

**DRAFT COMMISSION NOTICE
ON
IMMUNITY FROM FINES AND REDUCTION OF FINES
IN CARTEL CASES**

UNICE COMMENTS

1. INTRODUCTION

UNICE has noted the Commission's draft Notice on immunity from fines and reduction of fines in cartel cases and welcomes the Commission's initiative to consult widely on the issue. UNICE appreciates being given the opportunity to exchange views with the Commission as regards issues to be taken into consideration during the review of the 1996 leniency notice and hopes that the comments set out below will be taken into account.

Competition is crucial for business; it provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice. UNICE therefore endorses the Commission's objective to devise an effective leniency programme which will provide appropriate incentives to companies which are able to provide relevant information about serious and harmful restrictions of competition in order to assist the Commission in carrying out its duties assigned to it by the Treaty.

UNICE welcomes the Commission's proposals to improve existing rules, although it has some reservations and suggestions regarding elements of the proposals, which are set out below. In its view, these suggestions, if taken on board, would render the framework more effective in favour of ensuring efficient competition.

2. DRAFT NOTICE

1 General remarks

In the Introduction of the draft notice, the Commission argues that practices aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports, are among the most serious and harmful restrictions of competition. Although UNICE would agree that such practices can indeed be very harmful and result in increased prices and reduced choice for consumers, UNICE would like to warn against an oversimplified approach in labelling hard-core cartels. The concept of a hard-core cartel as set out in the OECD Recommendation is open to many interpretations. For example, as far as limiting imports or exports are concerned, limiting production is sometimes encouraged by the authorities to avoid surpluses. Also, in some instances, such as in the case of production joint ventures, price fixing is not considered a hard-core offence.

UNICE would also caution against the risk that the leniency framework is abused as a commercial weapon by competitors who falsely accuse a company of being involved in an existing cartel. The Commission could for example state in the new notice that making allegations of anti-competitive

conduct is a serious matter causing significant damage to the undertakings concerned and that therefore such allegations will have to be substantiated, and should not be made lightly or in bad faith. As a deterrent to such conduct, consideration could be given to publicly identifying 'whistleblowers' also in the event that an investigation as regards the falsely accused undertaking fails to produce any relevant evidence.

2 Exchange of information

UNICE is worried that the effectiveness of the leniency framework could be substantially reduced if information provided by a company involved in an illegal cartel were to lead to exposure to sanctions under alternative regimes which may have jurisdiction, or worse, civil liability and claims for damages. Although, at present, general rules protecting confidential information diminish the risk of exchange to other jurisdictions, the situation might be different for the EU in the future once the Commission's modernisation proposals have entered into force.

Similarly, consideration should also be given to the interrelationship between the Commission's regime and the leniency arrangements in jurisdictions outside the EU, for instance, the effect in the EU of leniency granted in the USA or Canada.

Serious concern may arise regarding the risk of exposure to civil liability claims in or outside the EU. If the information that has been provided to the Commission by a company (or the information published by the Commission in its public decision) could substantially facilitate the establishment of civil liability of that company, this would expose this firm to claims for compensation, or worse, punitive damages, which might easily offset the advantage of receiving immunity from a fine or a reduction. UNICE therefore urges the Commission to give special consideration to this risk, which could greatly undermine the effectiveness of the leniency framework, by ensuring that the information which is published in its reasoned decisions as to the behaviour of the company qualifying for immunity is as limited as possible, and by insisting that the information used for its proceedings is privileged and cannot subsequently be used in civil law proceedings.

3 Immunity from fines and reduction of fines

For a leniency framework to work in practice, there should be clear binding conditions for immunity and reductions, which allow companies to determine precisely what their position is. In this respect, UNICE welcomes the Commission's efforts to increase clarity and certainty. UNICE fears, though, that in some respects the Commission's draft notice is not sufficiently clear to allow for an accurate evaluation.

Awareness

At para 8 of the draft Notice the Commission proposes that it will grant an undertaking immunity from a fine if the Commission is unaware of the alleged cartel and if the undertaking is the first to disclose its existence. It is unclear from the draft Notice when exactly the Commission is "aware" of an alleged cartel. UNICE suggests therefore that the Commission clarifies that it is not aware of an alleged cartel when it does not have evidence and information which, in its view, may enable it to adopt a decision ordering a verification under Article 14 (3) of Regulation 17. For the sake of consistency, point 9 (a) should then be deleted. By doing so the Commission would make it easier for companies to assess whether it is likely that they will satisfy this condition, since, alternatively, they might presume that less detailed information, for example contained in press articles or unconfirmed reports, would suffice to make the Commission 'aware' of the cartel.

Coercion

At para 9 (d) it is proposed that a company that has coerced other undertakings, through its economic strength or otherwise, to participate in the illegal activity, will not be granted immunity. UNICE finds the concept of 'coercion through economic strength or otherwise' rather vague and would welcome a clarification that the coercion at least had to be undertaken 'actively'.

Hypothetical information

At para 11 the Commission clarifies that, if necessary, the undertaking may initially present information in hypothetical terms to enable it to clarify with the Commission whether it is in a position to satisfy the conditions that the Commission is unaware of the alleged cartel and that the undertaking is the first to disclose its existence. It seems from the Notice that the information that can be presented in hypothetical terms has to be the same information that is necessary to enable the Commission to adopt a decision ordering a verification under Article 14 (3) of Regulation 17 and which is specified at para 10. This supposition is based on the inclusion of the word 'this' in the first sentence of para 11 whereby reference is made to the specified information in para 10 which enables the Commission to start an investigation. It would be contradictory to the concept of allowing hypothetical information if this information would have to be so detailed as to include a description of the suspected infringement with information on the nature of the infringement, its suspected geographical scope, the number and identity of participants and the size of the market affected. Such detailed information could hardly be presented in hypothetical terms, would in fact cease to be hypothetical.

Considering that it may be difficult to specify precisely what kind of information should be presented in hypothetical terms, UNICE suggests that at least the word "this" is deleted from the first sentence of para 11, so that companies are not discouraged from approaching the Commission with more indistinct hypothetical information.

Moreover, for the sake of clarity, UNICE suggests that the Commission clarifies whether information can be submitted orally, e.g. by telephone or in a meeting, and how this is recorded.

Five working days

Also at para 11 the Commission proposes that a deadline of no more than 5 working days will be set for the undertaking to disclose fully all information it has provided in hypothetical terms if it appears that the Commission was not aware of the alleged cartel and that the undertaking is the first to disclose its existence.

UNICE is of the opinion that the Commission should not be too strict in applying the deadline of 5 working days, but should take special circumstances into account. In some situations it can be difficult for a company to get hold of all the required information, for instance because the company which approaches the Commission has come across information about illegal activities of a subsidiary that it recently acquired. In such circumstances, where a company is still actively investigating illegal behaviour, the Commission should adopt a flexible approach, whilst at the same time guarding against abuse.

In addition, for the sake of certainty, the Commission should clarify how the 5 working days are to be calculated, for example, which holidays are taken into account and which not.

Acknowledgement

At para 12 the Commission suggests that DG COMP will provide a written acknowledgement of the undertaking's application for immunity from fines, confirming the date on which the undertaking either submitted information and evidence to the Commission or agreed to do so within 5 working days. In UNICE's view the written acknowledgement should also take the conditions set out in point 8 into account and mention that it has not become apparent that these conditions are not met, i.e. that the Commission was not "aware" of the alleged cartel and that the undertaking is the first to disclose its existence.

Moreover, for the sake of certainty, UNICE suggests adding reasonable time limits for DG COMP to provide a written acknowledgement. Referring to para 14, UNICE suggests that it is also clarified that the date on which the request for immunity was received by DG COMP is decisive for the question of which undertaking was the first applicant for immunity.

Conditional decision

At para 13 the Commission proposes that it will provide a conditional immunity from fines in writing once it has received the information and has had an opportunity to verify and come to the conclusion that it meets the requirements as set out in points 8 and 9 (a). From the point of view of providing proper levels of legal security to companies, UNICE would welcome a clarification as regards the status in law of the “conditional immunity”. A possible solution could be that the Commission mandates the Competition Commissioner to adopt a binding decision in this context.

Moreover, considering that, as suggested above, the Commission should clarify that it is not “aware” of an alleged cartel when it does not have evidence and information which, in its view, may enable it to adopt a decision ordering a verification under Article 14 (3) of Regulation 17, it should delete point 9 (a) as well as all references to that point.

Significant added value

The Commission proposes that a company can qualify for a reduction of a fine, if it provides evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission’s possession and terminates its involvement in the illegal activity (para 17). At para 18 the Commission clarifies that the concept of “added value” refers to the extent to which the evidence provided strengthens the Commission’s ability to fully establish the facts, and which information would have greater “qualitative” value than other information. The “qualitative” value of the information that represents “significant added value” and the time of presentation of the information determine the amount of the reduction, which the Commission will establish within specified bands (paras 19 and 23).

Although UNICE appreciates that the Commission wishes to increase the incentive for companies to come first with helpful information by reducing the fines for companies that come later and/or provide information with less qualitative value, UNICE believes that the proposed concepts for reduction leave too much scope for discretion to the Commission in applying them. For a leniency framework to work in practice, there should be clear binding conditions, which allow companies to determine precisely what their position is. The criteria of “significant added value” and “the qualitative value of the information that represents significant added value” are too subjective for companies to assess their position. This might discourage these companies from submitting valuable information and UNICE therefore suggests that the Commission grants a clear reduction for information which by its very nature and/or its level of detail would be suitable to contribute to establishing the facts in question.

Additionally, referring to para 21, UNICE wonders why an undertaking wishing to benefit from a reduction of a fine should provide ‘documentary’ evidence and information that may constitute proof of the cartel in question, whereas para 17 and following do not require the presentation of *documentary* evidence.

Moreover, for the sake of certainty, UNICE suggests adding reasonable time limits for DG COMP to provide an acknowledgement of receipt as referred to in para 22.

Besides, in UNICE’s view, the obligation set out in para 23 for the Commission to inform the undertaking concerned, at the latest by the date a statement of objections is notified, of a preliminary conclusion that the information and evidence submitted constitutes added value and that it intends to apply a reduction of a fine, does not provide companies with sufficient certainty. UNICE wonders what the status in law is of the “written intention to apply a reduction of a fine” and suggests that the Commission mandates the Competition Commissioner to adopt a binding decision in this context.

Aggravating circumstances

At para 20 the Commission proposes 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 infringement or constitute aggravating circumstances, it will not take into account these elements when setting any fine to be imposed on the undertaking which provided this evidence.

It is not entirely clear what the intention and impact of this proposal is and what exactly the relationship is with the Commission's guidelines on the method of setting fines. UNICE would therefore welcome some further clarification on these points, for instance by including an example in a footnote.

Final reasoned decisions

At para 24 of the draft the Commission states that it will evaluate the final position of each undertaking which has invoked the benefit of a reduction of a fine at the end of the administrative procedure and reason the conclusions in any decision adopted. Although from the point of view of transparency and providing guidance, giving reasoned decisions at the end of the procedure may seem attractive, UNICE wishes to repeat concerns expressed above about information published by the Commission in its public decision that might substantially facilitate the establishment of civil liability of a company which has provided information to the Commission. UNICE urges the Commission to give special consideration to this risk, which could greatly undermine the effectiveness of the leniency framework, by ensuring that the information which is published in its reasoned decisions is as limited as possible as to the behaviour of the company qualifying for a reduction or immunity.
