Introduction

In the Summer 2003 issue of the EC Competition Policy Newsletter, one of the authors described the Commission’s first year of practice in implementing the 2002 Leniency Notice (hereafter ‘the 2003 article’) (1). In the current article, we discuss the Commission’s handling of certain additional issues in the implementation of the 2002 Leniency Notice (hereafter ‘the 2002 Notice’ or ‘the Notice’) (2) that have become prominent over the past two and a half years (3). Specifically, we address the question which legal entity within an undertaking should make a leniency application, what the procedure is for submitting leniency applications in oral fashion, what the evidential value is of corporate statements, in which situations the Commission will normally not be in a position to grant immunity and how to interpret the notion of significant added value. We start by providing some updated statistics on the operation of the 2002 Notice so far (5).

Some statistics

Since the entry into force of the Notice in February 2002, the Commission had received, by the end of September 2005, 80 applications for immunity (6) and 79 applications for a reduction of fine (7).

With respect to these 80 immunity applications received, 11 of them were hypothetical applications pursuant to point 13(b) of the Notice. By the end of September 2005, the Commission had granted conditional immunity decisions in 49 cases. 45 of these conditional immunity decisions were granted under point 8(a) of the Notice, i.e. on the basis that the evidence submitted enabled the Commission

(1) The views expressed in this article do not represent official positions of the European Commission. The authors wish to thank Waltraud Mizelli of the Cartels Directorate for her help with statistics and Ewoud Sakkers for his detailed comments. The authors alone are responsible for any remaining errors.

(2) Bertus van Barlingen: The European Commission’s 2002 Leniency Notice after one year of operation, EC Competition Policy Newsletter, Number 2, Summer 2003, pp. 16 to 22.

(3) OJ C 45, 19.2.2002, pp. 3 to 5. The previously applicable Notice, which was issued by the Commission in 1996 (OJ C 207, 18.7.1996, pp. 4 to 6) is referred to as ‘the 1996 Leniency Notice’ or ‘the 1996 Notice’. The term ‘leniency’ is used to cover both immunity from fines and reduction of fines.

(4) The discussion of the issues raised in the 2003 article continues to be relevant unless specifically re-addressed in this article.

(5) Issues raised by multiple leniency applications within the European Competition Network (ECN) are not dealt with in this article. For a discussion of these issues, reference is made to Stephen Blake and Dominik Schnichels: Leniency following modernisation: safeguarding Europe’s leniency programmes, EC Competition Policy Newsletter, Number 2, Summer 2004, pp.7 to 13.

(6) In practice, leniency applications are normally made for immunity from fines or, in the alternative, reduction of fines. For statistical purposes, where several immunity applications have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines. The 80 immunity applications listed therefore pertain to 80 different infringements.

(7) Compared to this total of 159 leniency applications received in the three and a half years of operation of the 2002 Notice, the six years of operation of the previous 1996 Leniency Notice saw a total of slightly more than 80 leniency applications. See François Arbault and Francisco Peiro: The Commission’s new notice on immunity and reduction of fines in cartel cases: building on success, Competition Policy Newsletter, Number 2, June 2002, pp. 15 to 22. The most important difference, however, is not so much the considerably higher number of leniency applications received under the 2002 Notice, as the fact that the large majority of the leniency applications under the 1996 Notice were made only after the Commission had undertaken inspections and resulted in a reduction of fines. Under the 2002 Notice, on the contrary, more than half of all leniency applications have been made before any inspection took place and in most of these cases conditional immunity from fines has been granted upfront. The 2002 Notice has therefore been much more successful than the 1996 Notice in revealing secret cartels.
to carry out a surprise inspection (1). Most of these decisions were indeed followed up by surprise inspections or requests for information within weeks after conditional immunity was granted (2). The remaining four were granted under point 8(b) of the Notice, i.e. on the basis that the evidence submitted enabled the Commission to find an infringement of Article 81 EC.

Of the 31 immunity applications which had not been granted by the end of September 2005, 12 were still being examined. In the remaining 19 cases, conditional immunity was not granted. In one case, this was because the application did not fall within the material scope of the Leniency Notice as such. In five other cases, it was because the criteria in point 8 of the Notice, necessary for granting conditional immunity, were not met. Finally, in 13 cases where there was considerable doubt as to whether the conditions of the Notice were met and the case was not suitable for further investigation by the Commission, the applicants were informed that the Commission did not intend to consider the application further.

In one case where conditional immunity had been granted, the Commission subsequently informed the applicant that it did not intend to grant immunity at the end of the administrative procedure, because one of the requirements for receiving immunity had not been met (3).

Regarding the 79 applications for a reduction of fines, the Commission had, by the end of September 2005, informed 18 applicants of its intention to apply a reduction within a certain band.

At the time of writing of this article, the Commission was still processing most of the remaining 61 applications for a reduction of fines within the framework of the ongoing investigations (4). There have also been several instances where the Commission considered, in a preliminary fashion, that no significant added value had been provided.

**The legal person making the leniency application**

Although infringements of Article 81 EC are committed by ‘undertakings’, i.e. economic entities, fines are imposed on and collected from legal persons (5). According to the Notice, leniency is applied for and granted to ‘undertakings’ (6). However, since prohibition decisions with fines are addressed to legal persons, it is important for undertakings, when they apply for leniency, to be clear about which legal persons are meant to be covered by their application and are thus meant to benefit from immunity from fines or a reduction of fines at the end of the administrative procedure in any prohibition decision. In the case of immunity applications, clarity regarding the legal persons covered by the application is needed also to determine which legal persons fall under the obligation of cooperation with the Commission during the administrative procedure (7).

Potential problems in respect of the legal persons covered by the leniency application may arise in particular in situations where a leniency application is made by a subsidiary within an undertaking rather than the parent company managing the undertaking. Since the subsidiary normally cannot control the behaviour of the parent company or of its sister companies within the undertaking, the

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(1) This includes a number of cases where the evidence may also have been sufficient to qualify for conditional immunity under point 8(b) of the Notice, meaning that the evidence could have enabled the Commission to find an infringement of Article 81 EC. This is in line with the Commission’s policy to use the lower of these two thresholds for conditional immunity whenever both options have been applied for (as is usually the case) and are available. Indeed, the legal position of the applicant is the same whether it is granted conditional immunity under point 8(a) or point 8(b) of the Notice. In this manner, the Commission is able to grant conditional immunity more quickly — within a number of weeks — than if it had first to make a definitive analysis of whether the evidence provided is sufficient to find an infringement of Article 81 EC. As a result, point 8(b) of the Notice is in practice used primarily to deal with immunity applications that are made after an inspection has taken place (and provided conditional immunity has not yet been granted to another undertaking under point 8(a) of the Notice).

(2) In a very few cases where the conditions for conditional immunity were fulfilled and the Commission granted conditional immunity, the Commission and the national competition authority/ies of the Member State(s) concerned agreed that investigative action should be taken at Member State level. In those cases, the applicant was duly informed that the Commission did not intend to actively investigate the case and applied for immunity (when it had not already done so) with the national authority/ies concerned before inspections were carried out.

(3) These four possible outcomes where immunity is not granted (‘non eligibility letters’, ‘rejection decisions’, ‘no action letters’ and ‘loss of leniency’) will be analysed in greater detail further below under ‘Situations where immunity is not granted’.

(4) Whereas applications for conditional immunity are normally decided within a matter of weeks, applications for a reduction of fines can often only be decided shortly before a statement of objections is issued. See the discussion further below on significant added value.

(5) The situation of an undertaking consisting only of one or more natural persons is not considered here.

(6) Compare points 8, 12, 20 and 24 of the Notice.

(7) See point 11(a) of the Notice.
Commission cannot, in such a situation, assume that the parent company or any sister companies are covered by the leniency application. To avoid any unwelcome surprises in respect of any fines to be imposed at the end of the administrative procedure, it is recommendable that the leniency application be made by the legal person which manages the undertaking that is involved in the infringement. In that case, the Commission will assume that all legal persons under the direct or indirect control of the parent company are also covered by the leniency application and, in the case of immunity applications, by the duty of cooperation. Such presentation of the application is not interpreted by the Commission as an admission by the parent company that it had been involved in or is liable for the infringement. But it does ensure that all potentially liable legal entities may benefit from lenient treatment in any prohibition decision.

Where a joint venture has been involved in a cartel and wishes to apply for leniency, the question arises whether one or both of its parent companies can be parties to the leniency application together with the joint venture. The answer may differ depending on the precise factual circumstances of the case. If, for instance, neither of the parent companies had ever participated in the cartel in their own right, it may be possible to regard the joint venture and its two parent companies together as a single cartel participant. In that case, it could be possible to associate the parent companies to the application, so as to cover any potential liability on their part. On the other hand, if one or both of the parent companies had, in the present or past, participated in the cartel in their own right, a joint application would in fact cover more than one cartel participant. Since under the Notice each leniency application is to be made by a single, separate undertaking (1), the Commission will want to ensure itself that a joint venture construction is not created or abused to seek immunity or the same reduction of fines for two separate cartel participants. It is therefore desirable that in all cases where a joint venture wishes to apply for leniency, it discusses the possible association of one or both of its parent companies to the application as quickly as possible with the Commission.

Corporate statements and the oral leniency procedure

As mentioned in the 2003 article (2), the Commission allows applications to be made orally both for immunity and for reduction of fines. The Commission does so in order to ensure that by making an application under the Commission’s Leniency Notice, undertakings are not worse off than non-cooperating cartel members in respect of civil procedures for damages. Many applicants have used this possibility, describing verbally their participation and that of other undertakings in the cartel. Until now, the Commission has not set any requirement that the applicant must show that it would face a serious risk of discovery if its corporate statement were made in writing. In any case, written corporate statements also receive special protection from the Commission in terms of the form in which access to these documents is given when access to the file is granted to the addressees of a statement of objections. It should also be noted that, in accordance with point 13(a) of the Notice, all available relevant contemporaneous documents always have to be submitted (unless - and then only in a first stage - a hypothetical application is made under point 13(b)). The ‘oral’ part of the application therefore pertains in particular to the corporate statement which is exclusively made for the purposes of a leniency application to the European Commission.

Evidential value of the corporate statement

As to the value of corporate statements for the Commission to prove the infringement, there is jurisprudence from the Court of First Instance (hereafter the ‘CFI’) recognising that statements of undertakings (whether made in writing or orally) can constitute evidence in cartel cases. In JFE Engineering Corp. and others v. Commission, the CFI stated:

‘In that connection, no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings...’ (3).

(1) See points 6, 8, 12, 15, 19, 21, 24 and 27 of the Notice.

(2) See footnote 2, page 6.

(3) JFE Engineering Corp. and others v. Commission, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraph 192.
The CFI went on to say, referring to its earlier judgment in *Enso-Gutzeit v. Commission* (1):

‘...an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence’ (2).

The interesting question in this respect is whether this corroborating information may be formed by a statement from another cartel participant. There should be nothing in principle to prevent this. At the end of the day, however, both the Commission and the Court will have to make an overall assessment of the reliability of all the evidence taken together to assess whether it suffices to establish that an undertaking infringed the competition rules (3).

As to oral statements in particular, the CFI has recognised the admissibility of oral information in *Graphite Electrodes*, a case handled under the 1996 Leniency Notice, where the CFI stated:

‘...the [1996] Leniency Notice states that not only ‘documents’ but also ‘information’ may serve as ‘evidence’ which materially contributes to establishing the existence of the infringement. It follows that the information need not necessarily be provided in documentary form’ (4).

Even if the 2002 Leniency Notice no longer refers to ‘information, documents or other evidence’ (5), but simply to ‘evidence’ (6), it is clear from this legislative history and jurisprudence that the notion of ‘evidence’ in the 2002 Leniency Notice includes oral information and in particular oral corporate statements.

Obviously, lawyers involved in leniency applications with the Commission would prefer it if, in order to minimise the risk of discovery in civil procedures for damages, the Commission only used corporate statements by leniency applicants as a so-called ‘road map’ to get a better understanding of the cartel and did not use such corporate statements in evidence in its prohibition decisions. The actual evidence would then have to be collected by the Commission through surprise inspections or requests for information. However, such suggestions overlook the requirements of the legal system within which the Commission has to operate. Within the European legal anti-trust regime, the Commission is the institution that establishes the facts of the case, determines whether an infringement exists and imposes the appropriate penalty, even if its decision may be appealed to the European Courts. It is therefore essential for the Commission to provide sufficient evidence in its decisions to justify the prohibition of the behaviour concerned and the penalties it imposes. The value to the Commission of corporate statements in proving the infringement in its prohibition decisions is considerable, even after surprise inspections have taken place. Nothing convinces more than cartel participants’ own admission of misbehaviour. It is clear therefore that corporate statements will continue to form an important part of leniency applications made to the Commission and will continue to be used in the Commission’s prohibition decisions.

**Procedure for submitting oral corporate statements**

The Commission’s current practice in handling oral leniency applications is as follows:

The applicant, usually represented by outside legal counsel (7), contacts the Commission’s Cartel Directorate through the phone (8) or fax numbers (9) dedicated to leniency applications. A meeting to discuss an intended leniency application or to make an oral corporate statement can be set up at the shortest possible notice. The meeting will take place at the day and hour proposed by the applicant, provided it falls within normal working

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(2) *JFE Engineering Corp. and others v. Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraph 219. This follows the CFI’s earlier line established in *Cimenteries CBR and Others v. Commission*, Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, [2000] ECR II-491, paragraph 1838.
(3) In the words of the CFI: ‘...the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place... However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement’. *JFE Engineering Corp. and others v. Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraphs 179 and 180.
(4) *Tokai Carbon Co. Ltd. and others v. Commission*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, not yet published, paragraph 431.
(6) See for instance points 8, 13, 21 and 24 of the Notice.
(7) Henceforth, the term ‘the applicant’ should be understood to include the applicant’s outside legal counsel.
(8) The dedicated telephone number is +32 2 298 41 90 or 298 41 91.
(9) The dedicated fax number is +32 2 299 45 85.
hours (1). Applicants have to realise, however, that there is no ‘marker’ system and an application is only made when evidence has been submitted to the Commission. Therefore, should the Commission receive evidence from another undertaking before the scheduled meeting takes place, the other application will take priority of place (2). For this reason, it is always advisable, also when an applicant intends to make an oral corporate statement, to immediately submit by fax all relevant contemporaneous documents in the possession of the undertaking to the Commission.

In proposing the starting hour for a meeting, applicants should also take into account that the meeting may be interrupted by the Commission services in case it extends beyond normal working hours and may then be continued from the start of working hours in the afternoon or, if the meeting started in the afternoon, on the following working day. Whenever immunity applications are not made in a single uninterrupted period, even if it concerns just a break over lunch, the rule applies that a second applicant submits evidence regarding the same infringement in the intervening period, the first application can no longer be supplemented with further evidence and will be evaluated on the basis of the evidence submitted until the moment the second application was made (3). Applicants therefore have every incentive to submit a maximum of evidence within the shortest possible period.

The Commission records on tape the oral statement made by the applicant. This registration on tape is the original evidence and is part of the Commission’s investigation file. The applicant has the right to check the correctness of the recording and of the substance of its statement. To facilitate their work, the Commission services may and usually do produce a written transcript of the oral statement. This is added to the investigation file.

As required by the Notice (4), the Commission prepares a written acknowledgement of receipt of the application and of any subsequent submissions. This acknowledgement may be notified to the applicant at the premises of the Commission, without the applicant taking possession of the document. The same procedure for notification may be used in respect of the subsequent Commission decision to grant (or deny) conditional immunity and the Commission’s preliminary conclusion regarding whether significant added value has been provided.

Before a statement of objections is issued, no access to the Commission’s investigation file is granted to any party, including the leniency applicant. When a statement of objections is issued, the Commission sends the statement of objections to the addressees together with a CD-ROM with all accessible documents in the Commission’s investigation file, with the exception of (transcripts of) corporate statements (5). The Commission is legally obliged to grant access to corporate statements to the addressees of the statement of objections, so that they can exercise their legitimate rights of defence. However, access to corporate statements, whether made in written form or on tape, is granted only at the premises of the Commission. Parties may read written corporate statements and transcripts of oral corporate statements and make their own notes. They may also, if they deem it necessary, request access to a copy of the tape recording of an oral corporate statement and make their own notes. But they are not allowed to make any mechanical copies of corporate statements (whether made in writing or orally) or of transcripts thereof.

The Notice provides that statements made by the leniency applicant may not be disclosed or used for any other purpose than the enforcement of Article 81 EC (6). Furthermore, pursuant to Article 15 (4) of Commission Regulation (EC) No 773/2004 of 7 April 2004 (7), documents obtained through the access to the file may only be used for the purposes of judicial and administrative proceedings for the application of Article 81 EC. For this reason, the Commission will reject any request for access to the file for any other purpose than the application of Article 81 EC. Moreover, to underline the protection of the integrity of its investigation, the Commission now requests that undertakings that seek access to the file sign a document whereby they commit to abide by these provisions.

Situations where immunity is not granted

Whereas at the time of writing of the 2003 article almost all immunity applications that had been processed qualified for the granting of conditional immunity, the number of applications that are less

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(1) The Commission’s normal working hours are Monday to Friday from 08.30 to 13.00 hours and from 14.15 to 17.30 hours.
(2) See footnote 2, page 6. Under the Notice, it is not sufficient to announce a leniency application to ensure one’s ‘place in line’, as the application is considered to be made when actual evidence is received.
(3) See footnote 2, page 6.
(4) See points 14 and 25 of the Notice.
(5) The same procedure applies to all addressees of the statement of objections, whether or not they are leniency applicants.
(6) See point 33 of the Notice.
solid has unfortunately grown in the meantime. Based on this experience, one can now distinguish four basic situations where immunity may not be granted:

- the facts reported are not covered by the material scope of the Notice: in these cases, the Commission services issue a so-called ‘non eligibility letter’;
- the substantive conditions for conditional immunity are not met; in these cases, the Commission adopts a so-called ‘rejection decision’ whereby it denies conditional immunity;
- it does not appear, prima facie, that the substantive conditions for immunity have been met and the case is not suitable anyway for further investigation by the Commission; in these cases, the Commission services issue a so-called ‘no action letter’; and finally
- the conditions for receiving immunity in any prohibition decision turn out not to have been met by the undertaking which was granted conditional immunity; in these cases of ‘loss of leniency’, the Commission informs the applicant that it will not receive leniency in any prohibition decision.

‘Non eligibility letters’

Point 1 of the Notice makes it clear that the type of infringement for which leniency can be granted is ‘secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports’. Because of the secret nature of cartels and consequently the difficulties to detect them, immunity can be offered to the first participating undertaking to come forward and provide evidence that will permit the launching of a surprise inspection or the finding of an infringement (as well as varying degrees of reduction of fines for subsequent undertakings if they add significant added value to the Commission’s ability to prove the facts in question). As point 4 of the Notice puts it, ‘The interests of consumers and citizens in ensuring that cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.’

In an unwelcome recent development, the Commission has received an application for immunity that clearly does not concern secret cartel activity, but rather clauses in a general business contract, in casu even of a vertical nature. The compatibility of these contractual clauses with Article 81 EC might well be doubtful, but they clearly do not fall within the above described scope of the Notice. By reporting such clauses to the Commission and asking immunity for them, legal counsel of the undertaking concerned apparently attempted to re-create something similar to the previous notification system that was abolished with the entry into force of Regulation (EC) No 1/2003 (1). The Commission has reacted to this application by sending a short standard letter at the administrative level saying that the reported arrangements do not fall within the scope of the Notice, that this letter is without prejudice to the compatibility of the arrangements with EC competition rules and that the applicant may withdraw the evidence disclosed, but that this does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

‘Rejection decisions’

There has been a slight increase in the number of instances where the immunity application did not meet the substantive conditions for conditional immunity under point 8(a) of the Notice, i.e. did not, in the Commission’s view, enable it to adopt a decision to carry out a surprise inspection.

Partially, this increase may be due to the fact that several large undertakings have, following the entry into force of the 2002 Notice, conducted intensive internal compliance programmes and as a result have reported multiple alleged cartel violations to the Commission. For certain of these alleged violations very little concrete information may then in fact have been available, so that carrying out an inspection on this basis would not have been possible.

Partially, however, the increase may also have been caused by the fact that in some cases the undertaking concerned, rather than frankly admitting its own participation in the cartel, has chosen extremely cautious language regarding its own participation in the cartel, and sometimes even regarding the participation of other undertakings. It is clear that an applicant should not accuse other undertakings or make admissions regarding its own behaviour if these accusations or admissions are not grounded in fact, supported by evidence whenever available and based on a true conviction that the events actually occurred. But when words such as ‘might’, ‘could have’, ‘it appears that’ ‘cannot be excluded that’, ‘possibly’ etc. abound in a corporate statement, and very little or no evidence in the form of contemporaneous documents is submitted, the applicant should not be surprised that the Commission becomes hesitant to consider that it could order a surprise inspection on such an uncertain basis.

(1) Compare Article 15(5) of Regulation 17, OJ 13, 21.02.1962, page 204.
In instances where the application for immunity could not be granted for lack of sufficient evidence, the undertakings concerned have so far always chosen to apply for a reduction of fine, rather than to withdraw the evidence (1). The application for a reduction of fine then stays on the record but only becomes active if and when the Commission decides to investigate the matter further on its own motion (for instance through a request for information or ex officio sector investigation) or receives another, better-founded leniency application regarding the same infringement.

‘No action letters’

A different situation may arise where it does not appear, prima facie, that all of the conditions of the Notice are met (for instance because the infringement is local only and the applicant does not clearly establish that the infringement may affect trade among Member States) and the case is in any case not suitable for further investigation by the Commission. An application may be unsuitable for further consideration by the Commission because it is considered too unimportant for the Commission to investigate, given the Commission’s limited resources; because one or several Member State competition authority(ies) may be considered well placed to investigate the matter; or because the Commission considers that further investigative measures would be unlikely to bring any positive result (for instance if the same undertakings have already been recently inspected for a related product).

In such cases, coming to a conclusion on whether or not the applicant qualifies for conditional immunity could be time-consuming for the Commission and would not bring it any benefits, since, based on the evidence available, it does not intend to investigate the matter anyway. From the applicant’s perspective, it is well possible that if a decision has to be taken, the Commission would reject the application for immunity. In such situations, the Commission services may therefore send a so-called ‘no action’ letter to the applicant stating that, in view of their preliminary assessment that it does not appear prima facie that the conditions of the Notice are met, it is not the intention of the Commission services at present, and in the absence of other evidence, to consider the application further. The letter adds that should the Commission services change their position in this respect, the Commission would take a formal position on the application for immunity.

In this manner, the decision on the initial immunity application is, as it were, put on ice. The evidence submitted remains on the file (unless the applicant chooses to withdraw its application) and the applicant’s leniency position is safeguarded if the Commission should later choose to investigate the matter, e.g. on the basis of a second application. While it remains possible for the applicant to insist that the Commission should take a formal decision on its application (which may be either positive or negative), applicants have until now been satisfied with the protection offered by the ‘no action letter’.

‘Loss of leniency’

As mentioned earlier, there has, until now, been only one case where the Commission, after it had first granted an applicant conditional immunity, subsequently informed the applicant of the Commission’s intention not to grant it any leniency in any prohibition decision to be adopted. This concerned a case where the Commission discovered in the course of the administrative procedure that the immunity applicant had informed the other cartel members of its leniency application before the Commission had undertaken an inspection. Such conduct is considered to constitute a violation of the obligation of full cooperation upon which immunity is conditional (2). It is evident that if an immunity applicant tips off the other cartel members about its application, before the Commission has even started its investigation, the surprise element in any ordered inspection is lost and the Commission is unlikely to be able to locate any useful evidence. The applicant has then not kept its side of the bargain. (3)

A different, but potentially comparable situation could arise where an undertaking applying for immunity has a publication obligation regarding the fact that it may face a liability for an antitrust infringement, for instance under rules of the US Securities and Exchange Commission. It is essential that the undertaking either finalises its immunity application sufficiently long in advance of any such publication deadline or arrives at a prior agreement with the Commission regarding the wording of any text to be published. No publication may, in any case, take place prior to the intended inspection without the Commission’s permission. Violation of this obligation is interpreted as a violation of the obligation of full cooperation and could lead to the loss of leniency, as it would endanger the results

(1) See point 17 of the Notice.
(2) See point 11(a) of the Notice.
(3) See Commission press release IP/05/1315 of 20.10.2005, ‘Competition: Commission fines companies € 56 million for cartel in Italian raw tobacco market’. It should be noted that in this proceeding, due to the particular circumstances of the case, the Commission granted the undertaking concerned a reduction outside of the leniency notice to acknowledge its actual contribution to the establishment of the infringement.
of the intended inspection. If the non-authorised publication takes place before conditional immunity has been granted, conditional immunity may be denied.

What legally happens in such cases of loss of leniency in immunity cases is that the Commission, rather than withdrawing the conditional immunity it had granted, decides in its prohibition decision not to grant immunity. It should be remembered that where conditional immunity has been granted, the final grant of immunity in any prohibition decision always remains dependent on compliance with the conditions stated in the Notice (1). Similarly, if an applicant for a reduction of fine turns out not to have terminated its involvement in the cartel at the time of its application, it will not be granted any reduction of fines in any prohibition decision, even if the Commission, initially unaware of this continued involvement, had already indicated its intention to grant a reduction.

If non-compliance with the conditions of the Notice leads the Commission to take the view that immunity or a reduction of fine finally should not be granted in the prohibition decision, it will immediately so inform the applicant concerned and provide it with an opportunity to respond before any final decision is taken. It should be noted that, once conditional immunity has been granted, loss of the conditional immunity status also implies that no reduction of fines will be granted under the Notice for the application concerned (2). Nor is the applicant allowed to withdraw the evidence it had submitted (3). With respect to other applicants, nothing changes in their position. Loss of immunity does not mean that the second leniency applicant then becomes eligible for immunity or that an applicant that qualified for a band of between 20% to 30% reduction now suddenly qualifies for the band of 30% to 50% previously occupied by the applicant that lost leniency.

**Significant added value**

*Substantive issues*

Given that only a limited number of statements of objections under the 2002 Notice have been issued at the time of writing of this article (and no prohibition decision yet adopted), the exact contours of the notion of significant added value as defined in points 21 and 22 of the Notice have not crystallised yet. Whether an applicant for a reduction of fines has submitted sufficient evidence to constitute 'significant added value' compared to the evidence already in the possession of the Commission is, of course, very much a case-specific evaluation. Moreover, while the Notice describes the notion of 'added value' in point 22 as 'the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the facts in question,' the Notice does not provide guidance as to when such added value must be considered 'significant'. It is clear, therefore, that the Commission can determine only on a case-by-case basis what evidence it finds to be 'significant' in adding value to its ability to prove the facts in question. Nevertheless, a few general guidelines can be given.

If the Commission has already granted conditional immunity under point 8(a) of the Notice, but, possibly even after an inspection, is not yet able to prove the infringement, it seems beyond doubt that if a leniency applicant brings sufficient new evidence to the Commission to allow the Commission, taking all evidence in its possession into account, to then prove the infringement, the leniency applicant will have provided significant added value.

Significant added value may also be provided when a leniency applicant does not necessarily bring new evidence, but corroborates already existing evidence where such corroboration is needed to prove the infringement. Where the Commission is in possession of clear contemporaneous evidence, it can determine the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the facts in question. Nevertheless, a few general guidelines can be given.

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(1) See point 30 of the Notice. For immunity, these conditions are the immediate provision of all evidence relating to the suspected infringement available to the applicant at the time of the submission of its application (point 11(a) of the Notice), full cooperation throughout the investigation, the ending of the involvement in the cartel at the time of its application, and no coercion of other undertakings to participate in the cartel (point 11 of the Notice). For a reduction of fines, there is only one condition, that the applicant must have terminated its involvement in the cartel at the time of its application (point 21 of the Notice). For a discussion of these conditions, see footnote 2 (pages 18 and 19).

(2) Point 17 of the Notice provides that an undertaking which fails to qualify for conditional immunity may ask the Commission to consider the evidence disclosed for a reduction of fines. This possibility is not, however, given to undertakings that do qualify for conditional immunity but subsequently violate their obligations under the Notice. Indeed, were this otherwise, the applicant could still under the last paragraph of point 23 of the Notice *de facto* benefit from full protection against any fine for its reported behaviour, because none of that behaviour may have been known to the Commission at the time when the applicant made its application. As for a new application for a reduction of fines, it remains theoretically open to such applicants to subsequently file a new application for a reduction of fines, with new evidence not previously available. However, the chances of this being factually possible appear minimal.

(3) Point 17 of the Notice, which allows the withdrawal of evidence, does not apply to this situation: as mentioned in the previous footnote, the applicant has met the conditions set out in points 8(a) or 8(b) of the Notice, but has violated point 11 of the Notice.
neous documents, corroboration is not normally required. However, where the Commission only has a statement from an immunity applicant, corroboration by a second applicant would normally be required. Such corroboration could consist either in documents or in a statement by the second applicant. If the original statement from the immunity applicant plus the documents provided by the second applicant or the statements from the two applicants together are considered sufficient to find an infringement, the second applicant will have provided significant added value. The same may apply in situations where the Commission possesses contemporaneous documents which in themselves are not sufficient to prove an infringement, for instance because they are unclear. Here too, corroborating information from a second applicant, whether in the form of documents or statements, may be of significant added value if it is instrumental in allowing the Commission to find an infringement.

The examples mentioned above describe situations where it was only through the assistance of the second applicant that the Commission was able to find an infringement. However, significant added value may also be provided where the Commission was already able to find an infringement (1).

Point 23 of the Notice states that ‘if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence’. While it would be hazardous to draw any direct conclusions from this paragraph regarding the notion of significant added value, this text does suggest that the Commission attaches considerable value to evidence that allows it to prove facts that result in a significant increase in the total fine amount. Examples could be evidence that, compared to the original evidence, allows the Commission to prove that the infringement covered a larger geographic area, that the cartel activities covered more products or services, that there were more participating undertakings or that the duration of the infringement was longer than the Commission could prove originally.

Two observations can be made regarding the previous paragraph: First, there are no absolutes. If, for instance, a leniency applicant adds only limited duration to an infringement which the Commission could already prove lasted many years, the applicant should not be surprised that the Commission will not consider this to be significant added value (2). On the other hand, a limited extra duration may be of significant added value if the Commission could until then only prove a very short duration. Secondly, in situations where the Commission was not yet aware of the facts which the second applicant now provides evidence of, that applicant may in effect get a double ‘reward’: Not only may it get a reduction from its fine for having provided significant added value, but also the new facts in question will not be held against it (3).

Beyond this, it is difficult at this point in the development of the application of the Notice to provide further guidance that would be generally applicable. As was mentioned, much will depend on the facts of each case and the relative strength of the evidence already in the possession of the Commission. Suffice it to say that a mere confirmation of facts the Commission could already prove clearly does not constitute significant added value.

**Procedural issues**

An application for a reduction of fines is usually not made in a single submission, but tends to take the form of a series of submissions over time, each one of them being made as soon as the evidence is ready to be presented to the Commission. For applications for reductions of fines there is no rule in the Notice, as there is for immunity applications (4),

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(1) This interpretation is supported by the fact that according to point 17 of the Notice, if an undertaking fails to meet the conditions set out in points 8(a) or 8(b), it may ask the Commission to consider the evidence it has disclosed under section B of the Notice, i.e. with a view to obtaining a reduction of fines. This suggests that even if the Commission is already able to prove an infringement and immunity is therefore no longer available, it should still be possible to provide significant added value to the Commission’s case.

(2) At the same time, if the Commission was not yet aware of this additional duration, they will not be held against the applicant, in accordance with the last paragraph of point 23 of the Notice.

(3) Thus, to give a numerical example, if the duration is extended from five to ten years, the fine for the applicant that provided the evidence for this previously unknown period will be calculated based on a duration of five years. The resulting fine amount will then be reduced by the percentage of reduction granted. If, on the other hand, the Commission already knew that the infringement had lasted ten years, but could only prove five years, the applicant will benefit from a reduction for having provided significant added value. This reduction will be calculated on a fine amount based on a duration of ten years.

(4) Regarding successive submissions in the context of an immunity application see our discussion above under the section ‘Procedure for submitting oral corporate statements’. 
that the Commission must first take a position on a first application before it can start to examine a second application (1). For reduction of fine applications, undertakings are therefore in a virtual race against each other to be the first to voluntarily provide the Commission with evidence constituting significant added value. The Commission will examine each voluntary submission of evidence, from whichever applicant, in the chronological order in which submissions have been made and evaluate for each submission whether it, together with the value accorded to any previous submissions by the same applicant, constitutes significant added value with respect to the evidence already in the Commission's possession (2). As soon as the Commission is able to determine that an undertaking has reached the threshold of significant added value, the Commission will inform the applicant in the form of a Commission decision. Subsequent submissions can then help the applicant to obtain a higher percentage of reduction within the band of reduction to which it has been assigned (3).

As may be deduced from the discussion above on substantive issues regarding significant added value, a careful (and possibly time-consuming) analysis is required to determine whether the applicant had provided significant added value compared to the evidence already in the Commission's possession at the time of application. In accordance with its obligations under the Notice (4), the Commission has, however, so far always informed all the applicants which qualified for a band of reduction before the statement of objections was issued. The Commission will, with a view to further increasing transparency, henceforth also inform applicants that do not qualify for a band by means of a Commission decision sent to them before the statement of objections was issued, even if this is not specifically foreseen in the Notice (5). It should be noted that these decisions are provisional and that the Commission will determine and motivate its final position only in any prohibition decision to be adopted. The letters preliminarily assigning bands

1. Compare points 18 and 25 of the Notice.
2. See point 21 of the Notice. To take a hypothetical example: Let us assume that 100 points are needed to reach the threshold of significant added value. Undertaking A makes a first submission. It is worth 70 points, taking into account the evidence the Commission already had at that moment. At this point in time, undertaking A has not yet qualified for significant added value. One week later, undertaking B makes a voluntary submission of evidence. Based on the evidence the Commission already had, including the submission of undertaking A, the value of this submission is considered to be 80 points. Undertaking B also does not qualify yet. Again one week later, undertaking B comes back with a second submission, worth 20 points, taking into account as always all the evidence the Commission had gathered until then. Undertaking B has now accumulated 100 points in total and is the first undertaking to qualify for significant added value, even if undertaking A was the first applicant for a reduction of fines. Undertaking B will thus benefit from a reduction between 30% and 50%. If undertaking A then comes back again a week later with a second submission worth 80 points, it will have accumulated 150 points and will be the second undertaking to qualify. It will thus receive a reduction between 20% and 30%. Where exactly in each band the final reduction will be located depends largely on the total value of the cooperation of each undertaking, also taking into account whether useful subsequent submissions were made. In our example, undertaking B could get a reduction at or just above 30% because it has precisely met the threshold of 100 (assuming it does not make any further useful submissions), whereas undertaking A may get a reduction at or just below 30% because it has significantly exceeded the threshold of 100 points.

5. It is sometimes argued that if there is some delay in the notification to the applicant that it has reached the threshold for significant added value, the applicant is disadvantaged because the value of its subsequent submissions (i.e. after the threshold had been reached but before the notification) would be neglected. As the numerical example in the previous footnote shows, this is not correct, as long as each submission is given its due weight. The result is the same whether the Commission determines only shortly before issuing the statement of objections that an applicant was the first to reach the threshold of 100 points, that it should be in the 30-50% reduction band and then in the prohibition decision decides that it should be given a 50% reduction because the total number of points it has obtained is 200, or immediately informs the applicant when it has reached 100 points and then decides in the prohibition decision that the applicant should receive a 50% reduction based on the additional 100 points value of its subsequent submissions. See points 26 and 27 of the Notice. In accordance with point 27, the final position of each applicant within the band to which it has been assigned will be determined in the prohibition decision, taking into account all the available information, including the replies to the statement of objections.

6. See point 26 of the Notice.

7. Previously such applicants could deduce from the fact that they received a statement of objections without any prior letter indicating that they had qualified for a band of reduction that their application for a reduction had not been successful.
of reduction are not, therefore, decisions that are challengeable before the European Courts in their own right (1).

**Conclusion**

The high number of leniency applications submitted to the Commission over the past three and a half years clearly shows that the 2002 Notice has been instrumental in persuading many undertakings that, instead of continuing their cartel behaviour, it is in their best interest to denounce the cartels in which they participate to the Commission with a view to obtaining the lenient treatment foreseen in the Notice. The high number of decisions granting conditional immunity in particular shows that this confidence has not been misplaced. As a result, the Notice has proven a crucial and highly successful instrument for the Commission to further detect and punish cartels, thereby deterring their formation in the first place, to the advantage of European consumers and the European economy.

The Commission’s task in the years ahead is to maintain and if possible further strengthen this confidence in the fairness and effective functioning of its leniency instrument in the face of continuing and new challenges. A major continuing challenge is, in particular, the risk of discovery by US courts of corporate statements made to the European Commission. A new challenge could be the sheer administrative burden of handling the large volume of leniency applications and subsequent cartel investigations under the 2002 Notice. Cartel cases are, by their very nature, lengthy and complex procedures. The recent creation of a dedicated Cartels Directorate within DG Competition will help to handle the flow of cases more efficiently and expeditiously.

Finally, through its ever increasing experience with the application of the Notice as well as the experience gained in other leniency systems in the European Competition Network and in third country jurisdictions, the Commission will in the period ahead contemplate the desirability of any further changes to its leniency policy, with a view to achieving maximum effectiveness and attractiveness for business. Input from legal and business circles in this regard will be welcomed.

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(1) The same is true for Commission decisions granting or rejecting conditional immunity, for ‘no action letters’, for ‘non eligibility letters’ and for decisions indicating that an applicant may lose leniency. In all these cases, only the Commission’s prohibition decision imposing fines can be successfully appealed before the European Courts. As long as the Commission does not adopt any decision imposing fines, any appeal before the CFI for interim measures opposing the Commission’s stated intention to grant or withhold immunity from fines or reduction of fines if fines are to be imposed, would be premature, as the applicants would be unable to demonstrate that they would suffer serious and irreparable damage in the absence of such interim measures. Indeed, such damage only arises if and when the Commission imposes a fine on an undertaking. For comparable situations, see for instance Hoechst AG v. Commission, Case 46/87R, [1987] ECR 1549, Cimenteries CBR SA and Others v. Commission, Joined Cases T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R, T-15/92 R, [1992] ECR II-1571 and Reisebank AG v. Commission, Case T-216/01 R, [2001] ECR II-3481.