part of the general file and must be applied for separately. They are seldom released.

4.5 Right of Parties to be Heard/Oral Hearings

An oral hearing may be requested by both the parties accused. This request for the oral hearing should be done by the parties before the expiry of the deadline in their reply to the SO.

The hearing is not a trial but is part of a fact finding process for both the parties and the Commission. It also gives the parties a chance to fairly put forward their case orally before the Hearing Officer. The Hearing Officer produces a report containing a summary of the proceedings and their views become part of the case file.

5. How do I deal with information requests?

There are two types of requests: simple Requests for Information or Decisions requiring Information.

5.1 Requests for Information

Although there is no legal obligation for a company to comply with a simple request for information, there are penalties for supplying intentionally or negligently incorrect or misleading information if an undertaking decides to respond. Fines can extend to 1% of the total group turnover in the preceding business year of the undertaking in question.

5.2 Decision requiring Information

The Commission can require undertakings and associations of undertakings to supply information by formal Decision. Penalties for non-compliance include:

- (a) Fines up to 1% of a company's group turnover for non-compliance or providing incorrect or incomplete or misleading information, or
- (b) periodic penalty payments up to 5% of the average daily turnover in the preceding business year of the company in question. This penalty is imposed on a daily basis for the non-provision of information.

6. Handling inspections/dawn raids

6.1 Inspections

An important weapon in the Commission's armoury is the ability to undertake inspections of business premises as well as other premises including an individual's home. Inspections can be carried out by agreement or unannounced.


Unannounced inspections are commonly referred to as "dawn raids".

The EU Commission can:

- (a) enter premises;
- (b) examine books and other records including electronically stored data;
- (c) take or obtain copies or extracts from them;
- (d) seal premises, books or records to the extent necessary for the inspection. This can be important if the inspection goes into a second day and there is a possibility of evidence being interfered with overnight; and
- (e) ask for explanations of facts or documents and to record the answers.

The Commission does not have an obligation to attempt a voluntary inspection prior to a mandatory inspection.

During both voluntary and mandatory inspections, companies have an active duty to assist the Commission officials in the investigation in finding the information they want. It is not sufficient to grant them unlimited access to all filing cabinets or the IT system. The Commission's recent practice has been to regard a lack of cooperation as an aggravating factor when it comes to determining the level of the fine.



During a mandatory inspection, the Commission usually waits for the attendance of lawyers or at least for the undertaking to take advice before proceeding with the inspection. However, it will only wait for a short time for lawyers to attend. The Commission officials will come armed with a Commission Decision which will explain the penalties for non-compliance and the fact the Decision can be reviewed by the General Court.

6.2 Power to take Statements

The EU Commission has the power to take statements by interview. The person concerned must consent to the interview and there are no restrictions as to the persons who may be interviewed. Former employees who could be a very good source of information can be interviewed. The interview may concern any information relating to the subject matter of the investigation.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

Certain documents uncovered during an inspection or coming within the scope of an information request may be subject to legal professional privilege and exempt from disclosure to the Commission. Crucially, certain correspondence between a client and an independent lawyer qualified in the EEA is legally privileged, whereas correspondence between a client and an in house lawyer or with a lawyer in a third country was not.

Privilege extends to correspondence which contains legal advice about the subject matter of the investigation, whether it was produced after or prior to the initiation of any proceedings by the Commission. Correspondence between external lawyers and a lawyer acting for a third party does not enjoy privilege.

7.2 Privilege against Self-Incrimination

There is a limited privilege against self-incrimination under EU law. This entitles companies to refuse to answer questions that would require them to admit to the very infringement the Commission is seeking to establish. However this privilege does not entitle them to refuse to hand over documents to the Commission which might serve to establish an infringement by the company concerned.



8. How do I negotiate a settlement or appeal any decision ?

8.1 Settlements

- (a) **Leniency Procedure:** The leniency procedure is essentially the procedure by which the Commission acknowledges a company's cooperation when they whistleblow their own cartel activity and come forward voluntarily. Public resources can only go so far in the detection of cartels and so rewarding whistleblowers with 100% immunity from fines has proved a highly successful programme in the EU. However, the successful leniency applicant is granted no immunity from civil actions for damages by victims of the cartel.

The Commission's leniency system does not confer leniency from national competition authorities. Therefore, those seeking protection and the disclosure of their wrongdoing will often do so both to the Commission but also to national competition authorities in the relevant member states affected.

Under the Leniency Notice, companies who have come forward may be awarded either a total immunity from fines or merely a reduction in the level of the fine. This reduction can be significant or it can be small depending on the circumstances of the application. The normal practice is for the first through the door who blew the whistle and gave up the crucial information to receive immunity whilst those who co-operated and admitted liability would likely receive just a reduction in their fines. For this reason, it may be very important that your company is the first through the door to the Commission should any cartel activity be uncovered.

- (b) **Cartel Settlement Procedure:** The cartel settlement procedure is similar but separate from the leniency procedure mentioned previously. The settlement procedure was designed to encourage companies to settle ongoing cases with the Commission. This is both to benefit the Commission in that they can save resources and time when companies settle cases and admit liability, but it can also be of benefit to companies when they are awarded a reduction of 10% of their fines and save on legal and appeal costs going forward.



- (c) **Commitments Procedure:** The commitments procedure is there to encourage parties to resolve cases quickly through consent in situations where the Commission does not feel it appropriate to fine parties. The accepting of the commitments by the Commission effectively closes the case.

Commitments are usually promises by the offending companies to carry out or refrain from carrying out a particular practice or behaviour. Commitments are usually used in abuse of dominance cases to secure future compliance where the nature of the abuse is novel or has not previously been considered by the Courts or the Commission.

It is worth noting that the acceptance of commitments can be hugely beneficial for the companies concerned, not only in the closing of a case and in the avoidance of fines, but also because accepting commitments is not an admission of liability. As such the parties involved do not open themselves up to follow-on litigation by affected parties seeking compensation.

8.2 Rights of Appeal

Parties have a right to appeal the Commission's Decisions to the General Court. It should be noted that not only has the General Court the ability to overturn the Commission's Decisions but conversely it can increase a parties level of liability and even raise their fines, so appeals come at a risk.

Costs for the appeals can be apportioned between the Commission and parties, but most likely will be awarded against the Commission if the appeal is successful.



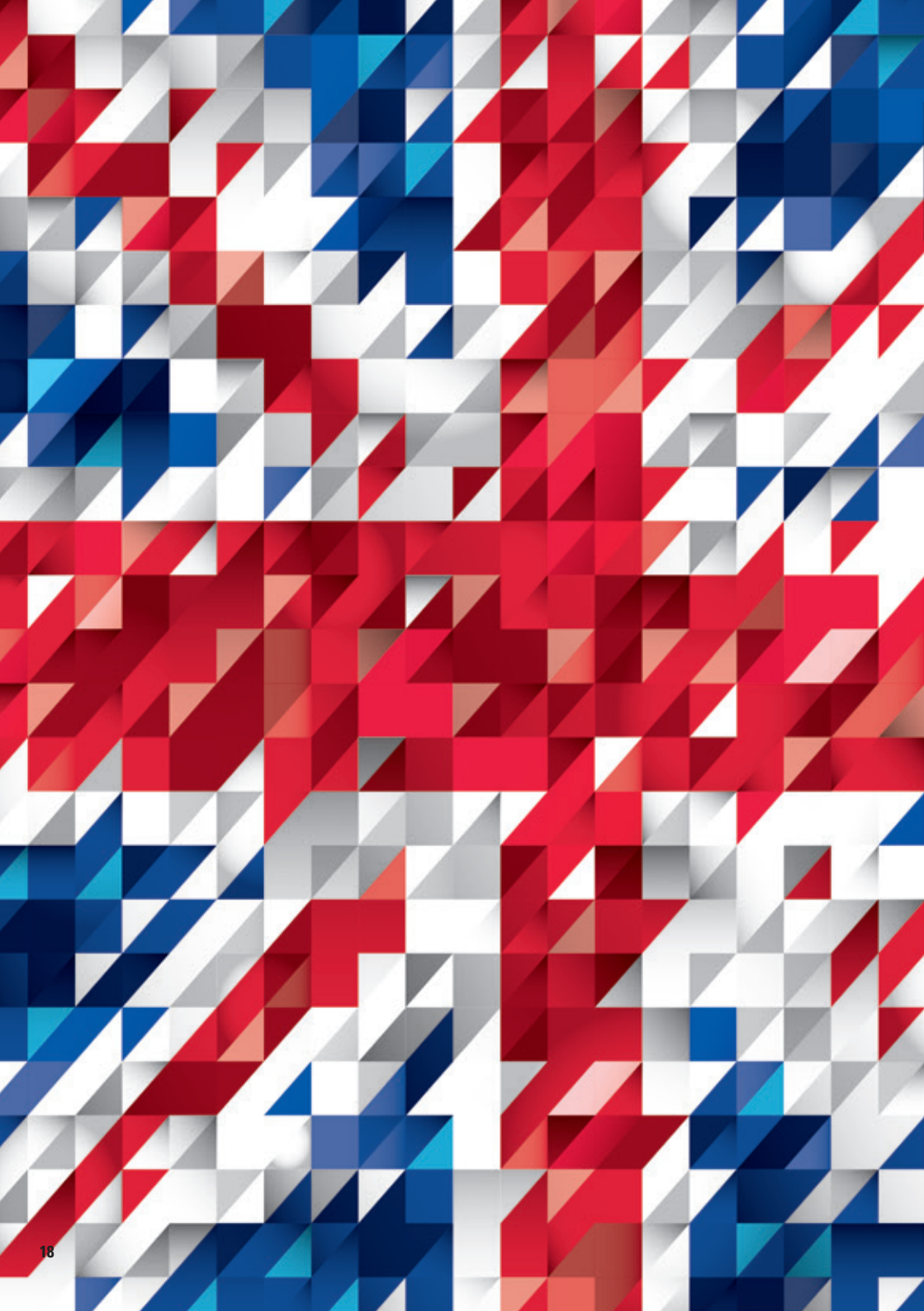
A compliance programme should be one which will instil a culture of compliance from Board level down throughout the whole organisation.

9. Top tips for dealing with investigations

- (a) **Ensure that your company has an effective on-going holistic competition compliance programme in place:** Do not view this as “a tick the box” exercise. Instead a compliance programme should be one which will instil a culture of compliance from Board level down throughout the whole organisation. Part of the programme should be bespoke training on competition compliance targeting high risk areas such as where employees (e.g. sales executives) have direct contact with customers and possibly competitors.
- (b) **On sensitive issues, take advice from an external law firm with EU qualified lawyers for that advice to be regarded as legally privileged under EU law:** Advice from the General Counsel or other in-house lawyers to the company will not be legally privileged and will be subject to disclosure to the Commission in the event of an information request or inspection.



- (c) **Place external legal advice in a separate file:** This will ensure its legally privileged nature is highlighted in the event of any Commission inspection. Privileged correspondence is usually kept in the General Counsel's office or in the case of smaller companies in the office of a senior executive.
- (d) **Review the scope and purpose of the Commission's investigation and understand the limits of their authority:**
We recommend to cooperate wherever possible unless exceptional circumstances apply. If you do decide to reply to an information request remember to ensure your answers are accurate and do not mislead. There are penalties for providing inaccurate and misleading information even if the reply to the information request is voluntary.
- (e) **In the case of an inspection provide the inspectors with a designated room and have the relevant documents brought to them:** You want to avoid them going on a fishing expedition around the building. In any event they should be accompanied at all times. It is important you take a careful note of what documents are copied and any oral explanations offered by staff in relation to certain documents.
- (f) **After the inspection has concluded you should undertake a detailed debrief and ensure a comprehensive competition law audit is undertaken.**
- (g) **Consider whether it is appropriate to seek leniency from the Commission and/or other relevant Member States:** Remember only the first person that approaches the Commission is entitled to full immunity from fines so it is important to act fast if a leniency application is deemed appropriate.
- (h) **Start a dialogue with the EU Commission as soon as possible:** Many cases are settled informally on a without prejudice basis with a company agreeing to amend its practices. The Commission normally accepts these assurances from the company and closes its file. However, it is important such discussions take place at an early stage of the Commission's investigation before the Commission's investigation becomes too advanced.





Section B: UK Competition Investigations

1. What is UK competition law?

UK competition laws are principally found in Chapters I and II of the Competition Act 1998 (CA98).

The Chapter I prohibition which closely follows Article 101 of the TFEU, prohibits agreements, arrangements and concerted business practices which have as their object or effect to appreciably prevent, restrict or distort competition and which appreciably affect or distort competition within the UK.

Chapter II which mirrors the provisions of Article 102 of the TFEU prohibits certain unilateral abusive by any business which enjoys a very strong market position such that it can act without regard to its customers, competitors or suppliers and which appreciably affects trade and competition in the UK.

In addition, the cartel offence under Section 188 of the Enterprise Act 2002 (EA02) creates a criminal offence under which individuals such as company directors guilty of certain cartel behaviour can receive up to 5 years imprisonment and/or an unlimited fine. It is a criminal offence for an individual to enter into an agreement between competitors to rig bids, fix prices, share markets or customers, or limit production or supply, subject to certain statutory exclusions and defences.



2. Who enforces it?

2.1 Competition & Markets Authority

The main UK competition regulator is the Competition & Markets Authority (CMA). The CMA replaced the Office of Fair Trading (OFT) as the primary enforcement body for UK competition law on 1 April 2014.

The CMA has jurisdiction to enforce both UK and EU competition law. Within their respective industry sectors, the UK utility regulators (including Ofcom, Ofwat, Ofgem, FCA, Monitor etc.) have concurrent power with the CMA to enforce UK and EU competition law.


2.2 Competition Appeal Tribunal (CAT)

The CAT is an independent court to hear competition cases. It is headed by a president who is a lawyer from a competition law background and hears full merits appeals under the Competition Act 1998 (CA98) from the CMA. A further appeal is possible to the Court of Appeal but only on points of law

3. What are the consequences of breaking it?

3.1 The sanctions for breach of Chapters I & II of the Competition Act 1998 are as follows:

- **Fines:** The UK competition authorities have powers to impose very significant fines on businesses in breach of competition rules (up to 10% of worldwide aggregate group turnover the preceding business year).
- **Unenforceability:** Contractual restrictions that infringe competition law will be void and unenforceable, so that they cannot be enforced in the Courts. However if those offending restrictions go to the heart of the agreement so that the essence of the arrangement would be changed by their deletion, the whole agreement is likely to be void and unenforceable.
- **Disqualification:** Directors of UK companies that have infringed UK or EU competition law may be disqualified from acting as a director for up to 15 years.
- **Procedural penalties:** Executives and companies may also incur fines for failing to comply with procedural requirements (such as providing requested information) imposed by the UK or EU authorities. There is also criminal liability (punishable by further fines and/or prison sentences of up to two years) for obstructing an investigation by the CMA or any of the concurrent regulators.



The UK competition authorities have powers to impose very significant fines on businesses in breach of competition rules (up to 10% of worldwide aggregate group turnover the preceding business year).

- **Damages:** Third parties which have suffered loss and damage by reason of the offending anti-competitive agreement or behavior can sue for damages before the national courts of a Member State.
- **Reputational Damage:** One consequence of infringing the competition rules which is often overlooked is reputational damage as the decisions taken by competition authorities are always well publicised and high profile.

3.2 Behavioural Remedies

If the CMA or any other concurrent UK regulator has made a decision that an agreement infringes the Chapter I prohibition or takes a decision that conduct infringes the Chapter II prohibition it may under Sections 31 and 32 CA98 respectively give directions that the offending agreement or conduct may be amended or brought to an end. These orders may not only demand parties cease to carry out certain behavior, they may also impose positive measures such as ordering parties to specifically carry out an action.

Parties are also able to give legally binding commitments to the same effect. Such commitments can be enforced by the UK competition authorities but are made without prejudice to any finding of liability on the part of the subject of the investigation.

3.3 Structural Remedies

There are no structural remedies available under the CA98. However the CMA does have the power to order divestiture in the context of Market Investigation or Merger control inquiries under the Enterprise Act 2002.

4. What happens if you are investigated?

4.1 Powers of Investigation

The CMA has powers to obtain all necessary information from individuals and companies. It can also conduct investigations at business (and, in certain circumstances, domestic) premises and take copies of documentation, electronic files, e-mails, and, in certain cases, to seize original documents.

The CMA can make inquiries of complainants or competitors to a agreement. These powers can also be used to inspect the premises of a business which is not under suspicion but which may have evidence which is relevant to an investigation into another business, such as a customer, competitor or supplier.

4.2 Launch of a Formal Investigation

The CMA can launch a formal investigation if the CMA has reasonable grounds to believe that the Chapter I/Article 101(1) or Chapter II/Article 102 prohibitions have been infringed.

In most cases when the CMA opens a formal investigation, the CMA will send the businesses under investigation a case initiation letter including contact details for key members of the case team including the Senior Responsible Officer, who will decide whether to issue a Statement of Objections in the case.

During the investigation there is regular review and scrutiny of the case by senior officials and the CMA keeps the parties informed about their progress in the case. The CMA also offers parties the opportunity to meet with the case team for state of play meetings.

4.3 Results of Formal Investigation

When the formal investigation has been concluded there are a number of ways in which an investigation can be resolved. The CMA can:

- Close its investigation on the grounds of administrative priorities. The CMA can sometimes write to businesses explaining that although the CMA is not currently pursuing a formal investigation, it has concerns about their conduct.
- Issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement.
- Accept commitments from a business about its future conduct.
- Issue a Statement of Objections where its provisional view is that the conduct under investigation amounts to an infringement.

4.4 Appointment of Case Decision Group

If the CMA has decided to issue a Statement of Objections, a three-member Case Decision Group is appointed to be the decision-makers in the case. The Case Decision Group is responsible for taking decisions on whether to (a) issue an infringement decision (with or without directions) or a 'no grounds for action' decision; and (b) on the appropriate amount of any penalty.

The case team will remain in place to progress the investigation under the direction of the Case Decision Group as appropriate. The case team will remain the primary point of contact for the parties under investigation, complainant(s) and third parties, and will relay information from those parties to the Case Decision Group as necessary.

4.5 Reply to the SO

After issuing a Statement of Objections, the parties to whom the Statement of Objections is addressed have the right to make representations to the CMA. Following such representations the CMA can, if justified, issue a final decision that the conduct amounts to an infringement.

Alternatively, if it is not satisfied there is credible evidence of an infringement following a review of the evidence, it can close its case.

4.6 Access to File

At the same time as issuing the Statement of Objections, the CMA will also give the addressees of the Statement of Objections the opportunity to inspect the file. This is to allow them to properly defend themselves against allegations of competition law infringement.

The CMA allows addressees of the Statement of Objections a reasonable opportunity, typically six to eight weeks, to inspect copies of disclosable documents on the file.

These are documents that relate to matters contained in the Statement of Objections, excluding certain confidential information and CMA internal documents.

4.7 Right of Parties to be Heard/Oral Hearings

When the CMA issues a Statement of Objections, the CMA will invite each addressee of the Statement of Objections to respond in writing. However, there is no obligation to submit a response. The deadline for submitting written representations will be specified in the Statement of Objections usually at least 40 working days, and no more than 12 weeks, from the issue of the Statement of Objections.

The CMA will also offer all Addressees of the Statement of Objections the opportunity to attend an oral hearing to discuss the matters set out in that Statement of Objections. The Addressee can bring legal or other advisers to the oral hearing to assist in presenting its oral representations, subject to any reasonable limits that the CMA may set in terms of the number of persons that may attend on behalf of the Addressee.

To promote a focused and productive meeting, the case team will ask the Addressee to give an indication, in advance, of the matters it proposes to focus on in its oral representations at the hearing.

The oral hearing provides the Addressee with an opportunity to highlight directly to the Case Decision Group issues of particular importance to its case, and which have been set out in its written representations. The oral hearing may also provide a useful opportunity for the Addressee to clarify the detail set out in its written representations. As a general rule, any points raised orally by the Addressee at this stage should be limited to those already submitted to the CMA in writing.

5. How do I deal with information requests?

5.1 Requests for Information

Prior to an investigation, parties may get informal requests for documents and information from the CMA. There is no requirement to answer these requests, but those parties cannot lie or mislead the CMA.

If the CMA does open a formal investigation it will send out formal written information requests (Section 26 notices) to obtain information from a range of sources such as the business under investigation, their competitors and customers, complainants, and suppliers.

The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is also a criminal offence punishable by fine and/or imprisonment to provide false or misleading information, or to destroy, falsify or conceal documents.

Information that can be asked for under this section includes internal, business reports, copies of emails and other internal data.



6. Handling inspections/dawn raids

6.1 Inspections

The CMA also has the power to enter, and in some instances to search, business and domestic premises to obtain information relevant to its inquiries. The occupier of the premises does not have to be suspected of having breached competition law.

The power the CMA uses to gain entry will depend on whether the CMA intends to inspect business premises (such as an office) or domestic premises (such as the home of an employee). Under certain circumstances the CMA can enter business premises, but not domestic premises, without a warrant.

Where the CMA has obtained a warrant in advance of entry, the CMA can enter and search both business and domestic premises.

(i) Entering premises without a warrant

A CMA officer who is authorised by the CMA in writing to enter premises but does not have a warrant may enter business premises in connection with an investigation if they have given the premises' occupier at least two working days' written notice. In certain circumstances, the CMA does not have to give advance notice of entry if it has reasonable suspicion that the premises are, or have been, occupied by a business whose conduct the CMA is investigating, or if a CMA authorised officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

When an inspection without a warrant is taking place, CMA officers may require any person to:

- Produce any document that may be relevant to the CMA's investigation;
- CMA officers can take copies of, or extracts from, any document produced;
- Provide an explanation of any document produced; and/or
- Tell the CMA where a document can be found if CMA officers consider it to be relevant to the investigation.

(ii) Entering and searching premises with a warrant

The CMA can apply to the court for a warrant to enter and search business or domestic premises. The CMA would usually seek a warrant to search premises where the CMA suspects that the information relevant to the investigation may be destroyed or otherwise interfered with if the CMA requested the material via a written request. Therefore, the CMA mostly uses this power to gather information from businesses or individuals suspected of participating in a cartel.



6.2 Power to Take Statements

The CMA can require any individual who has a connection with a business which is a party to the investigation to answer questions on any matter relevant to the investigation. The CMA can fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA's questions.

Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests.

In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation. While the CMA recognises that the interview power may be used in a range of circumstances, the starting point for the CMA is that it will be generally inappropriate for a legal adviser only acting for the undertaking to be present at the interview.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

Under Section 30 of the CA 98, an investigator has no right to see documents which are protected by the legal advice privilege. Communications with in-house lawyers are also protected in this context.

Under the EA2002, the CMA cannot require the disclosure of any documents which are subject to the legal advice privilege, meaning any communications discussing legal advice between businesses or individuals and their external (not in-house) lawyers.

Just as importantly, the CMA may not go on a fishing expedition for evidence and must instead only request documents or information narrowly in accordance with its stated investigation.

7.2 Privilege Against Self-Incrimination

In regard to criminal competition investigations, Section 197 of the Enterprise Act 2002 creates a privilege against self-incrimination where evidence can only be used against an individual when he is being prosecuted for making false statements. Under Section 197, an individual cannot be compelled to make statements that would incriminate them.

8. How do I negotiate a settlement or appeal any decision ?

8.1 Settlements

There are three distinct forms of settlement in UK competition investigations:

- (a) **Leniency Procedure:** The leniency procedure is completely separate from the formal CMA settlement procedure. The first party to expose a cartel to the CMA will be granted 100% immunity from CMA fines. This does not prevent that company being sued in private litigation by affected individuals but they do avoid the usually large CMA fines. Coming forward first for this complete immunity is also important for the individual directors and employees who can be granted immunity from criminal prosecutions under the Enterprise Act 2002.

It is possible to seek leniency even after the first party has already 'whistleblown'. However, these subsequent leniency applications can only get up to a 50% reduction in a fine so again the importance of getting legal advice to make sure your company is first through the door in exposing a cartel is of utmost importance.

- (b) **Cartel Settlement Procedure:** This is a voluntary procedure instigated by the party under investigation who wish to acquiesce to the CMA's investigation and accusations of wrongdoing in return for a streamlined administrative process and likely reduction in fine. Parties ongoing legal costs in defending investigations and management time and pressure in dealing with investigations can sometimes mean wrongdoers find it easier to come clean and accept penalties than to go on resisting the prosecution.

It is up to parties and their legal representatives to come up with a compelling package to persuade the CMA of the settlement and hopeful reduction in fine. However, settlement is not a guaranteed way of receiving a reduction in the value of a fine as the CMA will insist that the settling party when it admits liability will also agree to the possibility of the maximum possible fine being imposed. Careful legal and strategic considerations will need to be considered to decide whether settlement really is the right option for the company in question.



The stage at which the party chooses to settle is important with regard to fine discount. Before the statement of objections there can be up to 20% discount on the fine, after only up to 10%. This is structured to encourage early settlement by parties but this may not always be the most advantageous or even cost effective course of action.

- (c) **Commitments Procedure:** The CMA can accept binding commitments from parties under investigation as a remedy to anti-competitive behaviour or an anti-competitive situation. Commitments are not likely to be accepted by the CMA in cases of cartels such as a secret price fixing or market sharing cartel. In those situations the leniency and settlement procedures are the appropriate early exit strategy for parties under investigation.

It is possible for companies and groups of companies under investigation to put forward their own voluntary package of commitments to the CMA with a clear timeline for implementation and accountability. Again, experience legal advice to put together a compelling package is crucial to bring an early and relatively cost free end to CMA investigations.

An example of a commitment could be to refrain from a particular practice or allow the open licensing of a much desired and relied upon technology to other businesses.

8.2 Rights of Appeal

Full merits appeals of the CMA's decisions are made to the CAT. Full merits appeals are made on points of law, fact and procedure. The CAT has wide powers to assist parties including setting the CMA's decisions aside and granting temporary injunctions to assist parties. The CAT has the ability to refer questions of law to both the UK Court of Appeal but also the European Court of Justice on issues of EU law.

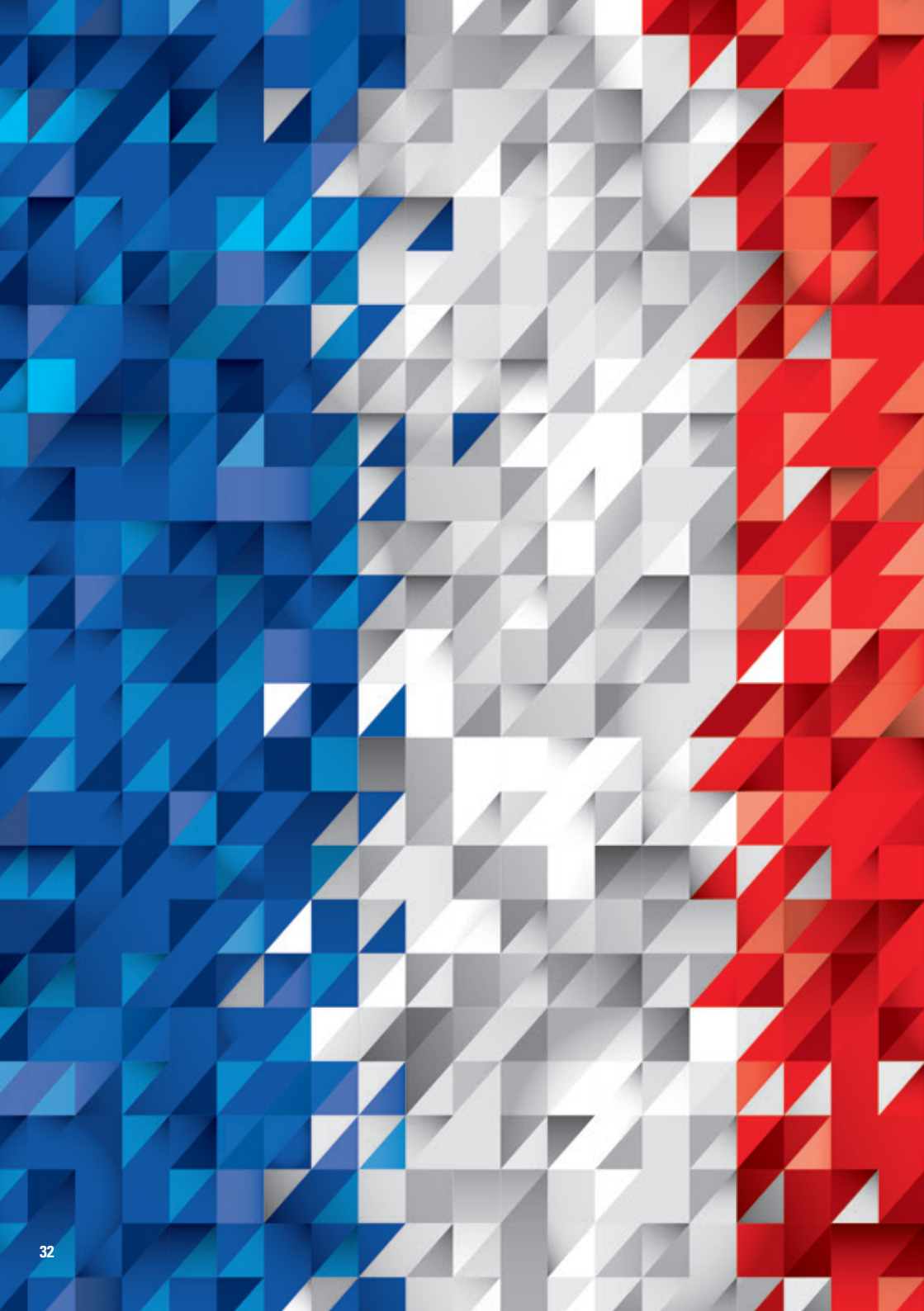
Appealing to the CAT has its risks however. Although it can reverse any CMA decision, the CAT also has equal powers to sanction companies. A company could appeal the size of their fine to the CAT only to discover that the CAT's believes the original fine to be insufficient and raises it. A CMA decision will have to be carefully dissected and analysed by the parties' legal representation and it may not be appropriate or cost effective to appeal CMA decisions in all cases.



9. Top tips for dealing with investigations

- (a) **Come clean on cartels with a leniency application:** Being first through the door has unbeaten advantages on both costs and immunity. If you are involved in suspected cartel activity, seek legal advice and approach the CMA before your competitors do.
- (b) **Carefully consider when and how to settle proceedings:** Whilst a settlement offer can be an attractive way out of a prosecution, the CMA may have a weak case and an admission of liability leads to only small reductions in fines and leaves your company at the CMA's mercy. Time and resources could be better spent defending the case and being exonerated of any wrongdoing.
- (c) **Have a carefully thought out and rehearsed dawn raid procedure in place.**
- (d) **Negotiate with the CMA to narrow its enquiries if you believe its requests are pernicious or onerous.**





Section C: French Competition Investigations

1. What is French competition law?

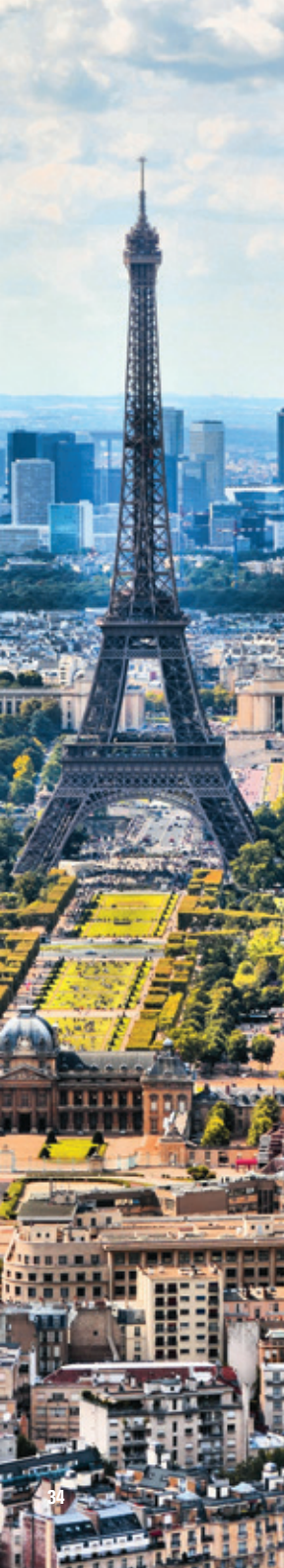
The French Commercial Code (FCC) provides rules for the regulation of competition in France.

The main prohibitions concern:

- (i) Anti-competitive agreements and concerted practices (*Article L. 420-1 FCC*);
- (ii) abuses of an individual or collective dominant position (*Article L. 420-2(1) FCC*);
- (iii) abuses of economic dependence of a party (e.g., a supplier or a customer) on an enterprise or group of enterprises (not necessarily dominant) (*Article L. 420-2(2) FCC*); and
- (iv) abusively low pricing practices (*Article L. 420-5 FCC*).

By virtue of the principle of supremacy of EU law over national law relating to the same objects, the French Competition Authority (FCA) and national courts are bound to apply EU competition law if there is an appreciable effect on competition and trade between EU Member States.

Nonetheless, French competition rules may apply to anti-competitive conduct initiated or implemented outside France, where its object or effect is to restrict competition in France.



2. Who enforces it?

2.1 Autorité De La Concurrence

The French Competition Authority (*Autorité de la concurrence*) is an independent administrative authority which specialises in the analysis and regulation of the functioning of competition on French markets. It has first instance jurisdiction (subject to possible judicial review) to enforce national and EC competition law in France. Investigations of cases handled by the FCA are supervised and carried out by the FCA's *Instructions Services*, headed by the *Rapporteur Général*.

The FCA decides to investigate a case either on its own initiative, upon proposal of the *Rapporteur Général*, upon receiving a complaint, or pursuant to a referral by the Minister of Economy. Complaints may be lodged by enterprises, the Minister of Economy, local authorities, and various organisations such as trade-unions and trade associations, chambers of commerce, and approved consumer associations. Individual consumers may not directly lodge complaints with the FCA.

A complaint may be filed with the FCA requesting that it investigate and prohibit an infringement of competition law. If the FCA decides to accept the complaint it will then carry out an investigation to determine whether an infringement has occurred and if so, issue a decision providing for an injunction to cease a given practice or to carry out other remedies and/or impose penalties if appropriate. Investigations often take several years and, although it is possible to initiate a private civil action for damages while investigations are ongoing, it is unusual for potential claimants to do so.

2.2 Civil Courts, Commercial Courts and Criminal Courts

Parties that suffer damages as a result of an anti-competitive agreement or market conduct may initiate a private action to seek damages and/or the annulment of said agreement before the competent civil or commercial courts.

Actions for damages for infringement of competition law would then be based in tort. Such actions may be brought before the Commercial Courts (*Tribunaux de Commerce*) if between companies or commercial entities or otherwise before the Civil Courts (*Tribunaux de Grande Instance*). For competition matters, special chambers of the Civil and Commercial Courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes have exclusive territorial jurisdiction (*Decree No. 2009-1384 dated November 11, 2009*).



Before the FCA, infringing enterprises may incur an individual fine of up to 10% of the annual worldwide turnover of the group to which they belong.

Actions based exclusively on criminal law must be brought before the Criminal Courts (*Tribunaux Correctionnels*) by a State Prosecutor, often at the instigation of a private complainant who then may be present as a victim (*partie civile*). Victims may, if they are party to criminal proceedings (*parties civiles*) before the Criminal Court, seek damages based on tort liability. In order to recover, both causation of harm and loss actually suffered must be proven.

2.3 Arbitration

Parties may resort by agreement to arbitration or mediation to resolve disputes involving competition law issues.

With respect to arbitration, the Paris Court of Appeal confirmed in 1993 that, although arbitrators lack the power to impose fines for infringements of competition law, they may decide upon the consequences of such infringements (*e.g.*, damages and other amounts to be paid) (*Société Labinal v. Sociétés Mors et Westland Aerospace, Paris Court of Appeal, May 19, 1993*).

3. What are the consequences of breaking it?

3.1 Fines

Before the FCA, infringing enterprises may incur an individual fine of up to 10% of the annual worldwide turnover of the group to which they belong. If the infringer is not a part of an enterprise, the maximum individual fine is EUR 3 million (*Article L. 464-2(I) FCC*).

When the FCA applies the non-contest/settlement procedure (see below), the maximum amount of the fine incurred is capped at 5% of the worldwide turnover and EUR 1.5 million for infringers other than enterprises (*Article L. 464-2(III) FCC*).

When the *Rapporteur Général* has notified the parties that simplified procedure applies (see below), the fine for each of the authors of prohibited practices cannot exceed EUR 750,000 (*Article L. 464-5 FCC*).

The present method of setting fines is as follows:

- A basic amount is determined by adding the amount of the turnover in the relevant market and the total turnover achieved in France by each infringing company. This differs significantly from the method of the European Commission, based only on the turnover on the market concerned.
- This basic amount is multiplied by a ratio reflecting the gravity and duration of the infraction and damage to the economy.
- Then, aggravating and mitigating circumstances are added to (or subtracted from) the result.

3.2 Behavioural Remedies

Pursuant to Article L. 464-2 of the French Commercial Code, the FCA may issue injunctions aimed at restoring competition. The FCA ensures the execution of its decisions (*Article L. 464-8 FCC*). If injunctions and commitments by infringers which have been agreed are not met, the FCA may impose a fine (*Article L. 464-3 FCC*).

It may also order the parties to publish the infringement decision or parts thereof in the press.

3.3 Structural Remedies

The FCA is also entitled to order structural measures such as dismantling or sale in order to restore competition which has been hindered by the abuse of a dominant position by a merged enterprise or other concentration of enterprises (*Article L. 430-9 FCC*).

3.4 Sanctions Pronounced by National Courts

The competent civil or commercial courts may pronounce (i) the annulment of the infringing companies' anticompetitive agreements, and (ii) the payment of damages to the victims of anticompetitive practices.

Pursuant to FCC Article L. 420-6, any individual who has fraudulently taken a personal and decisive part in anticompetitive practices faces up to four years of imprisonment and a fine of up to EUR 75,000 imposed by a criminal court (*Article L. 420-6 and L. 462-6 FCC*).

4. What happens if you are investigated?

4.1 Powers of Investigation

The FCA has broad power to investigate by ordering inspections, hearing the parties, and requesting information.

Parties under investigation may submit commitments to the FCA prior to the case going forward and a statement of objections being issued (see below). The FCA has the authority to accept or to reject the commitments which must be relevant, credible, verifiable, and proportionate (*Article L. 464-2 FCC*).

The commitments must be necessary and sufficient to alleviate the competition concerns.

If the FCA accepts the commitments, its acceptance makes them binding upon the parties and puts an end to the investigations and subsequent possible action.

4.2 Issue of Statement of Objections

If the FCA's investigations raise doubts as to the existence of anti-competitive behaviour, a Statement of Objections (SO – *Notification des Grièfs*) is then drafted by the case-handler and notified to the parties, the complainant and the Government Representative (*Commissaire du Gouvernement*) by the *Rapporteur Général* (*Article L. 463-2 FCC*), who may decide to apply the simplified procedure in less harmful cases.

This notification opens the adversarial phase of the procedure. In deference to the rights of the defence, the FCA may not sanction an anti-competitive practice that was not notified to the parties in the SO.

4.3 Reply to the SO

From the receipt of the SO, the parties, complainant and *Commissaire du Gouvernement* are given two months (three months when required by exceptional circumstances) to access the file and submit written observations (*Article L. 463-2 FCC*).

At this stage, the parties may choose not to contest the objections raised in the SO and benefit accordingly from a reduction of the fine.

4.4 Report of the case-handler

Unless the case is subject to the simplified procedure, a report is then drawn up by the case-handler, which is notified to the parties, the complainant and the *Commissaire du Gouvernement*.

The parties are given two additional months to reply to the report.

4.5 Hearing Before the FCA Board

An oral hearing thereafter takes place before the FCA's collegial board where the *Rapporteur Général*, the parties and the *Commissaire du Gouvernement* may make oral observations.

The parties have a right to be heard by the hearing officers on both procedural and substantive issues.

The collegial board then renders its decision. The decision may not be based on grounds of infringements other than those contained in the SO.

5. How do I deal with information requests?

The FCA may request parties to supply information and/or documents which are relevant to the case investigated. Such requests can be made orally during inspections at the enterprises' premises, at the FCA's premises upon request of the case-handler, or on the basis of written requests for information prior or further to inspections.

In a case before a national court, parties have a duty to disclose all documents on which they rely. However, unless a specific document is ordered to be produced by the Court (see below), either during the proceedings or in view of prospective proceedings, they do not have to disclose documents that would adversely affect their case or support the other party's case.

A party may nevertheless request the Court to order the other party to disclose documents relevant to the case that are not already within the control of the requesting party. Such requests should normally expressly identify the documents requested - “fishing expeditions” are not permitted.

Pursuant to FCC Article L. 463-4, the Rapporteur Général can refuse communication of documents to a party if such documents contain business secrets of others.

As part of the investigation by the FCA, the *Rapporteur Général* considers requests for protection of business secrets before relevant parts of the file are made available or disclosed to the parties (*Article R. 463-4 FCC*).



6. Handling inspections/dawn raids

6.1 Inspections

The agents of the FCA's *Instruction Services* are entitled to enter the parties' business premises and conduct unannounced inspections ("dawn raids") there. These inspections may be carried out either without prior judicial authorisation (*Article L. 450-3 FCC inspections*) or on the basis of a prior authorisation delivered by a judge in whose jurisdiction the inspected premises are located (*Article L. 450-4 FCC*).

Article L. 450-4 FCC grants wider inspection powers than Article L. 450-3 FCC. The agents of the FCA may be assisted by DGCCRF (The Directorate General for Competition Policy, Consumer Affairs and Fraud Control) agents in conducting the inspection.

Both types of inspection can be carried out on business premises, land and means of transport used for professional purposes. However, searches of private residences of directors, managers and other members of the staff of the investigated enterprise require prior authorisation of a judge. During both kinds of inspections, the agents can investigate physical records but also electronic data stored in computers, and interview members of the staff regarding factual issues.

During inspections, the inspected enterprise has the right (i) to be informed of the nature of the alleged infringement prior to the beginning of the inspection, (ii) to be assisted by a lawyer, and (iii) not to incriminate itself with respect to the suspected infringement when interviewed *in situ*.

Furthermore, the parties (and the public prosecutor (*ministère public*)) may challenge the validity of (i) the judicial order authorising an Article L. 450-4 inspection, and (ii) the conditions in which the inspection itself was carried out, before the First President of the Court of Appeal having jurisdiction over the judge who delivered the judicial order authorising the inspection (*Article L. 450-4 FCC*). Both appeals must be filed within ten days, and have no suspensive effects.

6.2 Power to Take Statements

During inspections authorised by a judge, the FCA's agents are entitled to interview individuals/employees about the suspected infringement.

They may not however require self-incriminating statements.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

The main exception to disclosure ordered under these provisions is that confidential and privileged documents do not need to be disclosed. Confidentiality and legal privilege must, however, be justified and, unless such confidential or privileged documents compromise the rights of the defence, the court may in certain circumstances consider that the documents should nonetheless be disclosed (*Criminal Court of the Cour de Cassation 8 April 2010, n° 08-87415 et 08-87416*).

If the court requires the disclosure of a confidential document, it may decide that this document will not be divulged to the opposing party or that the document will be examined only by an appointed expert.

The FCA considers as legally privileged:

- (i) Written communications between outside lawyers (as opposed to in-house counsels) and their clients;
- (ii) internal notes which report the text or the content of such communications; and
- (iii) preparatory documents not necessarily exchanged with an outside lawyer in relation to the exercise of the client's rights to defend itself in the given case.



The parties can lodge an appeal for annulment or reversal of the FCA's decisions enforcing French and EU competition rules before the Paris Court of Appeal within one month from the notification of the decision.

8. How do I negotiate a settlement or appeal any decision?

8.1 Settlements

In order to reduce the duration of the proceedings before the FCA in cases where the facts alleged are not contested, companies are encouraged to recognize the relevance of the violations that have been notified to them. In this case, provided that the failure to object is accompanied by a commitment by the company to “change its behavior for the future”, the *Rapporteur Général* may propose to the FCA to impose a fine reduced by half (*Article L. 464-2 FCC*).

8.2 Rights of Appeal

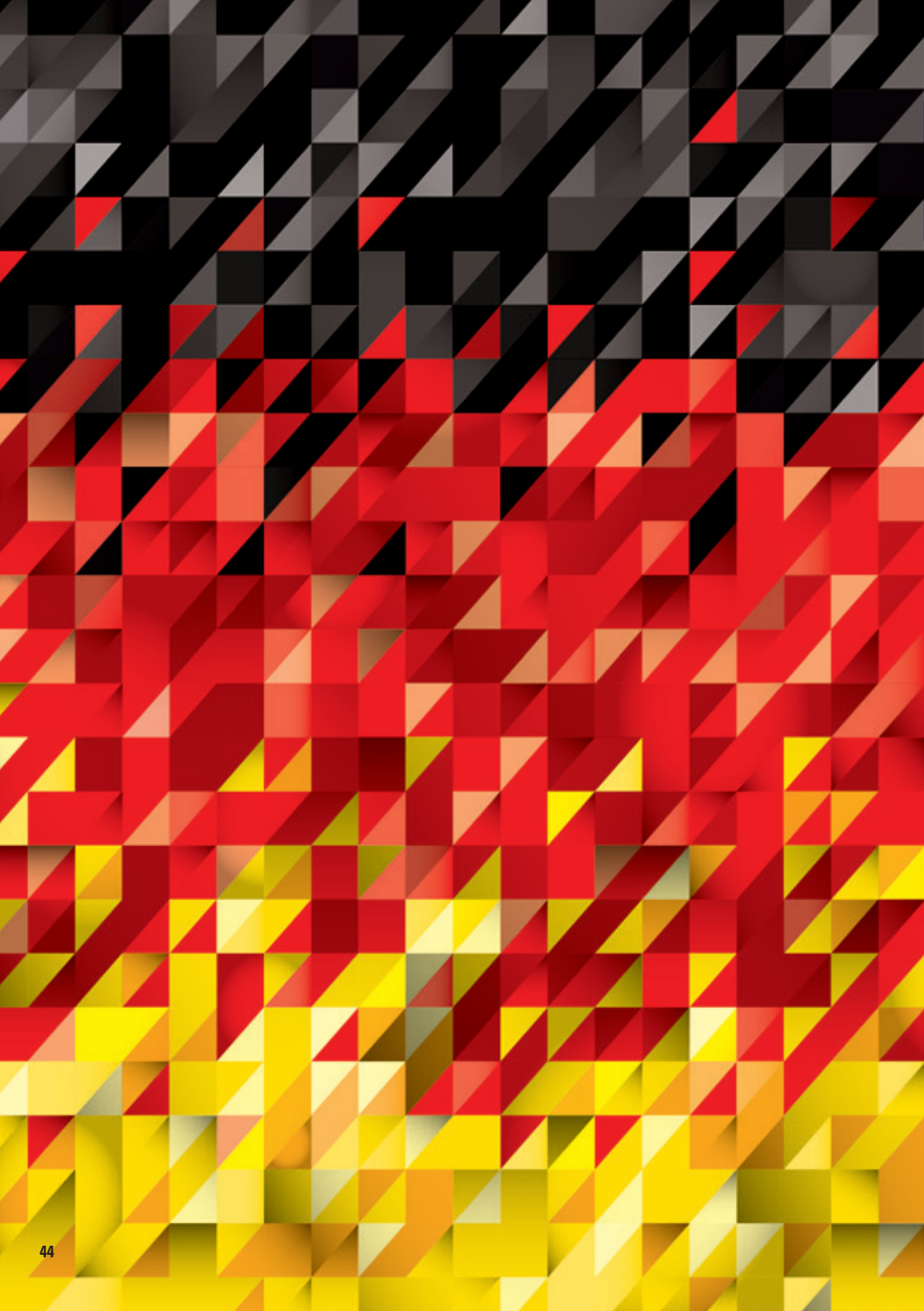
The parties (along with the Minister of Economy) can lodge an appeal for annulment or reversal of the FCA's decisions enforcing French and EU competition rules before the Paris Court of Appeal within one month from the notification of the decision (*Article L. 464-8 of the FCC*). Commitment decisions (where parties agree to refrain or carry out certain conduct) can be appealed within one month either by the Minister of Economy or the complainant, provided that the latter can prove a legitimate interest, that is to say that the said commitments have an effect on its situation. The Paris Court of Appeal has exclusive jurisdiction to rule on decisions delivered by the FCA (*Article D. 311-9 of the French Code of Judicial Organisation*).

The appeal does not suspend the execution of the challenged decision, which remains fully enforceable pending the appeal.



9. Top tips for dealing with investigations.

- (a) **If you are the subject of an unannounced inspection, call your lawyer immediately and insist that s/he be present.**
- (b) **Take legal advice to help you through the investigation process and help you assess the file that has been notified to you by the *Rapporteur Général*:** An attorney will also help you prepare written observations to defend your rights.
- (c) **Place external legal advice in a separate file:** This will ensure its legally privileged nature is highlighted in the event of any FCA inspection.
- (d) **The *Rapporteur Général* can refuse communication of documents to a party if this could harm the business secrets of the discloser or other companies:** The decision not to disclose such documents is taken upon request detailing, for each piece of information, document or part of a document, the object and motives supporting the request. The non-disclosure request procedure should be used as often as needed in order to protect your company's business secrets.
- (e) **Start a dialogue with the FCA as soon as possible:** Many cases can be settled with commitments rather than fines. You are also likely to benefit from a settlement or lower fines if you take full responsibility for your infringements and accept to put an end to them.





Section D: German Competition Investigations

1. What is German competition law?

The German Act Against Restraints of Competition (GWB) governs German competition law.

The German regulations are almost completely aligned with EU regulations. The general prohibition of cartels (section 1 of the GWB) covers the same anti-competitive conduct (horizontal and vertical restraints of competition) as its EU counterpart in article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 2 of the GWB provides an exemption to the prohibition on cartels that is similar to article 101(3) TFEU. With regard to cartels, the German and the EU regulations differ merely in such that the EU rules apply only to conduct that may affect trade between member states.

2. Who enforces it?

The Federal Cartel Office (*Bundeskartellamt*), an independent federal authority located in Bonn, is primarily responsible for investigating and enforcing cartel matters. The decisions of the FCO are made by decision divisions, which are comprised of a chair and two associate members.



3. What are the consequences of breaking it?

3.1 Fines

Bid rigging is a criminal offence under German law pursuant to section 298 of the Criminal Code and is punishable by up to five years of imprisonment or a criminal fine. Administrative fines may be imposed by the cartel authorities on individuals and undertakings for a breach of section 1 of the GWB in an amount of up to €1 million or, in excess of that, up to 10 per cent of the total turnover generated by the undertaking and its affiliated companies (aggregate group turnover) in the business year preceding the decision of the cartel authority.

Criminal, civil and administrative sanctions can be pursued at the same time for the same conduct. The fact that an undertaking or individual may have already been punished or fined in another jurisdiction does not prevent the German cartel authorities from conducting an investigation and levying fines.

Any third party that can demonstrate that it has been affected by a violation of the prohibition on cartels under German or EU law may file a private suit for injunctive relief or to recover damages. Claims are limited to the actual amount of damage and legal expenses but not limited to direct customers (or competitors) of a cartel participant. Other market participants further downstream of the customers of the cartel participants may also claim damages suffered from the cartel behaviour. German law permits the passing-on defence.

The plaintiff has to prove it actually incurred damage for which it seeks compensation but the Federal Court of Justice (*Bundesgerichtshof*) ruled that any decision citing the passing-on defence must plausibly argue that a passing-on might have occurred and that this passing-on did not lead to a loss of profit, in particular because the demand was reduced due to higher prices. Thus it is often questionable whether the passing-on defence can be successfully used in practice. Definitive cartel authority decisions on cartel violations may be introduced into civil proceedings as proof of actual infringements.



Bid rigging is a criminal offence under German law pursuant to section 298 of the Criminal Code and is punishable by up to five years of imprisonment or a criminal fine.

3.2 Behavioural and Structural Remedies

The cartel authorities may also order that an infringement of section 1 of the GWB (or article 101 TFEU) be brought to an end. Since its amendment in 2013, section 32(2) GWB explicitly states that all necessary and proportionate measures, both behavioural and structural, may be imposed but a structural measure may only be imposed if no equally effective behavioural measure is available, or if the available behavioural measures would interfere with the undertaking's interests to a greater degree than the available structural measures.

Cartel authorities may also decide to make the commitments that the undertaking offered to bring an infringement to an end binding on an undertaking. However, the cartel authority may be reluctant to accept commitments if it deems fines appropriate.

Federal cartel authorities are not permitted to directly impose sanctions for the exclusion from government procurement procedures. However, several states keep registers of companies which have been in conflict with certain types of regulations. Public contracting authorities may, or in some cases, must, consult these registers prior to concluding a contract. While the registers of some states are limited to bid rigging, other states' registers also include violations of provisions of the GWB. North Rhine-Westphalia, the most populous state of Germany, has the strictest regulations on debarment.



4. What happens if you are investigated?

The cartel authorities may start investigations for many reasons, such as, for example, as a result of complaints by a third party, whistle-blowing by cartel members or employees thereof, media reports or due to cartel investigations in other jurisdictions regarding the same industry. Investigations are completed when a decision is issued or proceedings are discontinued (cases may be closed without formal decision).

4.1 Powers of Investigation

In order to prove a violation of antitrust laws, cartel authorities, and in criminal cases involving bid rigging, the criminal prosecutor, may conduct any necessary investigations and collect any required evidence. Additional information is usually collected, either informally or through its formal powers of investigation, including searches and seizures and the collection of evidence through the testimony of witnesses and experts.

4.2 Issue of Statement of Objections/Reply to the SO/Access to File

If it concludes that there is evidence of an infringement of section 1 of the GWB, the cartel authority will open formal proceedings and in this case it usually will inform the parties and later serve a statement of objections on the parties. The parties are then given access to the file and may respond to the statement of objections in writing and orally.

4.3 Right of Parties to be Heard/Oral Hearings

The parties and individuals involved will be summoned to a hearing and must be given the opportunity to comment prior to a decision being reached.

5. How do I deal with information requests?

Those subject to the information request will be obliged to produce the documents requested and answer any questions asked by the FCO in the conduct of its investigation. Persons obliged to provide information may refuse to answer questions on the basis of the privilege against self incrimination mentioned at point 7.2.

According to the recently introduced section 81a GWB, the concerned undertaking must also provide to the cartel authority the information necessary to determine the amount of the fine if the imposition of a fine appears as a possible outcome of an investigation.

6. Handling inspections/dawn raids

Upon issuance of a search warrant by a local court, the investigating authority is entitled to access and search the business premises, cars or residences of employees (dawn raids) and seize letters and other means of communication (including e-mails), electronic and non-electronic databases, computer hardware, calculations, documents on travel expenses and diaries, and it may hear witnesses and experts.

The FCO may copy hard drives and search those copies electronically at the FCO premises following a dawn raid.

Lawyers of companies under investigation are not permitted to be present when such post-dawn raid searches of IT systems are conducted. If a prior court order would cause a delay that could jeopardise the investigation, the cartel authorities may issue the warrants for searches and seizures by their own authority. The cartel authority may not seize correspondence documents, such as posted letters, which are subject to the sanctity of the mail, but the criminal prosecutor may seize these documents in cases involving bid rigging. Cartel authorities are not authorized to tap wires.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

Only attorney-client correspondence in the hands of the undertaking which specifically concerns representation in the current cartel proceedings is exempt from seizure. Professional secrecy for legal advice is guaranteed by law.

7.2 Privilege against Self Incrimination

If the investigating authority considers an oath necessary to obtain evidence through testimony, then it may request a local court to administer the oath to a witness. Witnesses may refuse to answer questions if they have been accused of a violation of the antitrust laws, or if the answer would expose them or their family to the risk of criminal prosecution or proceedings under the Administrative Offences Act (OWiG). In addition, there are certain fundamental rights of defense during an investigation, including the right to legal advice.

8. How do I negotiate a settlement or appeal any decision ?

8.1 Settlements

(a) **Leniency Procedure:**

A formal leniency programme was issued by the FCO in March 2006. The leniency program stipulates that the FCO will not impose a fine on a cartel participant if the cartel participant meets the following conditions:

- (i) It is the first to approach the FCO before the FCO has sufficient evidence to obtain a search warrant;
- (ii) it provides sufficient oral and written information and other evidence enabling the FCO to obtain a search warrant;
- (iii) it was not the sole leader of the cartel and did not coerce others to participate in the cartel; and
- (iv) it continuously and unreservedly cooperates with the FCO.

The FCO may reduce the fine for other cartel offenders by up to 50 per cent if substantial evidence is submitted and the offender unreservedly cooperates with the FCO.

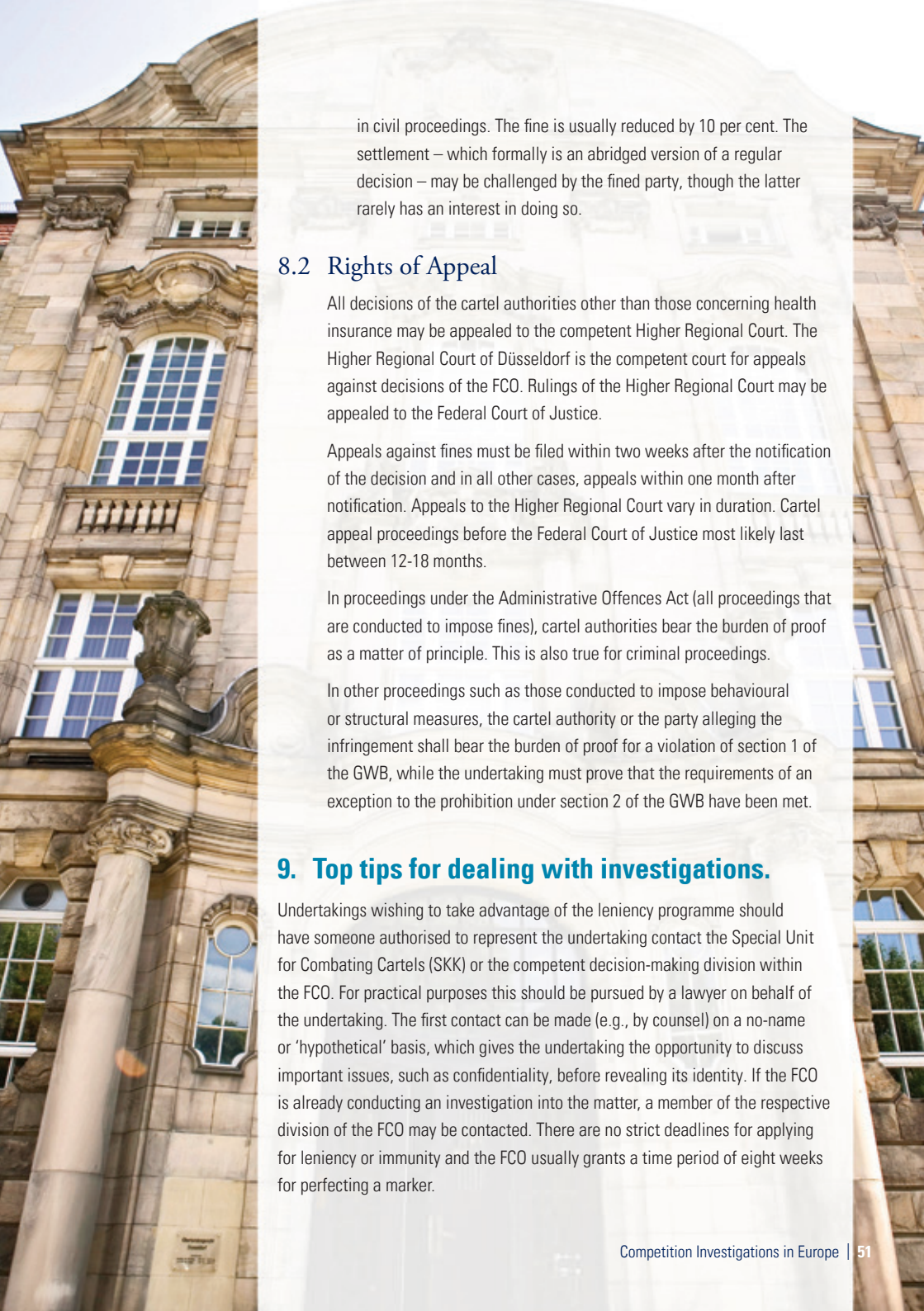
Fines may not be charged at all to the first party approaching the FCO if the FCO is not yet aware of the cartel or if there is not sufficient evidence to prove the cartel offence.

There are no specific provisions for the undertakings that follow but the fine may, however, be reduced by up to 50 per cent for any cartel participant providing substantial evidence of the cartel offence.

Cartel participants ineligible for immunity but seeking a fine reduction must provide information or evidence making a significant contribution to proving the offence.

(b) **Cartel Settlement Procedure:**

The FCO is not obliged to initiate proceedings against a cartel participant and may use its discretion. The FCO furthermore increasingly conducts settlement-type procedures. In this process, cartel participants are usually asked to confirm the facts as perceived by the FCO. In return, the administrative decision imposing the fine usually only includes very basic reasons which makes it less likely that the order will be introduced as proof of the alleged infringement



in civil proceedings. The fine is usually reduced by 10 per cent. The settlement – which formally is an abridged version of a regular decision – may be challenged by the fined party, though the latter rarely has an interest in doing so.

8.2 Rights of Appeal

All decisions of the cartel authorities other than those concerning health insurance may be appealed to the competent Higher Regional Court. The Higher Regional Court of Düsseldorf is the competent court for appeals against decisions of the FCO. Rulings of the Higher Regional Court may be appealed to the Federal Court of Justice.

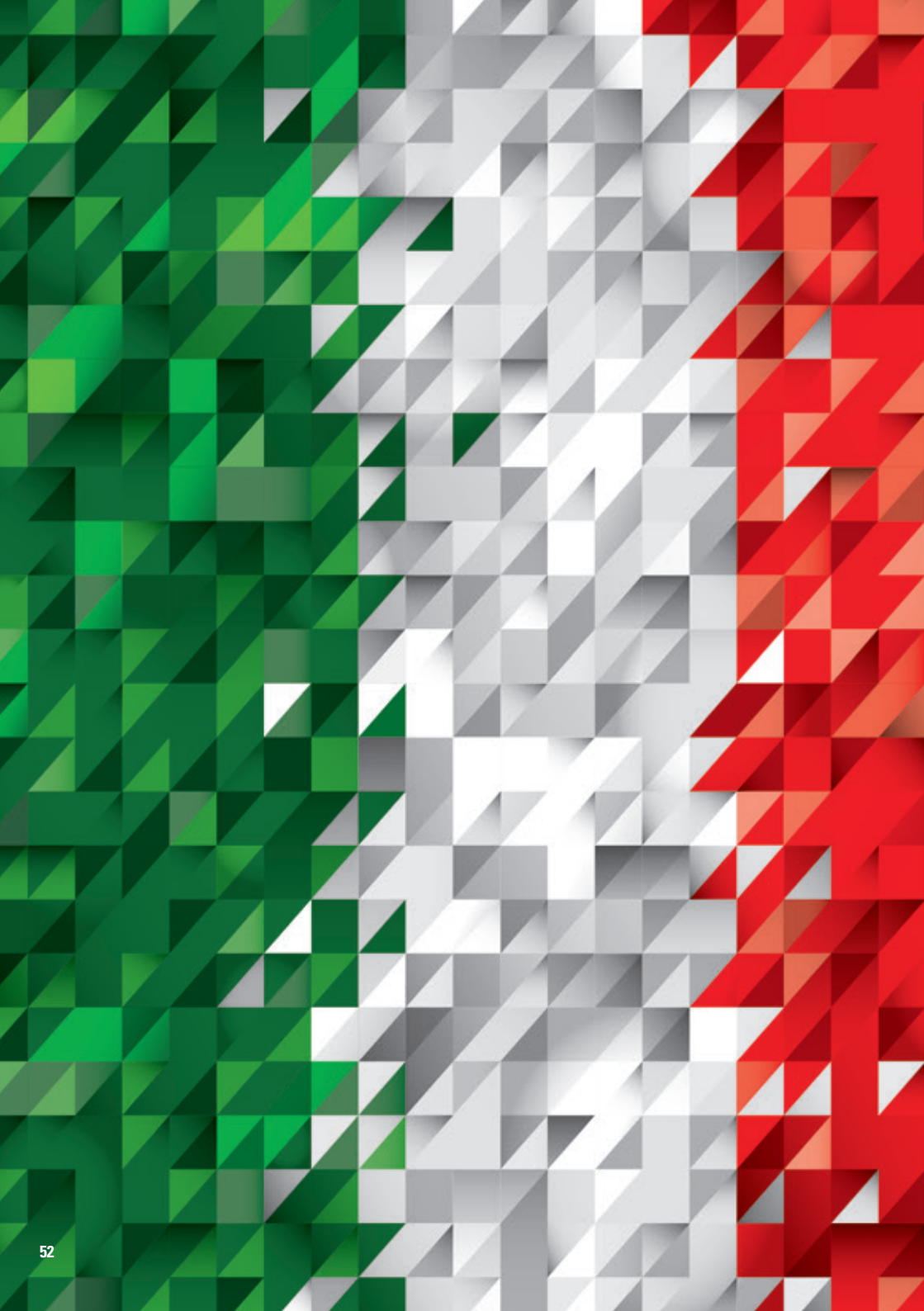
Appeals against fines must be filed within two weeks after the notification of the decision and in all other cases, appeals within one month after notification. Appeals to the Higher Regional Court vary in duration. Cartel appeal proceedings before the Federal Court of Justice most likely last between 12-18 months.

In proceedings under the Administrative Offences Act (all proceedings that are conducted to impose fines), cartel authorities bear the burden of proof as a matter of principle. This is also true for criminal proceedings.

In other proceedings such as those conducted to impose behavioural or structural measures, the cartel authority or the party alleging the infringement shall bear the burden of proof for a violation of section 1 of the GWB, while the undertaking must prove that the requirements of an exception to the prohibition under section 2 of the GWB have been met.

9. Top tips for dealing with investigations.

Undertakings wishing to take advantage of the leniency programme should have someone authorised to represent the undertaking contact the Special Unit for Combating Cartels (SKK) or the competent decision-making division within the FCO. For practical purposes this should be pursued by a lawyer on behalf of the undertaking. The first contact can be made (e.g., by counsel) on a no-name or 'hypothetical' basis, which gives the undertaking the opportunity to discuss important issues, such as confidentiality, before revealing its identity. If the FCO is already conducting an investigation into the matter, a member of the respective division of the FCO may be contacted. There are no strict deadlines for applying for leniency or immunity and the FCO usually grants a time period of eight weeks for perfecting a marker.





Section E: Italian Competition Investigations

1. What is Italian competition law?

Italy was the last European country to enact a proper law against anti-competitive conducts. Indeed, before the approval of Law No. 287 of 1990 (“Italian Competition Law”) the protection of competition was guaranteed only by the EU competition rules (i.e. Articles 101 and 102 TFEU) and the Italian Civil Code.

Italian Competition Law resembles the European provisions against anti-competitive conduct. In particular, Article 2 of the Italian Competition Law prohibits agreements between two or more undertakings or associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition while Article 3 of the Italian Competition Law forbids undertakings from abusing their dominant position in a given market.

Italian competition law only applies if the anti-competitive conduct has an appreciable effect on the Italian market.



2. Who enforces it?

2.1 Authority

The Italian Competition Authority (the “ICA”, in Italian language “*Autorità Garante della Concorrenza e del Mercato*”) is entrusted with the enforcement of the competition rules. The ICA is an independent agency which has investigative and decision-making powers and it can act either on its own initiative or following a complaint.

The ICA is composed of a chairman and two members, all appointed by the Speakers of the Senate and the Chamber of Deputies. Upon the recommendation of the ICA chairman, the Ministry of Economic Development appoints a General Secretary (*Segretario Generale*), who oversees the structure and the functioning of the ICA. In the course of performing its duties, the ICA has significant powers of investigation and may request information from any governmental department and any other statutory body or agency.

Furthermore, the ICA can apply the competition rules not only to private undertakings, but also to public and state-owned undertakings.

2.2 Tribunal

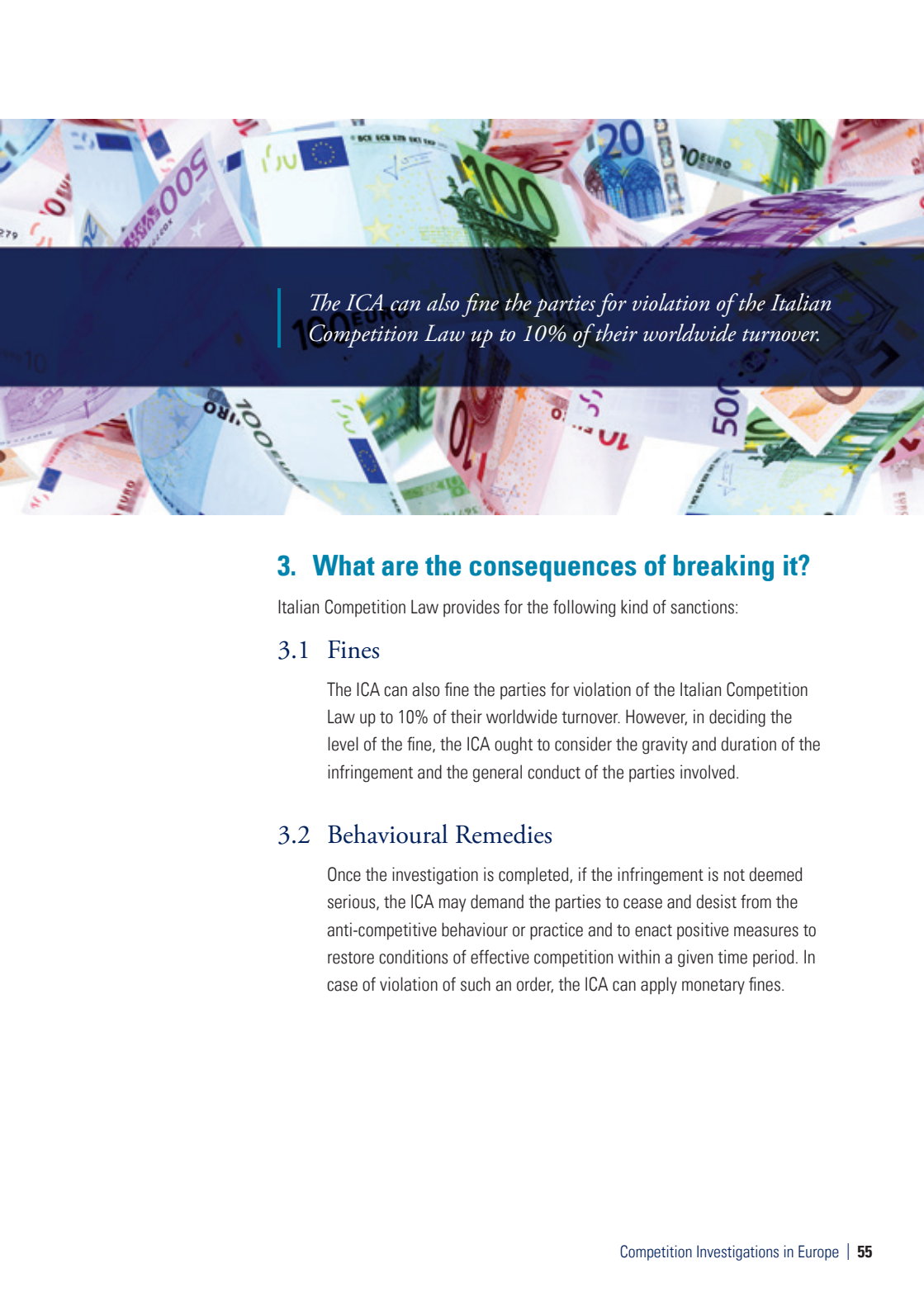
The ICA’s decisions can be challenged by the parties on procedural or substantive grounds before the Regional Administrative Court at first instance, based in Rome.

It is important to note that the Regional Administrative Court cannot question the economic assessment made by the ICA, but is entitled to investigate the existence of procedural errors, logical faults or the Court’s failure to state reasons.

The Regional Administrative Court may of course annul the ICA’s decision and modify sanctions.

2.3 Italian Supreme Administrative Court

The decision of the Regional Administrative Court may be appealed to the Italian Supreme Administrative Court (“ISAC”) on the same grounds. The ISAC is also based in Rome and has the power to reverse the judgment of the lower Court and any fines levied.



The ICA can also fine the parties for violation of the Italian Competition Law up to 10% of their worldwide turnover.

3. What are the consequences of breaking it?

Italian Competition Law provides for the following kind of sanctions:

3.1 Fines

The ICA can also fine the parties for violation of the Italian Competition Law up to 10% of their worldwide turnover. However, in deciding the level of the fine, the ICA ought to consider the gravity and duration of the infringement and the general conduct of the parties involved.

3.2 Behavioural Remedies

Once the investigation is completed, if the infringement is not deemed serious, the ICA may demand the parties to cease and desist from the anti-competitive behaviour or practice and to enact positive measures to restore conditions of effective competition within a given time period. In case of violation of such an order, the ICA can apply monetary fines.



4. What happens if you are investigated?

4.1 Powers of Investigation

The ICA is endowed with wide investigative powers but they only can be exercised after communicating the decision to open an in-depth investigation towards the undertaking/s involved. This typically occurs at the outset of a so-called dawn raids (on-site inspections) which can be delegated to the Italian judicial police (“Guardia di Finanza”).

In particular, the ICA can require the parties to provide information and documents, carry out interviews with individuals, order inspection of the premises of third parties (companies or individual) to find evidence and request the support of external consultants.

4.2 Issue of Statement of Objections

Once the ICA deems to have acquired sufficient evidence of the anti-competitive practice, it sends the Statement of Objections (in Italian language “*Comunicazione delle Risultanze Istruttorie*”) to the undertakings involved.

The Statement of Objections is a formal document by which the ICA discloses the preliminary findings of the case at stake including the legal assessment of the evidence gathered so far. Along with the Statement of Objections, the ICA delivers to the parties the date the investigation shall be closed (which must be at least 30 days later than the date of notification of the Statement of Objections).

4.3 Reply to the SO

The parties involved in the investigation may file a written brief to respond to the Statement of Objections and attach the relevant documents at least five days before the date of closure of the investigation.

4.4 Access to File

After the ICA has delivered the Statements of Objections to the parties involved, the parties have the right to access the file and the relevant documents in order to prepare their defense.

However, the parties have no right to access all the documents in the relevant file, and accordingly, the ICA often must balance the right to access against confidentiality considerations. Generally speaking, the ICA grants access to all documents useful to the preparation of the defense and denies access to documents containing confidential information, such as business secrets.

Further, the ICA's internal documents (such as drafts, working papers and so on) that are gathered during a formal investigation are not accessible. Likewise, the ICA may choose to deny access to its correspondence with the European Union or other public institutions for confidentiality reasons.

4.5 Right of Parties to be Heard/Oral Hearings

The undertakings being investigated may request to be heard by the ICA. In such a case, the ICA usually sets a hearing on the date of closure of the investigation. The right to be heard is aimed at discussing the ICA's findings as specified in the Statement of Objections. Hearings may be recorded for the purpose of drafting the minutes, which must be signed by the parties and included in the relevant file.

5. How do I deal with information requests?

The ICA can require information and documents from the parties involved only by a formal decision. In such a case, the undertakings concerned must cooperate actively with the ICA.

The ICA may impose fine of up to € 25,822 against companies that refuse or fail, without objective justification, to provide the information or produce the requested documents. Moreover, the ICA can levy fines of up to € 51,645 on undertakings that provide misleading or incorrect information.

6. Handling inspections/dawn raids

6.1 Inspections

The ICA can carry out unexpected inspections on the business premises of the parties, which are known as “dawn raids”. The ICA’s officials must show to the parties their authorisation on which it must be indicated the object and purpose of the investigation and the penalties in case of refusal to supply information or if the information provided is incorrect or misleading.

The ICA’s officials may be assisted by the Italian judicial police (“*Guardia di Finanza*”). The undertakings that are subject to the inspections may ask for the assistance of their lawyers but the ICA’s officials are not obliged to wait for their arrival.

Further, the ICA’s officials have the power to enter any premises, land, and/or means of transport of the parties, with the exception of premises in which no business activity is conducted; examine books, business records, and documents which are relevant to the undertaking’s activity, and make copies of any relevant information.

6.2 Power to Take Statements

In addition to the above, the ICA’s officials – during a dawn raid or at a hearing – have the power to ask for oral explanations from an undertaking’s legal representatives that are deemed to be in possession of useful information.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

Italian law protects the confidentiality of communications (including documents) between an external lawyer and his or her clients. Therefore, they are covered by professional legal privilege and cannot be used by the ICA for the purposes of an investigation.

However, it should be noted that under Italian law, in-house lawyers’ communications are not covered by privilege so that their communications within their business can be taken and used by the ICA.

8. How do I negotiate a settlement or appeal any decision ?

8.1 Settlements

(a) Leniency Procedure

In accordance with the European Union competition rules, the ICA has introduced a leniency program for companies which choose to cooperate with the ICA and are capable of providing useful information. As a result, they may be granted total immunity from fines or reductions in the fines imposed.

In 2007, the ICA approved its Leniency Notice – which was amended in 2013 – and set forth the criteria to be followed to grant immunity or a reduction of fines to the undertakings making a leniency request.

To get full immunity or fine reductions, companies must provide the ICA with information (including documents) capable of detecting and punishing the alleged cartel. Furthermore, companies must cooperate fully and continuously with the ICA and not only at the beginning of the procedure.

(c) Commitments Procedure

Following the equivalent powers granted to the European Commission, the ICA also has the power to accept and make binding on the parties concerned commitments intended to stop the infringing conduct.


To date, the ICA has been willing to close cases by accepting submitted commitments from the parties without imposing a fine.

A sizeable advantage of the commitments procedure is the fact that companies, by closing down the ICA's case in this way without a finding of liability, will avoid private follow-on actions by parties who believe they are owed compensation.

8.2 Rights of Appeal

The parties have the right to challenge the ICA's decisions before the Regional Administrative Court in the first instance. The Italian Supreme Administrative Court hears the final appeals in Italy.

The decision of the ICA must be challenged within 60 days from the reception of the notification. The parties can ask for a stay of execution of the decision concerned in case of very likely irreparable damage if the judgment was to come into immediate effect.



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9. Top tips for dealing with investigations.

- (a) **Having an up-to-date competition compliance programme.**
- (b) **Requiring legal advice from external competition lawyers:** By taking advice in this way, the advice will be privileged and protected from disclosure. In any event, specialist competition law advice is essential when dealing with the ICA.
- (c) **Seeking immediate legal advice when a formal information request is received:** It is very important to examine the request legally from the outset to understand the likely line of inquiry and to maximise your chances of closing the investigation to your company's satisfaction.
- (d) **Trying to be very cooperative with the ICA and contact the authority as soon as possible to seek clarifications.**
- (e) **Taking into account the opportunity to submit commitments in order to avoid either sanctions or possible follow-on actions.**
- (f) **Considering filing a leniency application if you can provide clear evidence of the anti-competitive agreements and if the ICA is about to start an investigation:** In such a case, timing is essential to be granted full immunity.









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