MEMO/06/469

Brussels, 7th December 2006

Competition: revised Leniency Notice – frequently asked questions

(see also IP/06/1705)

The European Commission has taken another important step to uncover and put an end to hard-core cartels by adopting a revised Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the "Leniency Notice", see IP/06/1705). The revision takes account of public consultations in February and October 2006.

I. Threshold for immunity

Has the threshold been changed?

There is now more clarity. Experience shows that there was a need for further guidance for potential applicants on the threshold that applies in situations where the Commission does not yet have enough information to carry out an inspection (point 8(a) threshold of the Notice). To avoid uncertainties as to what type of information and evidence is required to meet this threshold for immunity, the Notice gives a list which helps applicants to anticipate what is required. In addition, the Commission will continue the current practice of discussing with an applicant the collection and submission of information and evidence. Any supplementary submissions by an applicant can be taken into account as a part of its application, until such time as the Commission receives another application for immunity in the same case or, if the applicant has been granted a marker (a new concept in the revised Notice, see point on Marker system below for details), until the marker period expires.

Why has the concept of a "targeted inspection" been added to the threshold? What is meant by a "targeted inspection"?

The Notice specifies that the applicants should provide sufficient evidence to enable the Commission to carry out the inspection in a "targeted" manner. An immunity applicant by definition has been a party to an alleged cartel that is subject to the application. It should therefore be in a position to provide to the Commission such "insider" information on the cartel that would allow he Commission to better target its inspection with more precise information as to, for instance, what to look for and where in terms of evidence. The information and evidence listed in point 9 of the Notice aims at meeting this need.

The Notice also specifies that the assessment of the "targeted inspection" threshold will have to be carried out ex ante, i.e. without taking into account whether a given inspection has been successful or whether an inspection has been carried out. The assessment will be made exclusively on the basis of the type and quality of the information submitted by the applicant.

Will the information and evidence listed in point 9 be enough to qualify for immunity under point 8(a)?

The purpose of the Notice is that by providing the information and evidence listed in point 9, the applicant can qualify for point 8(a) immunity. In line with the spirit of cooperation expected from the applicant, the latter should not, however, limit itself strictly to providing only the things specified in point 9, if it has at the time of the application more information or evidence available.

How exhaustive must the applicant be in providing information and evidence to qualify for conditional immunity? What is meant by "to the extent that this would not, in the Commission's view, jeopardise the inspections"?

To qualify for point 8(a) immunity, an applicant needs to provide the information and evidence listed in point 9. However, as specified in the Notice, the purpose is that an applicant should not take any measure in preparing its application "that would jeopardise the inspections". If an applicant learns that its internal inquiries, carried out for the purposes of completing or supplementing an application, raise a real concern of alerting other cartel members prior to an inspection, it should communicate its concerns to the Commission. It should also be pointed out that under the continuous cooperation obligation of point 12, the applicant should during the whole administrative proceedings provide the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it. Therefore, if the applicant comes across or can obtain information or evidence listed in point 9 after its initial submission, it should provide those for the Commission. This also means that if the applicant has not completed its internal inquiries due to risk of leaks prior to a conditional immunity decision and/or a Commission inspection, the applicant should complete such inquiries directly thereafter, unless the Commission otherwise requires.

Why does the applicant need to provide home addresses of individuals? How is this requirement reconciled with privacy laws?

The Commission has been given the power (under the Council Regulation (EC) N° 1/2003 on how the Commission should apply the EC Treaty's anti-trust rules – see IP/04/511) to carry out inspections of other premises, including the homes of directors, managers or other members of staff, of the companies concerned. This power can be exercised if a reasonable suspicion exists that relevant books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article 81 of the EC Treaty, are being kept in such other premises. The Notice also specifies that home addresses need to be provided only "where necessary" and in so far as known to the applicant. The Commission will process personal data in the context of the Leniency Notice in conformity with its obligations under Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies.

Why do applicants need to provide both "contemporaneous, incriminating" evidence and a corporate statement to meet the 8(b) threshold for immunity? What is meant by "contemporaneous, incriminating evidence"?I

f the Commission has carried out an inspection concerning an alleged cartel or has already sufficient evidence in its possession to carry out an inspection, immunity under point 8(a) is no longer available. However, in such a situation an applicant can still qualify for immunity under point 8(b) of the Notice. To meet the point 8(b) threshold for immunity an applicant needs to submit information and evidence which will enable the Commission to find evidence of a violation of Article 81 of the EC Treaty in connection with the alleged cartel. This threshold corresponds to the one required under Article 7 of Regulation 1/2003 for the Commission to be able to adopt an infringement decision. It is higher than the threshold for immunity in a situation where the Commission does not yet have any knowledge of the alleged cartel. In order to find an infringement against the suspected cartel participants, and not only the applicant that self-reports on the cartel, the applicant needs to submit incriminating evidence that originates from the time of the infringement. Experience shows that corporate statements are needed in addition to the evidence to explain the pieces of evidence and to give insight to the alleged cartel that only an ex-cartel member can provide. For example, in the Raw Tobacco Italy case (see IP/05/1315), the Commission granted conditional immunity under point 8(b), to reward the applicant for providing the Commission with decisive incriminating evidence for the establishment of objections which the Commission included in the Statement of Objections and in the final Decision.

Threshold for reduction of fines

Has the threshold been changed?

The threshold for reduction of fines remains the same: in order to qualify, an applicant for a reduction of fines needs to provide evidence which represents significant added value as compared to the evidence already in the file. For the sake of clarity and in the light of the latest case-law of the EC Courts dealing with the relative value of evidence, the revised Notice expressly recalls that evidence that requires little or no corroboration provides greater value for proving the case than evidence which requires corroboration if it is contested. This is one amongst a number of (non-exhaustive) criteria explicitly mentioned in the Notice.

What is meant by "compelling evidence" and what does this seek to add to the criteria of significant added value?

"Compelling evidence" means conclusive, stand-alone evidence as compared with, for instance, a corporate statement uncorroborated by other pieces of evidence which would not be used as evidence against other parties to the cartel if they all contradicted it in similar statements. This does not mean that corporate statements can never provide significant added value, but it signals that they are more likely to provide it in when they corroborate other statements or pieces of evidence.

Why does receiving an extra reduction outside the normal bands for reduction of fines require that the evidence provided is compelling?

Compelling evidence is the level of evidence enabling the Commission to prove additional facts liable to extend the gravity or the duration of the infringement. Therefore, a company providing this level of evidence should be sure that the effects of such an extension directly linked to its contribution will not increase its own fine. A company should have an incentive to provide all conclusive evidence as early as possible in the procedure in order to benefit from any extra reduction before others do.

When is an applicant for reduction of fines informed whether it meets the threshold set in the Notice?

The applicant will be informed on the preliminary conclusion that it meets the threshold as soon as the Commission has ascertained that the evidence submitted constitutes significant added value. This information will be communicated to the applicant no later than the date on which a statement of objections is notified.

Conditions for immunity and reduction of fines

What is meant by genuine cooperation and why has this requirement been added to the conditions?

Cooperation is an essential feature of the leniency programme that rewards those who assist the Commission in its investigation. Cooperation by an applicant has to be sincere and to make this clear, the Notice specifies that the applicant needs to cooperate "genuinely, fully, on a continuous basis and expeditiously from the time it submits its application". Genuine cooperation, as referred to in the case-law of the EC Courts, requires in particular that the applicant provides accurate and complete information that is not misleading. This addition to the Leniency Notice is therefore fully in line with judgements of the EC Courts.

How can the company meet this requirement if its personnel refuse to answer questions from Commission's investigators through fear of criminal sanctions by EU Member States?

It is already the established practice of the Commission under the 2002 Leniency Notice to interview directors and employees of the applicants. Natural persons interviewed can be subject to different types of sanctions in different EU Member States. There are therefore safeguards in place regarding transfer of information to Member States that apply criminal sanctions. Regulation 1/2003 EC ensures that information exchanged in the network of EU Member States' competition authorities can only be used by the receiving authority if it has been collected in a way which respects the same level of protection of the rights of defence of natural persons as in the receiving authority. Moreover, exchanged information can only be used by the receiving authority to impose custodial sanctions if the law of the transmitting authority foresees such sanctions for antitrust infringements, which is not the case for the Commission Moreover, making directors and employees available for interviews does not imply that they have to provide self-incriminating information.

Does the obligation not to disclose the fact or content of the application take into account other legal obligations of the applicant which may oblige it to make such a disclosure?

Leniency applicants may have legal obligations to acknowledge in public their cooperation under the Leniency Notice (e.g. listed companies). This is why the revised Leniency Notice provides that the restriction on disclosure to third parties applies "unless otherwise agreed" with the Commission. This point of the Notice also covers the practice of the Commission to discuss with the applicants the question of how to address discovery requests in third country jurisdictions, while protecting the EU leniency programme. Naturally, the applicants are free to approach other competition authorities, in which case the Commission may ask for a waiver to discuss the application and exchange information with such authorities.

Would any acts of destruction, falsification or concealment of evidence lead to a loss of leniency? How far back can this condition extend before actual filing of an application?

The Leniency Notice makes it clear that this obligation applies only from the moment when the applicant is "contemplating making its application", i.e. when the applicant is deciding on and preparing its application. This reference to the timing, as well as the reference to "the undertaking" and not to any employee, also makes it clear that the Commission wants to catch deliberate actions of destruction, falsification and concealment of evidence.

What happens if an immunity or reduction of fines applicant does not meet some of the conditions? Can they still get some reduction of fines?

The Leniency Notice makes clear that failure to comply with the conditions will disqualify the applicant from the leniency programme. This question has already been addressed in the Commission decision in the Raw Tobacco Italy case (see above) . That case showed that in such situations the Commission follows the normal enforcement procedure set out in Regulation No 1/2003, notably with a hearing and respecting full rights of defence of the party concerned. The same Raw Tobacco Italy case also demonstrated that, in exceptional circumstances, particularly when the company has contributed substantially to the Commission's investigation, the Commission can take the cooperation into account by granting a reduction of fines under the Fines Guidelines (recently revised – see IP/06/857 and MEMO/06/256) as cooperation outside leniency

The marker system

How will the marker system be operated in practice?

The Leniency Notice makes a marker available for immunity applicants at the discretion of the Commission. It is in the public interest to maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements, and not in the race to simply get a place in the queue. Nevertheless, there can be various circumstances that would justify the granting of a marker. Therefore, the decision to grant a marker will need to be made on a case by case basis, taking into account the specificities of each situation and the justifications that the applicant presents for its request to get a marker.

The marker is one of the key new features in the revision of the Leniency Notice and therefore the practical modalities of this system need to be developed following discussions with applicants and according to experience. When the Commission is dealing with a case where applications for leniency have been made in several

different jurisdictions, it may need to coordinate the marker system with the other jurisdictions, as it would coordinate also first investigation actions.

How long a time period can an applicant expect to have to perfect the marker?

The time period to be granted to perfect a marker (i.e. to complement the initial information to bring it up to the standard required to qualify for immunity) will need to be decided based on the circumstances of each case. But it is clear that the time period will necessarily be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be launched swiftly. The longer the time period is, the higher the risk of leaks on the application become, which may ultimately jeopardise a Commission investigation into the case.

What information must an applicant provide to get a marker?

When applying for a marker, the applicant is only asked to provide the following information: the applicant's name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration of the cartel and the nature of the cartel conduct. This information is necessary to ensure that this is a serious application and that there are no prior applications relating to the same alleged infringement. This information would also allow the Commission to see whether the case concerns one or more Member States. This list of information is the same as in the ECN Model Leniency Programme (see IP/06/1288 and MEMO/06/356).

Why would the Commission grant a marker only for immunity applicants and not for reduction of fines applicants?

It is necessary for the effectiveness of the leniency programme to maintain the race between the applicants for reduction of fines. Practical experience shows that following the Commission inspections, there may be several such applications in a short interval. It would also be in practice difficult for the Commission to effectively process and assess several simultaneous markers.

What is the difference between a hypothetical application for immunity and a marker request? Why can a marker not be combined with a hypothetical application?

A marker and a hypothetical application cannot be combined due to their different purposes and features. The hypothetical application is available to allow companies to ascertain whether the evidence in their possession would meet the immunity threshold before disclosing their identity or the infringement. In a hypothetical application, the company is supposed to actually show the evidence liable to meet the relevant immunity threshold, although it can be done by means of edited copies with the data that could identify the company and the cartel at that stage deleted.

In contrast, a marker is granted to protect the place in the queue of an applicant which has not yet gathered the evidence necessary to formalise an immunity application. In order to protect the place in the queue without obtaining the relevant evidence in exchange, the Commission must be in a position to ascertain whether it already has a previous immunity application for the same cartel and ensure that the company is seriously engaged to provide the evidence. Therefore, in order to obtain a marker, a company is expected to provide certain data listed in the Notice, which include the identity of the applicant and some details on the cartel, but not the rest of the evidence required to meet the immunity threshold. This can be submitted later within a specified timeframe.

The specific procedure to protect corporate statements

When does the specific procedure established for corporate statements apply?

The procedure to protect corporate statements applies to voluntary corporate statements supplied in the framework of the Leniency Notice, with a view to applying for immunity or for a reduction of fines. Those corporate statements (and the protection provided to them) will be covered by the relevant provisions in the Notice irrespective of whether the applicant finally obtains immunity from or reduction of fines. However, to avoid any misuses of this new system, if the applicant itself discloses the content of its statement to third parties in other jurisdictions, while at the same time asking the Commission to protect its statement, there is no justification for any protection of the statement

How does the production of oral statements and transcripts work?

Oral corporate statements will be recorded and verbatim written transcripts will be made of each statement. The recording and transcribing of the statements will take place at the Commission's premises. Applicants making oral statements will not retain or receive from the Commission any copies of these statements, but as soon as the oral statement has been given, it will become a Commission document.

Why does the accuracy of the written transcript produced at the Commission of an oral corporate statement need to be checked?

Oral corporate statements are considered as evidence on alleged cartels and both the tape and the transcript form part of the Commission file. In order to guarantee the value as evidence provided by a transcript, the applicant making the statement will need to check, at the Commission premises, the accuracy of the written transcript as compared to the recording.

Entry into force

If one or more companies have already applied for leniency under the 2002 Leniency Notice, which Notice applies for new applications for leniency made in the same case? Will the amended Leniency Notice apply for pending cartel cases too?

According to point 37 of the Notice, it will replace the 2002 Leniency Notice as from the date of its publication in the Official Journal, i.e. 8th December 2006, for all cases (including pending ones) in which no undertaking has contacted the Commission in order to take advantage of the favourable treatment set out in that Notice. In order to guarantee that all parties to a same procedure are subject to the same set of rules, it is reasonable that one and the same Leniency Notice will apply to all applications made in one single case. However, according to the same provision, the section of the 2006 Notice that reflects the current Commission practice regarding corporate statements will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines.