

Draft Leniency Guidelines

On the non-imposition or reduction of fines under Article 81 of the EC Treaty and/or Article 6 of the Dutch Competition Act in conjunction with Articles 56 paragraphs 1 and 4, 57, 62, 88 and 89 of the Dutch Competition Act and Article 51 paragraph 2 of the Dutch Criminal Code

Introduction

1. A cartel within the meaning of the Leniency Guidelines (“Guidelines”) is an agreement and/or a concerted practice between two or more competitors aimed at restricting competition, particularly by agreeing purchasing or sales prices, allocating production or sales quota or sharing markets, including bid rigging, contrary to Article 81 of the EC Treaty and/or Article 6 of the Competition Act (“CA”) (hereinafter jointly referred to as the “cartel prohibition”).
2. The Guidelines set out the conditions under which the Netherlands Competition Authority (“NMa”) provides immunity¹ or reduction of a fine (hereinafter jointly referred to as “leniency”) to undertakings which have participated in a cartel and to natural persons who have given instructions or have exercised *de facto* leadership with regard to cartel conduct (hereinafter jointly referred to as “Individuals”). Undertakings and Individuals who apply for leniency under the programme set out in the Guidelines are jointly referred to as “leniency applicants”.
3. Leniency applications are handled by the NMa Leniency Office (“Leniency Office”). The Leniency Office works under the responsibility of the Board of the NMa and is authorised to apply the Guidelines on behalf of the Board. The Leniency Office may be reached by telephone on +31 70 330 17 10, by fax on +31 70 330 17 00 and by e-mail at clementie@nmanet.nl.

Procedure

4. Anyone may contact the Leniency Office for information on leniency. In addition, an Individual or undertaking may approach the Leniency Office:
 - a. by telephone, whether or not through a lawyer admitted to the bar or any other representative, in order to exchange thoughts on a hypothetical set of facts and the application of the Guidelines to those facts. Such a conversation may take place on a no-names basis;
 - b. by telephone, exclusively through a lawyer admitted to the bar, in order to verify whether immunity within the meaning of paragraph 13 is available in respect of a particular cartel in which the Individual or undertaking has been involved, provided that if the leniency officer informs the applicant that immunity is available within the meaning of paragraph 13, the lawyer immediately submits the leniency application by e-mail or fax;
 - c. by e-mail, fax, mail or telephone in order to submit a leniency application, in which case an undertaking must be represented by a person who is fully authorised to make binding agreements on its behalf.²

¹ Immunity from fines entails a reduction of a fine by 100%.

² Leniency applications, as well as any other document submitted by mail in the context of a leniency application, will be taken to have been received at 24.00 hours on the day of receipt by the NMa.

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5. Unless otherwise agreed with the Leniency Office, an undertaking's leniency application will be deemed to have been submitted on behalf of all Individuals who work in the undertaking at the time of the application. The Individual and the undertaking which submitted an application on his or her behalf, qualify for the same leniency category as referred to in paragraphs 13, 14 and 15 ("leniency category").
6. In addition, an Individual may apply for leniency individually, stating explicitly that the applicant does not act on behalf of the undertaking in which he or she works or has worked. One or more Individuals who work in the same undertaking may jointly and simultaneously submit a leniency application, stating explicitly that they do not act on behalf of the undertaking. As a result, they are all eligible for the same leniency category.
7. A leniency application comprises:
 - a. a corporate statement which includes:
 - an express and unconditional statement to the effect that the applicant has been involved in an alleged cartel; and
 - the name and address of the applicant as well as the names and addresses of all the other undertakings that participate or have participated in the cartel, the names, positions, office locations and, where relevant, home addresses of all persons who, to the applicant's knowledge, are involved or have been involved in the alleged cartel, including the Individual(s) who work or have worked in the undertaking concerned; and
 - a detailed description of the cartel arrangement, including the affected products and/ or services, the geographic scope, the duration and functioning of the cartel and the estimated market volumes affected by the cartel, the specific dates, locations, content of and participants in cartel contacts; and
 - Information which discloses which other competition authorities, inside or outside the EU, have been approached or may be approached in relation to the alleged cartel; and
 - b. an annex which contains all remaining evidence and relevant explanations in support of the corporate statement, in so far as the applicant is in possession of such evidence or such evidence is reasonably available to the applicant at the time of application.
8. Provided a leniency applicant demonstrates a legitimate interest, the Leniency Office may approve the oral submission of a leniency application. If so, the Leniency Office will record the oral statement and make a corresponding transcript. The Leniency Office will provide access to oral statements to addressees of the statement of objections within the meaning of Article 59 CA ("statement of objections"), only if they undertake:
 - a. not to make a copy of the information; and
 - b. to use the information in the statement exclusively in the administrative procedure in question.
9. An application which the Leniency Office considers incomplete but which nevertheless in its opinion offers a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel may qualify for a marker. A marker protects the leniency applicant's place in the queue relative to other possible leniency applicants, generally for a short period of time. If the marker is perfected in a

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timely and complete fashion the information will be deemed to have been submitted when the marker was granted. If a marker is not perfected in a timely or complete fashion the Leniency Office will reject the application.

10. The Leniency Office will accept applications of undertakings within the meaning of paragraphs 22 through 25 of the ECN Model Leniency Programme (“summary application”) if:³
 - a. immunity is available within the meaning of paragraph 13 of the Guidelines; and
 - b. the Commission is particularly well placed to investigate the cartel within the meaning of paragraph 14 of the Commission Notice on Co-operation within the Network of Competition Authorities;⁴ and
 - c. the leniency applicant has also submitted a leniency application to the Commission or intends to do so shortly.
11. The date and time at which the Leniency Office receives a full application or a summary application determine the leniency applicant’s place in the queue relative to other possible leniency applicants. If a marker is granted in respect of an incomplete application the order is determined by the date and time of the marker.

Full co-operation

12. During the entire procedure, up until the moment at which the sanctions decision becomes final with regard to all entities involved in the cartel, the leniency applicant has a continuous obligation to provide full and genuine co-operation with the NMa (“full co-operation”). The obligation to cooperate includes at least the following elements:
 - a. following the intention to submit a leniency application the applicant should desist from any conduct which may impede the investigation, including:
 - the disclosure of the existence or the substance of the leniency application to any third party, except insofar as previously agreed with the Leniency Office; and
 - the destruction of any evidence; and
 - b. following the submission of a leniency application:
 - the leniency applicant without prompting and in any event upon request, provides the NMa with all information which it has at its disposal or may reasonably receive, including documents, statements and any other elements of proof in relation to the cartel; and
 - the leniency applicant terminates its involvement in the cartel, except insofar as may be expressly agreed otherwise with the Leniency Office; and
 - the undertaking ensures that people who work at the undertaking are at the NMa’s disposal for providing statements.

Leniency Category A – Immunity from fines

13. A leniency applicant is eligible for immunity if:

³ ECN Leniency Programme, 29 September 2006.

⁴ OJEC 2004/ C 101/03.

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- a. the applicant is the first to submit a leniency application with regard to a cartel which the NMa has not yet started to investigate;⁵ and
- b. the application provides information previously unknown to the NMa which will enable the NMa to start an investigation; and
- c. the applicant has not coerced another undertaking to participate in the cartel; and
- d. the applicant complies with the duty of full co-operation.

Leniency Category B – Reduction of the fine between 60% and 100%

14. A leniency applicant is eligible for a reduction of the fine between 60% and 100% if:
 - a. the applicant is the first to submit a leniency application with regard to a cartel which is being investigated by the NMa, though a statement of objections has not yet been issued; and
 - b. the application contains information on the cartel which is of significant additional value to the investigation; and
 - c. the applicant has not coerced another undertaking to participate in the cartel; and
 - d. the applicant complies with the duty of full co-operation.

Leniency Category C – Reduction of the fine between 10% and 40%

15. A leniency applicant is eligible for a reduction of the fine between 10% and 40% if:
 - a. the applicant is the second or later party to submit a leniency application with regard to a cartel prior to the issuance of a statement of objections, or the applicant is the first to submit a leniency application with regard to a cartel within the meaning of paragraphs 13 or 14 and has coerced another undertaking to participate in the cartel; and
 - b. the applicant provides information on the cartel which is of significant additional value to the investigation; and
 - c. the applicant complies with the duty of full co-operation.

Determination of the reduction of the fine

16. The Leniency Office determines the reduction percentage in leniency categories B and C on the basis of the additional value of the information provided by the leniency applicant as part of its leniency application. For the determination of the reduction of the fine 'additional value of the information' means the extent to which the information contributes to proving the cartel in view of the nature of the evidence and the information known to the NMa when the information is provided.
17. An applicant in leniency category B will be granted a reduction of the fine of 100 % provided that it is the first to provide authentic, incriminating evidence previously unknown to the NMa that enables the NMa to prove the cartel.
18. If a leniency applicant in category B or C is the first to provide information to the NMa which allows the NMa to prove that the cartel is more serious and/or has lasted for a longer period of time than

⁵ An investigation shall be deemed to have started within the meaning of this paragraph from the moment on which the NMa has internally laid down its suspicion of a cartel in writing.

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previously known to the NMa, the NMa will not take that information into account in calculating the fine for the leniency applicant.

19. The Leniency Office informs an applicant in leniency category B or C of the exact percentage with which the fine shall be reduced before issuing the statement of objections.

Grant of leniency

20. As soon as possible after the leniency application the Leniency Office will draft a document in which it lays down the rights and obligations of the Board of the NMa and the leniency applicant ("grant of leniency"). The leniency applicant shall sign the grant of leniency.
21. The Board of the NMa will decide on the imposition of a fine in accordance with the grant of leniency, provided the leniency applicant entirely fulfils the obligations, unless in the Leniency Office's view there are reasonable grounds for the leniency applicant's non-observance.
22. If the Board of the NMa withdraws the grant of leniency, the NMa may use as evidence all information provided by a leniency applicant.

Confidentiality

23. If the Leniency Office rejects a leniency application which has been submitted in good faith, the NMa will not use the information as evidence unless the information had already come into the possession of the NMa from other sources.
24. The NMa will protect the leniency applicant's identity until the statement of objections is issued, except if the NMa were bound by an overriding legal duty or if the leniency applicant were to have given consent.

Entry into force

25. These Guidelines will enter into force on [...]. Leniency applications submitted after that date will be handled in accordance to the Guidelines, unless the Leniency Office has already started handling a leniency application with respect to the same cartel. In that event the Leniency Office will handle applications in accordance with the Guidelines Grant of Leniency of 1 July 2002, as most recently amended on 28 March 2006 (Netherlands Government Gazette [*Staatscourant*], 29 March 2006, no. 63).

EXPLANATORY NOTES WITH CONSULTATION DOCUMENT ON LENIENCY GUIDELINES
July 2007

1. Introduction

Background to consultation

1. The current leniency guidelines entered into force on 1 July 2002 (hereinafter: "Guidelines 2002").⁶ As soon as the recent amendments to the Competition Act enter into force, the NMa shall have the power to impose fines not only on undertakings but also on individuals who have been involved with cartel behaviour. After having applied the Guidelines 2002 in a sufficient number of cases and in the light of the said amendment of the Competition Act, the NMa has fundamentally revised the Guidelines 2002. These explanatory notes accompany the consultation for the new Draft Leniency Guidelines (hereinafter: "Draft Guidelines").
2. In these notes, which aim to support the public consultation process, the NMa sets out how it envisages the new leniency system to function in practice. The information is structured as follows. The introduction contains a general explanation of the leniency system and deals with the notions of "a person having exercised *de facto* leadership with regard to cartel conduct" [*feitelijk leidinggevende*] and "a person having given instructions with regard to cartel conduct" [*opdrachtgever*]. Section 2 sets out the most important new features of the Draft Guidelines in comparison with the Guidelines 2002. The NMa invites all parties to comment on the Draft Guidelines, particularly with regard to the new elements. The consultation period ends on 7 September 2007.
3. Individuals who may be classified as "having exercised *de facto* leadership" or "having given instructions" with regard to cartel conduct within the meaning of paragraph 1 of the Draft Guidelines, are hereinafter referred to as "Individuals".

Basic system

4. As under the Guidelines 2002, a leniency applicant under the Draft Guidelines falls in one of the leniency categories A, B or C, regardless of whether it is an Individual or an undertaking. Leniency categories A and B are exclusively available to the first-in applicant of a cartel, provided the applicant has not coerced other undertakings in the cartel. Second-in and following leniency applicants may classify for leniency category C.

Category	Rank	Coercion towards other undertakings in the cartel	NMa has started investigation	Reduction
A	1 st	No	No	100 %
B	1 st	No	Yes	60-100 %
C	2 nd and following or 1 st and coercion	Possibly	Possibly	10-40 %

⁶ The Guidelines were amended on minor points, most recently on 28 March 2006 (Netherlands Government Gazette [*Staatscourant*], 29 March 2006, no. 63).

Coercion

5. As under the Guidelines 2002, coercion precludes the grant of leniency in categories A and B, but does not preclude the grant of leniency in category C. Coercion may be of an economic nature or may involve physical threat. It is evident from the NMa's experience so far that coercion is very rare. The NMa takes the view that for economic coercion to exist, there must at least be an immediate threat of market exit. In view of the uncertainty attached to the condition of coercion for leniency applicants, the Leniency Office will in genuine close calls give the leniency applicant the benefit of the doubt. Acting as ringleader of a cartel does not necessarily entail the coercion of one or more undertakings to participate in the cartel. A ringleader is a cartel participant who, to a stronger degree than other participants, actively organises, chairs and facilitates the cartel. Therefore, ringleaders who are not coercers are eligible for leniency categories A and B.
6. The basic system described above is the same as under the Guidelines 2002 and the Draft Guidelines.

Individuals

7. The amendment of the Competition Act which authorises the NMa to impose a fine on Individuals has led the NMa to introduce a fundamental change in the Draft Guidelines as compared to the Guidelines 2002. Under the Draft Guidelines Individuals may apply for leniency in addition to undertakings.
8. Whether someone is an Individual depends on the following criteria, which follow from Article 51 paragraph 2 of the Dutch Criminal Code as developed in case law:⁷
 - The exercise of *de facto* leadership with regard to cartel conduct occurs where a person, although authorised and reasonably required to do so, fails to take measures to prevent cartel conduct and thereby consciously accepts the significant risk that such conduct occurs;
 - An instruction with regard to cartel conduct is given where a person gives express instruction to someone else to engage in cartel conduct.
9. The legal concept of “*de facto* leadership” appears more limited than is the case in reality. *De facto* leadership relates to conduct, i.e. someone may exercise *de facto* leadership with regard to cartel conduct into which subordinate employees have engaged, but he or she may also exercise *de facto* leadership with regard to his own cartel conduct. Such a person need not necessarily be a director, manager or owner of the undertaking. The concept of Individual may include people on various levels of the undertaking. There may be various Individuals within one single undertaking.

⁷ See NJ 1987, 321 (Slavenburg II).

2. New elements in the Draft Guidelines

Substantive scope

10. As compared to the Guidelines 2002, the scope of the Draft Guidelines has been specified and is now limited to horizontal *hard core* infringements (paragraph 1).

Leniency Applicants

11. The Draft Guidelines distinguish between two kinds of leniency applicants: undertakings and Individuals.
12. As under the Guidelines 2002, an undertaking may be eligible for leniency if it submits an application in accordance with the guidelines.
13. An Individual may become eligible for leniency by means of:
- a leniency application, expressly stating that the applicant does not act on behalf of the undertaking in which he or she works or has worked. This option is available to either current or former employees of the undertaking;
 - a leniency application which is submitted jointly and simultaneously with one or more other Individuals who currently work in the same undertaking, expressly stating that the applicants do not act on behalf of the undertaking in which they work. This option is only available to current employees within the same undertaking.
 - a leniency application submitted by an undertaking on behalf of one or more Individuals. This option is only available to current employees of the undertaking.

Corporate Leniency covers current employees who may be classified as Individuals

14. An undertaking which applies for leniency shall in principle also apply for leniency on behalf of all Individuals within the undertaking. If an undertaking wishes to exclude one or more Individuals, it must expressly indicate so to the Leniency Office. The Leniency Office will subsequently discuss with the undertaking the exact personal scope of the application and the conditions under which it is submitted. Following such an application, the undertaking and the Individuals are eligible for the same leniency category.
15. The discussion with the Leniency Office on the scope of the application *ratione personae* does not take away from the undertaking's duty under paragraph 7 (a), second hyphen of the Draft Guidelines to name all persons who have been involved in the cartel. The undertaking's duty of full cooperation means that it must name all persons involved, regardless of whether they are currently employed by the undertaking and irrespective of whether they may be classified as Individuals.

Leniency applications by one or more Individuals

16. An Individual may apply for leniency on his/her own behalf, that is, separately from the undertaking in which he/she works or has worked.

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17. Two or more Individuals who work in the same undertaking may apply for leniency jointly. A joint application by several Individuals who work in different undertakings which have participated in the cartel is invalid (and implies that the Individuals have violated the duty of full co-operation by disclosing the intention to submit a leniency application outside the undertaking). A joint leniency application by several Individuals who work in the same undertaking entails that the joint applicants may discuss the application among themselves. The joint application will be considered as one single application, as a result of which the applicants become eligible for the same leniency category.

Same treatment of undertaking and Individual, with due consideration for differences

18. Both Individuals and undertakings may submit leniency applications under the leniency programme. As a result, they are subject to the same rights and duties. However, the NMa acknowledges that an Individual, as compared to an undertaking, may sometimes have a more limited knowledge of the cartel. This will be taken into account when the NMa assesses the extent to which the applicant has complied with the duty to cooperate. At all times, the NMa will invite the Individual who applies for leniency for an introductory interview, which shall clarify the Individual's precise role in the cartel activity, irrespective of whether the leniency application was submitted by the Individual concerned or by the undertaking in which he/ she works.

One single order for all leniency applicants

19. An important objective of the new leniency programme is to introduce a marker system for undertakings as well as Individuals who are involved in a cartel. In effect, the "leniency race" among cartel participants, brought about by the Guidelines 2002, is being expanded under the Draft Leniency Guidelines to also include Individuals.

The table below gives an example, exploring three possible outcomes of the "leniency race".

Example and possible outcomes			
Case: Undertaking X, Y and Z participate in a cartel. Natural persons x1 and x2 are current employees with X. y1 is a current employee of Y; y2 is a former employee of Y and has in the meantime found employment with an undertaking outside of the sector. z1 and z2 are current employees with Z. x1, x2, y1, y2, z1 and z2 may each be specified as Individual.			
Alternative situations:		Outcome leniency race:	
1.	x1 is the first-in leniency applicant, submitting an application on its own behalf (not on behalf of X). The NMa has not yet started an investigation into the cartel. x1 has not coerced another undertaking, has not destroyed evidence following his intention to submit a leniency application and has maintained strict confidentiality as regards the application and advance preparations thereto. x1 is	Leniency category	
		Leniency applicant	
		A (100%)	x1
		C (0-40%)	X, x2
		C(0-40%)	Y, y1
		No leniency:	y2, Z, z1, z2

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	<p>eligible for leniency category A. Subsequently, undertaking X submits a leniency application prior to a company visit by the NMA. X submits information to the Leniency Office through passing on written evidence, a statement by x2 and statements made by other persons within the undertaking who were aware of the cartel's existence (but cannot be considered as "having exercised <i>de facto</i> leadership with regard to cartel conduct" or as "having given instructions with regard to cartel conduct"). The evidence concerned shall have significant additional value and X and x2 will as a result be eligible for leniency category C. Subsequently, the NMA carries out a surprise company visit. Y submits a leniency application several weeks later. In the judgment of the Leniency Office, the information disclosed by Y only just has significant additional value. Y as well as y1 are eligible for leniency category C. Former employee y2 does not submit an independent leniency application. Z submits a leniency application two weeks later, but it is rejected due to a lack of significant additional value.</p>										
2.	<p>Undertaking X is a first-in leniency applicant. The NMA has not yet started an investigation into the cartel. X has not coerced another undertaking, has not destroyed evidence following its intention to submit a leniency application and has maintained strict confidentiality towards the other cartel participants as regards the application and preparations thereto. As a result, X as well as x1 and x2 are eligible for leniency category A. y2, a former employee with Y, is the second party to submit a leniency application shortly afterwards; as a result, y2 is eligible for leniency category C. Next, the NMA carries out company visits. Shortly after, Z submits a leniency application. The application submitted by Z no longer has significant additional value. Z, z1 and z2 are not eligible for leniency. Y does not submit a leniency application, nor does y1 as an Individual.</p>	<table border="1"> <thead> <tr> <th>Leniency category</th> <th>Leniency applicant</th> </tr> </thead> <tbody> <tr> <td>A (100%)</td> <td>X, x1, x2</td> </tr> <tr> <td>C (0-40%)</td> <td>y2</td> </tr> <tr> <td>No leniency:</td> <td>Y, y1, Z, z1, z2</td> </tr> </tbody> </table>	Leniency category	Leniency applicant	A (100%)	X, x1, x2	C (0-40%)	y2	No leniency:	Y, y1, Z, z1, z2	
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No leniency:	Y, y1, Z, z1, z2										
3.	<p>Within undertaking Z, z1 and z2 are concerned about the fact that their Board of Directors will not submit a leniency application or will do so too late. Therefore, they agree simultaneously to submit a leniency application to the Leniency Office on</p>	<table border="1"> <thead> <tr> <th>Leniency category</th> <th>Leniency applicant</th> </tr> </thead> <tbody> <tr> <td>B(60-100%)</td> <td>z1, z2</td> </tr> <tr> <td>C (0-40%)</td> <td>X, x1, x2</td> </tr> <tr> <td>No leniency:</td> <td>Y, y1, y2, Z</td> </tr> </tbody> </table>	Leniency category	Leniency applicant	B(60-100%)	z1, z2	C (0-40%)	X, x1, x2	No leniency:	Y, y1, y2, Z	
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<p>behalf of themselves. z1 and z2 jointly are first-in leniency applicants. The NMa has already started an investigation into the cartel. They are considered as a one single leniency applicant. They did not coerce another undertaking. As a result, they are eligible for leniency category B (fine reduction between 60 and 100 per cent). Subsequently, X submits a leniency application, which the Leniency Office deems to have significant additional value. As a result, X, as well as x1 and x2 are eligible for leniency category C. Y does not submit a leniency application, neither do y1 y2 as Individuals.</p>	
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How to approach the Leniency Office

20. Paragraph 4(a) of the Draft Guidelines provides for the possibility of having an open discussion with the leniency office of the NMa (“the Leniency Office”). This may take place on a no-names basis. The Leniency Office considers such discussions to be confidential for so long as no leniency application is made which will lead to a leniency grant.
21. The procedure set out in paragraph 4(b) of the Draft Guidelines enables aspirant-leniency applicants to verify on a no-names basis whether immunity is available. The NMa envisages the following procedure:
- The lawyer admitted to the bar, who acts for the undertaking or Individual shall contact the Leniency Officer by telephone and shall confirm that he/ she has been instructed by a client to submit a leniency application for immunity within the meaning of paragraph 13 of the Draft Guidelines, provided the leniency category concerned is still available (“conditional instruction”);
 - The lawyer shall disclose information which allows the Leniency Office to establish whether the NMa has already started an investigation into the cartel and/ or whether a first-in application with regard to the cartel concerned has been submitted;
 - The Leniency Officer may subsequently, in confidence, inform the lawyer whether or not immunity is available;
 - If the Leniency Officer confirms the availability of immunity, the lawyer shall at the same time submit the leniency application by e-mail or by fax on behalf of his/ her client;
 - If the Leniency Officer indicates that no immunity is available, the lawyer and his/ her client is at liberty to consider all options. The Leniency Officer will treat the conversation as confidential.
22. As stated above, the NMa will treat as confidential the information exchanged with the Leniency Office in the course of bona-fide anonymous or “hypothetical” conversations. This means that the Leniency Office will not use the information obtained during such conversations to make an attempt at tracing the identity of its interlocutor, for so long as the latter has not submitted a leniency application resulting in immunity (no *reverse engineering*).

Procedural modalities and requirements for submitting a leniency application

23. The various ways of submitting a leniency application are outlined in paragraph 4(c), while the requirements to be met are listed in paragraph 7 of the Draft Guidelines.
24. A leniency application comprises a statement and appendix containing evidence in support of the statement. Depending on the form according to which the leniency application is submitted as well as its degree of completeness, four kinds of leniency applications may be distinguished as eligible for handling by the Leniency Office:
- A full leniency application, i.e. a leniency application which at once meets the conditions set out in paragraph 7 of the Draft Guidelines;
 - An oral leniency application, i.e. a leniency application in which the statement referred to in paragraph 7 of the Draft Guidelines is made orally at the offices of the NMa and which is transcribed into a written record. This procedure has been drafted accordance with the Commission Notice and the ECN Model Leniency Programme;
 - A summary leniency application within the meaning of the ECN Model Leniency Programme. This procedure has been included with a view to relieving the administrative burden placed on parallel leniency applications as submitted to various NCAs in the EU with regard to cartels of a cross-border nature, affecting multiple EU Member States;
 - An incomplete leniency application which the Leniency Officer nevertheless considers to provide a concrete basis for a reasonable suspicion of a leniency applicant's involvement in a cartel. A leniency application of this kind does not meet the requirements set out in paragraph 7 of the Draft Guidelines, but may be eligible for a marker. Procedures are set out in further detail below.

Marker system

25. Leniency applications are often submitted as part of a 'leniency race'. Owing to pressure of time, a leniency applicant is not always capable of meeting the requirements set out in paragraph 7 of the Draft Leniency Guidelines at once. It may particularly prove time-consuming to gather all the evidence in relation to a cartel. By means of a marker an applicant's position in the queue relative to other possible applicants is established and secured for a limited period of time. A leniency applicant who submits an application by telephone shall generally be eligible for a marker only, as he cannot support his application with written pieces of evidence, as required by paragraph 7(b) of the Draft Guidelines, due to the chosen mode of submission.
26. If the Leniency Office, during the term allowed for perfecting the marker receives another leniency application in relation to the same cartel, it will only register a date and time of receipt. The second application will not be dealt with prior to the perfection of the marker by the first applicant. Provided the marker is perfected in a timely and complete manner, the information is deemed to have been submitted at the moment of granting the marker.
27. The Leniency Office may, differently from the Commission, also grant a marker to the second and following applicants in line. The Leniency Office is contemplating a term of one or two weeks for perfecting a marker. The term may be prolonged. The Leniency Office shall have full discretion to grant a marker and prolong the term for perfecting a marker.

Full duty of co-operation for leniency applicants

28. Paragraph 12 of the Draft Guidelines lists the elements of the duty of co-operation. These have been further specified and modelled after the ECN Model Leniency Programme and the Commission Leniency Guidelines.
29. Unlike the current guidelines, the full duty of co-operation is wholly applicable to the second and next applicants in line.
30. Some elements of the duty of co-operation arise at an earlier stage than others. The duty to refrain from all conduct which may impede the investigation and/or the procedure (e.g. disclosure of information to other cartel participants and/or destruction of evidence) arises as soon as the intention to apply for leniency is arises. The other obligations flowing from the duty of cooperation, arise at the moment of submitting the leniency application.
31. The duty of co-operation for leniency applicants extends to the entire procedure that emanates from the cartel investigation. The NMa shall also be entitled to request the cooperation of leniency applicants after the initial sanctions decision. In particular, the NMa expects to oblige leniency applicants to make available employees who work within the undertaking (or make themselves available, as the case may be) for giving evidence during procedures that may follow the sanctions decision.

New scope of leniency categories B and C

32. Leniency applicants who are eligible for leniency category B are entitled to a fine reduction of at least 60 per cent, at a lower standard of evidence than set out in the ECN Model Leniency Programme. In accordance with the ECN Model Leniency Programme and under a similar condition, leniency category B includes the eligibility for immunity. Leniency category C was awarded a lower maximum amount for fine reduction, standing at 40 per cent.

Significant additional value

33. As to categories B and C, it is conditional that a leniency application contains information of 'significant additional value' to the investigation. 'Significant' means, to a higher degree than before, that information which is disclosed by applicants who are second or next in line must be passed on to the NMa in time and must provide a clear contribution to the evidence mounted against the cartel.

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