



COMMISSION OF THE EUROPEAN COMMUNITIES

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Amended 2002 Commission Notice

on

Immunity from fines and reduction of fines in cartel cases

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(Text with EEA relevance)

INTRODUCTION

1. This notice concerns 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. Such practices are among the most serious restrictions of competition encountered by the Commission and ultimately result in increased prices and reduced choice for the consumer. They also harm European industry.
2. By artificially limiting the competition that would normally prevail between them, undertakings avoid exactly those pressures that lead them to innovate, both in terms of product development and the introduction of more efficient production methods. Such practices also lead to more expensive raw materials and components for the Community companies that purchase from such producers. In the long term, they lead to a loss of competitiveness and reduced employment opportunities.
3. The Commission is aware that many undertakings involved in this type of illegal agreements are willing to put an end to their participation and inform the Commission of the existence of such agreements, but are dissuaded from doing so by the high fines to which they are potentially exposed. The Commission considers that it is in the Community interest to grant favourable treatment to undertakings which co-operate with it. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices., .
4. The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.
5. Moreover, co-operation by one or more undertakings may justify a reduction of a fine by the Commission. Any reduction of a fine must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement. Reductions are to be limited to those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession.

6. In order to clarify its position in this type of situation, the Commission adopted a first notice on the non-imposition or reduction of fines in cartel cases in 1996¹. A new notice was published in 2002². This notice provided, in particular, more certainty to the first applicant to denounce a cartel that it would obtain full immunity from fines. The current amended 2002 notice maintains the key provisions of the 2002 notice but adds an annex detailing a special procedure to protect corporate statements which have been made to the Commission in the context of its leniency programme against discovery in civil damage proceedings.
7. The Commission is a strong proponent of effective civil proceedings for damages against cartel participants. However, the Commission considers it inappropriate that undertakings which cooperate with the Commission in revealing cartels would be placed in a worse position in respect of civil damage claims than cartel members that do not cooperate. The discovery in civil damage proceedings of corporate statements which have been made especially to the Commission in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the Commission's leniency programme, could undermine the effectiveness of the Commission's fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions.

A. IMMUNITY FROM FINES

8. The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if:
 - (a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 20(4) and, as the case may be, Article 21(1) of Regulation (EC) No 1/2003³ in connection with an alleged cartel affecting the Community; or
 - (b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC⁴ in connection with an alleged cartel affecting the Community.
9. Immunity pursuant to point 8(a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 20(4) or, as the case may be, Article 21(1) of Regulation (EC) No 1/2003 in connection with the alleged cartel.
10. Immunity pursuant to point 8(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point 8(a) in connection with the alleged cartel.

¹ Commission notice on the non-imposition or reduction of fines in cartel case, OJ C 207, 18.7.1996, p. 4.

² Commission notice on immunity from fines and reduction of fines in cartel case, OJ C 45, 19.2.2002, p. 3.

³ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (L 68, 6.3.2004, p. 1).

⁴ Reference in this text to Article 81 EC also covers Article 53 EEA when applied by the Commission according to the rules laid down in Article 56 of the EEA Agreement.

11. In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

- (a) the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;
- (b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate;
- (c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.

PROCEDURE

12. An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. Should it become apparent that the requirements set out in points 8 to 10, as appropriate, are not met, the undertaking will immediately be informed that immunity from fines is not available for the suspected infringement.

13. If immunity from fines is available for a suspected infringement, the undertaking may, in order to meet the conditions in points 8(a) or 8(b), as appropriate:

- (a) immediately provide the Commission with all the evidence relating to the suspected infringement available to it at the time of the submission; or
- (b) initially present this evidence in hypothetical terms, in which case the undertaking must present a descriptive list of the evidence it proposes to disclose at a later agreed date. This list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of its disclosure. Expurgated copies of documents, from which sensitive parts have been removed, may be used to illustrate the nature and content of the evidence.

14. The Directorate General for Competition will provide a written acknowledgement of the undertaking's application for immunity from fines, confirming the date on which the undertaking either submitted evidence under point 13(a) or presented to the Commission the descriptive list referred to in point 13(b).

15. Once the Commission has received the evidence submitted by the undertaking under point 13(a) and has verified that it meets the conditions set out in points 8(a) or 8(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.

16. Alternatively, the Commission will verify that the nature and content of the evidence described in the list referred to in point 13(b) will meet the conditions set out in points 8(a) or 8(b), as appropriate, and inform the undertaking accordingly. Following the disclosure of the evidence no later than on the date agreed and having verified that it

corresponds to the description made in the list, the Commission will grant the undertaking conditional immunity from fines in writing.

17. An undertaking which fails to meet the conditions set out in points 8(a) or 8(b), as appropriate, may withdraw the evidence disclosed for the purposes of its immunity application or request the Commission to consider it under section B of this notice. This does not prevent the Commission from using its normal powers of investigation in order to obtain the information.
18. 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 suspected infringement.
19. If at the end of the administrative procedure, the undertaking has met the conditions set out in point 11, the Commission will grant it immunity from fines in the relevant decision.

B REDUCTION OF A FINE

20. Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.
21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.
22. The concept of "added value" refers to 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. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.
23. The Commission will determine in any final decision adopted at the end of the administrative procedure:
 - (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time.
 - (b) the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed. For the:

first undertaking to meet point 21:	a reduction of 30 - 50%;
second undertaking to meet point 21:	a reduction of 20 - 30%;
subsequent undertakings that meet point 21:	a reduction of up to 20%.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, 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.

PROCEDURE

24. An undertaking wishing to benefit from a reduction of a fine should provide the Commission with evidence of the cartel in question.
25. The undertaking will receive an acknowledgement of receipt from the Directorate General for Competition recording the date on which the relevant evidence was submitted. The Commission will not consider any submissions of evidence by an applicant for a reduction of a fine before it has taken a position on any existing application for a conditional immunity from fines in relation to the same suspected infringement.
26. If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes significant added value within the meaning of point 21, it will inform the undertaking in writing, no later than the date on which a statement of objections is notified, of its intention to apply a reduction of a fine within a specified band as provided in point 23(b).
27. The Commission will evaluate the final position of each undertaking which filed an application for a reduction of a fine at the end of the administrative procedure in any decision adopted.

GENERAL CONSIDERATIONS

28. The annex to this amended 2002 notice, entitled “Procedure for corporate statements made for the purpose of obtaining immunity from fines or reduction of fines in cartel cases”, forms an integral part of this notice. From the date of its publication in the Official Journal, this amended 2002 notice replaces the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases. Those cases in which an undertaking contacted the Commission with a view to obtaining immunity from fines or a reduction of fines before 14 February 2002 will continue to be governed by the 1996 Leniency Notice. However, the annex to the current notice will be applied from the moment of its publication to all pending and new applications for immunity from fines or reduction of fines, including those lodged before 14 February 2002.
29. The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.
30. Failure to meet any of the requirements set out in sections A or B, as the case may be, at any stage of the administrative procedure may result in the loss of any favourable treatment set out in this notice.

31. In line with the Commission's practice, the fact that an undertaking co-operated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.
32. The Commission considers that normally disclosure, at any time, of documents or statements received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001⁵.
33. Any statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC.

⁵ OJ L 145, 31.5.2001, p. 43.