Policy Rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112586, on the reduction of fines in connection with cartels (Leniency Policy Rule)

The Minister of Economic Affairs;

Considering Section 21 of the Framework Act on Autonomous Administrative Authorities and Section 56 (a) of the Dutch Competition Act;

Decides,

§ 1. Definitions and scope

Article 1

In this policy rule, the following definitions apply:

ACM: the Netherlands Authority for Consumers and Markets, as referred to in Section 2 of the Establishment Act of the Netherlands Authority for Consumers and Markets;

Immunity from fines: a reduction of a fine of 100%;

Reduction of a fine: a reduction of a fine of no more than 50 percent as referred to in Articles 5 through 7;

Leniency: the grant of immunity from fines or a reduction of a fine to an undertaking that has participated in a cartel or to a natural person within the meaning of Section 51, paragraph 2, sub 2 of the Dutch Criminal Code, who has given instructions or has exercised de facto leadership with regard to the participation in a cartel by an undertaking;

Grant of leniency: a document with the rights and obligations of ACM and the leniency applicant;

Leniency statement: a statement that has been drafted or has been orally made by a leniency applicant for ACM in connection with a leniency application;

Leniency application: an application for immunity from fines or for a reduction of a fine;

Leniency applicant: an undertaking or a natural person within the meaning of Section 51, paragraph 2, sub 2 of the Dutch Criminal Code, who invokes this policy rule;
*Information with significant added value:* evidence that, given its nature or level of detail, enhances the ability of ACM to prove the existence of the alleged cartel, taking into consideration the information that ACM has on that cartel at the time when such evidence is submitted;

*Cartel:* an agreement or concerted practice between two or more competitors with the objective of impeding competition, which is in violation of Article 101 TFEU or Section 6 of the Act;

*Marker:* a provisional place in the order of receipt of leniency applications with regard to the same cartel;

*TFEU:* Treaty on the Functioning of the European Union;

*Act:* the Dutch Competition Act.

**Article 2**

This policy rule applies to violations of Section 6 of the Act and Article 101 TFEU insofar cartels are concerned in connection with which ACM is authorized to impose administrative fines.
§ 2. Leniency

Article 3

Upon request, ACM issues a decision on leniency.

§ 2.1 Immunity from fines

Article 4

1. ACM grants immunity from fines to a leniency applicant, if:
   a. the applicant is the first to submit a request for immunity from fines with regard to a cartel;
   b. the application concerns a cartel into which ACM has not yet launched an investigation;
   c. with his application, the applicant provides ACM with information that enables ACM to perform a targeted inspection;
   d. the applicant has not coerced another undertaking into participating in the cartel; and
   e. the applicant complies with the obligation to cooperate as referred to in Article 17.

2. ACM also grants immunity from fines to a leniency applicant if the conditions referred to in paragraph 1 sub a, d and e have been met, and:
   a. the application concerns a cartel into which ACM has already launched an investigation, but ACM has not yet sent a statement of objections within the meaning of Section 59, paragraph 1 of the Act to any of the parties involved;
   b. the application provides ACM with documents that stem from the period of the practice in question, and that had not already been in ACM’s possession, and on the basis of which ACM is able to prove the existence of the cartel.

3. The moment ACM has internally laid down in writing its first suspicion of a cartel is considered the launch of an investigation.

§ 2.2 Reduction of a fine

Article 5

ACM grants a leniency applicant a reduction of a fine of at least 30 percent and no higher than 50 percent, if:
   a. immunity from fines within the meaning of Article 4 is not available;
   b. ACM has not sent a statement of objections within the meaning of Section 59, paragraph 1 of the Act to any of the parties involved in the cartel;
   c. with regard to a cartel, the applicant is the first to submit an application for a reduction of a fine that contains information with significant added value; and
   d. the applicant complies with the obligation to cooperate, as referred to in Article 17.
Article 6

ACM grants a leniency applicant a reduction of a fine of at least 20 percent and no higher than 30 percent, if:

a. immunity from fines within the meaning of Article 4 is not available;
b. ACM has not sent a statement of objections within the meaning of Section 59, paragraph 1 of the Act to any of the parties involved in the cartel;
c. with regard to a cartel, the applicant is the second to submit an application for a reduction of a fine that contains information with significant added value; and
d. the applicant complies with the obligation to cooperate, as referred to in Article 17.

Article 7

The ACM grants a leniency applicant a reduction of a fine of up to 20 percent, if:

a. immunity from fines within the meaning of Article 4 is not available;
b. ACM has not sent a statement of objections within the meaning of Section 59, paragraph 1 of the Act to any of the parties involved in the cartel;
c. with regard to a cartel, the applicant is the third or subsequent to submit an application for a reduction of a fine that contains information with significant added value; and
d. the applicant complies with the obligation to cooperate, as referred to in Article 17.
§ 3. Orientation on leniency application

Article 8

1. A prospective leniency applicant may contact ACM to exchange ideas about a body of facts and the applicability of this policy rule in that context.
2. The interaction, as referred to in the first paragraph, may take place anonymously or through a lawyer and may concern a hypothetical set of facts.

Article 9

1. A prospective leniency applicant may inquire with ACM by telephone, and solely through a lawyer, as to whether immunity from fines within the meaning of Article 4, paragraph 1, is still available.
2. If ACM responds positively to the inquiry as referred to in paragraph 1, the lawyer is required to submit an application for immunity from fines immediately.
§ 4. The leniency application

Article 10

A leniency application may be submitted by:

a. an undertaking that has participated in a cartel, represented by someone who is authorized to make binding arrangements on the undertaking’s behalf;

b. a natural person, not representing an undertaking but explicitly acting on his/her own behalf, who has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in a cartel; or

c. multiple natural persons simultaneously, not representing an undertaking but explicitly acting on their own behalf, who have given instructions or have exercised de facto leadership with regard to the participation of an undertaking in a cartel, provided that they work at the same undertaking involved in the cartel, when submitting the application.

Article 11

1. A natural person who submits a leniency application may be eligible for the same immunity or reduction of a fine as the undertaking at which he/she works, if he/she declares that he/she wishes to be considered a leniency co-applicant with the undertaking, and he/she, on his/her own, meets the conditions for immunity from fines within the meaning of Article 4, or for a reduction of a fine within the meaning of Articles 5, 6 or 7.

2. Paragraph 1 applies mutatis mutandis to a natural person who, at the time of submission of the leniency application, no longer works for the undertaking involved in the cartel, if, in ACM’s opinion, such application is not opposed by the interests of the investigation.

3. Multiple natural persons who submit a leniency application simultaneously may be eligible for the same leniency category if they declare that they wish to be considered each other’s leniency co-applicants, and each of them independently meets the conditions for immunity from fines within the meaning of Article 4, or for a reduction of a fine within the meaning of Articles 5, 6 or 7.

Article 12

A leniency application is submitted by email, fax, regular mail, telephone or in person.

Article 13

1. A leniency application includes a written leniency statement that includes, insofar as is known to the applicant at the time of submission:
   a. a statement that the applicant will comply with all applicable leniency conditions under this policy rule;
   b. a statement that the applicant has participated in the alleged cartel as claimed by the applicant, if the applicant is an undertaking;
c. a statement supported with reasons that the leniency applicant is a natural person within the meaning of Section 51, paragraph 2, sub 2 of the Dutch Criminal Code, who has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in the cartel, if the applicant is a natural person;
d. a detailed description of the cartel arrangement, including the products or services involved, the geographical scope, the duration, the functioning of the cartel and the estimated market volumes or sales affected by the cartel, as well as the specific dates, locations, contents of and participants in the cartel interactions;
e. the name and address of the leniency applicant;
f. the names and addresses of all the undertakings that participate or have participated in the cartel, as well as the names, positions, working locations and, where relevant, home addresses of the individuals who are or have been involved in the cartel;
g. information on whether the leniency applicant has approached or may approach the European Commission in relation to the cartel;
h. where applicable, which other competition authorities the applicant has approached or may approach in relation to the cartel, and

2. A leniency application also contains evidence corroborating the statement as referred to in paragraph 1, insofar the applicant has such evidence or such evidence is reasonably available to the applicant at the time of the submission of the application. The leniency statement contains an explanation of the evidence.

Article 14

1. Contrary to Article 13, paragraph 1, a leniency statement may, with ACM’s permission, be submitted orally, if the leniency applicant, in ACM’s opinion, has a legitimate interest in doing so.

2. In the event of an oral leniency statement, ACM records this statement and draws up a transcript.

Article 15

1. A leniency applicant who submits an incomplete leniency application may be eligible for a marker, if:
   a. the application offers, in ACM’s view, a concrete basis for a reasonable suspicion of the applicant’s involvement in a cartel; and
   b. the leniency applicant provides at least information on:
      i. the name and address of the leniency applicant;
      ii. the cartel participants;
      iii. the affected products or services;
      iv. the cartel’s geographical scope;
      v. the cartel’s duration;
      vi. the nature of the cartel’s practices; and
      vii. whether the leniency applicant has approached or may approach the European Commission with regard to the cartel;
viii. whether the leniency applicant has approached or may approach other competition authorities with regard to the cartel.

2. ACM furthermore establishes a marker for a leniency applicant, if:
   a. the European Commission is particularly well-placed to investigate the cartel;
   b. the leniency applicant has also submitted a leniency application to the European Commission or intends to do so shortly; and
   c. the leniency applicant, when it submits the leniency application, provides at least the information as referred to in the first paragraph sub b and specifies in which EU Member State or Member States the evidence regarding the cartel is presumably located.

3. If ACM establishes a marker for a leniency applicant, it specifies a time limit before which the applicant must have completed the leniency application.

4. If the incomplete leniency application is completed within the time limit as referred to in paragraph 3, the application is deemed to have been completed from the moment the marker became applicable.

5. If the incomplete leniency application is not completed before the time limit as referred to in paragraph 3, ACM turns down the application.

Article 16

ACM registers the time of receipt of a leniency application.
§ 5. Obligation to cooperate

Article 17

1. Until the decision to impose an administrative fine becomes final with respect to all practices involved in the cartel, a leniency applicant fully and continuously cooperates as required in the interest of the investigation or the proceedings.

2. The obligation to cooperate as referred to in paragraph 1 includes at least that the leniency applicant:
   a. Refrains from any action that may impede the investigation or the proceedings;
   b. From the moment of submission of the leniency application, provides ACM, of the applicant’s own accord or at ACM’s request, as soon as possible, with all information regarding the cartel that the applicant has or may reasonably obtain;
   c. Immediately after submission of the leniency application, ceases any involvement in the cartel, unless and insofar as ACM considers the continuation thereof to be reasonably necessary in order to preserve the effectiveness of inspections; and
   d. Ensures that individuals who are working for the applicant and, insofar reasonably possible, individuals who worked for the applicant, are available for making statements.
§ 6. Determining a reduction of a fine

Article 18

ACM determines a reduction percentage within the meaning of Articles 5 through 7, using the date and time as referred to in Articles 15, paragraph 4, or 16, and the added value of the information that the applicant provided to ACM as part of its leniency application.

Article 19

If a leniency applicant, within the meaning of Articles 5 through 7:
   a. is the first to provide information with significant added value that the ACM did have, and
   b. ACM uses this information to demonstrate additional facts, as a result of which the seriousness or the duration of the violation increases,
ACM does not take these additional facts into account when determining the level of the fine to be imposed on the leniency applicant that has provided that evidence.
§ 7. Grant of leniency

Article 20

1. Upon receipt of a leniency application that is in accordance with this policy rule, ACM draws up a grant of leniency as soon as possible.
2. The leniency applicant signs the grant of leniency.

Article 21

1. The leniency agreements determines the final order of receipt of leniency applications regarding a single cartel.
2. In situations as referred to in Article 11, ACM individually assesses compliance with the obligations of the leniency agreement for each leniency co-applicant.

Article 22

1. Failure on the part of a leniency applicant to fulfil the obligations of the grant of leniency renders the grant of leniency null and void.
2. If the grant of leniency is rendered null and void, ACM may use the information that it received from the leniency applicant in evidence, and ACM may impose a fine on the leniency applicant as if the leniency application had not been submitted.

Article 23

ACM informs a leniency applicant as referred to in Articles 5 through 7 of the percentage of the reduction of a fine no later than the statement of objections within the meaning of Section 59, paragraph 1 of the Act is sent to the applicant.

Article 24

ACM imposes the fine in observance of the grant of leniency, provided that the leniency applicant fully complies with the obligations of the grant of leniency.
§ 8. Confidentiality

Article 25

ACM does not use in evidence the information that it obtains:
   a. from prospective leniency applicants during the interactions as referred to in Articles 8 and 9; or
   b. as a result of leniency applications submitted in good faith that are turned down before the applicant is offered a grant of leniency, against the provider of the information, unless the provider gives its consent to ACM or ACM obtained the same information from another source.

Article 26

ACM does not disclose the identity of the leniency applicant to third parties until the statement of objections within the meaning of Section 59, paragraph 1 of the Act has been issued to anyone involved in the cartel, unless a statutory obligation mandates otherwise, or the leniency applicant has consented to disclosure.

Article 27

1. ACM grants addressees of a statement of objections within the meaning of Section 59, paragraph 1 of the Act access to a leniency statement, provided that the addressees and their authorized representatives promise in writing that they will not photocopy, photograph, or record the contents of the leniency statement or of its transcript in any other way, except by making written notes thereof, and that they will use the information contained in the leniency statement only in the administrative proceedings in connection with the cartel.

2. In accordance with Article 12 of Regulation 1/2003 of the Council of 16 December 2002 (OJ, 2003, L1), ACM only forwards a leniency statement to another competition authority or to the European Commission, if:
   a. the conditions of the Commission Notice on cooperation within the Network of Competition Authorities (OJ, 2004, C 101) are satisfied; and
   b. the protection against disclosure provided by the receiving competition authority or the European Commission is equivalent to that offered by ACM.
§ 9. Transitional and final provisions

Article 28

To leniency applications that had been received before this policy rule came into effect, to leniency applications concerning a cartel with regard to which other leniency applications had already been received before this policy rule came into effect, and to immunity from fines and reductions of a fine that had been granted before this policy rule came into effect, the Policy Rules of the Minister of Economic Affairs on the imposition of administrative fines by ACM continues to apply, as they were applicable immediately preceding that date.

Article 29

This policy rule enters into force on 1 August 2014.

Article 30

This policy rule will be referred to as: Leniency Policy Rule (Beleidsregel Clementie).

This policy rule will be published in the Dutch Government Gazette with its explanatory notes.

The Hague, 4 July 2014
The Minister of Economic Affairs
Explanatory notes

I. General

1. Introduction and purpose

This policy rule contains the rules on leniency which establish the conditions under which undertakings and natural persons that have been involved in a cartel, as referred to in Article 1, and that have informed the Netherlands Authority for Consumers and Markets (hereinafter referred to as ACM) of this cartel may be eligible for immunity from fines or a reduction of a fine. The level of the fine for violations of legislation that falls under the responsibility of the Minister of Economic Affairs is to be determined by ACM on the basis of the ACM Fining Policy Rule 2014. This policy rule is therefore considered in conjunction with the ACM Fining Policy Rule 2014.

The leniency rules apply exclusively to cartels, not to other violations of rules ACM enforces. This policy rule serves three purposes within the context of cartel enforcement. Firstly, this policy rule helps ACM track down cartels (which are generally conducted in secret). Secondly, it helps ACM acquire evidence about cartels. Thirdly, the existence of a leniency rule in itself may have a preventive effect on the formation of cartels.

The policy rule is a continuation of the leniency rules as previously applied by ACM and the Netherlands Competition Authority, one of its legal predecessors. The leniency instrument was previously included in the Policy Rules of the Minister of Economic Affairs on the imposition of administrative fines by ACM. Owing to the limitation of the scope to cartel violations only and the fact that the ACM Fining Policy Rule 2014 no longer makes a distinction on the basis of area or sector, it has been decided to lay down the leniency rules in a separate policy rule, as had been the case previously to the establishment of ACM (Policy Rules of the Minister of Economic Affairs on the reduction of administrative fines regarding cartels). Moreover, this corresponds with the leniency rules of the European Commission and many other European Member States. Splitting the policy rules into two separate rules has no material consequences for the contents of the leniency rules.

2. Correspondence with European leniency rules

This policy rule must be considered within the context of the leniency rules of the European Commission and those of other competition authorities, in particular within the European Competition Network (hereinafter referred to as ECN), but also outside of the European Union. After the first Dutch leniency rules entered into force in 2002, they were, in subsequent versions, increasingly aligned with, in particular, the leniency rules applicable in the European Union. ECN’s first Model Leniency Programme (hereinafter referred to as MLP) published in September 2006 was an important step in the harmonization of leniency regulations within the network of European competition authorities (MLP 2006). The MLP operates on the basis of the agreement between the competition authorities belonging to ECN, that the competition authorities align their leniency rules as much as possible with the MLP – within the limits of their national law. At the same time, ECN members are free, on the basis of this agreement, to deviate from the aforementioned model in their national leniency rules to the advantage of
leniency applicants.

The harmonization envisaged by the MLP 2006 was realized in the Dutch leniency rules of October 2007. In November 2012, certain issues of the MLP were revised (MLP 2012, see http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf). The present policy rule is, partly owing to the ever increasing practical experience of ACM and its leniency rules, more than previously aligned with the MLP, and, through this model, with the leniency rules of the European Commission and the other national competition authorities in the European Union.

3. Contents of the policy rule

The two most significant modifications of the previous leniency rules are the following. Firstly, leniency granted to a leniency applicant who is the first to confess a cartel, when ACM has already launched an investigation (type 1B leniency as defined in the MLP), is modified from a reduction of a fine between 60 and 100 percent to a fixed reduction of a fine of 100 percent and the evidential threshold for this leniency type (Section 4, paragraph 2) is aligned with that of the MLP. Secondly, a provision is made for the reduction of a fine for leniency applicants who are not eligible for immunity (type 2 leniency as defined in the MLP), in a form in which the previously applicable single range of reduction between 10 and 40 percent is replaced by three graduated fine reductions as provided in Sections 5 (within the range of 30 to 50 percent), 6 (within the range of 20 to 30 percent), and 7 (up to 20 percent).

4. Leniency Office of ACM

ACM has entrusted ACM’s Leniency Officer to implement the rules regarding leniency. The Leniency Officer is the head of the Leniency Office. Leniency applications are to be submitted exclusively to the Leniency Office (therefore not to any other ACM section). The Leniency Office carries out exploratory talks, amongst other things, with prospective leniency applicants, accepts leniency applications and assesses the leniency applicants’ cooperation.

5. Implementation review and internet consultation

A draft of this policy rule was submitted to ACM for an implementation review. ACM deems the policy rule feasible. No further comments were made. Considering the nature of the policy rule, the enforceability of the policy rule has not been reviewed.

A draft of this policy rule has also been publicly consulted. There have been two responses; from Freshfields Bruckhaus Deringer and from the Dutch Bar Association. One respondent emphasized the importance of an adversary procedure. ACM acknowledges this. The arrangements of the hearing, however, are not subject to this policy rule, but for ACM to decide. The respondent’s comment has ACM’s attention.

Another respondent pointed out in this policy rule some minor deviations from the leniency rules in a number of other Member States of the European Union, the European Commission, and the European Competition Network (ECN). Following this comment, some issues in the policy rule were amended. It is provided that when ACM decides to grant a marker to a leniency applicant, it gives the leniency applicant a time limit within which the leniency
applicant must complete the leniency application. In addition, the explanatory notes clarify that ACM accepts concise leniency applications in English, and these explanatory notes refer to the template on the ECN website.

II. Sections

Section 1

This section contains the definitions that are not laid down in the Dutch Competition Act (hereinafter referred to as Act).

Grant of leniency

The grant of leniency is a document which the Leniency Officer sends to the leniency applicant after he has confirmed that a leniency application was submitted in accordance with the terms and condition of this policy rule.

Leniency statement

The leniency statement refers to any statement of a leniency applicant, regardless of whether it is drawn up and submitted in writing, or conducted orally, within the context of a leniency application.

The concept of leniency statement includes statements of undertakings (meaning statements submitted as such by an undertaking) as well as statements made by natural persons on behalf of the undertaking, for example employees or former employees kept available by the undertaking, as part of its obligation to cooperate, to make statements to ACM, or natural persons who are leniency co-applicants with the undertaking within the meaning of Section 11.

The concept of leniency statement includes not only leniency statements submitted through which a leniency application is submitted until the time ACM grants leniency to the leniency applicant, but also includes statements submitted to ACM afterwards on account of the obligation to cooperate during the investigation into the cartel. These may include statements of the leniency applicant in response to written or oral requests for information by ACM, or further statements made to ACM by the leniency applicant on his or her own initiative. The concept of leniency statement includes neither documents and other evidence from the time period of the behavior subject to the investigation, nor documents and other evidence submitted by the leniency applicant along with the leniency statement within the context of the leniency application.

Leniency applicant and leniency application

A leniency application may result in immunity from fines or a reduction of a fine. Wherever the distinction is irrelevant, in the policy rule the generic term leniency application or leniency applicant is used.
Information with significant added value

The concept of ‘information with significant added value’ serves two purposes within the scheme (system?) of this policy rule.

Firstly, this concept is determines in whether an applicant may qualify for a grant of leniency with regard to a reduction of a fine (see Sections 5 through 7, in which the concept is referred to as the “threshold criterion”)
Secondly, this concept determines the percentage level of the fine reduction for which the leniency applicant is eligible within the applicable range (see Sections 18 and 19).

With regard to the contents of the term “information with significant added value”, the general rule is that written evidence originating from the time period in which the facts took place is considered to have greater value than evidence established at a later stage. The same holds true for evidence directly relevant to the facts in question, in comparison to evidence with only indirect relevance. Finally, evidence that is determinative in itself is considered to have greater value than evidence such as statements that in the event of a dispute need to be further substantiated.

Cartel

The scope of applicability of this policy rule is limited to cartels. The concept of a cartel includes behavior that under set European case law may be regarded as a single and continuous infringement (also “complex cartels”). The concept of competitors includes actual as well as potential competitors. The words “between competitors” refer to the requirement that the cartel should contain a horizontal element. The use of the words “between competitors” does not exclude that a cartel within the meaning of this policy rule may also contain vertical elements. For example, the policy rule may apply in a situation in which a group of competitors participate in a cartel together with a cartel facilitator, or in a situation in which two groups of undertakings from different levels of the production and distribution chain participate in a cartel. Furthermore, the policy rule may apply if a group of competitors indirectly exchange information through one or more third parties (a ‘hub-and-spoke’ system).

Moreover, the concept of cartel is limited to arrangements or concerted practices, but does not include decisions of associations of undertakings. This limitation seeks to prevent a situation in which effectively an entire cartel (its members by virtue of the association) would qualify for immunity from fines or a reduction of a fine through a leniency application by an association of undertakings, as this would conflict with the purpose of these policy rules to assist, in view of public interest, in cartel enforcement.

Marker

A marker is a point in time (time and date) determined by the Leniency Officer. This time protects a provisional place in the queue of received leniency applications regarding the cartel concerned. A leniency applicant may, after ACM has granted a marker with regard to the leniency application in question in the advantage of the leniency applicant, supplement said leniency application within a period determined by the Leniency Officer. The perfected
leniency application must be submitted by the date when the marker is granted, and will be assessed in light of the information ACM has concerning the alleged cartel at the time of the marker.

Section 2

This provision limits the scope of applicability of this policy rule to cartels, as described in the definition in Section 1. Furthermore, it follows from this provision that ACM does not grant leniency in cases in which it is able to determine that there has been an infringement, but in which its competences to impose a fine are barred.

Section 3

Upon request, ACM issues a decision on leniency. Leniency applications must be submitted to ACM’s Leniency Office, which is entrusted with the implementation of this policy rule. The Leniency Officer is responsible for preparing and issuing grants of leniency.

Section 4

Section 4 deals with the conditions to be eligible for immunity from fines. Immunity from fines is defined as a reduction of a fine of 100 per cent.

The first paragraph sets out the provisions for immunity of fines of the so-called type 1A. Such an immunity from fines is granted to a leniency applicant essentially in exchange for confessing the cartel to ACM. Notwithstanding the condition that a leniency applicant belonging to this type must submit all evidence he or she would reasonably have or could have at his or her disposal (see Section 17, paragraph 2, sub-paragraph b), the evidential threshold for this type of immunity is reached when the leniency application enables ACM to carry out a “targeted inspection”. In cases in which ACM does not have the competence to carry out a targeted inspection itself, for example if certain relevant business locations or homes are situated outside of the Netherlands, the information must enable ACM to invoke competences in a different manner, for example by having a competition authority under a different jurisdiction carry out an inspection on behalf of ACM (for example pursuant to Section 22 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4/1/2003).

The second paragraph sets out the provisions for immunity of fines of the so-called type 1B. Such an immunity from fines is granted to a leniency applicant in exchange for providing evidence of the alleged cartel to ACM. The evidential threshold for this type of immunity is reached if the leniency application provides documents, in any form whatsoever (for example in writing or in digital form), originating from the period of the practices, that ACM did not yet have at its disposal, and on the basis of which ACM is able to prove the existence of the cartel.

Section 4, paragraph 1, sub-paragraph d, sets out the condition that a leniency applicant otherwise meeting all conditions has not coerced another undertaking into participating in the cartel. The purpose of including this excluding criterion is to prevent undertakings from abusing the system in order to create a disadvantage to competitors, for the sole reason that
The policy rule is in place. The criterion concerns the coercing of an undertaking to participate in a cartel. Coercion seldom occurs; threats of a commercial nature do not usually constitute coercion. Coercion may be the case in a situation in which there is a concrete threat of physical violence or an economic threat endangering acutely, realistically and permanently the existence of the coerced undertaking. The latter is likely to occur only in extreme cases, for example when the coercer is the supplier of essential material for the coerced undertaking and threatens to suspend the supply. In effect, the undertaking coerced into participating in the cartel must be able to demonstrate that there has been a form of objective dominance.

Sections 5 through 7

Sections 5 through 7 set out the three graduated categories of the fine reductions which are also included in the leniency rules of the European Commission and several other Member States, and concern leniency as considered Type 2 in the MLP 2012. In a situation in which there were multiple leniency applicants, and each applicant submitted a leniency application in the form of, principally, an application for immunity from fines, and, alternatively, an application for a reduction of a fine, and all applicants successively meet the conditions for the most favorable form of leniency in the individual situations, the first leniency applicant is eligible for immunity from fines (either under Section 4, paragraph 1, or under Section 4, paragraph 2), the second leniency applicant is eligible for a reduction of a fine within the range of 30 to 50 percent, the third leniency applicant is eligible for a reduction of a fine within the range of 20 to 30 percent and the subsequent leniency applicants is eligible for a reduction of a fine within the range of 0 to 20 percent.

However, it is also possible that the first leniency applicant fails to meet the conditions for immunity from fines, for example because the criterion of coercion set out in Section 4, paragraph 1, sub-paragraph d, applies (both in type 1A and 1B cases). Furthermore, it may be the case, in type 1B cases in particular, that the leniency application fails to reach the evidential threshold set out in Section 4, paragraph 2, sub-paragraph b. In such cases, it is possible that the leniency application of the first applicant does reach the evidential threshold for “significant added value” set out in Sections 5 through 7. If this is the case, and there are multiple leniency applicants each applying principally for immunity from fines and alternatively for a reduction of a fine, none of the applicants are eligible for immunity from fines, but the first leniency applicant is eligible for a reduction of a fine within the range of 30 to 50 percent, the second applicant is eligible for a reduction of a fine within the range of 20 to 30 percent, and the third and subsequent applicants are eligible for a reduction of a fine within the range of 0 to 20 percent.

A leniency applicant is eligible for a reduction of a fine only if the case concerns a leniency application for a reduction of a fine in accordance with this policy rule. Such a leniency application consists of a leniency statement within the meaning of Section 13, and any other documents originating from the period in which the practices took place submitted as annexes along with the statement, considering which the Leniency Officer establishes whether they meet the conditions of this policy rule, including the evidential criterion of having significant added value. Such an application for a reduction of a fine is in practice be submitted subsequent to an initial submission (often by telephone) indicating that the initial leniency application is incomplete, followed by the granting of a marker, and subsequently the
completion of the leniency application within the time limit determined in connection with the
granting of the marker. As a general rule, the Leniency Officer determines at that time whether
the application for a reduction of a fine meets the threshold criterion of having significant
added value, in which case the Leniency Officer issues a grant of leniency.

Section 8

This section sets out the provisions for the option for prospective leniency applicants to
present practical and technical issues of all sorts to ACM’s Leniency Officer. Many subjects
presented to the Leniency Officer are in practice issues that involve the framework of the
undertaking considering under company law to apply for leniency or issues that involve
observing the prospective leniency applicant’s confidentiality with regard to the preparation
and submission of a leniency application.

Section 9

Section 9 sets out the provisions for the option to ask ACM’s Leniency Officer, through an
attorney-at-law, whether immunity from fines within the meaning of Section 4, paragraph 1, is
in principle available with regard to the cartel. This requires the attorney-at-law to describe
the product or service to which the cartel is relevant as accurately as possible. If the answer is
in the affirmative, the prospective leniency applicant is obligated to submit an application for
immunity from fines immediately. This submission does not necessarily result in a conditional
grant of immunity, for it is possible that the application for immunity from fines fails to meet
the conditions set out in section 4, paragraph 1. If the answer is in the negative, the
prospective leniency applicant is not obliged to submit the application. Moreover, it is possible
that the Leniency Officer is unable to answer the question whether immunity from fines is
available, for example because it is impossible to define sufficiently and accurately the
boundaries of potentially separate cartels, which constitutes an obstacle to answering the
question correctly.

Section 10

These provisions describe the three types of leniency applicants distinguished in this policy
rule: undertakings; natural persons in effect considered having a leading and/or commissioning
role with regard to the behavior of an undertaking which falls within the notion of cartel; and,
finally, groups of natural persons from the same undertaking who, together but independently
from the undertaking, submit a leniency application.

The concept of undertaking is in accordance with the definition in the Act, which in turn is in
accordance with the notion of undertaking in EU legislation. With regard to undertakings, t
the leniency application must be submitted by the civil law entity that is held liable by the
undertaking for participating in the cartel. The general rule is that this is at least the highest
parent company of a group as structured at the time a leniency application is submitted. The
notion of undertaking frequently includes multiple legal entities (legal persons) from the same
group. Generally, legal entities no longer connected to the undertaking may not be included in
the leniency application of the undertaking. They may, provided that they are liable for the
behavior and provided that the competences of ACM to impose a fine are not barred by
In cases in which finable natural persons are considered leniency co-applicants with an undertaking, the assessment of the leniency application of the undertaking is followed by the assessment of the evidential aspects of the leniency applications of these natural persons. The undertaking is free to obtain and include information of such individuals, insofar they are individuals employed at the undertaking at that time, in the leniency application of the undertaking.

The aim of this policy is to provide that finable individuals working for an undertaking who, as leniency co-applicants with the undertaking, fully cooperate with the investigation may be eligible for leniency of the same type (immunity from fines or the applicable range of a reduction of a fine) as the undertaking for which they work.

The second paragraph of this section grants ACM a margin of discretion to provide that natural persons no longer employed at the undertaking at the time of the leniency application may be eligible for leniency of the same type as this undertaking. In a situation in which a finable natural person had been employed at the undertaking submitting the leniency application, but was subsequently employed at another undertaking which is suspected to be liable for the same cartel but which has not submitted a leniency application, this is usually not permitted.

Section 12

The time of receipt of the leniency application determines the application of this policy rule. This time of receipt is registered by ACM pursuant to Section 16. As no guarantees can be given with regard to the times of certain relevant actions concerning mail handling (mail delivery as well as internal mail management within ACM), submission by post is not recommended.

Section 13

These provisions describe the contents of a leniency application. A leniency application consists of a leniency statement and documents (in any form whatsoever) or other evidence originating from the period of the behavior. After an initial statement (often by telephone), a leniency application is generally incomplete, and a marker follows, with a time limit within which to complete the leniency statement. When the marker is granted, the leniency applicant may make or submit several leniency statements, and submit documents.
The leniency statement of an undertaking must be drawn up in the form of a corporate statement on behalf of the undertaking. This is a statement in which the undertaking states its behavior as involvement in the alleged cartel. The cartel conduct must be described in the corporate statement from the perspective of the undertaking. Such descriptions do not generally require inclusion of confidential details of the undertaking.

The first paragraph, sub-paragraph b, sets out the requirement that the leniency applicant must state in his leniency statement that he participated in the by him alleged cartel.

From the first paragraph, sub-paragraph d, it follows that the statement must contain a detailed description of the cartel. Given the fact that a leniency statement constitutes a statement “from within” the cartel, the requirements for the level of accuracy and detail of the description are generally high.

A leniency application of an undertaking must describe those involved in the cartel contacts, including the current or former employees of this undertaking.

The second paragraph of this section provides that the leniency statement must also contain explanatory notes for every piece of evidence submitted. In practice, this requires accurate piece-by-piece explanatory notes for each individual document submitted.

**Section 14**

This section provides that ACM permits oral statements, in the event that the leniency applicant has a justified interest in making one. A justified interest in making an oral statement applies in any case if the leniency applicant risks mandatory disclosure under civil law of a written statement in legal systems such as that of the United States and several Member States of the European Union (such as Cyprus, Ireland and the United Kingdom). Furthermore, ACM considers a justified interest in submitting an oral statement instead of a written one applicable, if the European Commission is particularly well placed, within the meaning of marginal 14 of the Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101/103, 27/04/2004), to carry out the investigation into the cartel, as is the case when the cartel has consequences for competition in more than three Member States.

**Section 15**

This section provides for the marker. ACM may grant markers both with regard to applications for immunity from fines and with regard to applications for a reduction of a fine. The first paragraph of this section contains the conditions to qualify for a marker.

When ACM grants a marker, it sets a time limit within which the leniency applicant must complete the leniency application. If the incomplete leniency application is perfected within this time, the leniency application is deemed complete, pursuant to paragraph 4, from the date the marker becomes applicable. If the leniency applicant fails to perfect the leniency application within the set time, ACM rejects the leniency application pursuant to paragraph 5.
The second paragraph clarifies that ACM may also grant a marker in answer of a so-called “summary application” (see Sections 24 through 27 of the MLP 2012). This applies in situations in which leniency applications are submitted by undertakings when the European Commission seems particularly well placed to carry out the investigation, but the undertaking is not certain and therefore also needs to take into account the possible allocation of the case to national competition authorities. In such situations ACM generally establishes a marker without immediately setting a time limit for the leniency applicant to complete the leniency application. Should thoughts about the allocation of the case require it, ACM may set a reasonable time for the leniency applicant within which to complete the summary application.

ACM accepts summary applications in English. ACM may afterwards request a Dutch version of the leniency statement from the leniency applicant. The members of ECN have published a uniform template for the submission of summary applications: http://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf.

Section 17

This section describes the specific obligation to cooperate by which leniency applicants are bound in order to be eligible for any form of leniency.

First paragraph

A leniency applicant is obligated to lend continuously all cooperation which is required in the interest of the investigation or the proceedings. This must be clearly explained to the applicant. The broad scope of the concept is due to the exception provided by the leniency rules to current rules (on account of the Fining Policy Rule) about the fining of cartels, which are considered serious infringements of competition rules. Such is illustrated by words such as “at least” in the second paragraph. Only if a leniency applicant “supports ACM” in effect by way of his leniency application, is the granting of leniency justified from a public point of view (see also the Judgment of the General Court of 9 September 2011, Case T-12/06, Deltafina SpA v Commission).

The obligation as referred to in the second paragraph, sub-paragraph a, to refrain from any behavior hindering ACM’s investigation, plays a role from the moment the leniency applicant considers the leniency application; therefore before submitting a leniency application. The obligations referred to in the second paragraph, sub-paragraphs b, c, and d, play a role from the moment the leniency application is being submitted. The obligation to cooperate also extends to the proceedings, therefore to the period after a report as referred to in Section 59, paragraph 1, of the Act has been sent to the leniency applicant. Cooperation with the proceedings, outside of the examination of the facts, includes, for example, providing witnesses in the proceedings in support of ACM.
Second paragraph, sub-paragraph a

Confidentiality

The obligation to refrain from impeding behavior also means that the leniency applicant is expected to refrain from any act or omission that may impede ACM’s investigation. This includes, amongst other things, the protection of confidentiality from third parties (in the case of an undertaking: any third party outside of the undertaking) about the fact that a leniency application is being prepared or is submitted, as well as the contents thereof. This naturally excludes contacts with third parties brought in by the undertaking for support in contacts with ACM. This does require, naturally, the guarantee that no information reaches other third parties through the authorized representative or his office. Furthermore, the possibility remains for a leniency applicant to inform other authorized competition authorities of the existence of the leniency application, in the event that this is necessary with regard to the submission of a leniency application there. In that case, it is not a question of impeding behavior. In the event that, in other situations, the leniency applicant should wish to provide certain data to third parties, he may contact the Leniency Officer in this matter. The Leniency Officer can assess whether in the situation in question the providing of this information would be considered behavior potentially impeding the investigation.

Other aspects of the obligation to refrain from any act or omission potentially impeding ACM’s investigation

The obligation of a leniency applicant to refrain from any act or omission that might impede ACM’s investigation also includes, for example, the obligation not to destroy any evidence and not to manipulate or tamper with any evidence.

Second paragraph, sub-paragraph b

Active obligation to provide information

The second paragraph of Section 17, sub-paragraph b, sets out the provision, in short, that a leniency applicant provides to ACM all relevant information about the cartel that the applicant has or may reasonably obtain from the moment of submission of the leniency application.

The concept of “[information that the applicant] has or may reasonably obtain” needs to be interpreted broadly. If the leniency applicant is an undertaking, this concept includes documents (in any form whatsoever) or other evidence coming from within the undertaking (meaning the group of which the undertaking consists under competition law. In principle, all information in the memories of all people employed at the undertaking must be put at the disposal of the undertaking (regardless of the capacity in which or the employer from which the individual concerned has obtained this information). This concept also includes information and documents (in any form whatsoever) or other evidence which does not lie within the undertaking, but which can be accessed by the leniency applicant, for example archives or digital information kept by third parties at the request of the undertaking.
With regard to leniency applicants who submit their leniency application at a time when no investigations have been carried out, in practice the obligation to observe confidentiality (second paragraph, sub-paragraph a) generally influences the extent to which the leniency applicant must observe the obligation to provide information (second paragraph, sub-paragraph b). Once it is presumed that the leniency application meets the applicable conditions, retaining a surprise effect with those subject of inspections may justify certain actions being withheld within the internal investigation of the undertaking until after the inspections. Finding a balance in the application of both leniency conditions in light of the interests of the investigation may be the subject of discussion with the Leniency Officer.

Section 18

Pursuant to this section, the exact percentage of the fine reduction is determined within the applicable range pursuant to Sections 5 to 7. As mentioned in the explanatory notes of Sections 5 to 7, the exact percentage of the fine reduction within the applicable range is determined based not only on the information submitted along with the initial leniency application, but also on any information subsequently submitted within the framework of the obligation to lend full cooperation (supplementary leniency statements and evidence). This last assessment generally takes place just before communicating the report within the meaning of Section 59, paragraph 1 of the Act to the leniency applicant.

Section 19

This section provides the rules of the so-called “de facto” partial immunity. The provisions specify that it must concern information (statements and evidence originating from the period of the behavior) that (i) in itself has significant added value, (ii) is new to ACM, and (iii) is used by ACM to establish that there has been an infringement which results in a higher calculation of the fine for the applicant requesting a fine reduction.

Section 20

These provisions regulate the grant of leniency. Certain necessary steps precede the communication of a grant of leniency, such as the submission of the leniency application (often by telephone) in which the leniency applicant submits the information needed in order to obtain a marker, the establishing of a marker, the continuation of an internal investigation within the leniency applicant resulting in the collection of relevant documents and other evidence and the drawing up of a detailed leniency statement. Once the detailed leniency statement and supplements have been submitted, the Leniency Officer assesses them in light of the leniency conditions, among which is the applicable evidential threshold. Generally, shortly afterwards a grant of leniency is communicated to the leniency applicant. Subsequently, an investigation is launched, or continued if it already was underway. In the event that a leniency applicant is eligible for a conditional reduction of a fine (as opposed to conditional immunity from fines), the Leniency Officer generally first communicates a grant of leniency in which the applicable range of the fine reduction is mentioned, after which, after the conclusion of the examination of the facts of the cartel (just before the communication of a potential report within the meaning of Section 59, paragraph 1, of the Act), he informs the
leniency applicant of the exact percentage of the fine reduction (which is still conditional) that ACM has determined.

Grants of leniency are conditional in the sense that their application depends on whether the leniency applicants meet all conditions for leniency which result from this policy rule during the investigation and the proceedings concerning the alleged cartel.

Section 21

The first paragraph of this section provides that a grant of leniency determines the question of which type of leniency will afterwards be available with regard to the cartel. At the time of the grant of leniency, the investigation into the cartel is often at an early stage or in full swing. Therefore, certain elements in this grant of leniency are provisional. These provisions seek to prevent subsequent leniency applicants from being able to challenge successfully the decision to grant an earlier leniency applicant a (more favorable) type of leniency.

The second paragraph of this section provides that ACM individually assesses every leniency applicant within each group (consisting of one or more natural persons and an undertaking, or consisting of multiple natural persons) who may, in principle, be eligible for the same type of leniency.

With regard to natural persons who have a right to leniency as leniency co-applicants with an undertaking, this means an individual assessment of the question whether the individual personally meets the conditions for leniency. In view of the explanatory notes of Section 11 (individual follows undertaking, this means in practice fulfilling the obligation to cooperate and guaranteeing completeness when providing information regarding the facts that the individual concerned has at his disposal. In the event that several natural persons wish to be considered leniency co-applicants of an undertaking, the percentages within the same applicable range may vary according to the individual value of the natural persons’ leniency applications.

Section 22

These provisions lay down the consequences of a breach of the conditions for leniency on the part of a leniency applicant. ACM takes the principle of proportionality into account in the assessment of whether there has been a breach of the conditions for leniency. ACM may decide that in the event of a breach, all claims pursuant to this policy rule lapse and all information and evidence submitted may be used freely by ACM as evidence against everyone, including the leniency applicant, as if the leniency application had not been submitted.

Section 24

This section contains the ultimate obligation of ACM to apply grants provided under this policy rule in the penalty fine with regard to the cartel. Fine reductions under grants of leniency are applied in the system of fining policy rules after the level of the fine has been calculated up to and including the potential application of the statutory maximum fine.

Section 27

These policy rules exclusively provide for leniency for a fine imposed by ACM, and contain no rights concerning potential rights of leniency applicants to civil liability. The aim of the policy of
ACM is, to the extent possible, not to disadvantage leniency applicants with regard to their potential civil liability any more than other participants in the cartel who do not enjoy the right to leniency. The provisions in Sections 14 and 27 are a result of this policy.

Section 27 provides that a leniency statement, thus any statement drawn up by or on the side of a leniency applicant within the framework of the leniency application (or the preparation thereof), may be accessed for inspection exclusively by addressees of a report if these addressees confirm in writing not to copy this report and not to use information obtained through inspection of this report for any other purpose than the administrative proceedings. This particular arrangement regarding inspection is only applied concerning leniency statements drawn up by the leniency applicant in the context of the leniency application (or the preparation thereof).

These also include leniency statements drawn up by the leniency applicant after a potential grant of leniency, for example because the leniency applicant later obtains more evidence of cartel behavior of which he informs ACM, or because the leniency applicant answers questions from ACM by means of a statement. Evidence not drawn up specifically within the framework of the leniency application (of the preparation thereof), for example written evidence originating from the time of the cartel, fall outside the scope of the particular arrangement regarding inspection.

*The Minister of Foreign Affairs*

*(H.G.J. Kamp)*