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## Decision of 9 February 2021, containing the establishment of rules regarding the granting of leniency in connection with fines for cartel agreements (Leniency decision)

*Dutch Government Gazette 2021, 73*

We Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc. etc. etc.

At the request of the State Secretary for Economic Affairs and Climate Policy on 2 November 2020, no. WJZ / 20238176;

Considering Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, and Section 58c of the Dutch Competition Act;

Having heard the Advisory Division of the Dutch Council of State (recommendations of 13 January 2021, No. W18.20.0400/IV);

Taking into consideration the further report of the State Secretary for Economic Affairs and Climate Policy of 4 February 2021, no. WJZ / 21015285;

Have approved and understood:

### **§ 1. Definitions and scope**

#### **Article 1**

The following definitions are used in this decision:

- *ACM*: the Netherlands Authority for Consumers and Markets;
- *Act*: The Dutch Competition Act.
- *Cartel*: an agreement or concerted practice between two or more competitors with the objective of coordinating their competitive behavior on the market or influencing the relevant parameters of competition, which is in violation of Article 101 TFEU or Section 6 of the Act;
- *Evidence with significant added value*: evidence that enhances the ability of ACM to prove the existence of an alleged secret cartel, compared with the evidence that ACM already has when such evidence is submitted;
- *Immunity from fines*: waiving the fine that would have been imposed on an undertaking or a natural person for participating in a secret cartel, as a reward for that undertaking or natural person for cooperating with a competition authority as part of a leniency process;
- *Leniency*: the grant of immunity from fines or a reduction of the fine to an undertaking that has participated in a secret cartel or to a natural person within the meaning of Section 51, paragraph 2, under 2°, of the Dutch Criminal Code, who has given instructions or has exercised de facto leadership with regard to the participation in a secret cartel by an

- undertaking;
- *Leniency applicant*: an undertaking or natural person within the meaning of Section 51, paragraph 2, under 2°, of the Dutch Criminal Code, which files an application for immunity from fines or a reduction of the fine;
  - *Leniency application*: an application for immunity from fines or for a reduction of the fine that meets Article 12 of this decision, a summary application for immunity from fines or for a reduction of the fine that meets Article 13 of this decision, or an application for immunity from fines or for a reduction of the fine that meets Article 14 of this decision;
  - *Leniency statement*: an oral or written statement or a recording thereof voluntarily given to a competition authority by or on behalf of an undertaking or a natural person, in which the undertaking or natural person shares their knowledge of the secret cartel, and tells about their role therein, and which has been drawn up specially for the benefit of that authority with an eye to obtaining immunity from fines or a reduction of the fine, except for evidence that exists separately from the enforcement procedure, regardless whether or not this information is already part of the file of a competition authority;
  - *Marker*: a provisional place in the order of receipt of leniency applications with regard to the same cartel;
  - *Reduction of the fine*: reducing the amount of the fine that would have been imposed on an undertaking or a natural person for participating in a secret cartel, in consideration of that undertaking's or natural person's cooperation with a competition authority as part of a leniency process;
  - *Secret cartel*: a cartel the existence of which is fully or partially concealed;

## **Article 2**

This decision applies to secret cartels on which ACM is authorized to impose administrative fines.

## **§ 2. Leniency**

### **§ 2.1. General**

#### **Article 3**

Upon request, ACM issues a decision on leniency.

#### **Article 4**

1. A leniency applicant is eligible for leniency, if the applicant:
  - a. During the period that that individual considered filing a leniency application with ACM, has not destroyed, falsified or concealed any evidence regarding the alleged secret cartel, and has not announced their application plans or its contents other than to other competition authorities.

- b. Has ended any involvement in the alleged secret cartel at the latest immediately after filing the leniency application, unless and insofar ACM finds the continuation thereof reasonably necessary in order to preserve the integrity of its investigation;
  - c. Genuinely, fully, on a continuous basis, and as soon as possible cooperates with ACM from the moment they filed their leniency application, and has refrained from taking any action that could impede the investigation or the process until the decision on imposing an administrative fine has become irrevocable with regard to all individuals involved in the cartel or if ACM has ended its enforcement process vis-à-vis all individuals involved in the cartel.
2. A leniency applicant meets the first paragraph, part c, if the applicant, at least:
- a. Remains at ACM's disposal for answering any request that may help establish the facts;
  - b. Keeps available anyone that is employed with the leniency applicant, insofar applicable, and, insofar reasonably possible, anyone that was employed with the leniency applicant, for the purpose of giving statements;
  - c. Does not destroy, falsify, or conceal any relevant information or evidence concerning the alleged secret cartel;
  - d. Unless agreed on otherwise, does not disclose the filing of the leniency application or its contents before ACM has drawn up a statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act in the enforcement process, to which the leniency application relates.
  - e. Files a leniency application that meets Article 14.

## § 2.2. Immunity from fines

### Article 5

1. ACM grants a leniency applicant immunity from fines, if the applicant:
  - a. Meet the criteria mentioned in Article 4;
  - b. Notifies ACM of their participation in a secret cartel;
  - c. Has not taken any steps coercing other undertakings to take part in a secret cartel or to remain in the secret cartel; and
  - d. Is the first to provide evidence that
    - i. Enables ACM to carry out a targeted inspection connected to the alleged secret cartel to which the leniency application relates, provided that, at the time of providing the evidence, ACM did not yet have sufficient evidence for carrying out such an inspection; or
    - ii. In ACM's opinion, is sufficient for establishing a violation of competition law, for which leniency can be granted under Article 4 of this policy, provided that, at the time of providing the evidence, ACM did not yet have sufficient evidence for establishing such a violation, and no other undertaking has been eligible for immunity from fines sooner under point i, with regard to the alleged secret cartel.

2. ACM will inform the leniency applicant in writing no later than the sending of the statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act whether or not they are granted conditional immunity from fines. The leniency applicant can ask ACM whether ACM informs them in writing of the result of their application.
3. In the case that ACM turns down an application for immunity from fines, the applicant can ask ACM to treat their application as an application for a reduction of the fine.

## **§ 2.3. Reduction of the fine**

### **Article 6**

1. ACM grants a leniency applicant a reduction of the fine if:
  - a. The applicant has not been granted immunity from fines under Article 5;
  - b. The applicant meets the criteria listed in Article 4;
  - c. The applicant notifies ACM of their participation in a secret cartel; and
  - d. The applicant provides evidence with significant added value with regard to the alleged secret cartel.
2. The reduction of the fine is at least 30% and no more than 50% if the leniency applicant is the first to provide evidence of significant added value.
3. The reduction of the fine is at least 20% and no more than 30% if the leniency applicant is the second to provide evidence of significant added value.
4. The reduction of the fine is no more than 20% if the leniency applicant is the third, or any of the ones after that, to provide evidence of significant added value.
5. ACM determines the percentage of the reduction of the fine within the meaning of paragraphs 2 through 4 on the basis of the time, as referred to in Article 12, paragraph 5, Article 13, paragraph 8, or Article 11, paragraph 1, and the value of the submitted evidence of significant added value.
6. ACM informs a leniency applicant in writing, no later than when the statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act has been sent, whether or not they have been granted (conditionally or not) a reduction of the fine, including the percentage (conditional or not) of the reduction of the fine.

### **Article 7**

If a leniency applicant that meets the conditions, as referred to in Article 6, paragraph 1, provides incontrovertible evidence that is used by ACM to prove additional facts as a result of which the fines are higher than the fines that would have been imposed on the secret cartel's participants, ACM will not take these additional facts into account when determining the fine that is imposed on the leniency applicant.

## **§ 3. Contemplating filing a leniency application**

### **Article 8**

ACM can exchange ideas with anyone that is contemplating filing a leniency application about a body of facts and the applicability of this decision in that context.

### **Article 9**

1. Anyone that is contemplating filing a leniency application may inquire with ACM by telephone, and solely through a lawyer, as to whether immunity from fines within the meaning of Article 5, paragraph 1, part d, under I, is still available.
2. If ACM responds positively to the inquiry as referred to in paragraph 1, the lawyer is required to submit an application for immunity from fines immediately.

## **§ 4. Filing a leniency application**

### **Article 10**

A leniency application may be submitted by:

- a. an undertaking that participates or has participated in a secret cartel, represented by someone who is authorized to make binding arrangements on the undertaking's behalf;
- b. a natural person, within the meaning of Section 51, paragraph 2, sub 2° of the Dutch Criminal Code, who has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in a secret cartel, and who files the leniency application on their own behalf; or
- c. multiple natural persons, within the meaning of Section 51, paragraph 2, sub 2° of the Dutch Criminal Code, simultaneously who have given instructions or have exercised de facto leadership with regard to the participation of an undertaking in a secret cartel, and file the leniency application on their own behalf, provided that they work at the same undertaking involved in the secret cartel, when submitting the application.

### **Article 11**

1. ACM registers the time of receipt of a leniency application.
2. If requested by the leniency applicant, ACM confirms in writing the receipt of the leniency application, including the date and time of receipt.

### **Article 12**

1. Those that contemplate filing a leniency application, have the opportunity to file an incomplete leniency application with ACM.
2. An incomplete leniency application as referred to in the first paragraph contains, insofar

available, the following information:

- i. The name and address of the leniency applicant;
  - ii. The points of concern that have prompted the application;
  - iii. The names of all other undertakings that participate and have participated in the alleged secret cartel;
  - iv. The affected goods or services;
  - v. The geographical scope of the alleged secret cartel;
  - vi. The duration and the nature of the alleged cartel's practices;
  - vii. Previous or possible future leniency applications filed with or that will be filed with competition authorities in other EU member states, pertaining to the alleged secret cartel.
3. On the basis of an incomplete leniency application, ACM can establish a marker if, in ACM's view, the incomplete leniency application offers a concrete basis for a reasonable suspicion of the leniency applicant's involvement in an alleged secret cartel, and the incomplete leniency application contains at least the available information mentioned in the second paragraph.
  4. If ACM, pursuant to the third paragraph, establishes a marker, it will set a deadline for the leniency applicant before which the applicant is given the opportunity to gather the required information and evidence in order to be able to comply with Article 14.
  5. All information and evidence that the applicant has provided before the deadline, as referred to in the fourth paragraph, are considered to have been submitted at the time of the application, as referred to in the first paragraph.
  6. If the leniency applicant fails to file a leniency application before the deadline, as referred to in the fourth paragraph, that complies with the requirements in Article 14, ACM can turn down the leniency application.

### **Article 13**

1. A leniency applicant that has filed a leniency application with the European Commission regarding an alleged secret cartel the geographical area of which covers more than three member states, can file a summary leniency application with ACM.
2. A summary leniency application, within the meaning of the first paragraph, contains the elements as referred to in Article 12, paragraph 2, except for part ii, as well as a short description of the member state or member states where the evidence regarding the alleged secret cartel is likely to be located. If the summary application meets these requirements, ACM will establish a marker.
3. If, at the time of receipt of a summary application, ACM has not yet received a leniency application regarding the same alleged secret cartel from another applicant, and is of the opinion that the summary application complies with the second paragraph, it will inform that applicant thereof in writing.
4. If the European Commission informs ACM that it will not handle (or only partially handle) the case, ACM will give the leniency applicant the opportunity to file a leniency application with

- ACM that meets the requirements in Article 14.
5. If the European Commission has not yet informed ACM that it will not handle (or only partially handle) the case, ACM will ask the leniency applicant only to file a leniency application that meet the requirements in Article 14 if such is strictly necessary for defining the boundaries of cases or for allowing cases.
  6. Prior to the moment ACM, under the fourth or fifth paragraph, asks for a leniency application that meets the requirements of Article 14, ACM asks the leniency applicant only to provide specific clarifications regarding the information as referred to in the second paragraph.
  7. If, in accordance with the fourth or fifth paragraph, ACM asks the leniency applicant to file a leniency application that meets the requirements of Article 14, it will set a deadline before which the applicant must file this leniency application.
  8. If the leniency applicant files a leniency application in accordance with the fourth or fifth paragraph, the leniency application that meets the requirements of Article 14 is considered to have been filed at the time of submission of the summary leniency application, provided that the summary leniency application concerns the same alleged secret cartel as the leniency application that was filed with the European Commission.

#### **Article 14**

A leniency application contains a leniency statement that includes:

- a. all relevant information and evidence, including any explanatory notes to that evidence, in connection with the alleged secret cartel that the applicant has in their possession or to which they have access at the time of submission of the leniency application, in particular:
  - i. the name and address of the leniency applicant;
  - ii. the name and address of those that take part or have taken part in the alleged secret cartel;
  - iii. a detailed description of the alleged secret cartel, including the goods or services involved, the geographical areas involved, the duration and the nature of the alleged cartel behavior as well as the specific dates, locations, contents or and participants in the cartel interactions;
  - iv. Information about all previous or possible future leniency applications related to the alleged secret cartel that have been or will be filed with other competition authorities;
- b. A statement of the leniency applicant that they will comply with all applicable requirements laid down in this decision;
- c. A statement of the leniency applicant that they have participated in the alleged secret cartel as claimed by the leniency applicant, if the leniency applicant is an undertaking, or a statement of the leniency applicant that they as a natural person within the meaning of Section 51, paragraph 2, sub 2 of the Dutch Criminal Code, has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in the alleged secret cartel, if the applicant is a natural person.

#### **Article 15**

1. Leniency statements can be submitted in writing, orally, or in another way, while the leniency applicants are not required to possess, keep or have control over the submitted leniency statements.
2. In the event of an oral leniency statement, ACM records this statement and draws up a transcript.

### **§ 5. Grant of leniency**

#### **Article 16**

Using provisional grants of leniency, ACM sets the final order of receipt of leniency applications regarding a secret cartel.

#### **Article 17**

If a leniency applicant does not comply with their requirements under this decision, ACM can withdraw the grant of leniency.

### **§ 6. Natural persons**

#### **Article 18**

ACM does not impose any sanctions on natural persons that are employed with or have been employed with an undertaking to which the leniency application relates, if:

- a. The leniency application that is filed by the undertaking complies with Article 5;
- b. The natural persons actively cooperate with ACM in this context; and
- c. The leniency application is filed by the undertaking before the natural persons were informed by the relevant authorities of enforcement procedures with regard to the alleged secret cartel to which the leniency application relates.

#### **Article 19**

1. Natural persons that file leniency applications on their own behalf may be eligible for the same reduction of the fine as the undertaking at which they work, if the undertaking has already filed a leniency application and if they declare that they wish to be considered leniency co-applicants with the undertaking, and they, on their own, meet the conditions for a reduction of the fine, as referred to in Article 6.
2. Paragraph 1 applies mutatis mutandis to natural persons that, at the time of submission of the leniency application, no longer work for the undertaking involved that has filed the leniency application, insofar these natural persons are not employed with another undertaking that is suspected to be involved in the same alleged secret cartel, but that has



not filed a leniency application.

3. Natural persons that simultaneously file a leniency application may be eligible for the same reduction of the fine if they state that they wish to be considered leniency co-applicants of each other, and each of them, on their own, meet the conditions for a reduction of the fine, as referred to in Article 6.

## **§ 7. Confidentiality**

### **Article 20**

The evidence as referred to in Article 5, paragraph 1, part d, under i, that ACM obtains from those that contemplate filing leniency applications during the interactions as referred to in Articles 8 and 9 or that ACM obtains as a result of filed leniency applications that are turned down will not be used by ACM against the provider of the information, unless that provider gives its consent to ACM or unless ACM obtained the same information from another source.

### **Article 21**

ACM does not disclose the role of an undertaking or natural person as leniency applicant to third parties until the statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act has been sent to everyone involved in the cartel, unless a statutory obligation mandates otherwise, or the leniency applicant has consented to disclosure.

### **Article 22**

In accordance with Article 12 of Regulation 1/2003, ACM only sends a leniency statement to a competition authority of another EU member state, if:

- a. the leniency applicant has consented to sending; or
- b. the competition authority to which ACM forwards the leniency statement has received a leniency application from the same leniency applicant with regard to the same alleged secret cartel as ACM has, on the condition that, at the time of sending the leniency statement, the applicant has no opportunity to withdraw the dispatched information.

## **§ 8. Transitional and final provisions**

### **Article 23**

To leniency applications that had been received before this decision came into effect, to leniency applications concerning a cartel with regard to which other leniency applications had already been received before this decision came into effect, and to immunity from fines and reductions of a fine that had been granted before this decision came into effect, the Policy Rule of the Minister of Economic Affairs on the reduction of fines in connection with cartels continues to apply, as it was applicable immediately preceding that date.

**Article 24**

If the bill of May 25, 2020, proposing the amendment of the Dutch Competition Act and the Establishment Act of the Netherlands Authority for Consumers and Markets in connection with the implementation of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019, L 11) has become law or will become law, and Section II, part J of that act has come into force, this decision will come into force at the same time.

**Article 25**

This decision will be referred to as: Leniency Decision (in Dutch: *Besluit Clementie*).

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

The Hague, 9 February 2021

Willem-Alexander

The State Secretary of Economic Affairs and Climate Policy,  
M.C.G. Keijzer

17 February 2021  
The Minister of Justice and Security,  
F.B.J. Grapperhaus

# EXPLANATORY NOTES

## I General

### 1. Introduction and objective

This decision contains the leniency rules that determine under what conditions undertakings and natural persons that have been involved in a cartel and that have notified the Netherlands Authority for Consumers and Markets (ACM) of that cartel, are eligible for immunity from fines (deciding not to impose a fine) or reduction of the fine (reducing the amount of a fine). This leniency program is a key instrument in tracking down cartels, and helps towards an efficient prosecution and imposition of sanctions for violations (including serious violations) of competition law. In addition, the leniency program is useful in the collection of evidence about cartels. Furthermore, leniency programs have a deterrent effect on the formation of cartels. The leniency rules only apply to cartels, so not to other violations of rules that ACM enforces.

This decision must be considered in connection with the 2014 ACM Fining Policy Rule. ACM must determine the level of the fine that it imposes for violations of regulations that fall under the scope of the Dutch Minister of Economic Affairs and Climate Policy, including the cartel prohibition, on the basis of the relevant statutory maximum fine and the 2014 ACM Fining Policy Rule. The outcome of the leniency process subsequently becomes part of the fining decision.

Previously, the leniency rules had been laid down in the Leniency Policy Rule. Since 4 February 2021, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019, L 11) must be implemented, which contains a uniform scheme for leniency. This Decision acts as the implementation of the relevant leniency provisions from said Directive. The Leniency Policy Rule will therefore be repealed.

### 2. In line with European leniency rules

The directive seeks to establish a more effective enforcement of competition law, and, as such, to ensure that the internal market functions well. The directive mandates EU member states to enshrine in national legislation that the national competition authority is independent, that it has resources for the execution of its duties, and that it has the necessary powers to enforce competition law. In addition, the directive contains provisions that strengthen the opportunities for competition authorities to collaborate. The directive also contains harmonizing provisions with regard to leniency.

That is because, at the moment, there are notable differences between the leniency programs that are used in the various Member States. Among undertakings that have committed violations, those differences result in legal uncertainty regarding the criteria for their leniency applications and in uncertainty regarding their immunity status according to the relevant leniency programs. Uncertainty may reduce the incentive for potential leniency applicants to apply for leniency. That may lead to less effective enforcement of competition rules in the European Union, since fewer secret cartels will be discovered. In addition, the differences between the leniency

programs undermine the level playing field for undertakings that are active on the internal market. The directive aims to create more legal certainty for undertakings with regard to leniency programs, and to enhance the appeal of the use of leniency programs within the European Union. With the harmonization of the European leniency rules, it is expected that cartel participants will be inclined to report their cartel.

The implementation of the directive has virtually no material consequences for the contents of the leniency rules in the Netherlands. That is because the Leniency Policy Rule, which had been valid until today, was based on the European Model Leniency Programme (MLP)<sup>1</sup>. The MLP, which was created within the European network of competition authorities (European Competition Network or ECN), was meant to be a model for the design of leniency programs for network participants. The MLP functioned on the basis of the agreement between the ECN competition authorities, that they would bring their own leniency rules in line with the MLP as much as possible (within the boundaries of their national laws). The Netherlands honored this agreement by creating the Leniency Policy Rule in 2014, with which the Dutch national leniency program was brought in line (or more in line) with the MLP. Since the MLP formed the basis for the leniency provisions included in the directive, the leniency program that had been valid until today is largely in line with the provisions in the directive. That is why, in the implementation of the directive, the contents of the Leniency Policy Rule could largely be used as the starting point, and, in particular, the system used in this policy rule and the phrasing in the decision were adjusted in order to dovetail more with the directive.

### 3. Contents of the scheme

The purpose of the decision is the implementation of the leniency provisions in the directive (Articles 17 through 23), and this decision is largely a continuation of the leniency rules that were previously included in the Leniency Policy Rule. With regard to leniency, the directive has a harmonizing effect. The directive offers natural persons (in addition to undertakings) the ability to make use of leniency programs with regard to violations of the cartel prohibition. The Netherlands has taken advantage of this opportunity by having the leniency program apply to natural persons too, as was the case under the Leniency Policy Rule. Furthermore, the directive has been supplemented with regard to the point that natural persons can be eligible for the same reduction of the fine as the undertaking with which they are or were employed. After all, the directive only offers criteria with regard to *immunity from fines* for natural persons but does not say anything about *reductions of fines* for natural persons. This option already existed under the Leniency Policy Rule, and will thus be retained. One important change compared with the policy rule is that, in the decision, there is no longer any room for former employees to waive immunity in the interest of the investigation, if the criteria for granting immunity have been met. The directive mandates, under certain conditions, to grant current and former employees immunity, because the legal uncertainty regarding the question whether current and former employees of immunity applicants are protected against individual sanctions could prevent potential leniency applicants from applying for leniency. Considering their contributions to the tracking down of and to the investigations into secret cartels, these individuals should be protected against sanctions that are imposed by government agencies in connection with their involvement in secret cartels. In addition, the phrasing of the leniency criteria and the requirements to leniency

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<sup>1</sup> ECN Model Leniency Programme: 2012 revision, see: [https://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](https://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf)

applications (including summary applications) and leniency statements have been adjusted in order to dovetail with the directive. Also, several criteria with regard to the processing of leniency applications by ACM have been included. These adjustments do not result in any material changes.

#### **4. ACM Leniency Office**

ACM's leniency officer is the head of ACM's Leniency Office, and is charged with enforcement of the rules on leniency. Leniency applications must be filed with ACM's Leniency Office only (so not with any other ACM departments). Some of the duties of the ACM Leniency Office are holding preliminary discussions with potential leniency applicants, receiving leniency applications, and assessing the level of cooperation from leniency applicants.

#### **5. Feasibility test**

The decision does not lead to any additional costs associated with regulatory burden for businesses. The purpose of the decision is the implementation of the leniency provisions from the directive, and largely represents a continuation of the leniency rules as previously laid down in the Leniency Policy Rule. Since these provisions had already been included in the policy rule, the current practice will be continued. These provisions will therefore not result in additional obligations for businesses. In its feasibility and enforceability test, ACM has also indicated that the decision is enforceable. The Dutch Advisory Board on Regulatory Burden (ATR) did not select the decision for the issuance of formal recommendations, given that this concerns the implementation of a directive where there is virtually no leeway for national policies (or none at all).

## **II Notes per article**

### **Article 1**

This article contains definitions that have not been specified in the Dutch Competition Act.

#### *Evidence with significant added value*

Evidence with significant added value has been defined as evidence that enhances ACM's ability to prove the existence of an alleged secret cartel compared with the evidence that ACM already had at the time of the provision of that evidence. The term «evidence with significant added value» serves two objectives within the system of this decision. First, the term is the determining factor when answering the question of whether an applicant is eligible for a grant of leniency with regard to a reduction of the fine (see Article 6, paragraph 1), where the term is described as «threshold criterion» (in Dutch: drempelcriterium). Second, the term is the determining factor when answering the question of what reduction percentage an applicant is qualified for within the relevant range (see Article 6, paragraphs 2 through 4). In that context, it is generally accepted that written evidence dating from the period in which the facts took place has more value than evidence dating from later periods. The same goes for evidence that is directly relevant for the facts involved compared with evidence that is only indirectly relevant. Finally, independently conclusive evidence has more value than evidence such as statements that need to be corroborated further in case of disputes.

With regard to the substance and styling of the term «evidence with significant added

value», Article 18, paragraph 2 of the directive was followed, and, in terms of substance, the term matches the term used in the former Leniency Policy Rule of «information with significant added value» (in Dutch: informatie met aanzienlijke additionele waarde).

#### *Immunity from fines*

Immunity from fines is described as waiving the fine that would have been imposed on an undertaking or natural person for their participation in a secret cartel, as a reward for that undertaking's or natural person's cooperation with a competition authority as part of a leniency process. This definition follows the definition in the directive (Article 2, paragraph 1, part 13 of the directive), on the understanding that natural persons have been added to the description because they too are eligible for immunity from fines on the basis of this decision. This decision supplements the directive with regard to immunity from fines with a program for natural persons.

#### *Reduction of the fine*

Reduction of the fine is described as the reduction of the amount of the fine that would have been imposed on an undertaking or natural person for their participation in a secret cartel, as a reward for that undertaking's or natural person's cooperation with a competition authority as part of a leniency process. This term replaces the term used in the Leniency Policy Rule «reduction of a fine», thereby following the definition in the directive (Article 2, paragraph 1, part 14 of the directive). In this case, too, the decision supplements the directive with a scheme for natural persons. The percentage by which the amount of the fine that would have been imposed on an undertaking or natural person is reduced depends on the order of the submission of evidence with significant added value by leniency applicants and on the value of this evidence.

#### *Leniency statement*

This definition follows the definition in the directive (Article 2, paragraph 1, part 17). The term 'leniency statement' encompasses both statements that are made on behalf of an undertaking as well as statements that are made by natural persons on the undertaking's side, for example employees or former employees that, at the behest of the undertaking because of its duty to cooperate, stand by for making statements to ACM as statements of natural persons that file leniency applications on their own behalf. The term 'leniency statement' not only encompasses the leniency statements with which a leniency application is filed in the period up to the moment when ACM grants a leniency applicant leniency, but also encompasses any statements given afterwards to ACM by reason of the duty to cooperate with the investigation into the cartel. These can be statements made by the leniency applicant in response to written or oral requests for information made by ACM, or further statements that the leniency applicant provides to ACM of its own accord. Under the previously mentioned definition in the directive, the term 'leniency statement' does not encompass the evidence that exists separately from the enforcement process such as documents and other evidence that date from the period of practices to which the request refers and those that the leniency applicant has given together with the leniency statements within the context of a leniency application.

### *Leniency applicant*

Under this decision, leniency applicants can be both undertakings and natural persons within the meaning of Article 51, paragraph 2, under 2°, of the Dutch Criminal Code, that apply for immunity from fines or for a reduction of the fine. It is also possible that multiple natural persons collectively file a leniency application, if, when the leniency application was filed, they were employed with the same undertaking that was involved in the secret cartel (see Article 10).

### *Cartels and secret cartels*

The leniency program as included in the directive concerns «secret cartels». These are cartels the existence of which is kept secret, either fully or partially. The directive assumes that cartels can also be considered secret cartels even if not all aspects of the practices are secret. A cartel can particularly be considered a secret cartel if elements of the cartel that make it more difficult to determine the full scope of the practices are not known to the general public, customers or suppliers. Almost by definition, cartels are obviously always kept secret (either fully or partially) by undertakings. In the decision at hand, the term «secret cartels» is explicitly used in order to bring the national framework in line as much as possible with the directive, and not to have any confusion about the scope.

For the purposes of this decision, cartels encompass agreements or concerted practices between two or more competitors, where the term «competitors» encompasses both actual and potential competitors. The phrase «between competitors» refers to the requirement that the cartel must have a horizontal element. The use of the phrase «between competitors» does not rule out that a cartel within the meaning of this decision also has vertical elements. For example, it is conceivable that this decision can be applied to a situation where a group of competitors together with a cartel facilitator participate in a cartel. It is also conceivable that this decision can be applied to a situation where two groups of undertakings from different levels in the production and distribution chain participate in a cartel. Another conceivable application of this decision is when a group of competitors exchanges information indirectly with one another through one or more third parties (a «hub-and-spoke» constellation). The objective of the cartels to which this decision applies is to coordinate the competitive behavior on the market of different competitors or to influence the relevant competition parameters in violation of Article 101 of the Treaty on the Functioning of the European Union or Section 6 of the Dutch Competition Act. Such practices may include but are not limited to the fixing or coordination of purchase or selling prices or other trading conditions regarding, among other aspects, intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, import or export restrictions, or anticompetitive actions against other competitors (Article 2, paragraph 1, part 11 of the directive).

Moreover, the concept of cartel is limited to agreements or concerted practices, and does not include any decisions of associations of undertakings. This limitation seeks to prevent a situation in which effectively an entire cartel (its members by virtue of the association) would be eligible for immunity from fines or a similar reduction through a leniency application by an association of undertakings, as this would go against the spirit of this decision to assist, with an eye to the public interest, in anti-cartel enforcement.

### *Marker*

A marker is a provisional place in the order of receipt of leniency applications with regard to the same cartel (Article 21, paragraph 1 of the directive). Those that contemplate filing a leniency application, have the opportunity to file an incomplete leniency application. On the basis of an incomplete leniency application, ACM can establish a marker. After ACM has granted a marker with regard to the leniency application in question in favor of the leniency applicant, the leniency applicant may supplement said leniency application within a period determined by ACM. The supplemented leniency application is considered to have been submitted at the time when the marker was granted, and will thus be assessed against the backdrop of the information that ACM had about the alleged cartel at the time of the marker. ACM can also grant a marker on the basis of a summary application.

### **Article 2**

This provision restricts the scope of applicability of this decision to cartels as described in the definition in Article 1, that, furthermore, are secret (the existence of which are kept secret in part or in full). In addition, it follows from this provision that ACM does not grant leniency in cases where it is able to establish the violation, but where its power to impose a fine has lapsed. After all, the leniency process seeks to get undertakings to disclose a cartel in exchange for immunity from fines or a reduction of the fine, and it is not meant to offer protection against the legal establishment of a violation.

### **Article 3**

This article stipulates that, on request, ACM issues a decision on leniency. Leniency applications must be submitted to ACM's Leniency Office, which is entrusted with the enforcement of this decision. The Leniency Officer is responsible for preparing and issuing grants of leniency.

### **Article 4**

The conditions in Article 4 come from Article 19 of the directive, which explains the general conditions for leniency. The requirement in the first paragraph, part a, is applicable from the moment the leniency applicant contemplates filing a leniency application, which means already prior to the filing of the leniency application. The obligation of not disclosing the contemplated application or the contents thereof during the period where the leniency application is contemplated, obviously does not apply to interactions with third parties that have been hired by the undertaking to assist the undertaking in its interactions with ACM. In that context, it obviously must be ensured that no information ends up with third parties through its representative or its offices. It remains possible to disclose the contemplated application or the contents thereof to other competition authorities. This may be necessary in connection with the filing of a leniency application there.

The requirements referred to in the first paragraph, parts b and c, apply from the moment the leniency application has been filed. In line with the former Article 17 of the Leniency Policy Rule, the duty to cooperate (part c) is in effect until the decision to the imposition of an administrative fine has become irrevocable with regard to each of the parties involved in the cartel or if ACM has otherwise suspended its enforcement procedure against each of the parties involved in the cartel. This means that the duty to cooperate remains in effect until the moment that the procedures against each of the



parties involved in the cartel have been completed, including after a statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act has been sent to the leniency applicant. Cooperation with such procedures, apart from the assessment of the facts, entails, for example, making witnesses available for the procedure on ACM's side. The duty to cooperate means that a leniency applicant is required to give at all times full cooperation that is needed in the interest of the investigation or the procedure. This duty to cooperate must be interpreted broadly. The broad scope of this term is connected to the exception that the leniency rules under this decision make to the existing rules on the fining of cartels, which are considered some of the most serious violations of competition rules. This is illustrated by, among other things, the phrase «at least» in the second paragraph of the provision. Only if a leniency applicant, by means of its leniency application, if you will, «sides with ACM», it is justified from a public point of view to grant leniency (see also the ruling of the Court of 9 September 2011, case T-12/06, Deltafina SpA vs. European Commission, 2011 II-05639).

The second paragraph of Article 4 gives an interpretation of the condition from the first paragraph, part c, to cooperate with ACM genuinely, fully, on a continuous basis, and as soon as possible, and to refrain from taking any action that could impede the investigation or the process. This duty means, first of all, that the leniency applicant remains available for ACM to answer any request that can help in establishing the facts (part a). Second, the leniency applicant must also, insofar applicable, keep available for making statements to ACM those individuals that are employed by the leniency applicant and, insofar reasonable, also those that were employed by the leniency applicant (part b). Third, the leniency applicant cannot have destroyed, falsified or concealed any relevant information or evidence about the alleged secret cartel (part c). Fourth, the leniency applicant cannot disclose the filing of the leniency application or the contents thereof before ACM has drawn up a statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act in the enforcement process to which the leniency application relates, unless agreed otherwise (part d). Finally, the leniency applicant must submit a leniency statement that meets the criteria in Article 14 (part e).

## **Article 5**

The first paragraph of this article lists the criteria for qualifying for immunity from fines. Immunity from fines means that the fine that would be imposed on an undertaking or natural person for their participation in a secret cartel will be waived as reward for the cooperation of that undertaking or natural person with a competition authority as part of a leniency process.

In order to be eligible for immunity from fines, the leniency applicant first of all must meet the criteria in Article 4 (part a). This means that a leniency applicant will only be eligible for immunity from fines if a leniency application for immunity from fines in accordance with this decision has been filed. Such a request consists of a leniency statement within the meaning of Article 14 as well as any documents from the period of the practices, which are enclosed with the application, with regard to which the Leniency Officer determines that these meet the criteria of this decision, including the material criterion with regard to the value of the evidence as described in Article 5, part d. In practice, an application for immunity from fines is usually filed after a first filing (often over the phone), which reveals that the initial, summary leniency application is incomplete, followed by the establishment of

a marker, and subsequently the supplement to the leniency application within the deadline that was set in connection with the marker.

Second, the leniency applicant must notify ACM of its participation in a secret cartel (part b). Third, the leniency applicant cannot have taken any steps coercing other undertakings to participate in a secret cartel or to continue participating in the secret cartel (part c). The reasons behind this criterion are to prevent an undertaking from abusing the leniency process to harm a competitor. With regard to this criterion, it is about coercing an undertaking to participate in a cartel. Few situations are actually considered coercion. Threats of a commercial nature are usually not considered coercion. Coercion is theoretically conceivable if there is a concrete threat of physical violence or if there is an economic threat that poses a direct, real, and permanent threat to the existence of the coerced undertaking. The latter (permanent) only seems conceivable in very extreme situations, for example, if the one that exercises coercion supplies the coerced undertaking with an essential raw material, and then threatens to stop that supply. Basically, the undertaking that was coerced into participating in the cartel must be able to demonstrate that it was some form of force majeure.

The fourth criterion for eligibility for immunity from fines is being the first one to provide ACM with evidence (part d). The evidence that is provided by the first cartel participant must subsequently enable ACM to carry out a targeted inspection connected to the alleged secret cartel to which the leniency application relates, provided that, at the time of providing the evidence, ACM did not yet have sufficient evidence for carrying out such an inspection (part i). With regard to this type of leniency, the directive (Article 17, paragraph 2, part c, under i) has included the requirement that, at the time the evidence was provided, the national competition authority did not yet have in its possession sufficient evidence to carry out such an inspection or had not already carried out such an inspection. Since the purpose of this provision is that immunity can be granted if, through the provision of evidence, ACM has been enabled to carry out an inspection, the part of the sentence «had not already carried out such an inspection» must be read in conjunction with the competition authority not yet possessing sufficient evidence. That is why, in practice, the part of the sentence «had not already carried out such an inspection» falls under the part «not yet have in its possession sufficient evidence to carry out such an inspection», which is why, for the sake of clarity, that phrase has not been included in the article. A leniency applicant can also be eligible for immunity if they are the first one to provide evidence that, in ACM's view, is sufficient for it to find an infringement covered by the leniency program, provided that the authority did not yet have in its possession sufficient evidence to establish such a violation and that no other undertaking was previously eligible for immunity from fines under point (i) in relation to that secret cartel (part ii).

Part d, under i, refers to immunity from fines of the so-called type 1A in the Model Leniency Programme 2012. Such immunity from fines is essentially granted to the leniency applicant in exchange for disclosing the cartel to ACM. Notwithstanding the criterion that a leniency applicant of this type, too, must provide the evidence that is reasonably in their possession or to which they have access (see Article 14, part a), the material threshold for this type of immunity is reached if the leniency application enables ACM to carry out a «targeted inspection» connected to the alleged cartel. In cases where ACM has no power to carry out targeted inspections of its own, for example if certain relevant company buildings or residences are located outside the Netherlands, then the information must enable ACM to use its powers in a different manner, for example by having a

competition authority in a different member state carry out an inspection on behalf of ACM (for example under Article 22 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1).

Part d, under ii, refers to immunity from fines of the so-called type 1B of the Model Leniency Programme 2012. Such immunity from fines is granted to the leniency applicant in exchange for the provision of evidence to ACM about the alleged cartel. The material threshold for this type of immunity from fines is achieved if the leniency application provides evidence, in any shape or form (for example, in writing or digital), that date from the period of the practices, which ACM did not yet possess, and on the basis of which ACM is able to prove the existence of the cartel. In this context, it is about the idea that, on the basis of the provided evidence, as it is, ACM should be able to establish a violation in connection with the alleged cartel.

The second paragraph also stipulates that, no later than when sending the statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act, ACM informs the leniency applicant in writing whether or not they have been granted immunity from fines. The immunity from fines is conditional since the leniency applicant continues to be bound by their duty to cooperate until the decision on imposing an administrative fine has become irrevocable with regard to all individuals involved in the cartel or if ACM has ended its enforcement process vis-à-vis all individuals involved in the cartel (Article 4, paragraph 1, part c). If the leniency applicant no longer meets the requirements under this decision, such as their duty to cooperate, ACM can, under Article 17, withdraw the conditional grant of leniency. In addition, it has been determined, pursuant to Article 17, paragraph 4 of the directive that the leniency applicant may request that it be informed by ACM of the result of its application in writing. The third paragraph of Article 5 is also an outcome of Article 17, paragraph 4 of the directive. It has been included that, in the case a national competition authority turns down an application for immunity from fines, the applicant may ask the national competition authority to treat their application as an application for a reduction of the fine.

## **Article 6**

The first paragraph of Article 6 contains the conditions under which ACM can grant a reduction of the fine to a leniency applicant. Granting a reduction of the fine is possible if ACM has not granted the applicant immunity from fines (part a), the applicant meets the criteria of Article 4 (part b), the applicant reports their participation in a secret cartel (part c) and the applicant provides evidence with significant added value in connection with the alleged secret cartel (part d). This means that evidence is provided that enhances the ability of ACM to prove the existence of an alleged secret cartel compared with the evidence that ACM already possessed at the time when the evidence was provided. The term «significant added value» comes from the directive and replaces the term previously used in the Leniency Policy rule «significant added value»<sup>2</sup>.

Paragraphs 2 through 4 subsequently set the extent to which the fine is reduced. These three staggered categories of fine reduction correspond with the fining percentages that are used by the European Commission and various other member states. Article 6 is about leniency that is

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<sup>2</sup> Translator's note: the previous term in Dutch was "aanzienlijke additionele waarde", whereas the current Dutch term is "significante toegevoegde waarde". Both translate to 'significant added value'.

considered type 2 in the Model Leniency Programme 2012. If there are multiple leniency applicants in a cartel, and each of them file a leniency application seeking, primarily, immunity from fines, and, secondly, for a reduction of the fine, and each of them meet the criteria for the form of leniency that is most favorable to them, the first leniency applicant will then be eligible for immunity from fines (under Article 5, paragraph 1, part d, under i (type 1A) or under Article 5, paragraph 1, part d, under ii (type 1B)). The second leniency applicant will subsequently be eligible for a fine reduction between 30% and 50%, the third leniency applicant for a fine reduction between 20% and 30%, and the fourth and subsequent leniency applicants for a fine reduction between 0 and 20%.

However, it is also conceivable that the first leniency applicant does not meet the criteria for immunity from fines. This can be the case because the coercion criterion laid down in Article 5, paragraph 1, part c, applies (both in type 1A cases, as well as in type 1B cases). In addition, particularly in type 1B cases, it is conceivable that the leniency application does not meet the material threshold from Article 5, part d. In such cases, it is conceivable that the leniency application of the first leniency applicant *does* meet the material threshold of «significant added value» from Article 6. If such is the case, and there are multiple leniency applicants that primarily seek immunity from fines, and secondly for a reduction of the fine, none of the leniency applicants will be eligible for immunity from fines, but the first will be eligible for a fine reduction between 30% and 50%, the second for a fine reduction between 20% and 30%, the third and subsequent ones for a fine reduction between 0 and 20%. Pursuant to paragraph 5, the range of the percentages for the reduction of the fine is determined, first of all, using the time at which the leniency application was filed. The percentage of the fine reduction within the specified ranges is subsequently determined using the value of the provided evidence with significant added value.

A leniency applicant will only be eligible for a reduction of the fine if there is a leniency application for a reduction of the fine in accordance with this decision. This consists of a leniency statement within the meaning of Article 14 as well as any documents from the period of the practices, which are included as annexes, with regard to which the leniency officer establishes that these meet the criteria of this decision, including the material criterion that it contains significant added value. In real life, such a request for a reduction of the fine is often filed following a first submission (often over the phone), which reveals that the initial, summary leniency application is incomplete, followed by the establishment of a marker, and subsequently the supplementation of the leniency application within the deadline that has been set in connection with the marker. Similar to the grant of leniency with regard to immunity from fines (Article 6), the grant of leniency with regard to a reduction of the fine, too, is conditional. This means that the grant can be withdrawn under Article 17 if the leniency applicant fails to fulfill its obligations under this decision, such as the duty to cooperate laid down in Article 4, paragraph 1, part c.

## **Article 7**

The provision that ACM does not take into account any additional facts when determining the fine that is imposed on the leniency applicant if the leniency applicant meets the criteria laid down in Article 6, paragraph 1, and if they provide incontrovertible evidence that is used by ACM to prove additional facts as a result of which the fines are higher than the fines that would have been imposed on the secret cartel's participants, follows from Article 18, paragraph 3 of the directive. A similar

provision had previously been included in Article 19 of the Leniency Policy Rule. This provision provides the rules for the so-called partial *de facto* immunity. With this form of partial immunity, it must concern evidence that, in itself, has significant added value, under Article 6, paragraph 1, part d, *and* that is used by ACM for establishing a violation, which results in a higher fine on the applicant for a reduction of the fine.

#### **Article 8**

This article provides for the opportunity for ACM (in practice, the Leniency Officer) to discuss various practical and technical issues with prospective leniency applicants. Issues that are discussed with the Leniency Officer are often issues that are connected to the legal form of the undertaking that contemplates filing a leniency application or issues that are connected to the safeguarding of confidentiality by the prospective leniency applicant with regard to the preparation and filing of a leniency application.

#### **Article 9**

Article 9 provides for the opportunity, prior to filing a leniency application, to inquire, through a lawyer, with ACM (in practice, the Leniency Officer) as to whether immunity from fines within the meaning of Article 5, paragraph 1, part d, under i (type 1A), is, in principle, still available in connection with the cartel. In that context, it is imperative that the lawyer describes the product or service in question as accurately as possible. If ACM's response is positive, the prospective leniency applicant is required to file an application for immunity from fines immediately. The filing does not automatically result in a conditional grant of leniency concerning immunity from fines. After all, it is possible that the application for immunity from fines does not meet the criteria laid down in Article 5, paragraph 1, part d, under i. If ACM's response is negative, the leniency applicant is not required to file an application. If the question about availability of immunity from fines is asked, the Leniency Officer may not be able to give an answer, for example because it is impossible to define potentially separate cartels sufficiently accurately or to separate them from each other at the time of when the question is asked, which may stand in the way of providing a correct answer to the question.

#### **Article 10**

This provision describes three types of leniency applicants that are distinguished in this decision. The first category consists of the undertaking that participate or have participated in a cartel. A leniency application can be filed, on behalf of an undertaking, by someone that is authorized to making binding arrangements on behalf of that undertaking. The second category of leniency applicants are natural persons that can be considered to have given instructions and/or to have exercised *de facto* leadership with regard to the conduct of an undertaking that falls under the concept of cartel, and that file a leniency application for themselves. The third category refers to multiple natural persons that meet the abovementioned criterion and that were employed by the same undertaking when the leniency application was filed. They are to file jointly yet independently from the undertaking (so on their own behalf) a leniency application.

The term undertaking follows the definition of the concept of undertaking in the Dutch Competition Act, which, in turn, follows the concept of undertaking in EU law. With regard to

undertakings, the leniency application must be filed by the civil-law entities, which can be held liable for the participation in the cartel. As a rule, this includes at least the highest parent company in a group as it was structured at the time the leniency application was filed. In most cases, the term undertaking consists of multiple legal entities from the same group. As a rule, legal entities that no longer belong to the undertaking cannot be part of the undertaking's leniency application. They can, however, apart from the existing undertaking, file a leniency application, provided they are held liable for the conduct, and provided ACM's power to impose a fine has not lapsed due to prescription. Compared with the previous Article 10, part b, of the Leniency Policy Rule, part b includes the reference to Section 51, paragraph 2, under 2°, of the Dutch Criminal Code, which gives a definition of the term de facto leadership. For clarification purposes, this provision also stipulates that individuals that have exercised de facto leadership, within the meaning of this article, file the leniency application on their own behalf and not on behalf of the undertaking.

#### **Article 11**

This article stipulates that ACM registers the time of receipt of a leniency application. Such a registration is necessary with a view to the subsequent grant of leniency, where the order of receipt of the leniency applications is relevant. Compared with the former Leniency Policy Rule, it has been included in the second paragraph of this article that ACM confirms the receipt of the leniency application, including the date and time of receipt. This second paragraph is the implementation of Article 20, paragraph 2 of the directive.

#### **Article 12**

This article concerns incomplete leniency applications, which can be filed by those that contemplate filing a leniency application. This provision acts as the implementation of Article 21 of the directive. Such incomplete leniency applications must contain, as much as possible, the elements mentioned in the second paragraph. These elements come from Article 21, paragraph 2 of the directive, and, on a substantive level, correspond with the elements that were previously mentioned in Article 15, paragraph 1, part b, of the Leniency Policy Rule. If the incomplete leniency application meets these criteria, and, in ACM's opinion, offers a concrete basis for a reasonable suspicion of the leniency applicant's involvement in an alleged secret cartel, ACM can establish a marker. This means that ACM assigns the leniency applicant a provisional place in the order of receipt of leniency applications with regard to the same cartel. This place in the queue is important with an eye to the possible grant of immunity from fines or a reduction of the fine, which depends on the order in which the leniency applications were filed. ACM can establish markers for both applications for immunity from fines as well as for applications for reductions of the fine. ACM thus takes advantage of the opportunity offered by Article 21, paragraph 5 of the directive. If ACM establishes a marker, a deadline is set before which the leniency applicant must collect the required information and evidence in order to meet the requirements of a complete leniency application as included in Article 14. This offers leniency applicants the opportunity to collect the information and evidence that is necessary for the complete leniency application. If the incomplete leniency application is completed before the set deadline, the leniency application will then, pursuant to the fifth paragraph, be designated as having been complete from the time that the marker was established. If the leniency applicant does not

complete the leniency application within the set deadline, ACM may turn down the leniency application, in accordance with the sixth paragraph.

### **Article 13**

This article concerns summary leniency applications, which can be filed with ACM by leniency applicants that have already filed leniency applications with the European Commission regarding an alleged secret cartel the geographical area of which covers more than three member states. This article is the implementation of Article 22 of the directive. The summary applications in this article must contain the elements as referred to in Article 12, paragraph 2, except the points of concern that prompted the application. In addition, the leniency applicant must provide a short description of the member state or member states where the evidence regarding the alleged secret cartel is likely to be located. If the summary application meets these requirements, ACM will establish a marker, with which a provisional place in the order of receipt of leniency applications is determined. If, at the time of receipt of a summary application, ACM has not yet received a leniency application regarding the same alleged secret cartel from another applicant, it will inform that applicant thereof in writing. If the European Commission informs ACM that it will not handle (or only partially handle) the case, ACM will give the leniency applicant the opportunity to file a complete leniency application. In the period before clarity has been given regarding the question whether the European Commission will handle (in full or partially) the case, the European Commission is the applicant's primary discussion partner. In the period before the European Commission informs ACM that it seeks to handle the case (in full or partially), ACM may request the leniency applicant to file a full leniency application in exceptional circumstances only, which is when such is strictly necessary for the demarcation or allocation of cases. Prior to the moment when ACM requests a complete leniency application under paragraph 4 or 5, ACM may ask the leniency applicant to provide specific clarifications only regarding the information as referred to in paragraph 2, which are the requirements for a summary application.

As is the case with Article 12, paragraph 4, ACM sets a deadline for the leniency applicant pursuant to paragraph 7, before which the complete leniency application, which meets the criteria laid down in Article 14, must have been filed. In addition, as is the case with Article 12, paragraph 5, if ACM sets a deadline before which a complete leniency application must be filed, the leniency application, pursuant to paragraph 8, is considered to have been filed at the time of when the summary application was filed, on the condition that the summary application concerns the same alleged cartel as the one in the leniency application that was filed with the European Commission.

### **Article 14**

Article 14 lists the criteria that a leniency application must meet in order to be designated as a complete leniency application. After the first statement (often over the phone), leniency applications are, generally speaking, not yet considered to be full. This is followed by a marker with a deadline before which the leniency application must be completed. When the marker has been set, a leniency applicant may give or file multiple leniency statements, and submits documents, for example because, in ACM's opinion, the filed leniency statement needs to comply with Article 14. A complete leniency application may thus consist of different leniency statements, filed at different times.

First, the leniency application consists of a leniency statement that includes all relevant

information and evidence, including explanatory notes, that are related to the alleged cartel. This concerns all relevant information and evidence that the applicant has in their possession or to which they have access at the time of submission of the leniency application. Insofar available, the information that must be provided in particular is the name and the address of the applicant, and the name and address of those that take part or have taken part in the alleged secret cartel: this may concern both the information of undertakings as well as that of natural persons that were involved in the cartel. In that context, positions, work locations, and home addresses can also be relevant. Furthermore, where possible, information must be submitted with which the alleged secret cartel can be described in great detail, and information must be submitted about previous or possible future leniency applications related to the cartel that have been or will be filed with other competition authorities (part a). Given the fact that a leniency statement is a statement 'from outside' the cartel, strict requirements are usually attached to the level of accuracy and detail of the cartel's description. With regard to the leniency applicant's descriptions of those individuals that are involved in the cartel, note that these descriptions also concern the undertaking's current or former employees. In practice, the explanatory notes to the evidence that must be submitted under part a mandate that each individual document or other piece of evidence must be explained in great detail.

With regard to leniency applicants that file their applications at a time when no inspections have yet taken place, the confidentiality requirement (Article 4, paragraph 1, part c) may affect the degree of compliance with the requirement to provide as much as possible all information and all evidence. In that context, as soon as it is likely that the leniency application will meet the relevant requirements, preserving the element of surprise for those that are objects of inspections may justify the decision to forego certain activities of the undertaking's internal investigation until after the inspections. Finding a balance in the application of both leniency conditions against the backdrop of the investigation's interests may be a subject of discussion with the leniency officer.

Second, the leniency application must contain a statement in which the leniency applicant states that they will fulfill this decision's requirements that are relevant to them (part b). Third, the leniency statement contains a declaration of participation in the alleged secret cartel as claimed by the leniency applicant, provided that the leniency applicant is an undertaking. If the leniency applicant is a natural person, the leniency statement contains a statement that the leniency applicant as natural person within the meaning of Section 51, paragraph 2, under 2° of the Dutch Criminal Code has given instructions or has exercised de facto leadership with regard to the participation of an undertaking in the alleged secret cartel (part c). These criteria correspond, in terms of substance, with the criteria set out in the former Section 13, paragraph 1 of the Leniency Policy Rule.

The undertaking's leniency statement must be drawn up in the form of an undertaking's statement given on behalf of the undertaking. That is a statement in which the undertaking as such makes a statement regarding its own conduct in connection with the alleged cartel. In an undertaking's statement, the cartel's conduct ought to be described from the undertaking's perspective. Such descriptions generally contain no confidential information of the undertaking.

## **Article 15**

Article 20 of the directive allows for leniency statements to be submitted to national competition authorities in writing, orally, or any other manner. If a leniency statement is given orally, ACM will



record this statement, and draws up a transcript. Note that, in principle, leniency statements are submitted in Dutch. ACM and the leniency applicant may agree on submitting the leniency statement in any other official EU language. This follows from paragraph 3 of the previously mentioned Article 20.

#### **Article 16**

In this article, it has been laid down that ACM sets the final order of receipt of leniency applications regarding a secret cartel by means of provisional grants of leniency. This order of receipt determines what type of leniency is available afterwards. As explained with articles 5 and 6, the fact that the grant of leniency is provisional means that ACM may withdraw the grant of leniency if the leniency applicant no longer meets the requirements under this decision, such as their duty to cooperate. The exact moment of when ACM sends a provisional grant of leniency to the leniency applicant depends, in practice, on the type of situation. In the case of provisional immunity from fines of the type 1A (Article 5, paragraph 1, part d, under iii), this is usually shortly after the leniency application has been completed before the marker deadline, or at least around the time of the targeted inspections. In the case of provisional immunity from fines of the type 1B (Article 5, paragraph 1, part d, under ii) or a provisional reduction of the fine of the type 2 (Article 6), this is usually at the end of the assessment of the facts, shortly prior to or at the time of sending of the statement of objections to the cartel's participants. When deciding to impose an administrative fine, ACM takes into consideration the grant of leniency. This means that the provisional grants of leniency in and of themselves have no legal consequences. Only when ACM decides to impose a fine (which, logically, can also include the decision not to impose a fine meaning a grant of immunity from fines), it is considered a decision within the meaning of Section 1:3 of the Dutch General Administrative Law Act, against which objections and appeals can be filed.

#### **Article 17**

This provision explains the consequences of violation of the leniency criteria by a leniency applicant. When assessing whether or not a violation of the criteria has taken place, ACM will be mindful of the principle of proportionality. In addition, if there are multiple leniency applicants that, in principle, are eligible for the same leniency (one or more natural persons and an undertaking or multiple natural persons), ACM will assess the leniency criteria of each leniency applicant separately.

If a violation has been established, ACM may decide to withdraw the grant of leniency. This means that all rights/claims on the basis of this decision will be waived, and that all information and evidence that have been provided can be used freely by ACM as evidence against everyone, including the leniency applicant, as if the leniency application had not been filed.

#### **Article 18**

ACM is able to impose administrative fines for violations of the cartel prohibition on both undertakings as well as natural persons that have given instructions or have exercised de facto leadership with regard to the participation of an undertaking in the alleged secret cartel. This article sets out under what conditions natural persons together with the undertaking with which they are employed or have been employed are able to be eligible for the same grant of immunity. In accordance with Article 23,

paragraph 1 of the directive, ACM grants natural persons immunity from such administrative fines if the leniency application that has been filed by the undertaking meets the criteria for immunity laid down in Article 5, if the natural persons actively cooperate with ACM in this context, and if the leniency application has been filed by the undertaking before the natural persons were informed by the competent authorities of the enforcement procedures concerning the alleged secret cartel to which the leniency application relates. In cases in which natural persons punishable by fines wish to be designated as leniency co-applicants, the assessment of the material aspects of the leniency applications of these natural persons follows the assessment of the undertaking's leniency application. The undertaking has the freedom to obtain and process in its leniency application information from such persons at least insofar these are persons that, at that point in time, were employed with the undertaking.

### **Article 19**

This article stipulates under what criteria natural persons together with the undertaking at which they work or worked or collectively but without their undertaking, are able to be eligible for the same reduction of the fine. The ability of natural persons to be eligible for a reduction of the fine had already been included in Article 11 of the Leniency Policy Rule. As Article 23 of the directive contains several specific provisions relating to immunity for natural persons, the former Article 11 of the Leniency Policy Rule has been included in Article 19, insofar it concerned immunity for natural persons relating to a reduction of the fine.

The most common situation is that of natural persons that wish to be eligible for the same leniency as that of the undertaking at which they work or have worked. Paragraph 1 of Article 19 concerns the situation where the undertaking has already filed a leniency application and the natural persons file a leniency application on their own behalf and declare that they seek to be considered leniency co-applicants of the undertaking. In such cases, the assessment of the material aspects of the leniency applications of these natural persons follows the assessment of the undertaking's leniency application. The undertaking has the freedom to obtain and process in its leniency application information from such persons at least insofar these are persons that, at that point in time, were employed with the undertaking. The idea behind the rules is that any persons working at an undertaking on whom a fine can be imposed, which fully cooperate with the investigation as leniency co-applicants, should be eligible for the same reduction of the fine as the undertaking for which they work.

The second paragraph concerns natural persons that, at the time of when the leniency application was filed, no longer work for the undertaking that filed the leniency application. In this context, ACM may decide that these persons too are eligible for the same reduction of the fine as the undertaking at which they worked, insofar these natural persons did not work for another undertaking that is suspected to have been involved in the same secret cartel, but that has not filed a leniency application. This means that, in the situation that a natural person that is punishable by fines worked first for the undertaking that has filed the leniency application, but subsequently started working for another undertaking that is suspected to have been responsible for the same cartel but that has not filed a leniency application, this natural person will be granted immunity from fines.

The third paragraph concerns natural persons that simultaneously file a leniency application.

In that context, they may be eligible for the same reduction of the fine if they state that they wish to be considered leniency co-applicants of each other, and each of them, on their own, meet the conditions for a reduction of the fine, as referred to in Article 6.

#### **Article 20**

This article contains rules about how ACM should handle evidence that it obtains in the interactions during the period in which it is contemplated to file a leniency application or that it obtains through applications for immunity from fines as referred to in Article 5, paragraph 1, part d, under i, but that ACM subsequently turns down before a provisional immunity from fines is granted (see article 16). ACM cannot use this evidence as evidence against the provider of that information, unless that provider gives its consent to ACM or unless ACM obtained the same information from another source. This provision thus only applies to leniency applications of the type 1A and not to applications of the type 1B (Article 5, paragraph 1, part d, under ii) or type 2 (Article 6), with regard to which, in most cases at the time of when the leniency application is filed, an investigation has already started. If, in the latter situations, the leniency application, generally after the assessment of the facts, did not result in a grant of leniency, because the evidential value of the leniency application is insufficient, ACM may, under the fining policy rules, take into account the submitted evidence and/or the cooperation with ACM as a circumstance that may result in a reduction of the fine.

#### **Article 21**

This article stipulates that ACM does not disclose the role of an undertaking or natural person as leniency applicant to third parties until the statement of objections within the meaning of Section 5:48 of the Dutch General Administrative Law Act has been sent to everyone involved in the secret cartel. ACM will only disclose this role if a statutory obligation to that effect exists, or if the leniency applicant has consented to such disclosure. One example of such a statutory obligation is the duty to file a report within the meaning of Section 162 of the Dutch Code of Criminal Procedure.

#### **Article 22**

This provision replaces the former Article 27, paragraph 2 of the Leniency Policy Rule, and acts as the implementation of Article 31, paragraph 6 of the directive. Under Article 12 of Regulation (EC) no. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003, L 1), the competition authorities of the member states have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Article 22 of this decision gives two alternative conditions under which ACM may provide a competition authority of another member state leniency statements in accordance with Article 12 of the abovementioned regulation. Such provisions are allowed if the leniency applicant has consented to such provision or if the competition authority to which ACM forwards the leniency statement has received a leniency application from the same leniency applicant with regard to the same alleged secret cartel as ACM has, on the condition that, at the time of sending the leniency statement, the applicant has no opportunity to withdraw the dispatched information.

**Article 23**

This article contains a transitional provision, which means that the Policy Rule of the Minister of Economic Affairs on the reduction of fines in connection with cartels (Leniency Policy Rule), as it was applicable immediately preceding the date on which this decision enters into force, continues to apply to leniency applications that had been received before this decision came into effect, to leniency applications concerning a cartel with regard to which other leniency applications had already been received before this decision came into effect, and to immunity from fines and reductions of the fine that had been granted before this decision came into effect.

**Article 24**

This article sets the commencement date. This decision will come into force at the same time when Section 58c comes into force, which has been laid down in Section II, part J of the bill proposing the amendment of the Dutch Competition Act and the Establishment Act of the Netherlands Authority for Consumers and Markets in connection with the implementation of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019, L 11). This deviation from the fixed amendment moments is justified by the directive's implementation deadline.

**Article 25**

This article states how this decision will be referred to.

The State Secretary for Economic Affairs and Climate Policy, M.C.G. Keijzer

**Annex**

Transposition table of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
