



**Procedural notice relating to the French Leniency Programme  
issued on March 2<sup>nd</sup>, 2009**

**I – Origin**

1. Unlike many other countries, where leniency programmes are the result of notices issued by competition authorities, the French leniency programme (hereafter “the leniency programme”) was introduced by Law.
2. Section IV of article L. 464-2 of the *code de commerce*, which sets out the principles and outlines the programme, states that:

*“Immunity from any fine or a reduction of fine may be granted to an undertaking or body which has, with others, implemented a practice prohibited by the provisions of article L. 420-1 if it has contributed to establishing the reality of the prohibited practice and to identifying its perpetrators, by providing information which the Autorité de la concurrence or administration did not have previously. Following the steps taken by the undertaking or body, the Autorité de la concurrence shall adopt for this purpose a leniency opinion, which shall specify the conditions attached to the envisaged immunity, after the Government Official and the undertaking or body concerned have presented their observations. This opinion shall be notified to the undertaking or body and shall not be published. When the decision is adopted pursuant to point I of the present article, the Autorité may, if the conditions specified in the leniency opinion have been met, reduce the fines in proportion to the contribution made to establishing the infringement”.*

3. This provision was completed by article R. 464-5 of the *code de commerce*, which states the following:

*“The undertaking or body which takes the steps indicated in section IV of article L. 464-2 shall contact either the Director General of Competition, Consumer Affairs and Fraud Control, or the head Case Officer at the Autorité de la concurrence. This shall be done either by letter sent by recorded delivery with receipt request, or orally. In the latter case, the Director General of Competition, Consumer Affairs and Fraud Control (DGCCRF) or the head Case Officer at the Autorité de la concurrence shall confirm the date of application in writing. The declaration by the representative of the undertaking or body shall be collected as quickly as possible in the form of an official statement, and recorded by an investigator from the DGCCRF or a Case Officer from the Autorité de la concurrence.*

*The Director General of Competition, Consumer Affairs and Fraud Control and the Head Case Officer shall inform each other of any such application pursuant to paragraph 1 of the present article, as well as any possible investigation or inquiry concerning the practices in question, which may have been in progress prior to the application.*

*A Case Officer from the Autorité de la concurrence shall draft proposals for immunity from fines and specify the conditions that the Autorité de la concurrence may attach to immunity in its leniency opinion. His report shall be sent to the undertaking or body concerned and to the Government Official, at least three weeks before the hearing.*

*Where an undertaking or body has applied to take advantage of the provisions of section IV of article L. 464-2 of the code de commerce, the inquiry report or statement of objections and the Case Officer's report may include an assessment of the extent to which the undertaking or body concerned by the leniency opinion has complied with the conditions thereof.”*

4. On April 11<sup>th</sup>, 2006, the *Conseil de la concurrence* (hereafter the “*Conseil*”) adopted a procedural notice relating to the French leniency programme, which specifies the way in which it implements these provisions.
5. On September 29<sup>th</sup>, 2006, the European Competition Network (ECN) adopted a Model Leniency Programme (hereafter “the Model Programme<sup>1</sup>”), which was drafted by a working group co-chaired by the *Conseil* and the British Office of Fair Trading. As mentioned in point 2 of the Model Programme, its objective is *inter alia* to avoid that undertakings likely to seek the benefit of leniency be deterred by discrepancies between leniency programmes applicable in the ECN, and to establish common principles in the processing of leniency applications, which undertakings expect to be respected by any competition authority member of the ECN. As indicated in point 3 of the Model Programme, competition authorities members of the ECN committed themselves to bring their respective leniency programme in line with the Model Programme.
6. In order to respect the commitment taken within the framework of the ECN, the *Conseil* published a procedural notice relating to the new draft version of the revised leniency programme on January 29<sup>th</sup>, 2007 and invited the interested parties to deliver their observations in that respect. This public consultation ended on March 1<sup>st</sup>, 2007.
7. On April 17<sup>th</sup>, 2007, the *Conseil* adopted a revised procedural notice.
8. On March 2<sup>nd</sup>, 2009, the *Autorité de la concurrence* (hereafter the “*Autorité*”), created by the law n° 2008-776, dated August 4<sup>th</sup>, 2008, on the modernization of the economy, adopted the present procedural notice.

## II – Objective and scope

9. In accordance with the leniency programme, where an undertaking or body (hereafter an “undertaking”) is liable to be fined for taking part in an anticompetitive agreement or concerted practice, the *Autorité* may grant it full or partial immunity if the undertaking helps to establish the existence thereof. In principle, the agreements concerned are cartels between undertakings consisting in the fixing of prices, the allocation of production or sales quotas or the sharing of markets, including bid-rigging, or any other similar anticompetitive behaviour between competitors. These infringements are all covered by provisions of article L. 420-1 of the *code de commerce* and, where applicable, of article 81 of the EC Treaty.
10. Before the implementation of the leniency programme, undertakings wishing to end their participation in such illegal agreements and inform the *Autorité* of their existence could be deterred from doing so by the high fines to which they were exposed. Since the implementation of the programme, on the contrary, undertakings have an incentive to take these steps.
11. The legislator considered it to be in the interest of the French economy, and *inter alia* of consumers, to grant favourable treatment to those undertakings which inform the *Autorité de la concurrence* about illegal agreements and co-operate with them to bring such agreements to an end. Actually, such agreements are harmful to economies: they seriously harm the interests of consumers, particularly when they lead to artificial price increases or reduced choice, and enable undertakings to avoid the pressure that normally leads them to innovate. The benefit for consumers and citizens in ensuring that agreements are detected and prohibited more frequently and more effectively outweighs the interest in fining all undertakings involved in agreements, including those which, by revealing their existence, enable the *Autorité* to detect and penalise such practices.

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<sup>1</sup> The ECN Model Programme can be consulted on the Internet website of the *Autorité de la concurrence* (<http://www.autoritedelaconcurrence.fr>)

12. In order to encourage undertakings to cooperate with the *Autorité*, within the framework described in point 8, it will grant a full immunity from the fine incurred for breaching article L. 420-1 of the *code de commerce* and, where applicable, article 81 of the EC Treaty, to any undertaking who is the first to apply for leniency and satisfies the conditions set out in section III.1, A or B, and IV below. In other cases, the *Autorité* may also grant a partial immunity from fine to any undertaking if it applies for leniency and satisfies the conditions set out in III.2 and IV below.

### III – Eligibility conditions

#### III.1 – Full immunity from fines (hereafter “type 1 case”)

A – Case where the *Autorité* has no information on the alleged agreement (hereafter “type 1 A case”)

13. The *Autorité* will grant the conditional benefit of immunity from fine to any undertaking which is the first to submit information and pieces of evidence on the existence of an agreement if the following two conditions are met:

- the *Autorité* did not previously have sufficient information and pieces of evidence to be able to carry out or to have carried out targeted inspections, on their own initiative, as per article L. 450-4 of the *code de commerce*, and
- the information and pieces of evidence submitted by the undertaking applying for leniency are sufficient, in the *Autorité*'s point of view, to have such measures carried out.

14. In order to meet the second condition indicated above, the undertaking must, as a minimum requirement, provide orally or in writing:

- the name and address of the legal entity applying for full immunity;
- the name and address of the other members to the alleged agreement;
- a detailed description of the alleged agreement, including the nature and the use of the products involved, the territories on which the practices concerned may have an impact, the nature of these practices and an estimate of the duration of their implementation; and
- information about any leniency application relating to the alleged agreement which it has transmitted or intends to transmit to other competition authorities;

and pieces of evidence (documentary or of any other nature) in its possession or that can be available at the time of the application. These elements may consist in information helping to identify locations, dates and the object of contacts or meetings between participants in the alleged agreement.

B – Case where the *Autorité* already has informations on the suspected agreement (hereafter “type 1 B case”)

15. If the *Autorité* already has certain informations relating to the alleged agreement, it will grant the conditional benefit of full immunity from fines if the three following conditions are met:

- the undertaking is the first to submit pieces of evidence which, in the *Autorité*'s view, are sufficient to establish the existence of an infringement of article L. 420-1 of the *code de commerce* and, where applicable, to article 81 of the EC Treaty defining the existence of an agreement;

- at the time of the application, the *Autorité* did not have sufficient evidence to establish the existence of an infringement to article L. 420-1 of the *code de commerce* and, where applicable, of article 81 of the EC Treaty defining the existence of an agreement, and
- no undertaking has obtained a conditional opinion granting a type 1 A full immunity for the alleged agreement.

### III.2 – Partial immunity from fines (hereafter “type 2 case”)

16. Undertakings that do not meet the conditions stipulated in type 1 A or 1 B may nonetheless be eligible for a reduction of fine, subject to certain conditions.
17. In order to qualify for such a reduction, an undertaking must provide the *Autorité* with pieces of evidence of the existence of the alleged agreement which represent significant added value with respect to the evidence already in its possession. The concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the *Autorité* to prove the existence of the alleged agreement. As a rule, the *Autorité* will consider notably that:
  - the written evidence contemporaneous with the alleged agreement has a greater value than evidence subsequently established;
  - the incriminating evidence directly relevant to the facts at stake has a greater value than evidence of indirect relevance;
  - the compelling evidence has a greater value than the evidence which requires corroboration in case of dispute.
18. In order to assess the level of the reduction of the fine from which an undertaking may benefit, the *Autorité* will take into account the ranking of the application, the time when the evidence was submitted, as well as the extent to which the elements submitted by the undertaking bring significant added value to the case.
19. Besides, if the undertaking applying for leniency provides compelling evidence which enable the *Autorité* to establish additional elements of facts which have a direct bearing on the amount of the fine imposed on the participants to the agreement, this additional contribution will be taken into account in the individual setting of the fine which may give rise to partial immunity.
20. The partial immunity granted to an applicant having provided a significant added value shall not in principle exceed 50 % of the fine which would have otherwise been imposed, had it not been granted leniency.

### IV – Substantive conditions

21. In addition to the eligibility conditions set out above, the following cumulative conditions must be met in any case to qualify for full or partial immunity from fines:
  - the undertaking must end its involvement in the alleged agreement without delay and at the latest as from the notification of the leniency opinion of the *Autorité*. However, in order to preserve the confidentiality and the efficiency of the investigation measures, the *Autorité* may decide to postpone this date;

- the undertaking must genuinely and fully co-operate, on a continuous basis and expeditiously with the *Autorité*, as from the time of its application and throughout the inquiry and investigation proceedings; this includes in particular:
  - providing without delay the *Autorité* information and pieces of evidence on the alleged agreement that would come into the applicant's possession or are available to it;
  - remaining at their disposal to answer promptly to any request on their part that aims at contributing to the establishment of the facts at stake;
  - making current and, insofar possible, former employees and legal representatives available for interrogation;
  - abstaining from destroying, falsifying or concealing relevant information or evidence relating to the alleged agreement; and
  - abstaining from disclosing the existence or the content of its leniency application before the *Autorité* has issued its statement of objections to the parties unless otherwise agreed with the *Autorité*.
- when contemplating making an application to the *Autorité*, the undertaking must not have destroyed or falsified evidence of the alleged agreement, nor disclosed its intention to apply for leniency, nor even the content of this application, except to other competition authorities.

22. No full immunity from fines will be granted according to the present leniency programme to an undertaking which took steps to coerce another undertaking to participate in the infringement.

## **V – Procedure**

### *V.1 – Approach of the Autorité de la concurrence*

23. The *Autorité de la concurrence* accepts to enter into prior and anonymous contacts with any potential leniency applicant or his counsel wishing to obtain general information on the implementation of leniency proceedings.
24. An undertaking applying for leniency contacts the General *Rapporteur* of the *Autorité*.
25. The application is initiated by letter sent by recorded delivery with receipt request. For this purpose, the undertaking uses the address mentioned on the Internet site of the *Autorité*, in the section regarding the leniency programme<sup>2</sup>.
26. Alternately, the application can be made orally, in which case the General *Rapporteur* takes notice on a written document of the time and date of the statement.
27. In order to apply, the undertaking must provide the *Autorité*, in addition to its name and address, with information on the circumstances which led to the introduction of its leniency application, on the product(s) and on the territory(-ies) on which the alleged agreement is likely to have an impact, the identity of the parties to the alleged agreement, the nature and the estimated duration of the agreement and on any leniency application which has been, or will be made, to other competition authorities in relation to this alleged agreement.

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<sup>2</sup> The address is mentioned on the Internet site of the *Autorité* through the following link : [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=292](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=292)

28. The receipt of the mail sent by recorded delivery with receipt request or the statement established by the General *Rapporteur* makes it possible to mark the application for the leniency programme in the queue, provided the undertaking has submitted the informations referred to in the previous paragraph.
29. The General *Rapporteur* grant the undertaking a period of time, during which the application's rank in the queue is maintained, to allow the undertaking to collect the information and pieces of evidence relating to the alleged agreement which will be necessary for the examination of the leniency application by the *Autorité*. If the periods are respected, the information and the pieces of evidence will be considered as having being submitted at the date of receipt of the application, as indicated in the letter or in the statement marking its order of arrival.

#### *V.2 – Examination of the leniency application*

30. Once the leniency application is registered, either by receipt of the letter sent by recorded delivery with return receipt or by the drafting of a minute, a written or oral statement is taken from the undertaking's representative. This latter statement must be taken within the period set by the General *Rapporteur* of the *Autorité*. At the undertaking's request, the oral statement can be electronically recorded by the *Autorité*.
31. The undertaking provides the *Autorité* with the information and pieces of evidence that it considers necessary to ground its leniency application.
32. On the basis of the information and pieces of evidence supplied to the *Autorité*, the Case Officer appointed to investigate the leniency application drafts a report in which he verifies that the conditions set by the *Autorité* to obtain the conditional benefit for full or partial immunity are fulfilled and prepares, if needed, proposals for immunity from fines. He confirms as soon as possible to the applicant whether its application constitutes a type 1 A case or not.
33. The report is then sent to the applicant concerned and to the Government Official, at least three weeks before the hearing. However, this period may be shortened with the consent of the undertaking and the Government Official.

#### *V.3 – Leniency opinion*

34. On the basis of the Case Officer's report, the applicant is called to attend a hearing before the *Autorité*.
35. Following the hearing, the *Autorité* adopts an opinion in which it indicates whether it grants the undertaking full or partial immunity from fines as well as, in the latter case, the rate of reduction and specifies the conditions attached thereto.
36. In the case where, upon examination on the merits of the case, the *Autorité* considers that the undertaking fulfills the conditions set out, it will grant full or partial immunity from fines, as indicated in the leniency opinion. In the case of a partial immunity, it determines the exact level.
37. In the case where the *Autorité* considers that the conditions are not satisfied and consequently issues a negative opinion, the information and pieces of evidence are returned to the undertaking on its request.

#### *V.4 – Summary applications*

38. The *Autorité* accepts summary applications in 1 A type cases, under the conditions set out in the Model Programme listed hereafter:

- the European Commission is particularly well placed to deal with a case in accordance with paragraph 14 of the Notice relating to cooperation<sup>3</sup>;
- the undertaking has filed or is about to file an application for full immunity with the European Commission; and
- the undertaking provides its name and address, the identity of other parties to the alleged agreement, and summary information allowing to identify the product(s) involved, territory(-ies), the nature and the duration of the alleged agreement, the Member State(s) where the pieces of evidence are liable to be located and the information on its other past or possible future leniency applications to other competition authorities in relation to the alleged agreement.

39. Summary applications should be sent by recorded delivery with return receipt or by oral statement. The General *Rapporteur* acknowledges receipt of the date and time of the application.
40. The receipt of the application or the drafting of the statement makes it possible to mark the order in the queue of the summary application. The General *Rapporteur* confirms that the undertaking is the first to seek full immunity. The summary application will be considered by the *Autorité* as having been made in accordance with the conditions provided in order to seek full immunity under type I A.
41. After the receipt of a summary application, the undertaking remains bound to provide the *Autorité* with the additional information which it could request.
42. If the *Autorité* decides to take action in the case for which a summary application has been submitted, the undertaking will have to provide all information and pieces of evidence necessary for the examination of its application under the conditions provided for by paragraphs 29 and following of the present procedural notice.
43. In order to facilitate the processing of a summary application, and *inter alia* as regards language issues that may arise, the *Autorité* recommends to contact beforehand the General *Rapporteur*.

## VI – General considerations

44. Aware of the fact that undertakings which co-operate with the *Autorité* may want their co-operation to remain confidential, it will keep the identity of the leniency applicant confidential for the duration of the proceedings until the statement of objections is issued to the parties concerned, within the scope of the *Autorité's* national and Community obligations.
45. Since May 1st 2004, the *Autorité* is member of the ECN, which was created by Regulation No 1/2003<sup>4</sup>. Within the ECN, competition authorities co-operate closely. Rules on the efficient division of work and co-operation mechanisms for allocating cases and mutual assistance between authorities have been adopted. These rules, which include principles relating to the protection of persons who apply for leniency, were detailed by the Commission in the Notice relating to cooperation. The *Autorité* committed itself to respect these rules. Besides, oral statements made under the present programme will only be transmitted by the *Autorité* to other competition authorities, pursuant to article 12 of Regulation No 1/2003, if the conditions set out in the Notice relating to cooperation are met and provided that the confidentiality guaranteed by the receiving competition authority is equivalent to the one guaranteed by the *Autorité*.

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<sup>3</sup> Commission Notice 2004/C101/03 of 27 April 2004, relating to cooperation within the competition authorities network (OJ C 101, 27.4.2004, p. 43)

<sup>4</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1)

46. The undertaking's co-operation with the *Autorité* during the proceedings will be mentioned in the decision, in order to explain the reason for the full or partial immunity from the fines incurred by the undertaking.
47. Full or partial immunity from fines granted by the *Autorité* does not protect that undertaking from any civil law consequences that may result from its participation in an infringement under the provisions of article L. 420-1 of the *code de commerce* and/or article 81 of the EC Treaty.
48. Pursuant to paragraph 2 of article L. 462-6 of the *code de commerce*, the *Autorité* may pass the case file on to the French State Prosecutor's office if, in its view, facts of the case are such as to justify the application of article L. 420-6 of the said code. Article L. 420-6 only applies if three cumulative conditions are met: the individual must have fraudulently played a personal and decisive role in the creation, organisation or implementation of the practices referred to in article L. 420-1. The *Autorité* considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the undertaking which has been granted leniency, would be liable to such proceedings.
49. The present procedural notice replaces the procedural notice of April 17th 2007. It will be applied as from the date of its publication on the website of the *Autorité de la concurrence* to all application seeking immunity from fines received from that date and concerning cases where no other company has already filed for leniency under the procedural notice of April 17th 2007.