Immunity, Sanctions & Settlements

European Union

Ali Nikpay and Pablo Figueroa
Gibson Dunn & Crutcher LLP

GCR Know-how

Immunity, Sanctions & Settlements
European Union

Ali Nikpay and Pablo Figueroa
Gibson Dunn & Crutcher LLP

Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

The first qualifying applicant will obtain full immunity from the fines that would otherwise be imposed by the European Commission (the Commission) for the cartel behaviour it has reported.

2 Do the protections extend to current and former officers, directors and employees?

EU law only empowers the Commission to sanction companies (undertakings). The Commission's leniency protections thus extend only to undertakings. While the Commission cannot impose criminal or financial penalties on individuals, certain EU member states have introduced domestic legislation that enables criminal sanctions to be imposed on individuals. The EU leniency programme does not extend protection to such individuals.

3 Is immunity available after an investigation begins?

Yes. If the Commission has already launched an investigation, an undertaking may still obtain full immunity from fines provided that:

- no other undertaking has already applied for or been granted immunity;
- the applicant is the first to provide the Commission with information and evidence 'which in the Commission's view will enable it to (i) carry out a targeted inspection in connection with the alleged cartel or (ii) find an infringement of article 101 Treaty on the Functioning of the European Union (TFEU) in connection with the alleged cartel'; and
- the applicant meets the requirements of cooperation that are common to applicants for immunity or reduction in fines (see question 26 et seq).

4 What are the eligibility requirements before an investigation begins?

To be eligible for immunity in these circumstances an applicant must be the first to supply the Commission with information and evidence that allows the Commission to carry out a targeted inspection of the alleged cartel or information enabling the Commission to find an infringement of article 101 TFEU.

Pursuant to point 9 of Commission's 2006 Leniency Notice (the Leniency Notice), for the Commission to be able to carry out a targeted inspection, the immunity applicant must provide the Commission with the information and evidence listed below:

a. A corporate statement which includes, in so far as it is known to the applicant at the time of the submission:

A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.

The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;

The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

b. Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.

5 What are the eligibility requirements after an investigation begins?

See question 3.

6 Will the applicant have to admit to a violation of law?

There is no provision expressly requiring an immunity applicant to admit to having violated the law (ie, to admit to an infringement of the competition rules). This approach differs from that taken in the context of settlement discussions where undertakings are expressly required to submit 'an acknowledgement in clear and unequivocal terms of the parties' liability for the infringement' (see question 66).

However, this difference might be of little practical consequence. More specifically, the Leniency Notice states that immunity is available to an undertaking 'disclosing its participation in an alleged cartel', and the corporate statement must contain a 'detailed description of the alleged cartel arrangement, including, for instance, its aims, activities and functioning … specific dates, locations, content of and participants in alleged cartel contacts'.

7 Are ringleaders or initiators of the conduct eligible?

Yes. However, undertakings that actively sought to coerce other undertakings to join or remain in the cartel are not eligible for full immunity from fines. Nevertheless, the coercing undertaking may still qualify for a reduction in fines provided that it satisfies the relevant criteria set out in the Leniency Notice (namely the provision of evidence, which represents significant added value to the evidence already in the Commission's possession and compliance with the requirements of cooperation, etc, that are common to applicants for immunity or reduction in fines (see question 26).

First published on Wednesday, 20 April 2016 and last verified on Tuesday, 26 July 2016

8 When must the applicant terminate its involvement in the conduct?

The immunity applicant must terminate its involvement in the alleged cartel immediately following the submission of its application, except where the Commission considers that it is 'reasonably necessary to preserve the integrity of the inspections' for the applicant to continue with the alleged misconduct.

9 What constitutes termination of the conduct?

An applicant must refrain from participating further in the infringing conduct. However, complete and abrupt withdrawal without an obvious explanation, from the cartel may compromise the effectiveness of a potential on-the-spot inspection by the Commission. Therefore, the Commission may require an undertaking continuing its active participation when this would 'in the Commission's view be reasonably necessary to preserve the integrity of the inspections' (see Leniency Notice, at paragraph 12(b)).

10 Will the applicant be required to make restitution to victims?

No. The Leniency Notice does not require an immunity applicant to make restitution to the victims of a cartel.

Nevertheless, the European Court of Justice (the ECJ) has held that any citizen or business who has suffered harm as a result of breaches of article 101 TFEU is entitled to compensation from the infringers: see Joined Cases Case C-453/99 Courage and Crehan [2001] ECR 2001 p. I-6297. At present, while those who have suffered harm may initiate civil proceedings in member state national courts, the exact rules of standing, procedure and calculation of quantum vary between the different member states. The Commission believes that this may, in certain circumstances, act as a disincentive to victims wishing to bring claims. As such, a Directive on antitrust damages actions for breaches of competition law (Directive 2014/104/EU) was signed into law on 26 November 2014, after final adoption by Council on 10 November 2014 (the Damages Directive). The Damages Directive intends to 'avoid the divergence of applicable [damages] rules, which could jeopardise the proper functioning of the internal market'. The deadline for EU member states to incorporate the Damages Directive into their domestic law expires on 27 December 2016.

Under article 11 of the Damages Directive:

Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

In order to minimise the impact of article 11 on the leniency programme the Directive stipulates that an immunity recipient is jointly and severally liable only for the harm suffered by its own direct and indirect customers, ie, it will not be liable for the harm caused to the customers of the other cartel members. An exception to this takes place where victims cannot obtain full compensation from the other undertakings involved in the cartel.

11 Can more than one applicant qualify for immunity?

No. There can only be one successful immunity applicant per cartel. Accordingly, if the Commission has already granted conditional immunity to an applicant pre-inspection, no subsequent applicant can obtain immunity. However, a subsequent applicant may still be eligible for a reduction of up to 50 per cent of the fine.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

The EU leniency regime applies only to undertakings, and it requires a 'corporate statement' voluntarily provided by, or on behalf of, an undertaking that has participated in an alleged cartel. As a result, if an employee reports a cartel to the Commission in his/her individual capacity as 'informant' or 'whistle-blower', the undertaking that employs that individual does not benefit from the report. In addition, if the individual has provided sufficient information to the Commission to enable it to carry out an inspection, immunity under the pre-inspection head of the Leniency Notice will no longer be available. As a consequence, to obtain immunity, the undertaking would need to meet the conditions for immunity post-inspection and would need to provide sufficient evidence to allow the Commission to find an infringement (see question 5).

13 Does the afforded protection extend to any non-antitrust infringements?

No. Non-antitrust infringements are beyond the scope of the Commission's leniency programme.

14 What confidentiality assurances are given to the first applicant to report?

Other than EU member state competition authorities, the Commission will not disclose an immunity applicant's identity to any third partiy, including the other cartel members, without first obtaining the applicant's permission. This is the case, at least until the Commission issues the Statement of Objections (SO). At that point, the applicant's identity will become known to the other addressees of the SO (ie, the other cartel members). The applicant's identity will become publicly known when the Commission issues the final infringement decision.

Prior to the issue of the SO, if an undertaking seeks immunity and is informed that it is no longer available because of a prior application, the Commission will not disclose to the undertaking the identity of the first-in applicant.

The Leniency Notice specifies that the corporate statement, which sets out the immunity applicant's understanding of the cartel and its role in the cartel, can be provided orally to the Commission. The statement will be recorded and transcribed on the Commission's premises. Access to the corporate statement will be given to the other cartel members during the access to file process after issue of the SO. This will be done on the premises of the Commission. According to the Leniency Notice, access will be given only under condition that a copy of the statement is not made and that the information contained therein is used only for the purpose of 'judicial or administrative proceedings for the application of the EU competition rules at issue in the related administrative proceedings'. The Commission, for its part, will not disclose or use the corporate statement for any other purpose.

A frequently discussed concern is the potential for corporate statements to be subject to a disclosure or discovery order in follow-on civil litigation. In its 2011 Ruling in Pfleiderer AG vs. Bundeskartellamt, the EU Court of Justice held that national courts should carry out a case-by-case assessment of whether access to leniency documents should be required in damages actions (for an application of the balancing exercise that this requires, see the judgment of the UK High Court in National Grid Electricity Transmission v ABB and Others [2012]). To address concerns that the possibility of future disclosure of leniency documents could significantly reduce incentives for companies to apply for immunity, the Damages Directive on damages actions for breaches of EU Competition law requires member states to ensure that national courts cannot order the disclosure of leniency corporate statements.

On 5 August 2015, the Commission introduced a series of amendments to the relevant EU legislation and a range of "soft law" guidance notes in relation to its competition law procedures to ensure the smooth functioning of Damages Directive. As part of these changes, clear limits have been placed on the use that can be made of the information received through the access to the file process. More precisely, access to the file will only be granted on the condition that the information obtained is used by the recipient only for the purposes of defending itself before the Commission or in its appeal of the infringement decision to the EU courts.

Failure to comply with this requirement may result in the imposition of a fine by the national authorities of the EU member states.

Moreover, if improper use is made of information after the Commission has already adopted a prohibition decision, the Commission may ask the EU General Court to increase the fine imposed for the cartel conduct on the relevant undertaking.

Finally, should any of the above take place with the involvement of outside counsel, the Commission may report the incident to the relevant individual's bar association with a view to disciplinary action being taken.

15 Does the authority publish guidance regarding the application of the programme?

Yes. The Commission has published the following guidance:

- 2006 Leniency Notice (available at http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html)
- 2012 Antitrust Manual on of Procedures (available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf); and
- 2013 Guidance for delivering oral statements to DG Competition (available at http://ec.europa.eu/competition/cartels/leniency/oral_statements_procedure_en.pdf

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Applicants have to apply to any competition authority in the EU that might have standing in any particular case to apply article 101 TFEU or other applicable provisions. The European Competition Network Model Leniency Programme sets out the treatment all applicants can expect in any ECN jurisdiction and, in doing so, seeks to minimise the burden and bureaucracy associated with multiple applications by introducing a 'summary leniency application'.

On 20 January 2016, the ECJ held in Case C-428/14 DHL Express (Italy) and DHL Global Forwarding (Italy) (not yet reported) that:

(i) the instruments adopted in the context of the European Competition Network, such as the Model Leniency Programme, are not binding on national competition authorities;

(ii) there is no legal link between the application for immunity which an undertaking submits to the Commission and the summary application submitted to a national competition authority in respect of the same cartel.

As a result:

(i) the national competition authority is not required to assess a summary application in the light of the application for immunity to the Commission or contact the Commission in order to obtain information on the purpose and results of the leniency procedure carried out at the European level. For example, in a cartel with effects in the UK and Germany, company A, an immunity applicant reports the case only to the Commission and not to British or German NCAs. The Commission declines to take the case. Meanwhile B, a second member of the cartel reports it to the German NCA. Pursuant to the DHL Ruling, the German NCA is entitled to award immunity to B, despite the fact that A was the first to report the existence of the cartel to a competition authority in the EU (i.e., to the Commission); and

(ii) EU law does not preclude national competition authorities from accepting a summary application for immunity from an undertaking which was unable to apply for immunity to the Commission. In practice, this might lead to scenarios where the first entity to apply for leniency to a national competition authority might reap full immunity, even if it had not been the first one to contact the Commission, if the case ends up being investigated at the national level.

Immunity application and marker process

17 What is the initial process for making an application?

A company seeking immunity must contact the Directorate General for Competition (directly or through an authorised legal representative) and either: (i) apply for a marker; or (ii) submit a formal application for leniency. Before submitting a formal application, the applicant may first seek assistance from a Commission official by calling one of two dedicated and secure telephone numbers. The Commission will notify the applicant if immunity is not available, at which point, the applicant may instead apply for a reduction of fines in accordance with section III of the Leniency Notice (see questions 43 to 61). If full immunity is still available, then either a formal or hypothetical application for leniency must be submitted. This can be done by resort to the Commission's dedicated and secure fax number or by way of (oral or written) oral statement.

18 What information is required to secure a marker?

The Commission may grant a "marker" protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow time for the gathering of the necessary information and evidence.

The applicant must provide the Commission with information detailing:

- its name and address;
- the parties to the alleged cartel;
- the affected product(s) and territory(-ies);
- the estimated duration of the alleged cartel and whether it is still active;
- the nature of the alleged cartel conduct;
- details of any other leniency applications (past or possible future) to other competition authorities in relation to the alleged cartel; and
- its justification for requesting a marker.

19 How much time will an applicant have to perfect its marker?

Where a marker is granted, the Commission will determine the period within which it must be perfected on a case-by-case basis. Marker periods tend to be short – usually weeks rather than months.

20 Can the deadline for perfecting the marker be extended?

Yes. An undertaking may request the Commission to extend the deadline for perfecting the marker. Such a request should be submitted before the expiration of the marker and include sufficient detail to enable the Commission to make an informed decision. The Commission has discretion to accept or reject the request.

21 What is required to perfect the marker?

A marker is perfected when the applicant submits the information and evidence required for a formal immunity application within the given deadline (or extended deadline).

The applicant must provide the Commission with:

- a corporate statement; and
- additional supporting evidence relating to the alleged cartel.

The corporate statement must contain the following information:

- a detailed description of the alleged cartel arrangement, including its aims, activities and functioning;
- details of the product or service concerned together with the geographical scope, duration and estimated market volumes affected by the alleged cartel;
- the specific dates, locations and content of contact between the alleged cartel participants;
- explanations of the evidence submitted in support of the application;
- the name and address of the legal entity submitting the application, together with the names and addresses of all of the other undertakings that participate(d) in the alleged cartel;

- the names, positions, office locations and, where necessary, the home addresses of the individuals who, to the applicant's knowledge, are, or have been, involved in the alleged cartel – including those individuals who have been involved on the applicant's behalf;
- information about any other competition authorities (including those outside the EU) that have been approached or which the applicant intends to approach in relation to the alleged cartel; and
- other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any contemporaneous evidence of the infringement.

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

The marker granted by the Commission will cover the alleged cartel that has been reported to it (which entails a delineation of the affected products, geographical coverage, participants and duration). If an applicant discovers evidence of additional wrongdoing that relates to the same cartel, it may apply to the Commission to extend the scope of the marker. Provided that the undertaking is the first to inform the Commission of the additional misconduct, the Commission may extend the scope of the marker accordingly. However, if another undertaking has already sought and been granted a marker in relation to that conduct, the original immunity applicant will not be able to extend its marker. The applicant may nevertheless be eligible to a reduction on the fines it received in respect of that behaviour.

If the immunity applicant discovers information regarding a separate cartel, it can (but is not obliged, as a matter of law, to) apply for a separate marker covering that cartel.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

The Commission will not consider other immunity applications before it has taken a position on an existing application in relation to the same alleged infringement. Whether the immunity applicant receives immunity will therefore be assessed on the basis of whether it has met the conditions under the Notice before the expiration of the deadline for perfection of the marker, not on the basis of a comparison with another application.

24 What if the applicant's investigation reveals that no violation exists?

An application for immunity under the Leniency Notice is voluntary. If the immunity applicant considers that its own investigative steps reveal that no violation has taken place, the applicant can choose to withdraw its application. However, that does not necessarily mean that the Commission will not continue to investigate. The Leniency Notice specifies that, in the event that the applicant withdraws the evidence it has submitted for the purpose of its application, the Commission may use its own powers of investigation to obtain the information.

25 What if the authority decides not to investigate?

If, following submission of an application for immunity, the Commission decides not to investigate or to discontinue its investigations into the alleged infringement, it will send the applicant a 'no-action' letter stating that, on the basis of a preliminary assessment, the Commission does not intend to consider the immunity application further, but that should its position change, the Commission will then take a formal position as regards the application. In this way, although the case has been put aside, the applicant's position is secured should the Commission subsequently resume its investigation.

Immunity cooperation obligations

26 What is the applicant required to produce?

In addition to providing the Commission with a corporate statement and the relevant evidence (see question 21), an immunity applicant has a continuing duty to cooperate genuinely, fully, on a continuous basis and expeditiously throughout the investigation. This includes providing the Commission promptly with:

- all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;
- answers to any request from the Commission that may contribute to the establishment of the facts; and
- access to current (and, 'if possible', former) employees and directors whom the Commission may wish to interview.

27 Will the applicant be required to make a written confession?

No. Although the immunity applicant must provide details of the alleged cartel, the Commission will accept oral corporate statements. As noted above in relation to question 6, technically speaking, there is no express requirement on an immunity applicant to admit to having violated the law.

28 Can third parties obtain access to the materials provided by the applicant?

See response to question 14 as regards the corporate statement provided by the immunity applicant. As regards the supporting evidence, access to these materials will also be provided to the other cartel members during the access to file process after an SO has been issued. The same restrictions on subsequent use of the information will apply. As regards the potential for subsequent disclosure orders in follow-on litigation, it is important to note that the Damages Directive does not exclude the disclosure of the supporting evidence on the Commission's file (unlike the corporate statement itself which is protected).

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

The requirement of full and continuous cooperation set out in point 12 of the Leniency Notice requires the immunity applicant to make current (and, 'if possible', former) employees and directors available for interviews with the Commission and to not destroy, falsify or conceal relevant information or evidence. The undertaking must use its best efforts to ensure that its employees do cooperate with the Commission (for instance, by giving employees individual assurances that cooperation will not lead to disciplinary action being taken against them). If the undertaking does not comply with its duty of full and complete cooperation, the Commission may withdraw the immunity.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

See question 29. If an employee, either before or after the application, engages in obstructive conduct (such as destroying, falsifying or concealing evidence of the alleged cartel, or disclosing the fact or any of the content of the contemplated application to a third party), the undertaking will have failed to comply with the conditions for immunity and any immunity granted can be withdrawn.

31 Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

Attorney–client privilege: It is a general principle of EU law that an undertaking cannot be required to provide the Commission with communications that are protected by legal professional privilege (LPP). However, the European courts have ruled that only communications between an undertaking and external counsel benefit from LPP. Therefore, communications with in-house legal counsel do not benefit from privilege from inspection in the context of antitrust investigations (AM&S Europe Ltd [1982] and Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd [2010]). That said, the courts have held that communications between an in-house lawyer and the undertaking that relay the content or nature of privileged communications with external counsel will be privileged (an extension of LPP), although file notes prepared by employees or in-house counsel will not be protected (Hilti [1990]).

Material that is not communications between an undertaking and its external counsel may be privileged in some circumstances. The EU courts have held that summaries or working documents that are prepared by in-house counsel or the undertaking in order to compile information or evidence to assist external counsel's ability to understand the context, scope and nature of the circumstances upon which his or her advice is being sought may be privileged. However, this is only if the materials are prepared for the purpose of seeking independent external legal advice to defend against the Commission's investigation (Akzo Nobel Chemicals).

Granting immunity

32 How does the authority announce its promise not to charge or sanction?

The Commission grants conditional immunity by way of formal decision. The decision is addressed to the applicant only and is not published.

At the end of the administrative process, the Commission will confirm the decision to grant conditional immunity if all of the conditions under the Leniency Notice remain fulfilled at the time that the Commission adopts its infringement decision imposing fines. The infringement decision is published in the Official Journal and on Directorate General Competition's website.

33 Does the authority put its commitment in writing?

See response to question 32.

34 Who is given access to the document?

See response to question 32.

35 Does the authority publish a model letter for conferring immunity?

No.

Individual immunity or leniency

36 Is there an individual immunity programme?

See question 2. Article 101 TFEU applies only to 'undertakings' (ie, entities having an economic activity of their own, not to natural persons such as employees or directors). However, the term 'undertaking' has been widely defined and includes natural persons who are economic actors in their own right (for example, sole traders). While there is no separate immunity programme for individuals, the Leniency Notice would apply to such persons in relation to fines that may be imposed by the Commission.

37 What is the process for applying?

See responses above in relation to corporate immunity.

38 What are the criteria for qualifying?

See responses above in relation to corporate immunity.

Revocation of immunity

39 On what basis can corporate immunity be revoked?

Immunity is not formally granted until the conditional immunity is confirmed at the end of the administrative procedure through an infringement decision. If, at the end of the administrative procedure, the applicant has not complied with the duty to cooperate under point 12 of the Leniency Notice, the Commission may decide not to grant final immunity. Thus, as a technical matter, the Commission's decision is one not to grant final immunity. However, in practical terms it amounts to a 'withdrawal' or 'revocation' of conditional immunity (see response to question 40).

In addition, the Leniency Notice also specifies that immunity will not be granted if the Commission ultimately finds out that the applicant has acted as a coercer.

In Raw Tobacco Italy [2004], the Commission withdrew Deltafina's conditional immunity on the grounds that Deltafina had disclosed its immunity application to the other cartel members.

40 When can it be revoked?

See question 39. Conditional immunity may be withdrawn at any point during the investigation until the Commission adopts the infringement decision, at which time it decides whether to grant or refuse immunity. If, during the investigation, it becomes apparent that immunity is not available or that the applicant has not met the conditions for grant of immunity, the Commission will inform the applicant and the applicant may withdraw the evidence it has submitted.

41 What notice is required to revoke?

See response to question 40 as regards conditional immunity. At the end of the administrative procedure, the Commission's final infringement decision will set out the Commission's decision as to whether to grant or refuse formal immunity.

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes. The EU General Court has jurisdiction to review the legality of all Commission decisions, including the final infringement decision in which the Commission will, if it considers it appropriate, decide not to grant immunity and instead impose a fine on the applicant undertaking. In Raw Tobacco Italy, the decision not to grant immunity to Deltafina (despite the original grant of conditional immunity) was challenged before the General Court (which upheld the Commission's decision to withdraw, see T-12/06 Deltafina v Commission).

Reduction in sanctions

43 Does the leniency programme allow for reductions in sanctions?

Yes. Undertakings that do not meet the conditions for full immunity may still be eligible to benefit from a partial reduction in any fine that would otherwise have been imposed on them provided that they:

- provide evidence representing 'significant added value' to that already in the Commission's possession; and
- comply with the conditions under point 12 of the Leniency Notice (as is the case for immunity applicants).

44 What is the process for seeking a reduction in sanctions?

The applicant must make a formal application to the Commission, together with sufficient evidence of the alleged cartel which represents 'significant added value' with respect to the evidence that the Commission already has. To ensure that the evidence is assessed by the Commission for the purpose of determining whether a leniency reduction is available, an undertaking that voluntarily submits evidence must make it clear that the submission is part of a formal application for a reduction of a fine.

At the applicant's request, the Commission will provide an acknowledgment of receipt confirming the date and, where appropriate, the time of each submission.

The Commission will set out in the SO whether it intends to apply a fine reduction and will indicate in which 'band' the reduction falls (see question 47).

45 Is there a marker process similar to immunity applications?

No.

46 Are the reductions in sanctions fixed or discretionary?

The reduction in sanctions is discretionary, but the Commission has established certain 'bands' within which the reduction will fall (see response to question 47).

47 How are the reductions in sanctions calculated?

Once the Commission has determined that the applicant satisfies the conditions for a reduction in its fine, the level of the reduction will be calculated

by reference to three bands (which often turns on the point in the process at which the applicant provides the evidence):

- reductions of 30–50 per cent for the first applicant company to provide significant added value;
- reductions of 20–30 per cent for the second applicant company to provide significant added value; and
- reductions of up to 20 per cent for any subsequent applicant company that provides significant added value.

48 Are there sentencing guidelines?

The Commission has published its Guidelines on the method of setting fines: OJ (2006/C 210/02). However, the EU courts have confirmed that the Commission retains wide discretion as to the final amount of the fine imposed on infringing undertakings.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

Where the undertaking is the first applicant to submit 'compelling evidence' that the Commission later relies upon, the Commission will not take the additional information into account when setting the fine to be imposed upon the undertaking that provided the information (point 26 of the Leniency Notice in fine).

See further question 53 in relation to 'Immunity Plus'.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

See response to question 47.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

As a general matter, no. However, if the immunity applicant's conditional immunity is withdrawn, the Commission may grant conditional immunity to the first non-immunity applicant.

52 Does the competition authority publish guidance regarding sentencing reductions?

Yes. See response to question 48.

53 Does the authority provide for "Amnesty Plus" benefits?

No. EU law does not provide for 'Amnesty Plus' such as those provided under, for example, US law.

54 How is the Amnesty Plus discount calculated?

Not applicable.

Cooperation obligations for sentencing reductions

55 Are the cooperation obligations similar to those for immunity applicants?

Undertakings that apply for a reduction in fines must meet the same cumulative and continuing cooperation conditions as immunity applicants (ie, the conditions set out in point 12 of the Leniency Notice).

56 Will the applicant be required to make a written confession?

No. See response to question 27.

57 Can third parties obtain access to the materials provided by the applicant?

The position is the same as for materials provided by the immunity applicant. See response to question 14.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

The requirements for cooperation are the same as for immunity applicants. See response to question 29.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

The effect of obstructive conduct by an employee is the same as for immunity applicants. See response to question 30.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

The position is the same as for immunity applicants. See response to question 31.

61 Can an applicant challenge the amount of the reduction of sanctions?

Yes. The amount of the reduction will be set out in the Commission's infringement decision, which can be challenged before the EU courts . See response to question 64.

Settlements

62 How is the settlement process initiated?

The settlement process is initiated after the Commission has carried out its initial investigation but before the issuance of the SO. When the Commission considers that the case is appropriate for settlement, it invites each party to confirm its interest in the settlement process. A minimum of a two-week deadline is set for the parties to confirm their interest in writing. Importantly, at the stage of confirming their desire to engage in settlement discussions, parties are not required to acknowledge any participation in an infringement.

Once one or more parties have formally declared an interest in engaging in the settlement process, the Commission will hold three rounds of bilateral, without prejudice, discussions with each party. The discussions are intended to:

- set out the facts of the case and disclose key selections of the evidence on which the Commission's case relies (it is possible to request wider access to the file, but full access is not envisaged under the settlement procedure);
- discuss the likelihood of common understanding regarding the scope of the potential objections and the estimation of the range of likely fines to be imposed by the Commission and establish the relevant sales figures which may form the basis of the fine; and
- consider the amount of the fine.

In practice, in between the official discussions, there will often be a series of more technical meetings held to assist the Commission in its understanding of the evidence and also of the circumstances of the case for each individual party. Through these discussions, the Commission may change its view as to the scope and duration of the cartel. However, the Commission emphasises that this process is not a 'negotiation' as to the existence of the infringement or the level of the fine.

Once the settlement discussions are successfully concluded, the Commission will ask the parties to submit their settlement submissions within 15 working days (see response to question 66).

63 Is the amount of the sanction always fixed in the settlement agreement?

As mentioned above in response to question 62, the settlement discussions are not a 'negotiation'. The amount of the fine is not set out in any contractual agreement between the parties and the Commission at the end of the settlement process. The amount of the fine is fixed by the Commission in its final decision.

The Commission grants a 10 per cent reduction in the fine to all parties that settle (see Settlements Notice, at paragraph 32).

64 What role, if any, do the courts play in the settlement process?

The EU courts do not have a role during the settlement process itself. However, once the Commission has adopted the infringement decision, an undertaking may apply to the courts for a judicial review of that decision pursuant to article 263 TFEU, including a revision of the fine that has been imposed.

65 Are the settlement documents, including any factual admissions, made public?

The Commission does not publically disclose settlement submissions, as it considers that any such disclosure (even after a final decision has been made) would undermine both public and private interests. As regards follow-on actions, the Damages Directive requires member states to ensure that national courts cannot order the disclosure of settlement submissions.

66 Is an admission of wrongdoing required?

Yes. The undertaking's settlement submission must contain, inter alia, a clear and unequivocal acknowledgment of the undertaking's liability for the infringement. This should include a summary of:

- the object of the infringement;
- the possible implementation of the cartel; and
- the main facts of the case, including details of the undertaking's role and the duration of its participation in the cartel.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

Once the total amount of the fine has been calculated, the Commission will grant settling parties a 10 per cent reduction in the fine (see Settlements Notice, at paragraph 32). This is in addition to any leniency discount that the Commission may give.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

No. The Commission will pursue settlement discussions with all parties who have confirmed their interest in engaging with the process, even if some parties choose not to settle (so called 'hybrid' cases).

69 Will the authority settle with subjects who refuse to cooperate?

The Commission has a broad discretion to determine which parties to invite to participate in settlement discussions as well as whether to continue or discontinue those discussions and whether to ultimately settle (point 5 of the 2008 Settlement Notice point 5). Accordingly, the Commission can discontinue the settlement process with any party that refuses to cooperate.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

Admissions made, or information or evidence provided, to the Commission during the settlement process are on a without-prejudice basis. If settlement discussions terminate without agreement, the admissions, information and evidence will be deemed to have been withdrawn and cannot subsequently be used by the Commission as evidence against any party to the settlement discussions.

On 20 May 2015, the General Court of the European Union handed down its judgment in Timab Industries and CFPR v. Commission, Case T-456/10, which is the first ruling on the Commission's cartel settlement procedure. The General Court found that the Commission is not bound by positions it has taken during settlement negotiations. More specifically, the Commission is entitled to extend the scope of its investigation in relation to a party that has withdrawn from the settlement discussions, if this is justified by evidence that subsequently comes to light. Similarly, the General Court held that, if a party withdraws its settlement application, the Commission may ultimately impose a higher fine than that it has indicated as a 'likely range of fines' during settlement negotiations.

71 May a party to the settlement agreement void the agreement after it is entered?

Yes. This is because settlement decisions are entered into voluntarily.

72 Does the competition authority publish guidance regarding settlements?

The Commission has published:

- Regulation 622/2008, as regards the conduct of settlement procedures in cartel cases (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:en:PDF); and
- the 2008 notice on the conduct of settlement procedures (2008 OJ C 167/01) (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF).

KNOW-HOW ▸ FIRM

GIBSON DUNN

Gibson, Dunn & Crutcher LLP is a leading international law firm. Consistently ranking among the world's top law firms in industry surveys and major publications, Gibson Dunn is distinctively positioned in today's global marketplace with more than 1,100 lawyers and 18 offices, including Beijing, Brussels, Century City, Dallas, Denver, Dubai, Hong Kong, London, Los Angeles, Munich, New York, Orange County, Palo Alto, Paris, San Francisco, São Paulo, Singapore, and Washington, D.C.

Gibson Dunn has been representing clients in antitrust and competition matters for much of the last century and is recognised as one of the leading antitrust firms globally. Gibson Dunn's award-winning Antitrust and Competition Practice serves clients in a broad array of industries throughout the world in virtually every significant area of antitrust and trade regulation law, including global mergers, international cartel investigations, and private antitrust litigation with an international scope.

Gibson Dunn has coordinated a number of large and successful representations of clients involved in international cartel investigations, merger and joint venture transactions, abusive behaviour investigations and complex international distribution and licensing arrangements. International corporations, industry associations and government agencies regularly turn to the firm for strategic advice and representation on sophisticated matters with a multinational dimension that require the particular insight, technical skills and knowledge of the complex Brussels decision-making process for which Gibson Dunn has become well-known.

www.gibsondunn.com

KNOW-HOW ▸ BIOGRAPHY

Ali Nikpay is a partner at Gibson Dunn & Crutcher LLP. He has more than 20 years of cartel, merger control, and litigation experience in both the private and public sectors. He has served at both the European Commission's DG for Competition (DG COMP) and the UK competition authority where he was senior director for cartels and criminal enforcement; senior director for merger decisions and senior director of policy. Since returning to private practice he has represented clients in some of the largest, most complex, cartel and merger matters in the EU and the UK. In 2016 he was described by Chambers as "…an outstanding competition lawyer with a strategic approach and a clear appreciation of the relevant issues".

He is co-editor of Faull & Nikpay: The EU Law of Competition, which was described by European Competition Law Review as "… the best single volume work dealing with EU competition law that is available. He serves on the editorial boards of the following journals: European Competition Law, World Competition, Antitrust Enforcement Review and Competition Law International. Ali is a visiting lecturer at the University of Oxford and was a Visiting Fellow at the London School of Economics and Political Science (LSE). He has served on the Confederation of British Industry's Competition Panel and on several occasions appeared before the House of Lords Select Committee on the European Union.

anikpay@gibsondunn.com

Pablo Figueroa is a senior associate in the Brussels office of Gibson, Dunn & Crutcher LLP with more than ten years of experience working in European and National Competition law. A graduate from the University of Deusto (Bilbao, Spain), the College of Europe (Bruges, Belgium) and the Cornell Law School (Ithaca, New York),

Pablo has particular experience in EU and Spanish antitrust infringement proceedings and deriving litigation. He has represented clients in many of the largest cartel investigations dealt with by the EU and Spanish competition authorities and courts. More precisely, Pablo had prominent role in securing immunity for UBS AG from a €2.5 billion fine European Commission in relation to the latter's LIBOR investigation. Pablo has particular experience in EU and Spanish antitrust infringement proceedings and deriving litigation. Pablo is a visiting lecturer on Competition law at the Universidad de Deusto (Bilbao, Spain) and Queen Mary University (London, the United Kingdom), is an editor of World Competition, Law and Economics Journal (Kluwer) and is recommended by The Legal 500 EMEA 2015.

pfigueroa@gibsondunn.com

First published on Wednesday, 20 April 2016 and last verified on Tuesday, 26 July 2016