This document is submitted by the Secretariat to Working Party No. 3 of the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 23 October 2000. It has been revised in accordance with comments made during and after the February meeting. The Secretariat believes that a CLP report on Leniency Programs would be useful in its own right and as a mean of maintaining the momentum of OECD anti-cartel program. It is suggested that discussion of this note include consideration of what revisions would be desirable if the note were to be converted into a CLP report.
BACKGROUND PAPER ON LENIENCY PROGRAMS

Overview

1. Now that hard-core cartels have been recognised, in the 1998 Council recommendation, as “the most egregious violations” of competition law and hence a principal focus of competition policy and enforcement, Member countries face the challenge to design and implement effective enforcement procedures and adequate sanctions against them. Because cartel behaviour is illegal, and even criminal in many jurisdictions, the participants take pains to conceal it. That secrecy makes discovering and proving violations much more difficult for enforcement agencies.

2. Some jurisdictions have developed programs that offer leniency in order to encourage violators to tell these secrets, to confess and implicate their co-conspirators with first-hand, direct “insider” evidence that provides convincing proof of conduct parties want to conceal. The programs uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty.

3. Member countries have expressed interest in learning more about how leniency programs work as investigative tools and about how they might be adapted to different legal and administrative settings. This interest in comparing experiences, and the exposure of international cartels that demand action in many jurisdictions, makes the issue timely. A round table discussion on the subject was held at the WP3 meetings in February 2000. Based on that roundtable discussion and notes submitted by Member countries, this paper describes the major features of the existing and publicly proposed programs and sets out some of the practical and legal issues that these programs may raise.

Leniency programmes in Member countries

4. The current “amnesty” program at the US Department of Justice, Antitrust Division dates from 1993. The program has been a critical tool for successful enforcement action against major cartels. A corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, co-operating fully with the Antitrust Division in its investigation, and meeting other specified conditions. A similar program for individuals who approach the Antitrust Division on their own behalf to report antitrust violations was announced in 1994. The US has had an amnesty program since 1978, but the earlier one had been relatively ineffective, leading to only about one amnesty application per year. Changes in the program in 1993 make amnesty automatic if no investigation is underway before the applicant comes forward, make amnesty possible even after an investigation has begun, and grant amnesty to individual officers, directors, and employees of the applicant who co-operate with the investigation. After these changes, the number of applications multiplied, to more than 20 per year. The US program has led to the conviction of 30 defendants and collection of $1 billion in fines in the last two years.

5. The European Commission announced conditions in 1996 under which enterprises in a cartel agreement that decide to co-operate with the Commission may be exempted from fines or may be granted significant reductions in fines. In the EC system, leniency is not automatic. The decision is made at the end of the process, whether to grant amnesty, more lenient treatment, or nothing, depending on whether the party offered decisive evidence and continued to co-operate. The considerations are much like those applied in plea bargaining in other jurisdictions. The EC program specifies percentages by which fines might be reduced, in exchange for co-operation at different stages of an investigation. About a dozen...
leniency cases were at different stages of readiness as of February 2000, some of which were expected to appear soon.

6. Canada, which treats cartels as criminal offences, has had a “Cooperating Parties” immunity program for ten years. In September 2000, it adopted revisions to the program, which had been published in draft form for comment first in 1999 and again in February 2000. The revisions were developed after consultation with the US about its experiences. The purpose of the revision is to make the policies more transparent, so parties would know whether they were likely to qualify before they approach the enforcement authority. The element of discretion has been removed, so the only possible action for the successful applicant is complete immunity. In addition, the attorney general was brought into the system, because that office is ultimately responsible for taking action. The Bureau undertakes to recommend that the Attorney General grant immunity to a party who comes in before the Bureau knows of the offence, or before it knows enough to refer the party for prosecution. Although it is difficult to quantify the program’s effectiveness, the Bureau is certain that the program is key to enforcement against international cartels, and indeed that criminal enforcement would not be possible without it. Although the Bureau may have to make a decision on less than full information, leniency leads to decisions that are earlier rather than later and may thus terminate the cartel activity more quickly.

7. The UK Office of Fair Trading included a leniency program in the guidance about appropriate penalties under the new Competition Act, which was published for public comment in August 1999. The OFT program builds on the experiences of the US and EC leniency programs, and its terms take account of the US DOJ corporate leniency policy. A revised version of this proposed guidance was approved 29 January 2000, to become effective with the new Act on 1 March 2000. The Director General of OFT will offer total immunity from financial penalties to the first participant in a prohibited cartel to come forward before an investigation has begun. Immunity is automatic if conditions, similar to those for the US DOJ policy, are satisfied. And immunity may be offered to the first participant who comes forward after an investigation is underway, but before the Director General has given written notice of a proposed decision that the prohibition has been violated.

8. In Korea, the KFTC has undertaken a leniency program, which is explicitly authorised in the competition law, since 1997. Formal requirements are set out in the enforcement regulation. Although the regulations do not specify how valuable or complete the information must be, it would be expected that information which is not valuable or complete would not qualify the party for immunity. The party must not be the instigator of the violation. The degree of punishment is determined by relative responsibilities. In the only application so far, a member of a cartel who reported it to the KFTC received only a cease and desist warning, rather than an order and financial surcharge. In addition to offering lighter penalties to parties who inform on their partners in restrictive agreements, the KFTC might also agree not to refer their violations for criminal prosecution.

9. Other jurisdictions have made use of the incentives that underlie leniency programs, without adopting such policies explicitly. For example, in a 1997 action against a nine-firm cartel in the explosives industry, the Italian Competition Authority imposed fines totalling 1 406 million lire, but did not impose any fine on the complainant company, because it played a decisive role in the discovery of the agreement and it had voluntarily ceased breaking the law before the Authority had taken action. (OECD CLP 1998) Germany’s Bundeskartellamt has announced a leniency program, and France is considering legislation that would make a program possible.

10. As jurisdictions apply stronger sanctions to hard-core cartels, the benefits that a firm could gain by coming in first and thus obtaining leniency are becoming irresistible. Recent US cases illustrate how much a firm can save itself by confessing and implicating its co-conspirators. In the vitamins investigation, the applicant’s co-operation led directly to guilty pleas and fines of $500 million and $225 million against two other firms. In the graphite electrodes investigation, the next company in the door after the amnesty applicant was fined $32.5 million, the third company, $110 million, and the last company, $135 million. In
the marine construction investigation, a corporate co-conspirator agreed to plead guilty and co-operate shortly after the investigation was opened based on information provided by the amnesty applicant. Although the company provided very valuable co-operation and received a significant reduction in its fine for that co-operation, it was not the first one in, and it still paid a fine of $49 million.

**Aspects of information demanded**

11. To encourage cartels to break down, amnesty is typically offered only to the first firm to come in. In the US, if the conspirators “conspire” to confess together, all will be rejected. Sometimes parties have come in together, to plead guilty and bargain for more lenient treatment under the sentencing guidelines, but that is not “amnesty.” Complete “amnesty” is limited to the first, individual company. Some degree of leniency or consideration might be given to firms that co-operate with the investigation, even though they are not the first to come in. To preserve the incentive for firms to defect, it is important that the first firm in clearly receive the “best deal.”

12. An important consideration of existing leniency programs is that the company or individual seeking leniency provide information that the agency does not already have. One value of the programs is in ferreting out cartels that the agencies might not otherwise learn of at all. Leniency might also be granted to a firm whose confession makes the agency’s proof easier. In the US and UK programs, the first listed condition for granting full amnesty (that is, total immunity from penalties) is that the Division or the OFT has not yet received information about the illegal activity from any other source. In the EC program, the greatest degree of leniency would be given to the first firm to aduce decisive evidence of the cartel’s existence, informing the Commission before it has undertaken an investigation. In Canada, the first criterion for a recommendation of immunity is that the Bureau is unaware of an offence, and the party is the first to disclose it.

13. Leniency might still be granted to a firm that comes in after the agency has already begun an investigation. Even if the agency already has some idea that there might have been a violation, the investigation can be aided greatly by a confession accompanied by detailed, first-person evidence. And violations may end more quickly, if confession leads to the cartel’s breakdown. But conditions may be more stringent for granting leniency after the agency already has got wind of the violation. In the US program, qualifying for leniency after an investigation is underway requires that the company come in before the agency has enough evidence to lead to a conviction. Still, expanding the program to permit amnesty even after an investigation is underway, even subject to that caveat, was a critical step toward making the program more effective. About half of the applications in the US come in after some investigation is underway. In the vitamins case, which had already been under investigation for two and half years by the US and others, it was the co-operation of Rhone-Poulenc that cracked it. In the absence of a policy permitting amnesty after the investigation was underway, the outcome would have been uncertain.

14. Not only should the company or individual come in early, but its information should be valuable and reliable. The later in the process, the more detailed and incriminating the information should be, to justify granting leniency in exchange for it. By then the agency may not want simply a “tip” that a cartel exists, but evidence to prove the case against it. In the EC program, leniency depends on being “the first to adduce decisive evidence of the cartel’s existence.” After an investigation has begun, some degree of leniency might be granted to a firm that provides enough information to support initiating the EC’s decision process. Even at a later point, some reduction in fine is possible if a firm gives the Commission evidence that materially contributes to making the case against it before a statement of objections is sent.

15. Consensus may not yet exist among agencies about how much leniency should depend on the probative value of the evidence that the applicant proffers. Agencies take different approaches about whether the information supplied must be “decisive” or otherwise of particular significance. The US and UK programs do not set an evidentiary burden requirement, such as the “decisive evidence” standard that distinguishes the EC program. The US believes that, if such a requirement had been in place in the US,
some cartels might not have been cracked. For example, one applicant was a peripheral player in a conspiracy who did not attend many meetings. Under a “decisive evidence” standard, it might not have qualified. It supplied enough evidence to support search warrants, but not enough to support a conviction. The investigation that the information made possible led eventually to another, more culpable, member of the cartel pleading guilty. A reason given for the difference in approach is the nature of proof required in different legal systems. In the EC program, “decisive evidence” means, in a sense, the “smoking gun” that demonstrates the violation. In the EC process, where proof relies on documents, and it is not possible to test or confirm them through hearings and testimony under oath, it may be particularly important that the amnesty applicant supply information that will constitute usable proof.

Other considerations

16. The information and its source must be credible. To ensure against misrepresentations, material facts will need to be confirmed by further investigation. And the party seeking leniency must remain credible as long as its evidence may be needed in an enforcement action or appeal. Embarrassments to be avoided include the belated discovery of other, previously undisclosed offences that could undermine the party’s evidence or testimony in a contested proceeding.

17. Agencies typically demand complete and continuing co-operation from firms seeking leniency. Further investigation will be needed to track down all the participants and assemble the necessary formal proofs, and the informants will be particularly well placed to assist in that process. In addition, the agencies want to avoid the risk that the party will change its mind and repudiate its original confession. Canada’s program notes some of the practical implications of full co-operation, in requiring that the firm pay its own expenses, maintain co-operation throughout the ensuing prosecution and other legal proceedings, no doubt including appeals, and promote continuing co-operation of its officers and employees for that entire period.

18. The informant’s role and responsibility in the design and implementation of the activity reported is important. Agencies may refuse to grant leniency to firms that were the prime instigators or beneficiaries of the illegal conduct, or that coerced other firms to join it. The EC’s requirement is that the party not be an “instigator” or have coerced someone else to participate. It is judgement and a matter of fact, aimed at disqualifying the most blatant violators. In Canada, the applicant must not have been the instigator or the leader of the illegal activity. In the US program, the applicant for amnesty must not have “coerced another party to participate in the illegal activity” and must not “clearly [have been] the leader in, or originator of, the activity.” The sentences are in the singular, not the plural, referring to “the” leader and “the” originator of the activity, rather than “a” leader or “an” originator. The Division has interpreted this language to mean that, if the corporate conspirators are co-equals or two or more corporations are viewed as leaders or originators, then there is no single leader or originator so any of the corporate participants, including these co-equals or co-leaders, would be eligible for amnesty. The UK too takes this approach.

19. Good faith efforts to terminate and correct violations upon discovery are usually a condition of amnesty. In the EC program, for maximum leniency a firm must have terminated its involvement by the time it comes to the Commission to “confess”. The US program requires that a corporation have taken prompt and effective action to terminate its part in the illegal activity when it was discovered. The UK program requires that a party cease participating in the cartel from the time that it comes to the OFT. In Canada, the applicant must take effective steps to terminate the illegal activity. Korea notes, however, that requiring termination before a company applies for amnesty could delay prompt reporting, so it does not demand that a firm have ceased its violation before reporting it.

20. Determining what constitutes “discovery” and “termination” by a corporation can require making judgements about corporate formalities. The US has issued some guidance about this situation, which could be particularly significant for small or closely-held firms. Where the top executives, board members, or owners participated in the conspiracy, the corporation’s “discovery” of the activity arguably occurred when those participants joined the conspiracy, so it could be difficult to say that the corporation promptly
terminated its part in the activity. Nonetheless, the Antitrust Division will consider the corporation to have discovered the illegal activity at the earliest date on which either the board of directors or the corporation’s counsel (either inside or outside) were first informed of the conduct at issue. Thus, the fact that top executives, board members, or owners participated in the conspiracy will not necessarily bar the corporation from eligibility for amnesty. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters—the board or counsel representing the corporation—are advised of the illegal activity, they take action to cease that activity. In the case of a closely held corporation in which the board of directors is never formally advised of the activity, because all members of the board are conspirators, the corporation still may qualify if the activity is terminated promptly after legal counsel is first informed.

21. Termination need not mean a public announcement, because that action could impair further investigation against other participants. The US has issued guidance about what constitutes “termination.” Termination does not require announcement of withdrawal in the illegal activity to other participants in the activity (although that would constitute one means of termination). Termination can also be effectuated by reporting the illegal activity to the Division and refraining from further participation unless continued participation is with Division approval. An earlier draft of the UK program would have permitted the OFT to allow the applicant to continue in order to gather evidence, but that provision was deleted. The concern had been that a party might come in to request amnesty the day before a cartel meeting, and the failure of the company to appear would be a signal, causing the other conspirators to shred their evidence. In the UK, where the sanctions are not criminal so the quantum of proof needed is lower, this concern about evidence preservation was not considered significant enough to justify appearing to order parties to continue violating the law. In addition, controversies could arise about entrapment. The risk that termination could impair further investigation against other parties can still be dealt with, though, on a case-by-case basis.

22. Another measure of a party’s good faith is its effort to remedy the damage it has inflicted on others. One condition of leniency in the US is that, where possible, the firm makes restitution to injured parties. Restitution will be excused only where, as a practical matter, it is not possible. The restitution requirement might be excused if the applicant is in bankruptcy and is prohibited by court order from undertaking additional obligations, or if there was only one victim of the conspiracy and it is now defunct. And payment of full restitution may not be required if it would substantially jeopardise the organisation’s continued viability. In the US program, the issue of restitution is addressed in paragraph 2(g) of the model letter, which requires the applicant to make “all reasonable efforts, to the satisfaction of the Antitrust Division,” to pay restitution. This contemplates that, at some point before conditional amnesty becomes final, the Antitrust Division will make a determination that the applicant has satisfied any obligation to pay restitution and will so inform the applicant. Canada calls for restitution “where possible.”

23. There may be other considerations of fairness, too. In Canada, immunity will not be granted to a firm that was the sole beneficiary of the activity in Canada. This requirement is evidently intended to ensure against the possibility that there would be no party against which Canada could take enforcement action concerning a cartel that had caused harm there. Although a party’s intentions may not be determinative as long as it complies with a program’s requirements, agencies may want to discourage manipulation and avoid being required to arbitrate disputes about “honour among thieves”—although of course amnesty programs work because they invite one of the “thieves” to cheat on the others. In some circumstances the US program will consider the fairness to other parties of granting leniency to a particular informant, “considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.” A firm that originated or led the conspiracy or that coerced others to join would face a heavier burden—indeed, would probably be disqualified for leniency—as would a firm that does not come forward until the Division is on the verge of having enough evidence to sustain a conviction.

24. Other elements that an agency might consider are whether a firm is a recidivist and whether the firm has a compliance program. Existence of a compliance program could be a mitigating factor, but only
if it was followed; if management ignored its own compliance program, that could instead be an aggravating factor. The EC has encountered some recidivists, and recidivism is considered an aggravating factor in calculating fines. Other jurisdictions have not yet had to deal with a recidivist applying for amnesty. If certainty is considered very important to making the program effective, then if a recidivist qualified, amnesty would be granted, but grudgingly.

**Elements of leniency**

25. In principle, leniency could mean any penalty or obligation that is less severe than one which would be sought in the absence of full, voluntary co-operation. Where cartels are subject to criminal sanctions, leniency often takes the basic form of a grant of immunity from prosecution. Under the US program, “leniency” means not charging a firm or individual criminally for the activity being reported. In Canada the greatest degree of leniency that would be offered is a grant of immunity from prosecution.

26. Reduction in penalties might also be considered leniency, although some programs treat total immunity and leniency as somewhat different. In Canada, if a firm does not qualify for immunity, the Commissioner might still recommend that the Attorney General treat it more leniently. In the US, general principles of criminal justice administration permit financial penalties to be adjusted depending on the extent of the party’s co-operation in investigation. These guidelines for sentencing, for calculating fines and penalties (which apply in all kinds of cases, not just antitrust) provide that a company that comes forward early and provides substantial assistance can qualify for a reduction in otherwise applicable fines, of up to 50 percent or more. In Korea, leniency means reduction in otherwise applicable sanctions, and not necessarily complete amnesty from any order or finding of wrongdoing. Korea has not set concrete criteria in advance to relate the degree of leniency to the degree of culpability and co-operation. Although Korea recognised that there may be value in certainty, it also notes that specific criteria may undermine flexibility and equity in fact-specific antitrust cases.

27. The extent of potential reduction in fines or penalties in the EC program is quantified, with degrees of leniency correlated to percentage reductions. The greatest degree of co-operation, by a company that comes in before the investigation begins, can lead to “non-imposition” of any fine at all, or at least to “very substantial” reduction, meaning a reduction of from 75 per cent or more from the otherwise applicable fine. A lesser degree of co-operation can lead to a “substantial” reduction, of from 50 to 75 per cent; this might be available to the party who provides the “smoking gun”. And a “significant” reduction, of from 10 to 50 per cent, might still be granted to firms that provide critical information against themselves and do not contest their liability.

28. Narrowing the scope of sanctions may also amount to leniency. This is particularly significant where individuals may be subject to personal liability, and thus the incentive of granting immunity to individuals is very great. The US believes that its program would not be as successful without the risk of individual criminal prosecution. The risk is real: in the *ADM* case, three executives have been sentenced to prison terms of two years or longer, and in the vitamins case, a half dozen foreign executives have submitted to US criminal jurisdiction. There have been applications from foreign companies, whose executives might have evaded prosecution by staying out of the US. In Canada, there is a risk of individual liability, although there has been no tradition of actually imposing jail terms. The threat is still valuable, though. Some enforcers believe that the threat of tying up executives for several years of litigation, or constraining their ability to travel, could be a significant incentive to co-operation. In the US program, once a corporation qualifies for leniency, its officers and employees may also receive similar treatment, if they, too, admit their own individual involvement and assist in the investigation. Individuals who come forward with the corporation to seek leniency may qualify for individual immunity even if the corporation does not. In Canada, a firm may initiate an application on behalf of its employees, although it is not required to do so. If a corporation qualifies for immunity, though, then its present directors, officers and employees who admit their involvement as part of the corporate admission, and who provide complete and
timely co-operation, will qualify for the same recommendation. Employees may approach the Bureau on their own behalf, and each offer of co-operation will be evaluated for the benefit of the requesting party. Individual liability is not provided for under the EC system but individual consequences could be important, such as disqualification for serving in managerial positions. In the UK, there is a program of qualifying directors, and the Bureau is considering making participation in a cartel a disqualification.

29. But reduction in exposure to civil damages or other relief is not typically part of leniency. Agencies usually lack the power to grant this relief, at least directly. The EC program specifically rejects the possibility that co-operation could protect a firm from the civil law consequences of its conduct. If the Commission takes enforcement action, its decision will identify a firm benefiting from leniency as a violator and will describe in full the part it played. The firm’s co-operation with the Commission will also be described, to explain why the fine was reduced. The Commission is required to disclose details and explain the motivation for lenient treatment. So, a follow-up civil case could use that decision as evidence of wrongdoing. In the US program, firms and individuals that qualify for immunity from criminal liability could still face civil suit for injunctions or damages. The prospect, indeed the certainty, of a treble damage suit is probably the greatest disincentive to apply for amnesty in the US. The requirement to make restitution means paying single damages, and it does not eliminate the threat of civil suit. But to deal with this risk, amnesty applicants often contact potential private plaintiffs just as they contact the enforcement agencies, seeking to work out restitution or settlements, offering co-operation in exchange for cheaper terms. In the UK, parties may face the risk of damages actions at the end of the enforcement process. (There have been no awards to date, but there have been settlements). This highlights the need for significant penalties in the law. If the civil liability looks bigger than the fine, then the net incentive might be not to co-operate. As fines, which are based on the duration of the violation, increase over time after the new law becomes effective, the balance may shift.

30. An interesting feature of the US and UK programs is a provision for further reductions in penalties to a firm that reveals an additional second cartel, in a different market, after already co-operating in an investigation. That is, in addition to the reductions that might be given for bringing this second cartel to light, the firm could benefit from additional reductions in the penalties otherwise applicable with respect to the first one. The EC too would offer a bonus for learning of a second infringement. In the US, this offer of “amnesty plus” has proven to be a fruitful source of tips and leads about other violations. The typical “amnesty plus” situation involves a company that does not qualify for amnesty but is seeing a reduction in fine. (But if an applicant is not candid about its participation in the second cartel, which the Division finds out about separately, that failure could disqualify it from amnesty for the first one). Of the 30 ongoing international cartel investigations in the US, about half came to light through co-operation in other investigations.

Practical considerations

31. Because the enforcement agency may not know about the violation at issue, the process of granting leniency usually begins with an outside approach to the agency, perhaps by telephone, to discuss the possibility of immunity. The usual process is set out clearly in Canada’s announcement. Initial, very general contacts may then lead to a meeting among counsel for the firm or individual and the agency. Negotiations may be delicate. The agency needs to know how good the information really is, and so it will probe for more detail. The firm or individual, though, is concerned about being protected against the use of the information against it if immunity is not ultimately granted, and thus it may resist being too specific, too soon. Meetings may thus be held on a “without prejudice” basis, after agreement among counsel about the ground rules. The immunity request may appear as a hypothetical proffer of the information that could be provided if the agency recommended or granted leniency.

32. The proffer will be assessed in terms of how it meets such conditions as timeliness, completeness, and good faith. If some but not all conditions are met, the agency and counsel may negotiate further, perhaps about the possible terms of leniency short of complete immunity. The agency will want to
confirm the content and reliability of the proffer, both by interviewing individual witnesses and examining documentary evidence from the party seeking leniency and by investigating through other sources.

33. The agency may encounter several firms or individuals trying to come in at about the same time, each trying to be the one that confesses first. The US reports that firms have come in to apply for amnesty, too late, less than a day after their co-conspirator secured its position as first in line. Recognising this phenomenon, firms are advised not to dawdle. Agencies may need to assure firms that the time order will be respected strictly, and that bona fide requests for leniency will not be held up while the agency negotiates with or awaits a better offer from someone else.

34. Certainty and clarity are considered important in many jurisdictions. Firms may be more likely to come forward if the conditions and likely outcomes are certain. This has been the experience of the US program, which makes an unconditional promise of complete amnesty to those that meet the specified conditions—principally, being the first one in. Of course, the process is designed to make sure that parties keep their side of the bargain, for the amnesty does not become completely effective until the investigation is over and the possibility of prosecution is past. Although the US tries to make the process “certain” at the beginning, that does not mean that the Antitrust Division does not retain leverage. The letter a party gets at the outset grants “conditional” amnesty, subject to specified conditions including continued co-operation. In Canada, in consulting about the first draft of the proposed revisions, it became clear that the business community wanted certainty and transparency, which were necessary to provide enough incentive for a member to blow the whistle. The UK too intends to follow the US approach, emphasising certainty. In the EC, though, there is no formal mechanism by which a company can get some idea early on about the likely outcome if it continues to co-operate. It would be difficult to implement, because the final decision depends on the full Commission. It is hoped that as there are more cases, common practices will appear and lead to acceptably stable expectations. But the Competition Directorate cannot offer much of a commitment at the outset.

35. Considerations of speed and completeness may sometimes conflict. Companies may apply for amnesty before completing their own internal investigations, in order to ensure their place at the front of the line. Further investigation may uncover anti-competitive activity that is more extensive than the conduct originally reported, which falls outside of the non-prosecution protection of the (conditional) grant of amnesty. In the US program, if the company is providing full, continuing, and complete co-operation, and the company can meet the criteria for amnesty on the newly discovered conduct, the amnesty coverage will be expanded to include such conduct, by issuing an addendum to the original amnesty letter.

36. Leniency decisions are typically finally implemented at the end of the enforcement process. Any agreement between the agency and the firm or individual is likely to be conditioned on continued co-operation through the investigation. Of course, the agency cannot be arbitrary. Announced leniency programs and proceedings pursuant to them lead firms to take actions based on legitimate expectations about benefits to be obtained. But agencies reserve the power to keep firms and individuals to their side of the bargain, too. For example, in the EC program, if a firm does not contest the facts at the Commission and hence benefits from a reduction in a fine, but then objects before the Court of First Instance, the Commission will ask the Court to increase the fine. In Canada, parties may contact the Bureau to obtain a provisional guarantee of immunity. After receiving the provisional guarantee, the party makes its disclosure and enters a final agreement, which can be revoked later if it is determined that the party did not fulfil its obligations.

37. Leniency to a corporation depends on corporate action. In the US program, a firm’s admission of its participation in a cartel must be a corporate act, and not merely the isolated confessions of individual officials. The EC too makes it clear that the approach to the Commission must come from the corporation as an official act, not just from an individual. The value of the corporation’s “act” can be undermined if critical individuals do not also co-operate. If individual corporate executives represented by independent counsel refuse to co-operate, the corporation’s claim for amnesty might be in jeopardy because the
confession is no longer a “corporate act” or the corporation is not providing full and complete co-operation. In the US program, in order for the confession of wrongdoing to be a “corporate act” and in order for the co-operation to be considered “full, continuing and complete,” the corporation must, in the Division’s judgement, be taking all legal, reasonable steps to co-operate with the Division’s investigation. If the corporation is unable to secure the co-operation of one or more individuals, that will not necessarily prevent the Division from granting the amnesty application. But the number and significance of the individuals who fail to co-operate, and the steps taken by the company to secure their co-operation, are relevant in the Division’s determination whether the corporation’s co-operation is truly “full, continuing and complete.”

38. The situations and incentives of individuals may differ significantly from those of the corporations for whom they work. Where the individuals may also be liable or responsible for the violations, their interests and those of the corporation may conflict. In the US program, leniency for individuals may follow from, but does not depend on, leniency for the corporation. Canada’s programme is even more explicit in recognising the need to treat individuals separately from the corporations for which they work, emphasising that an offer of co-operation may be made by anyone who has been implicated in a possible violation and that employees are free to approach the agency on their own behalf. Individuals would be well advised to retain independent counsel, rather than rely on the corporation to represent their interests. In the EC, there is no individual liability, so there is less incentive for individuals to come forward against the judgement of their firms. Despite the lack of individual liability, firms still have an incentive to come forward because high company fines are possible and are being levied.

39. Firms or individuals informing on their fellow conspirators can run serious risk of commercial or even personal retaliation. They may also be exposed to liability in several jurisdictions. To encourage co-operation in the face of these risks, programs typically assure parties that their information will be granted strong protections against unauthorised disclosure. In the US program, the identity of the informant and the information provided are kept confidential and cannot be disclosed to other enforcement agencies, including foreign agencies that have co-operation agreements with the US, without the informant’s consent. In Canada, the Bureau generally treats as confidential the identity of the party requesting immunity and any information obtained from that party. Of course, agencies may find ways to communicate with each other about the existence of situations calling for enforcement attention, without divulging the details of these confidential sources. Information obtained from other sources in a continuing investigation, such as other members of the cartel, would not be covered by a promise of confidentiality about the information supplied by the applicant for leniency. And the fact that a firm has informed on its competitors in exchange for lenient treatment may become public knowledge in other ways. That the firm is not named or fined along with the rest of the industry when enforcement action is taken would be revealing. Securities laws may require some kind of public disclosure related to the potential for civil liability. The firms themselves sometimes make public announcements about their co-operation. The fact that a firm has co-operated with the EC will eventually be revealed if the Commission takes enforcement action, as the Commission is required to explain its decision, including the reasons why the fine of some violator was reduced.

40. It is important for the agency to publicise the availability of leniency, to encourage nervous conspirators to inform on their cohorts. Long before the UK’s revised competition law was set to become effective, the OFT began publicising its intention to offer immunity from the new, harsher penalties to firms that came in first to provide evidence against themselves and their co-conspirators. After a program is underway, publicity may take advantage of early successes, to demonstrate the real benefits of coming in, and the real risks of failing to be the first to do so. Until those successes are in hand, vivid examples of other jurisdictions may be compelling.

41. Implementing a leniency agreement may depend on action by another body, such as a court or a prosecutor. The competition agency’s decision may not be the last word. If sanctions must take the form of a court order, a judge may have to agree to impose reduced fines or other penalties. In Canada, decisions to
prosecute, and hence decisions to grant immunity, are ultimately up to the Attorney General. Thus, the Bureau’s own program is implemented by recommendations to the Attorney General, and the Department of Justice has its own published program about immunity. In developing and implementing a leniency program, coordinating policies and procedures with such other decision-makers will be important.

Potential problems or issues

42. The seriousness of the possible penalties, and thus the significance of relief that leniency can promise, is an important factor. If penalties are too weak or are applied too infrequently, then firms may disregard an offer to relax them. Firms or individuals with little concern about the risk of liability will have little incentive to annoy their co-conspirators by defecting from the cartel and informing on them. The firm may calculate that the benefits it receives from continuing to violate the law, discounted by the expected costs of getting caught, outweigh the benefits of avoiding that penalty—and it must consider not only the loss of its profits from the cartel, but also additional costs incurred as the others retaliate against its defection. It is difficult to generalise, however. Incentives to remain in the cartel or to defect will depend on the actual level of penalties and the perceived risk that they will actually be imposed, among other things. Differences within the cartel could be important. It may be an equilibrium strategy for all firms to remain in the cartel, if they are all in about the same position. But if their situations are not symmetrical, one firm may have an incentive to defect, and if the effects of that defection would be severe enough, others might then be persuaded to try to defect, too. Asymmetry within the cartel might lead to defection even if penalties are slight. A firm that is doing less well than its co-conspirators, and thus has less to lose from its collapse, might have an incentive to defect and end the cartel, even if the only sanction is a cease and desist order against all the members, including the defector. It may believe it could be more profitable in a competitive environment, or it may just want revenge against the others for cheating it out of its “fair share” of the cartel’s profits. But if penalties are so low that parties do not care whether any enforcement action is taken at all, regardless of the source—that is, they would not change behaviour or defect even if detection and enforcement were a certainty—then that weakness must be addressed before a leniency program will be effective.

43. The risk of personal liability could be a powerful motivator. The opportunity to avoid individual liability or criminal penalty may be a significant factor in encouraging early co-operation. An executive may feel compelled to come forward, to avoid personal exposure, when the corporation has not yet made that decision or indeed has decided against it. (The prospect of personal liability may also secure the cooperation of former employees, particularly if they are now working for a competitor). Thus, some agencies have been concerned that leniency programs will not be effective in systems that do not impose personal liability. But the threat of penalties or sanctions against individuals may not be a prerequisite to a leniency program. The promise of reduced fines puts the issue in a form that firms should be able to respond to. Corporate managers presumably can make the necessary calculations, to determine whether the firm gains financially more by defecting early than by holding out while hoping that others do too. They may pay even more careful attention to the trade-off, to the extent corporate governance structures enable directors or stakeholders to discipline managers for poor decisions. Here too, though, effectiveness will depend on penalties being large enough to materially affect corporate financial performance.

44. An objection to leniency, similar to an objection sometimes raised against “plea bargaining,” is that law enforcement agencies that take less than vigorous action against violations are improperly shirking their duties. In such a conception of jurisprudence, the enforcer has no discretion to moderate the law’s application. But few if any agencies could function effectively subject to such expectations. Some prioritising and balancing of costs and benefits in the enforcement process is inevitable. The European Commission addresses this objection directly, finding that “the interests of consumers and citizens in ensuring that [cartel] practices are detected and prohibited outweigh the interest in fining those enterprises which co-operate with the Commission, thereby enabling or helping it to detect and prohibit a cartel.” A similar statement appears in the UK program. It is likely that overall enforcement effectiveness and
compliance will improve, as leniency for a few participants makes it possible to apply the law more thoroughly to others.

45. There could be concern about the injustice of permitting a violator to avoid the consequences of its action by confessing and shifting the burden to others. But for violations like cartels, where there will be several parties, considerations of enforcement effectiveness may outweigh that concern. That is, even though one party “gets off,” there will be others to prosecute, and their prosecutions will be more certain and successful as a result of the evidence obtained through the amnesty offer. That depends on their being other parties to prosecute; in Canada, amnesty is not granted if the applicant is the only member of the conspiracy that has benefited from it in Canada.

46. Some jurisdictions have little discretion in setting the level of financial sanctions. A “surcharge” may be set by law or rule as a fixed percentage of sales, profits, or impact. Collecting such a charge may be conceived as an administrative function rather than as law enforcement, and thus it can avoid delays and uncertainties that may result from going through the courts. The lack of flexibility in setting the amount could be a handicap to offering leniency, if reducing or eliminating financial exposure could not be part of the offer. But enforcers may have some discretion about whether to exact surcharges at all, even if they have little discretion in calculating them. In addition, if other enforcement tools are available, such as criminal sanctions, part of leniency could be a commitment not to refer a matter for criminal prosecution against the parties that come in first. Whether that offer would encourage sufficient co-operation would depend on the credibility of the criminal or other enforcement threat.

47. Because the immediate effect of leniency is to reduce penalties to at least some participants, it has been argued that programs might actually encourage collusion, because they decrease the expected cost of misbehaviour. (Motta, 1999) But expected costs may be decreased only for the first firm in the door. For others, facing increased likelihood of detection and convincing proof of their participation, the expected costs of collusion may increase substantially after a leniency program is in place. At least, it is not clear that the net effect would be make firms more, rather than less, willing to collude. A firm could not be too confident that it would be the first one in the door. Certainly, if it calculated that move too closely, it could trip itself, because good faith would be an element in the leniency decision.

International co-operation and co-ordination among jurisdictions

48. As actions against international cartels increase, it will become necessary to deal with concerns about international co-ordination and the appropriate means for taking into account the important interests of other jurisdictions in establishing and implementing a program. Formal enforcement co-operation agreements could affect the extent and nature of co-ordination among different jurisdictions’ leniency treatment of participants in a cartel, at least to the extent of information sharing where that is authorised. Similarly, some degree of co-ordination is likely in the context of overlapping jurisdictional competence, such as between the EC and its member states or in some federal countries. The prospect of co-ordination between jurisdictions should not be over-emphasised, though, for too great a risk that information would be conveyed to other jurisdictions might decrease firms’ incentives to come in to seek leniency. But increasing co-operation means that agencies may learn about cartel problems from each other, rather than from confessions or complaints. Firms trying to come in first to tell the agency something it did not already know could be disappointed to find that the agency had already learned about it from another source.

49. Commitments to confidentiality in amnesty programs should not hamper co-operation, on balance. Even though agencies undertake not to disclose applications to other enforcement bodies, as a practical matter other agencies are finding out about them quickly anyway. Agencies may share information learned from other aspects of an investigation that follows the amnesty application, for example. The US promises applicants that it will not divulge their application to other agencies, but it does call the applicants’ attention to their self-interest in approaching those other agencies themselves, and quickly, before some other evidence comes in that the agency can share with impunity. The UK program
does not require parties to authorise sharing information with other jurisdictions, but they may do so, and the OFT brings up the issue with the companies. Some parties have reportedly tried to make enforcement co-operation arrangements some kind of escape from liability, or to demand commitments about what an agency will communicate to other agencies. But firms are evidently concluding that they cannot “game” the systems, trying to feed different information to different enforcers. Programs require the applicants to make complete, good faith disclosures. Discovery through other channels that a party has not been dealing honestly with an agency would lead to revocation of the leniency offered. And a party’s refusal to authorise an agency to check with others to confirm the party’s good faith, after the party had applied for amnesty there, might be considered suspicious. Firms appear to be moving toward accepting that sharing information with all authorities will become inevitable.

50. Agencies may make it clear that they will act independently, so that a firm will not jump to the top of the queue just because it has already qualified for leniency by coming in early elsewhere. This independent approach would preserve options, and it should have the effect of causing firms to confess early and often. Making it clear that treatment elsewhere is not relevant would deter a strategy of “confessing” in a jurisdiction where no penalty was likely anyway, then claiming that treatment as a binding or instructive precedent in jurisdictions where the risk was greater, but without having actually applied for amnesty there—or even having terminated participation in the cartel there. If jurisdictions refuse to link their treatment to what others are doing, firms are likely to come in as quickly as possible to each jurisdiction where they face significant exposure, once they have decided to act. Although duplication of the process, by agencies as well as firms, may imply some inefficiency, that cost would probably be outweighed by the enforcement advantage of encouraging firms to engage in a “race to the courthouse.” Already, the incentive for rapid action is obvious. Companies are now coming forward simultaneously in all the major jurisdictions with amnesty programs.
51. The leniency process is useful as a tool for getting information. Leniency-induced confessions produce information that an agency could not get otherwise, at least not without great cost. And the process may have other advantages, beyond simply eliciting confessions. The US program requires that the applicant make available documents and other evidence, wherever located. In effect, the amnesty applicant enters an agreement that overcomes some of the technical difficulties of obtaining evidence outside the US.
BIBLIOGRAPHY


Massimo Motta, and Michele Polo (1999), *Leniency Programs and Cartel Prosecution* (mimeo).
NOTES


2 Even if no investigation is underway, an amnesty applicant who offers a tip or lead that is not decisive enough may be rejected. And as investigation proceeds, firms may uncover more information and thus they may be able to make a more complete proffer at a later stage. By that time, the Commission may have learned more, too, so the criterion of “decisiveness” will likely have been raised.

3 In the US, resolving a criminal case with a plea of “no contest” could establish liability and support the imposition of criminal penalties, but it does not amount to an admission or otherwise support a *prima facie* case in a private lawsuit for damages or an injunction. Of course, if leniency takes the form of immunity from prosecution, there will not even be a “no contest” admission. For many years, the Antitrust Division has refused to accept pleas of “no contest” to resolve criminal antitrust cases.

4 It might also impair the use of leniency offers to obtain information by lending support to a party’s refusal to co-operate. A recent US case left open the question whether a party might refuse to supply information, despite a grant of immunity, where the US and other countries have substantially similar laws, aimed at offences of an international character, and the US was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries. *United States v. Balsys*, 524 U.S. 777 (1998) (*dictum*).
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U.S. ANTITRUST DIVISION CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. “Leniency” means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;

4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

5. Where possible, the corporation makes restitution to injured parties; and

6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;

2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;

3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;

4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;

6. Where possible, the corporation makes restitution to injured parties; and

7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.

If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1993
U.S. ANTITRUST DIVISION LENIENCY POLICY FOR INDIVIDUALS

On August 10, 1993, the Division announced a new Corporate Leniency Policy under which a corporation can avoid criminal prosecution for antitrust violations by confessing its role in the illegal activities, fully cooperating with the Division, and meeting the other specified conditions. The Corporate Leniency Policy also sets out the conditions under which the directors, officers and employees who come forward with the company, confess, and cooperate will be considered for individual leniency. The Division today announces a new Leniency Policy for Individuals that is effective immediately and applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware. Under this Policy, “leniency” means not charging such an individual criminally for the activity being reported.

A. Requirements for Leniency for Individuals

Leniency will be granted to an individual reporting illegal antitrust activity before an investigation has begun, if the following three conditions are met:

1. At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;

2. The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; and

3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Applicability of the Policy

Any individual who does not qualify for leniency under Part A of this Policy will be considered for statutory or informal immunity from criminal prosecution. Such immunity decisions will be made by the Division on a case-by-case basis in the exercise of its prosecutorial discretion.

If a corporation attempts to qualify for leniency under the Corporate Leniency Policy, any directors, officers or employees who come forward and confess with the corporation will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

C. Leniency Procedure

If the staff that receives the request for leniency believes the individual qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Deputy Assistant Attorney General for Litigation, setting forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Deputy Assistant Attorney General for Litigation will review the request and forward it to the Assistant Attorney General.
General for final decision. If the staff recommends against leniency, the individual and his or her counsel may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation to make their views known. Individuals and their counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

Issued August 10, 1994
MODEL AMNESTY LETTER, CORPORATIONS

U.S. Department of Justice
Antitrust Division

Office of the Deputy Assistant Attorney General
Washington, D.C. 20530

[insert]

Dear [insert]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and ABC, Inc., in connection with possible [insert description of conduct: e.g., price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: e.g., widget] industry [insert geographic scope--e.g., worldwide, in the United States]. This agreement is conditional and depends upon ABC, Inc., satisfying the conditions set forth below. After all of these conditions are met, the Division will notify ABC, Inc. in writing that the application has been granted. It is further agreed that disclosures made by counsel for ABC, Inc. in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.

AGREEMENT

1. Representations: ABC desires to report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [e.g., worldwide]. ABC represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, it:

   (a) took prompt and effective action to terminate its part in the activity upon discovery of the activity; and

   (b) did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity.

2. Cooperation: ABC agrees to provide full, continuing and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

   (a) providing a full exposition of all facts known to ABC relating to the reported activity;
(b) providing promptly, and without requirement of subpoena, all documents or other items in its
possession, custody or control, wherever located, requested by the Antitrust Division, to the
extent not already produced;

c) using its best efforts to secure the complete, candid and truthful cooperation of its current [and
former] directors, officers and employees, and encouraging such persons voluntarily to provide
the Antitrust Division with any information relevant to possible [e.g., price-fixing] agreements or
other conduct violative of 15 U.S.C. § 1 in the [insert] industry [e.g., worldwide];

d) facilitating the ability of current [and former] directors, officers and employees to appear for such
interviews or testimony as the Antitrust Division may require at the times and places designated
by the Antitrust Division;

e) using its best efforts to ensure that current [and former] directors, officers and employees who
provide information to the Antitrust Division respond completely, candidly and truthfully to all
questions asked in interviews, and grand jury appearances and at trial;

(f) using its best efforts to ensure that current [and former] directors, officers and employees who
provide information to the Antitrust Division make no attempt either falsely to protect or falsely
to implicate any person or entity; and

(g) making all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to
any person or entity injured as a result of any [e.g., price-fixing] agreements or other conduct
violative of 15 U.S.C. § 1 in the [insert] industry [e.g., worldwide], in which ABC was a
participant.

3. Corporate Leniency: Subject to verification of ABC’s representations in paragraph 1 above, and
subject to its full, continuing and complete cooperation, as described in paragraph 2 above, the Antitrust
Division agrees conditionally to accept ABC into [Part A/Part B] of the Corporate Leniency Program, as
explained in an Antitrust Division policy statement dated August 10, 1993 (attached). Pursuant to that policy,
the Antitrust Division agrees not to bring any criminal prosecution against ABC for any act or offense it may
have committed prior to the date of this letter in connection with the anticompetitive activity being reported in
the [insert] industry [e.g., worldwide]. The commitments in this paragraph are binding only upon the Antitrust
Division, although, upon request of ABC, the Antitrust Division will bring this Agreement to the attention of
other prosecuting offices or administrative agencies. If the Antitrust Division at any time determines that ABC
has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the
conditional acceptance of ABC into the Corporate Leniency Program. Should the Antitrust Division revoke the
conditional acceptance of ABC into the Corporate Leniency Program, the Antitrust Division may thereafter
initiate a criminal prosecution against ABC, without limitation. Should such a prosecution be initiated, any
documentary or other information provided by ABC, as well as any statements or other information provided
by any current [or former] director, officer or employee of ABC to the Antitrust Division pursuant to this
Agreement, may be used against ABC in any such prosecution.

4. Non-Prosecution Protection For Corporate Directors, Officers And Employees: Subject to ABC’s
full, continuing and complete cooperation, the Antitrust Division agrees that current [and former] directors,
officers and employees of ABC who admit their knowledge of, or participation in, and fully and truthfully
cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported, shall
not be prosecuted criminally by the Antitrust Division for any act or offense committed [during their period of
employment at ABC] prior to the date of this letter in connection with the anticompetitive activity being
reported in the [insert] industry [e.g., worldwide]. Such full and truthful cooperation shall include, but not be limited to:

(a) making his relevant personal documents and records available in the United States to attorneys and agents of the United States;

(b) making himself available in the United States to attorneys and agents of the United States for interviews;

(c) responding fully and truthfully to all inquiries of the United States in connection with [describe offense being reported], without falsely implicating any person or intentionally withholding any information;

(d) otherwise giving the United States access to knowledge or information he may have relevant to [describe offense being reported]; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings in the United States, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), in connection with [describe offense being reported].

The commitments in this paragraph are binding only upon the Antitrust Division, although, upon the request of ABC, the Antitrust Division will bring this Agreement to the attention of other prosecuting offices or administrative agencies. In the event a current [or former] director, officer or employee of ABC fails to comply fully with his/her obligations hereunder, this Agreement as it pertains to such individual shall be void, and any leniency, immunity or non-prosecution granted to such individual under this Agreement may be revoked by the Antitrust Division. Should any leniency, immunity or non-prosecution granted be revoked, the Antitrust Division may thereafter prosecute such person criminally, and any statements or other information provided by such person to the Antitrust Division pursuant to this Agreement may be used against him/her in such prosecution.

5. Entire Agreement: This letter constitutes the entire agreement between the Antitrust Division and ABC, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein.

6. Authority And Capacity: The Antitrust Division and ABC represent and warrant each to the other that the signatories to this Agreement on behalf of each party hereto have all the authority and capacity necessary to execute this Agreement and to bind the respective parties hereto.
The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely yours,

Date: ______________  Gary R. Spratling
Deputy Assistant Attorney General
Antitrust Division

_________________________________
Date: ______________
[Name]
ABC, Inc.

_________________________________
Date: ______________
[Counsel for ABC, Inc.]
MODEL AMNESTY LETTER, INDIVIDUALS

U.S. Department of Justice
Antitrust Division

Office of the Deputy Assistant Attorney General
Washington, D.C. 20530

Dear [insert]:

This letter sets forth the terms and conditions of an agreement between the Antitrust Division of the United States Department of Justice and [you/your client], [Name] (“Applicant”), in connection with possible [insert description of conduct: e.g., price fixing, bid rigging, market allocation] or other conduct violative of Section 1 of the Sherman Act, 15 U.S.C. § 1, in the [insert generic description of industry: e.g., widget] industry [insert geographic scope--e.g., worldwide, in the United States]. This agreement is conditional and depends upon Applicant satisfying the conditions set forth below. After all of these conditions are met, the Division will notify Applicant in writing that the application has been granted. [It is further agreed that disclosures made by counsel for Applicant in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege or the work-product privilege.]

AGREEMENT

1. Representations: Applicant desires to report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act in the [insert] industry [e.g., worldwide]. Applicant represents to the Antitrust Division that, in connection with the anticompetitive activity being reported, he did not coerce any other party to participate in the activity and was not the leader in, or the originator of, the activity.

2. Cooperation: Applicant agrees to provide full, continuing, and complete cooperation to the Antitrust Division in connection with the activity being reported, including, but not limited to, the following:

(a) making his relevant personal documents and records available [in the United States] to attorneys and agents of the United States;

(b) making himself available [in the United States] to attorneys and agents of the United States for interviews at the request of the United States;
(c) responding fully and truthfully to all inquiries of the United States in connection with [describe offense being reported], without falsely implicating any person or intentionally withholding any information;

(d) otherwise giving the United States access to knowledge or information he may have relevant to [describe offense being reported]; and

(e) when called upon to do so by the United States, testifying in trial and grand jury or other proceedings [in the United States], fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), in connection with [describe offense being reported].

3. Individual Leniency: Subject to verification of Applicant’s representations in paragraph 1 above, and subject to Applicant’s full, continuing, and complete cooperation, as described in paragraph 2 above, the Antitrust Division agrees conditionally to accept Applicant into the Individual Leniency Program, as explained in an Antitrust Division policy statement dated August 10, 1994 (attached). Pursuant to that policy, the Antitrust Division agrees not to bring any criminal prosecution against Applicant for any act or offense he may have committed prior to the date of this letter in connection with the anticompetitive activity being reported in the [insert] industry [e.g., worldwide]. If the Antitrust Division at any time determines that Applicant has violated this Agreement, this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of Applicant into the Individual Leniency Program. Should the Antitrust Division revoke the conditional acceptance of Applicant into the Individual Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against Applicant, without limitation. Should such a prosecution be initiated, any documentary information, statements, or other information provided by Applicant to the Antitrust Division pursuant to this Agreement may be used against Applicant in any such prosecution.

4. Entire Agreement: This letter constitutes the entire agreement between the Antitrust Division and Applicant, and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein. The commitments in this letter are binding only upon the Antitrust Division.
The signatories below acknowledge acceptance of the foregoing terms and conditions.

Sincerely,

Date: ______________

Gary R. Spratling
Deputy Assistant Attorney General
Antitrust Division

__________________________
[Applicant Name]

Date: ______________

__________________________
[Counsel for Applicant]

Date: ______________
UK PROGRAM

(OFFICE OF FAIR TRADING, GUIDANCE ON THE APPROPRIATE AMOUNT OF A PENALTY)

PART II: LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION

9 Immunity from or reduction in financial penalty for undertakings coming forward with information in cartel cases

9.1 Undertakings participating in cartel activities might wish to terminate their involvement and inform the Director of the existence of the cartel, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward the Director will offer total immunity from financial penalties for an infringement of the Chapter I prohibition to a member of a cartel who is the first to come forward and who satisfies the requirements set out in paragraph 9.3.2. Alternatively, the Director may offer total immunity from financial penalties to a member of a cartel who is the first to come forward and who satisfies the requirements set out in paragraph 9.3.4. An undertaking which is not the first to come forward, or does not satisfy these requirements may benefit from a reduction in the amount of the penalty imposed if it satisfies the requirements set out in paragraph 9.4.1 below.

9.2 The Director considers that it is in the interest of the economy of the United Kingdom to grant favourable treatment to undertakings which inform him of cartels and which then cooperate with him in the circumstances set out below. It is the secret nature of cartels which justifies such a policy. The interests of customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which are members of the cartel and which cooperate with the Director.

9.3 Total immunity from financial penalties in cartel cases

9.3.1 Where an undertaking participating in a cartel is the first to come forward to provide evidence of the existence and activities of the cartel, and it fulfills all the requirements in paragraph 9.3.2, it will benefit from total immunity from financial penalties in respect of that infringement; if it is the first to come forward to provide such evidence and it fulfills all the requirements of paragraph 9.3.4 below, it may benefit from total immunity from financial penalties in respect of that infringement.

9.3.2 Total immunity for the first to come forward before an investigation has commenced: In order to benefit from total immunity under this paragraph, the undertaking must be the first to provide the Director with evidence of the existence and activities of a cartel before he has commenced an investigation of the undertakings involved; provided that the Director does not already have sufficient information to establish the existence of the alleged cartel, and the following conditions are satisfied:
the undertaking must:

a) provide the Director with all the information, documents and evidence available to it regarding the existence and activities of the cartel;

b) maintain continuous and complete cooperation throughout the investigation;

c) not have compelled another undertaking to take part in the cartel and not have acted as the instigator or played the leading role in the cartel; and

d) refrain from further participation in the cartel from the time it discloses the cartel.

9.3.3 If an undertaking does not fulfill all the requirements in paragraph 9.3.2 above, it may still benefit from total immunity from financial penalties if it fulfills all the requirements in paragraph 9.3.4 below.

9.3.4 Total immunity for the first to come forward after an investigation has commenced: In order to benefit from the possibility of total immunity under this paragraph:

- the undertaking seeking immunity under this paragraph must be the first to provide the Director with evidence of the existence and activities of a cartel before the Director has given written notice of his proposal to make a decision that the Chapter I prohibition has been infringed; and

- conditions (a) to (d) in paragraph 9.3.2 above must be satisfied.

The grant of immunity by the Director in these circumstances is, however, discretionary. In order for the Director to exercise his discretion to grant immunity to the undertaking he must be satisfied that the undertaking should benefit from immunity, taking into account the stage at which the undertaking comes forward and whether or not at that stage the Director has sufficient evidence to make a decision that the Chapter I prohibition has been infringed.

9.4 Reduction in the level of financial penalties in cartel cases

9.4.1 Undertakings which provide evidence of the existence and activities of a cartel before written notice of a proposed infringement decision is given, but are not the first to come forward, or do not meet all the requirements under paragraphs 9.3.2 or 9.3.4 above, will be granted a reduction in the amount of a financial penalty which would otherwise be imposed of up to 50%, if the following conditions are met:

the undertakings must:

a) provide the Director with all the information, documents and evidence available to them regarding the existence and activities of the cartel;

b) maintain continuous and complete cooperation throughout the investigation; and

c) refrain from further participation in the cartel from the time they disclose the cartel.
9.5 **Procedure for requesting immunity or a reduction in the level of penalties**

9.5.1 An undertaking which wishes to take advantage of the favourable treatment set out in this Part must contact the office of the Director of Cartel Investigations at the Office of Fair Trading, or his equivalent at the appropriate regulator. This step has to be taken by a person who has the power to represent the undertaking for that purpose.

9.6 **Additional reduction in financial penalties**

9.6.1 An undertaking cooperating with an investigation by the Director under the Act in relation to cartel activities in one market (the “first market”) may also be involved in a separate cartel in another market (the “second market”) which also infringes the Chapter I prohibition.

9.6.2 If the undertaking obtains total immunity from financial penalties under either paragraph 9.3.2 or 9.3.4 in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional to the reduction which it would have received for its cooperation in the first market alone.

9.7 **Confidentiality**

9.7.1 An undertaking coming forward with evidence of a cartel may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The Director will therefore endeavour, where possible, to keep the identity of such undertakings confidential throughout the course of the investigation.
NOTES

1 See meaning of cartel activities as set out in footnote 5 [omitted] above.

2 By the exercise of powers under sections 26-28 of the Act.


4 i.e. there must not be any undertaking which is benefitting from total immunity under paragraph 9.3.2 in relation to the same cartel.

A. INTRODUCTION

1. The Competition Act (the Act)\(^1\) is a law of general application that establishes basic principles for the conduct of business in Canada. The Act maintains and encourages competition:
   - to promote the efficiency and adaptability of the Canadian economy;
   - to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada;
   - to ensure small and medium-sized enterprises have equal opportunity to participate in the Canadian economy; and
   - to provide consumers with competitive prices and product choices.

2. The Act gives the Commissioner of Competition (the Commissioner) independent authority to administer and enforce the Competition Act. The Commissioner is the head of the Competition Bureau (the Bureau), the organization that carries out investigations under the Act.

3. The Competition Act contains criminal provisions\(^2\) that prohibit anti-competitive business activities such as conspiracies that prevent or lessen competition unduly (e.g., price fixing or market allocation), bid rigging, price maintenance and deceptive marketing practices. There are also civil provisions relating to mergers, abuse of dominant position and misleading advertising. The criminal provisions carry serious penalties. For example, the conspiracy provision carries a maximum fine of $10 million and five years in prison per count.

4. When there has been a violation of the Act, the Bureau’s objective is to halt the anti-competitive acts and punish the firms and individuals responsible. By attaching penalties to such behaviour, the Bureau hopes to deter similar crimes. The Bureau also encourages firms to set up corporate compliance programs to ensure they adopt policies and practices that conform with the law. The Corporate Compliance Programs Bulletin provides advice to company management to promote appropriate corporate conduct.

5. The Bureau, as with other law enforcement agencies, recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes. This information bulletin details the Bureau’s approach to recommending immunity for violations of the Competition Act, and expands upon and supercedes earlier public statements by senior Bureau officials.
6. This bulletin describes the roles and responsibilities of the Commissioner and the Attorney General of Canada (the Attorney General), outlines the requirements for granting immunity requests, discusses the issues of timing and corporate versus individual immunity, and sets out the steps in the immunity process. Particular mention is made of transnational criminal activity, as well as issues such as confidentiality and failure to comply with the requirements of an immunity agreement.

7. This bulletin does not give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern.

8. For the purposes of this bulletin, the term party means a business enterprise or individual, as the case may be. The terms firm, company and corporation are used interchangeably to denote a business enterprise.

9. Anyone implicated in activity that might have violated the Competition Act may offer to co-operate with the Bureau and request immunity. A firm may but, does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf. Each offer of co-operation will be evaluated for the benefit of the requesting party.

10. In this bulletin, the term immunity refers to a grant of full immunity from prosecution under the Competition Act. When a party does not qualify for immunity, the Commissioner may recommend that the Attorney General grant another form of leniency. When a party believes it does not meet the requirements for immunity, it may still offer to co-operate with the Bureau and request another form of leniency.

B. ROLES OF THE COMMISSIONER AND THE ATTORNEY GENERAL

11. Criminal prosecutions under the Competition Act are the responsibility of the Attorney General, and the Commissioner may refer a matter to the Attorney General for consideration when there is evidence of an offence, for whatever action the Attorney General may wish to take. The Attorney General has the sole authority to grant immunity to a party implicated in an offence under the Competition Act. The Bureau investigates the matter and makes a recommendation to the Attorney General. The Attorney General then independently considers if the interests of the public are best served by granting immunity. The Attorney General’s policy on immunity is articulated in a document published by the Department of Justice Canada.

C. OBTAINING IMMUNITY

12. The Bureau encourages parties to come forward as soon as they believe they are implicated in an offence. It is not necessary for the party to have assembled a complete record of the information required at the first contact with the Bureau. Requests for immunity are subject to close scrutiny by the Attorney General and the Commissioner.

13. Subject to the following requirements, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the Attorney General that it grant immunity to a party in the following situations:

   a) the Bureau is unaware of an offence, and the party is the first to disclose it; or

   b) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.
Requirements

14. The party must take effective steps to terminate its participation in the illegal activity.

15. The party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada.

16. Throughout the course of the Bureau’s investigation and subsequent prosecutions, the party must provide complete and timely co-operation:

   a) the party must reveal any and all offences in which it may have been involved;

   b) the party must provide full, frank and truthful disclosure of all the evidence and information known or available to it or under its control, wherever located, relating to the offences under investigation. There must be no misrepresentation of any material facts; and

   c) the party must co-operate fully, on a continuous basis, expeditiously and, where the party is a business enterprise, at its own expense throughout the investigation and with any ensuing prosecutions. Companies must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.

17. Where possible, the party will make restitution for the illegal activity.

18. If the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

D. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS AND EMPLOYEES

19. If a company qualifies for immunity, all present directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation for immunity. Past directors, officers and employees who offer to co-operate with the Bureau’s investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis.

20. If a corporation does not qualify for a recommendation for immunity, the past or present directors, officers and employees who come forward with the corporation to co-operate may nonetheless be considered for immunity as if they had approached the Bureau individually.

E. THE IMMUNITY PROCESS

Step 1: Initial Contact

21. Anyone may initiate a request for immunity by communicating with the Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices, to discuss the possibility of receiving immunity from prosecution in connection with an offence under the Act. Certain inculpatory information will need to be disclosed at this stage in order to determine whether the party might qualify under Part C, above. Usually the request is made in terms of a hypothetical disclosure.
Step 2: Provisional Guarantee of Immunity

22. If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually still in hypothetical terms. The Bureau will then present all the relevant information to the Attorney General, who has independent discretion in these matters, in order to obtain a written provisional guarantee of immunity.  

Step 3: Full Disclosure

23. After the party receives a written provisional guarantee of immunity from the Attorney General, the Bureau will need to know with sufficient detail and certainty what evidence or testimony a potential witness will be able to provide and how probative it is likely to be. Full disclosure is, therefore, essential. The full disclosure process will be conducted with the understanding that the Bureau will not use the information against the party, unless there is a failure to comply, as described in section F.

Step 4: Immunity Agreement

24. Upon recommendation by the Bureau, and if, after an independent review, the Attorney General accepts the recommendation, the Attorney General will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

F. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AGREEMENT

25. Failure to comply with any of the requirements of the immunity agreement may result in the Attorney General revoking immunity.

26. The Bureau will resume investigating the party who has agreed to co-operate but who does not fulfill its obligations under the agreement and consider referral of the matter to the Attorney General. The Bureau will recommend that the Attorney General revoke any grant of immunity and take appropriate action against the party concerned.

27. Paragraph 26 extends to a company that does not fully promote the complete and timely co-operation of its employees, and to a party that fails to disclose any and all offences or that does not provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

G. TRANSNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY

28. As a matter of law and practicality, international anti-competitive activity, including price-fixing cartels and deceptive marketing practices, may fall under the jurisdiction of more than one competition authority. Parties should expect, then, that all jurisdictions affected will look into the matter. This may be the case when, for example, agreements to fix prices or allocate markets apply across national borders or when deceptive telemarketers take advantage of differing legal treatments to locate in one country and do business in another. In these circumstances, the authorities may decide to pursue independent, joint or parallel investigations.

29. Because the timing of an approach to the Bureau usually dictates the resolution options available, a party and its counsel should appreciate that when the matter involves other countries, a foreign investigation can potentially lead to the Bureau’s becoming aware of the matter prior to an approach by an involved party.
30. In situations involving multiple jurisdictions, a party may wish to approach each competition law authority individually. In particular, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

31. The Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.

32. When approached by a party seeking immunity, the Bureau will inform the party of the existence of similar immunity programs in other jurisdictions.

H. CONFIDENTIALITY

33. The Bureau treats as confidential the identity of a party requesting immunity and any information obtained from that party. The only exceptions to this policy would be the following:

a) when there has been prior disclosure by the party

b) when the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act;

c) when disclosure is required by law; and

d) when disclosure is necessary to prevent the commission of a serious criminal offence.

34. It is the Bureau’s policy with respect to private actions under section 36 of the Act to provide confidential documents and evidence only in response to a court order. In connection with information obtained under the Immunity Program, the Bureau will take all reasonable steps to protect the information.

I. CONCLUSION

35. The Bureau encourages the public to take advantage of its policies and programs, which facilitate conformity with the provisions of the Competition Act.

36. Anyone wishing to apply under the Commissioner’s Immunity Program may contact:

Deputy Commissioner, Criminal Matters
(819) 997-1208,

Johanne D’Auray
Deputy Commissioner, Fair Business Practices
(819) 997-1231.

37. For further information, visit the Bureau Web site (http://competition.ic.gc.ca) or contact the Bureau toll free at 1-800-348-5358.
NOTES

1 Competition Act, R.S.C. 1985, c. C-34.

2 See Appendix I for relevant provisions [omitted]

3 Refer to the *Federal Prosecution Services Deskbook*, Department of Justice Canada, particularly Part 7, Chapter 1, Immunity Agreements.

4 Subsequent references to evidence and information relate to this requirement to provide complete and continuing co-operation to the Bureau.

5 Having regard to the immunity agreement policy set out in the *Federal Prosecution Service Deskbook*, Department of Justice, Part 7, Chapter 1.
EC PROGRAM


COMMISSION NOTICE on the non-imposition or reduction of fines in cartel cases

A. INTRODUCTION

1. Secret cartels between enterprises aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports are among the most serious restrictions of competition encountered by the Commission.

Such practices ultimately result in increased prices and reduced choice for the consumer. Furthermore, they not only prejudice the interests of Community consumers, but they also harm European industry. By artificially limiting the competition that would normally prevail between them, Community enterprises avoid exactly those pressures that lead them to innovate, both in terms of product development and with regard to the introduction of more efficient production processes. Such practices also lead to more expensive raw materials and components for the Community enterprises that buy from such producers. In the long term, they lead to a loss of competitiveness and, in an increasingly global market-place, reduced employment opportunities.

For all those reasons, the Commission considers that combating cartels is an important aspect of its endeavours to achieve the objectives set out in its 1993 White Paper on Growth, Competitiveness and Employment. This explains why it has increased its efforts to detect cartels in recent years.

2. The Commission is aware that certain enterprises participating in such agreements might wish to terminate their involvement and inform the Commission of the existence of the cartel, but are deterred from doing so by the risk of incurring large fines.

3. In order to take account of this fact, the Commission has decided to adopt the present notice, which sets out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them. The Commission will examine whether it is necessary to modify this notice as soon as it has acquired sufficient experience in applying it.

4. The Commission considers that it is in the Community interest in granting favourable treatment to enterprises which cooperate with it in the circumstances set out below. The interests of consumers and citizens in ensuring that such practices are detected and prohibited outweigh the interest in fining those enterprises which cooperate with the Commission, thereby enabling or helping it to detect and prohibit a cartel.

5. Cooperation by an enterprise is only one of several factors which the Commission takes into account when fixing the amount of a fine. This notice does not prejudice the Commission’s right to reduce a fine for other reasons.
B. NON-IMPOSITION OF A FINE OR A VERY SUBSTANTIAL REDUCTION IN ITS AMOUNT

An enterprise which:

(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;

(b) is the first to adduce decisive evidence of the cartel’s existence;

(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;

(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;

(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity,

will benefit from a reduction of at least 75% of the fine or even from total exemption from the fine that would have been imposed if they had not cooperated.

C. SUBSTANTIAL REDUCTION IN A FINE

Enterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50% to 75% of the fine.

D. SIGNIFICANT REDUCTION IN A FINE

1. Where an enterprise cooperates without having met all the conditions set out in Sections B or C, it will benefit from a reduction of 10% to 50% of the fine that would have been imposed if it had not cooperated.

2. Such cases may include the following:

- before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;

- after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

E. PROCEDURE

1. Where an enterprise wishes to take advantage of the favourable treatment set out in this notice, it should contact the Commission’s Directorate-General for Competition. Only persons empowered to represent the enterprise for that purpose may take such a step. This notice does not therefore cover requests from individual employees of enterprises.

2. Only on its adoption of a decision will the Commission determine whether or not the conditions set out in Sections B, C and D are met, and thus whether or not to grant any reduction in the fine, or even waive its
imposition altogether. It would not be appropriate to grant such a reduction or waiver before the end of the administrative procedure, as those conditions apply throughout such period.

3. Nonetheless, provided that all the conditions are met, non-imposition or reductions will be granted. The Commission is aware that this notice will create legitimate expectations on which enterprises may rely when disclosing the existence of a cartel to the Commission. Failure to meet any of the conditions set out in Sections B or C at any stage of the administrative procedure will, however, result in the loss of the favourable treatment set out therein. In such circumstances an enterprise may, however, still enjoy a reduction in the fine, as set out in Section D above.

4. The fact that leniency in respect of fines is granted cannot, however, protect an enterprise from the civil law consequences of its participation in an illegal agreement. In this respect, if the information provided by the enterprise leads the Commission to take a decision pursuant to Article 85(1) of the EC Treaty, the enterprise benefiting from the leniency in respect of the fine will also be named in that decision as having infringed the Treaty and will have the part it played described in full therein. The fact that the enterprise cooperated with the Commission will also be indicated in the decision, so as to explain the reason for the non-imposition or reduction of the fine.

Should an enterprise which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court of First Instance, the Commission will normally ask that court to increase the fine imposed on that enterprise.