

**Comments by the  
European Competition Lawyers Forum (“ECLF”) Working Group  
on the  
Draft Commission Notice on  
Immunity from fines and reduction of fines in cartel cases**

**I. Introduction**

- (1) This paper is submitted on behalf of the ECLF Working Group, whose members comprise competition lawyers from 11 law firms spr acting in Europe (listed in the **Annex**), in response to the Commission’s invitation to provide comments on its Draft Notice on Immunity from fines and reduction of fines in cartel cases, published on 29 September 2006 (the “Draft Notice”).
- (2) The ECLF Working Group welcomes the Commission’s initiative to review and further enhance its current leniency practice. In particular, the ECLF Working Group welcomes
  - the introduction of a marker system,
  - the aim to provide protection of leniency applications from discovery, and
  - the clarification of various issues which arise in previous practice when applying the current notice, in particular as regards access to file.
- (3) The ECLF Working Group proposes, however, that the Commission reconsider some of the general approaches on which the Draft Notice is based, in particular the contemplated approach to “formalize” the corporate statement and the related consequence of raising the bar for qualification for immunity. In addition, we advocate further improving the applicant’s protection from discovery.

- (4) We note with interest that the Draft Notice does not speak to the issue of eligibility for filing applications under the Notice. This is an issue which has arisen, notably in cases where owing to the facts there may be more than one applicant for a particular subsidiary's conduct (i.e., the subsidiary and the past and current parents). The Commission should consider clarifying this point by addressing it in its Draft Notice and setting out the current policy on this issue. As Commission officials have said in conferences, the Commission appreciates in particular immunity applications arising out of a change of ownership, which deal with a very common situation in which the new management is really committed to putting an end to cartel behaviour in which the acquired business may have been involved. They have said that in such cases, the new owner applying for immunity will be granted a marker, to give it time to finalize internal investigation and complete the application. While this is to be welcomed, in reality, in such scenarios contractual reasons often justify –or oblige – seller and buyer to work together in the leniency avenues concerning the target's business. Joint applications in cases where former and current owner have never coincided in the relevant market (and have never been competitors or co-conspirators in the same cartel) do not entail tip-off issues and the acquirer's incentive to disclose the cartel could be neutralised where a joint approach is not allowed by the Commission. Given the frequency of cartel issues coming to light as part of due diligence or integration efforts related to the acquisitions of businesses, the absence of a policy ensuring such joint applications may have an important negative effect on the attractiveness of the leniency policy.

## **II. Immunity from fines**

### **1. Requirements to qualify for immunity from fines**

#### **a) Formalizing the “Corporate Statement” is not a helpful approach**

- (5) In principle we can welcome the Commission's clarification in point 9(a) of the requirements an immunity applicant needs to meet in order to qualify for full immunity. However, the comprehensive evidence to be provided by the immunity applicant, as described in point 9(a), would both (i) raise the evidentiary burden for immunity applicants and (ii) needlessly formalize corporate statements. For the reasons mentioned below, it is submitted that this approach results in a deterrent rather than an incentive for potential immunity applicants to seek leniency pursuant to the Commission's leniency program. It is, therefore, suggested that the Commission reconsider this approach:

- Requiring a formalized corporate statement – be it written or oral<sup>1</sup> – increases the risk of discovery and therefore makes an immunity application even more risky than at present (see also below at (39) et seq.).
- A corporate statement, as described in point (9)(a), is apparently requested by the Commission in order to increase the evidentiary value of the leniency application. The current practice of oral statements provided by lawyers should, however, – as suggested previously by others – rather be regarded as a road map for evidence than as evidence itself. By providing the road map for evidence, the applicant will facilitate a dawn raid, which should be sufficient to meet the requirements for an immunity application.
- Moreover, raising the bar for immunity applicants by requiring the comprehensive information specified in point (9)(a) further widens the discrepancy between what is generally required by the Commission to pursue a dawn raid and what is needed by an immunity applicant to qualify for immunity. Under the established case law, the Commission does not need all of the information mentioned in point (9)(a) in order to conduct a dawn raid. (Indeed no legal evidentiary threshold is even required.) This discrepancy is doubly problematic as point (10) states that immunity pursuant to point (8)(a) will not be granted if, at the time of the application, the Commission already had sufficient evidence to adopt a decision to carry out an inspection. The resulting use of this double standard for the same test (i.e., the information needed in order to pursue a dawn raid) does not seem appropriate and subjects the applicant to a situation of complete uncertainty, characterised by the considerable scope for discretionary assessment by the Commission.
- Finally, compiling all the information mentioned in point (9)(a) will require a significant amount of time. As other jurisdictions, in particular the US, follow a different, less burdensome approach, this will result in further discrepancies between leniency programmes whilst in fact harmonization is required. For example, in order to perfect a marker with the OFT, the OFT requires the applicant to provide the OFT with enough information to launch a credible investigation. In practice, this has been defined as enough information to carry out an on-site inspection (dawn raid).

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<sup>1</sup> Hereinafter references to corporate statements cover both written and oral form.

In summary, the contemplated proposal regarding the mandatory content of “corporate statements” in point (9)(a) is likely to result in companies being hesitant or even reluctant to come forward to the Commission - an effect which surely is not intended by the Commission.

**b) Cooperation obligations**

(6) We welcome the Commission’s clarification in point (12) of the Draft Notice of the various cooperation obligations of an immunity applicant. In particular, the added provision stating that the immunity applicant must not disclose the fact or any of the content of its application before the Commission has issued a statement of objections, unless otherwise agreed, is a helpful clarification.

(7) We further welcome the position taken in the Draft Notice that this non-disclosure obligation is not a strict rule but subject to discussions and possible exemptions to be agreed with the Commission. However, in view of the length of the Commission’s proceedings up to the point of time in which a statement of objections (SO) is finally issued and the fact that in international cartel cases, cooperation with civil plaintiffs will often need to be pursued long before an SO is issued, we advocate an even more flexible approach. We suggest that the Commission explicitly mentions that an immunity applicant (or any other applicant under the notice) may be entitled to cooperate with civil plaintiffs in any jurisdiction in due course, without prior approval by the Commission.

**c) Obligation to terminate participating in infringement**

(8) We welcome the more flexible approach as regards an immunity applicant’s obligation to terminate its involvement in an infringement proposed in point (12)(b) of the Draft Notice. However, we would suggest that flexibility should depend not only on “the Commission’s view” as mentioned in point (12)(b) of the Draft Notice but on other circumstances as well. For example, the need to continue participating in cartel meetings in order to comply with other leniency programs, or to comply with the request of another competition authority to whom a leniency application has been submitted, should be regarded and mentioned as a valid reasons for an exemption to the rule stipulated in point (12)(b) as well.

## **2. Procedure to obtain immunity**

### **a) Introduction of a marker system**

- (9) The proposed introduction of a marker system is to be welcomed, as it starts to harmonize the Commission's leniency programme with other leniency programmes, in particular that of the DOJ.
- (10) However, it seems that the use of the marker will not necessarily safeguard the immunity applicant from being "leapfrogged" by another applicant. We therefore suggest that the Commission clarifies in point (21) that the fact that it will not consider other applications for immunity from fines before it has taken a position on an existing application also applies to a marker application, unless the applicant has failed to complete the marker within the period set by the Commission. It would in particular be helpful, if the Commission were to state that within the time granted for the "marker applicant" to perfect its marker, the Commission will not entertain discussions on leniency with another applicant. Absent such clarifications, the marker system will be tainted by an element of uncertainty for the immunity applicant making use of a marker as regards the success of its application, which could endanger the success of the marker system.
- (11) Moreover, it is suggested that the Commission adopts a two-tier marker system similar to the one used by the DOJ, comprising a first contact by telephone announcing the intention to make the application, for which the Commission would grant a first marker. When the application is actually made, the position of the immunity applicant should be protected by a second marker which remains valid until the immunity letter is issued to the applicant.

### **b) Application for immunity in hypothetical terms**

- (12) It is welcomed that in the Draft Notice the procedure to apply for immunity in hypothetical terms is clarified in points (16)(b) and (19). However, the consequences of such an application versus an application based upon the marker may need a bit of clarification.
- (13) It follows from point (15) that if a company wishes to obtain a place in the queue, it must apply for a marker rather than making an application based upon evidence provided in hypothetical terms initially, as only the marker will guarantee the undertaking's place in the queue once the marker is perfected.

- (14) While it may be the Commission's intention to allow an application to be made on a no-names basis, very much like the OFT's current practice of a "proffer", this no-names basis application should not be able to give the applicant a guaranteed place in the queue. To do otherwise, would be to limit the benefits of the marker system – full disclosure in return for a guaranteed place in the queue.
- (15) It is therefore troubling to read point (21), which states that the Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same infringement. This wording appears to indicate that there is a queue system even for the applications in hypothetical terms.
- (16) For example, undertaking A applies for immunity in hypothetical terms. Before it has disclosed the evidence in the list submitted to the Commission, undertaking X approaches the Commission to make an application for immunity and to obtain a marker. Will point (21) prevent the Commission from giving X a marker, since there is an informal queue – in essence, a policy that the Commission will have to deal with all pending applications first, before X can even be given a marker?
- (17) It is worth bearing in mind that an application in hypothetical terms is of less immediate value to the Commission than a marker application, since a marker application gives the Commission evidence of the alleged cartel early on in the application process. The marker application requires the immediate disclosure of the identity of the applicant and requires, in order to perfect the marker, the evidence as specified in point (9). The application in hypothetical terms, on the other hand, allows a cautious applicant the time to assess whether it is worth revealing the evidence of the cartel, in order to get immunity. As a result, the evidence of the alleged cartel will be disclosed much later in an application in hypothetical terms than in a marker application. While the availability of the application in hypothetical terms is a good development, it should not allow such an applicant a place in the queue, which should be reserved only for those applicants who comply with the marker system. This is the approach that the OFT has taken in this area with regard to applications on a no-names basis.
- (18) It is therefore suggested that the Commission clarifies point (21), so that it does not imply that an application in hypothetical terms could block a substantive "non-hypothetical" application (even if based upon a marker). Point (21) is generally useful, in that it establishes a queue system. In order to encourage marker applicants to come

forward, they must not be liable to be prevented from obtaining a place in the queue in favour of an applicant who is making an application only in hypothetical terms.

### **3. Effects of failure to meeting the requirements for immunity**

- (19) The Draft Notice states in point (22) that an immunity applicant who has not met the conditions for obtaining immunity will not benefit from any favourable treatment under the notice.
- (20) It is submitted that the Commission should reconsider this strict approach as far as non-compliance with the obligation pursuant to point (12) is concerned. We advocate a more flexible approach, as the failed immunity applicant in most cases will still have provided the Commission with significant input to uncover, investigate and impose fines as regards the infringement initially reported.
- (21) It is understood that, according to the Commission's current practice, other applicants cannot take the vacant position of the "failed immunity applicant". The Commission may want to explicitly mention or clarify this in its Draft Notice.

### **4. The use of evidence stemming from an unsuccessful application**

- (22) Point (20) of the Draft Notice states that if an applicant does not meet the conditions for immunity, the applicant can withdraw the evidence disclosed or request that the Commission considers the evidence in support of an application for a reduction of the fine. Point (20) goes on to state "this does not prevent the Commission from using its normal powers of investigation in order to obtain the information". The meaning of this sentence is not entirely clear. It raises two concerns:
- Does it mean that the Commission can ask the undertaking to supply the same information under a request for information pursuant to Article 18 of Regulation 1/2003? If so, will the applicant be able to rely on the same evidence in support of its application for a reduction of the fine? What if the Commission sends the Article 18 request on the same day that the applicant submits an application for a reduction of the fine? The Commission may want to consider providing some rules as to how the applicant's evidence will be viewed in light of an Article 18 request that has been made in the same case.
  - Furthermore, does this sentence mean that the Commission, not having enough evidence to establish an infringement and having taken note of the evidence

submitted, will carry out an on-site inspection (dawn raid) for the documents and evidence submitted, and subsequently use these documents and evidence against the undertaking which originally submitted them in the failed application?

- (23) We suggest that, in order to protect the leniency programme, the Commission should follow the current practice of the OFT in this area. The OFT will not use information against a failed leniency applicant, except where the applicant has acted in bad faith. One example of bad faith is the “manifest failure to cooperate”. This current practice of the OFT has protected the leniency programme by clearly stating that if an application fails, the evidence submitted will not be relied on against the applicant except in unusual circumstances. Thus, there is no risk that evidence submitted in a failed application will be used against the applicant in ordinary circumstances where that applicant has acted in good faith. To do otherwise would be to discourage leniency applications.
- (24) Therefore, the Commission should clarify the meaning of this sentence in point(2 0). It is suggested that the OFT’s approach is an appropriate solution, in that it encourages leniency applications.

### **III. Reduction in fines**

#### **1. Requirements to obtain a reduction in fine**

##### **a) Concept of “added value” and its assessment**

- (25) The Draft Notice does not provide significantly more guidance as to what will be regarded as “added value” than the current notice. More clarity in this regard would be welcomed. Thus, the Draft Notice does not address the situation where a corporate statement is submitted by a parent company that no longer controls the subsidiary involved in the alleged cartel and who may have little more than admissions to offer. Clearly, such admissions relieve the Commission of its burden of proof but as mere admissions would they *per se* be excluded from the “added value” concept? Also, the Draft Notice does not address what value could be attributed to investigative reports that may be prepared (for reasons of compliance with, e.g., securities and financial regulatory laws or as a result of corporate group ethics policies) by a parent company or the company involved in a cartel itself. Such reports may provide valuable insights



- to the Commission and, notwithstanding their being second-hand evidence or hearsay (and thus not usable as evidence) could function as “high value” road maps.
- (26) The newly added sentence pursuant to which “the degree of corroboration from other sources required for the evidence submitted to be relied upon against other companies involved in the case will have an impact on the value of that evidence” adds to uncertainty rather than providing guidance. This is because, although the Draft Notice explicitly mentions that it will take into account the time at which the evidence fulfilling the condition in point (24) was submitted and the extent to which its presents added value (point (26), second paragraph), the level of reduction of a fine will - as currently - only be determined by the Commission in its final decision (point (26), first paragraph).
- (27) This concept of *ex-post* rather than an *ex-ante* assessment is likely to have an adverse effect on the willingness of a company to cooperate with the Commission in a timely manner, for example in case where it has been subject to a dawn raid (a situation which indicates that there already is an immunity applicant). We therefore advocate a system which rather provides incentives to cooperate, both by clarifying the concept of “added value” as well as by procedural measures (such as the one proposed below at (29) et seq.).

## **b) Obligations to co-operate**

- (28) The Draft Notice explicitly mentions in point (24) that an applicant for reduction of a fine must cooperate with the Commission in the same way as an applicant for immunity needs to cooperate pursuant to point (12). This clarification is helpful in principle. It is suggested, however, that the assessment as to whether an applicant has cooperated is assessed in a reasonable manner by the Commission. This applies in particular as regards the required cooperation with civil plaintiffs mentioned above (cf. (7)).

## **2. Procedure for obtaining a reduction in fines**

### **a) Letter granting a conditional reduction**

- (29) Whilst an immunity applicant will be provided with a letter granting conditional immunity, if the required conditions are met (points (18) and (19) of the Draft Notice), an applicant for a reduction of the fine will only be informed of whether it has met the

conditions, “no later than the date on which a statement of objections is notified” (point (29) of the Draft Notice).

- (30) It is submitted that the applicant for a reduction of the fine could also be given a letter granting a conditional reduction of the fine. This would involve a preliminary assessment of the evidence submitted by the applicant before the SO is issued. This would involve an *ex-ante* assessment of the evidence, instead of an *ex-post* assessment, which will encourage applicants to cooperate with the Commission (see our discussion in (26) and (27) above).
- (31) The letter could also mention where the applicant’s position is in the queue, vis-à-vis the immunity applicant. This letter granting a conditional reduction, which gives the applicant some certainty regarding its position in the queue, would act as an added incentive for the applicant to come forward with evidence which has “significant added value”.
- (32) Therefore, it is suggested that the Commission should issue a letter granting a conditional reduction of the fine to the applicant who has applied for a reduction of the fine. Similar to the one provided to an immunity applicant granting conditional immunity, this letter should be provided well before the SO is issued.

**b) Raising the bar to provide evidence to establish gravity and duration**

- (33) The Commission’s current leniency notice states that if an undertaking provides previously unknown facts regarding the gravity or duration of the alleged cartel, these facts will not be used in setting the fine for this undertaking (the so-called “no worse off” principle).
- (34) Point (26) of the Draft Notice changes this to “compelling evidence” and the undertaking must be the first to submit this “compelling evidence”. While the requirement that the undertaking be the first to submit the evidence is in keeping with the incentives of a leniency programme (i.e., the first to come forward will benefit), the requirement of “compelling evidence” raises the bar on the type of evidence required, which may discourage the disclosure of evidence. The applicant may not wish to disclose evidence which falls short of a required standard, based on the fear that the submission may be rejected as “compelling evidence” but the “confession” nevertheless used against that applicant.

- (35) According to point (25) of the Draft Notice, it appears that “compelling evidence” is evidence that does not need corroboration. It seems doubtful, therefore, whether documents of cartel meetings will be sufficient to show that the duration of the cartel was longer than the Commission initially supposed.
- (36) We therefore suggest that the Commission clarifies point (26) regarding the meaning of “compelling evidence” and how it will deal with evidence that falls short of “compelling” regarding the gravity and duration of the alleged cartel. It is submitted that evidence which does not meet the “compelling evidence” test should in any case not be used against the company providing such evidence.

### **3. Lack of “amnesty plus”**

- (37) It is noted that the Draft Notice does not envisage the introduction of any kind of “amnesty plus” despite ongoing discussions about this topic. We suggest the addition of the concept of “amnesty plus” to the Commission’s leniency policy. In particular, we suggest that where an applicant for a reduction of a fine provides the Commission with sufficient evidence of the existence of another cartel, different from that cartel which is the subject of the Commission’s proceedings in which the applicant is applying for a reduction, the Commission shall grant the applicant, as a minimum, a certain reduction of the fine (e.g. a minimum of 25 %). This reduction will be in addition to the reduction to be granted under Section III of the Draft Notice, irrespective of whether the applicant ultimately qualifies for immunity as regards the “other” cartel.
- (38) The OFT has had a policy of leniency plus for a number of years now, which mirrors the DOJ’s policy of amnesty plus. The OFT’s policy appears to be successful in revealing evidence of previously unknown alleged cartels (see the *Replica Kits* decision for details of Sports Connection’s leniency plus application.) The leniency plus policy appears to give the applicant for a reduction of the fine an incentive to reveal evidence of a previously unknown alleged cartel. This policy is certainly an important tool in detecting cartels.

### **IV. Protecting leniency applications from discovery**

- (39) We welcome the Commission’s continued efforts to try to protect leniency applications from discovery. It is submitted, however, that the contemplated approach of formalizing the concept of corporate statements involving the provision of comprehensive information from an immunity applicant, as suggested in point (9)(a)

of the Draft Notice, is not helpful in this context. Rather, such approach adds to the problem instead of providing a solution or even mitigating the risks.

- (40) We therefore suggest that the Commission appreciates and accepts different types of corporate statements, any of which, when submitted by the applicant, will be enough to qualify for immunity.
- (41) For example, the Commission should consider treating certain corporate statements as “road maps” for evidence rather than using them as evidence in themselves. This is especially true where the corporate statement provides extensive details regarding the alleged cartel by making references to documents seized and/or provides other pre-existing but not seized documents and/or is accompanied by an internal investigation report. This is to be contrasted with situations where the corporate statement must itself serve as evidence against other parties.
- (42) Moreover, in the case where a company voluntarily submits, as part of its cooperation under the Leniency Notice, a report prepared as the result of an internal investigation, such report should be afforded the same “road map” treatment as corporate statements (see (41) above) and should be considered entirely confidential and excluded from the access to file. Where the Commission finds that it must rely on such documents in whole or in part as evidence against third parties (which is unlikely, given that such reports will rarely contain first hand evidence or testimony that cannot be otherwise recorded),<sup>2</sup> the portions of the report used as evidence and included in the non-confidential file, should at a minimum be afforded the same special access provisions as set out in point (33) of the Draft Notice.
- (43) The approach outlined above would address some of the concerns regarding use of statements provided by leniency applicants in civil litigation while giving the Commission access to the information and, where appropriate, the co-defendants’ access to the evidence provided by the leniency applicants.

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<sup>2</sup> Where an internal investigation report relies on documentary evidence that is contemporaneous with the cartel and was not seized by the Commission, such documents can of course be included in the non-confidential file and used as evidence against third parties. Even in such circumstances, it seems reasonable that the restricted access to file procedure be applied to such documents, so as to avoid the possibility that leniency applicants do not supply these out of concern that the documents will be used against them in civil litigation. This approach is appropriate, given the absence of harmonisation of civil litigation discovery rules in the EU.

- (44) The procedure proposed by the Commission in point (31) et seq. of the Draft Notice - although to be welcomed as regards its aim to provide protection against discovery - may also raise concerns as regards the concept of due process and other rights of the defence. It is submitted these concerns would be mitigated if the Commission follows the proposal set forth above.
- (45) Furthermore, it is submitted that the protection of corporate statements as envisaged in the Draft Notice offers only an incomplete protection from discovery, if any protection at all. This is because there is still a lack of protection from discovery of the SO. It is therefore submitted that if the Commission wants to remain consistent with the approach taken, such approach should be extended to the SO as well.
- (46) The Draft Notice provides that corporate statements will be transmitted to competition authorities of the Member States if certain conditions are met (point (35)). As corporate statements are frequently made orally, the Commission should clarify how such transmission will be made with regard to oral statements and how such oral statements will be protected from disclosure.

## **V. Plea Bargaining**

- (47) It is noted that, pursuant to public statements made by Commissioner Kroes, the Commission is contemplating the introduction of some kind of "plea bargaining". We would like to encourage the Commission to think further about the introduction of an element of negotiated settlement, which will most likely have a positive impact on the overall success and administration of the Commission's leniency programme.
- (48) It has been suggested that the Commission is considering implementing direct settlements as an option that is available at the time the SO is issued. This is the apparent policy of the OFT regarding settlements in selected cases. It is worth bearing in mind that settlements at the time the SO is issued are not without procedural difficulties. A draft notice for public comment on this topic even in the early stages of the Commission's thinking would be highly welcome.

Brussels, 27 October 2006



**Law Firms participating in the ECLF Working Group  
commenting on the Draft Commission Notice on immunity from fines  
and reduction of fines in cartel cases**

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Bredin Prat

Cleary Gottlieb Steen & Hamilton LLP

De Brauw Blackstone Westbroek

Hengeler Mueller

Howrey LLP

Latham & Watkins LLP

Roschier Attorneys Ltd.

Gerrit Schohe

Schulte Riesenkampff Rechtsanwaltsgesellschaftm bH

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