

13 November 2006

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

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 this issue. UNICE hopes that the comments set out below will be taken into account.

As stated previously, UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU. Community competition law is crucial and UNICE strongly favours 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 the duties assigned to it by the Treaty.

UNICE largely welcomes the Commission's proposals to improve existing rules, although it has some reservations and suggestions 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

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.

Marker system

It is proposed that the Commission services may grant a marker protecting immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. UNICE supports the introduction of a marker system because it will make it easier for undertakings to assess their situation by giving them more certainty although this might be undermined to some extent by the fact that the marker system will be discretionary and that the period for perfecting the marker will be uncertain.

UNICE also suggests that it is clarified that an application for a marker can also be made orally (e.g. by telephone or in a meeting) and that an acknowledgement of receipt confirming the date and time of an application may also be requested in case of an (oral) application for a marker.

One stop shop

UNICE regrets that the introduction of a marker system stops short of the establishment of a real one stop shop throughout the EU. The system would protect the applicant's place in the queue in the framework of the Commission's leniency programme only and would not resolve the problem of multiple parallel applications with competition authorities in other Member States. It should be possible to introduce a marker system throughout the EU so that an application for a marker with one of the competition authorities which are part of the ECN and have a leniency programme would suffice to protect an applicant's place in the queue in the framework of both the Community programme and relevant national leniency programmes.

In this context, UNICE recommends that the draft Notice should expressly mention the one stop shop as an objective. This would be in line with developments leading to the ECN Model Leniency Programme. For the same reasons, a reference to the ECN Model Leniency Programme should be made.

Hypothetical information

Although it will not be possible to perfect a marker by making a formal application in hypothetical terms, it will still be possible to make a formal immunity application in hypothetical terms. UNICE welcomes this possibility although it regrets that the

information and evidence which has to be presented in hypothetical terms would have to be so detailed as to include a descriptive list of the evidence, which is to be disclosed at a later date, that reflects the nature and content of the evidence in question with information on the product or services concerned by the alleged cartel and the geographic scope. Such detailed information could hardly be presented in hypothetical terms, would in fact cease to be hypothetical.

Decision not to grant immunity

It is set out in the draft Notice that immunity is not granted when the Commission had already sufficient evidence to adopt a decision to carry out an inspection or if the undertaking failed to meet the conditions set out in points 8 (a) or 8 (b) of the draft Notice. In such a case, the Commission will inform the undertaking thereof in writing. UNICE suggests that this obligation is complemented by a requirement that the evidence on which the Commission's decision is based is also presented.

Continuing involvement of the undertaking in the alleged cartel

It is proposed that as a condition for qualifying for immunity from a fine, an undertaking ends its involvement in the alleged cartel immediately except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of inspections. This would in fact force a company to continue its involvement in a cartel, and possibly incite unlawful activities, which sits uncomfortably with the general purpose of a leniency programme.

The concept of "added value"

As in the existing Notice, it is set out in the draft Notice that in order to qualify for a reduction of a fine an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession. It is subsequently clarified that 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 alleged cartel, and which information would have greater value than other information. The value of the information which represents significant added value and the time of presentation of the information determine the amount of the reduction of a fine which is established within specified bands.

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 value, UNICE believes that the rules for reduction leave too much scope for discretion to the Commission in applying them. For a leniency framework to work well in practice, there should be clear binding conditions which allow companies to determine what exactly their position is. The criterion of "significant added value" is too vague and subjective for companies to assess their position. This might discourage these

undertakings 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 proving the alleged cartel.

Final reasoned decisions

As is currently the case, the draft Notice sets out that the fact that an undertaking cooperated 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. Although from the point of view of transparency and providing guidance, giving reasoned decisions at the end of the procedure may be attractive, UNICE wishes to express concerns 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 the this risk, which would 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.

Protection of corporate statements

UNICE welcomes the introduction of a specific procedure to protect corporate statements. As explained by the Commission when presenting the proposed changes to the existing Notice, the production in civil liability proceedings of corporate statements made under a leniency programme would indeed create a considerable disincentive for companies to come forward which would seriously undermine the effectiveness of the Commission's leniency policy, jeopardising the effectiveness of the Commission's fight against cartels. UNICE suggests though, for the sake of clarity, that it is expressly mentioned in the new Notice that the use of information obtained by access to the Commission's file for the preparation of a civil liability claim may also be regarded as lack of cooperation.
