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EUROPEAN COMMISSION ISSUES GUIDANCE TO STRENGTHEN LENIENCY PROGRAMME

To Our Clients and Friends:

Summary

- On 25 October 2022, the European Commission (“Commission”) published guidance to clarify and modernize its leniency notice to companies seeking immunity from cartel behavior.
- These measures signal a continued commitment from the Commission to enforcing its laws against cartels by encouraging potential whistleblowers to come forward.
- The Commission’s guidance includes the possibility for companies to inquire on a no-names basis as to whether they may qualify under the leniency programme, which will be beneficial for companies involved in conduct outside of the Commission’s traditional enforcement areas, such as no-poach or other novel conduct.
- The Commission has also created the new role of Leniency Officer as a contact point for potential leniency applicants to obtain “*informal advice*” and discuss the leniency process.
- These new tools will likely prove useful to assess and manage the legal risk when considering potential leniency applications.

Background

Cartel enforcement remains at the top of the Commission’s priorities. Last year alone, the Commission adopted ten cartel decisions with total fines amounting to roughly EUR 1.8 billion—the highest cumulative fines since 2016.

The Commission has stated that it is committed to aggressively pursuing cartel cases and building on its recent successes. On 22 October 2021, EVP Margrethe Vestager declared that “*cartels are the most fundamental threat to competition [...] and so, ever since the early days of the EU, the fight against cartels has been right at the top of the Commission’s priorities.*”^[1]

The leniency programme has been a critical tool for the Commission’s cartel enforcement over the years – with many cartels uncovered due to companies self-reporting the conduct and seeking immunity. Yet, the Commission has noticed a downturn in the number of leniency applications in recent years.

In response to this recent decline, the Commission has been actively considering changes to make its leniency programme more attractive to potential applicants – including by shielding the immunity applicant from follow-on damage claims^[2] or providing clearer guidance to companies involved in non-traditional cartels (such as no-poach cartels).

The Commission published guidance on 25 October 2022 that adopts several changes to its leniency programme and offers clarity for potential applicants about how the programme operates in practice. In many ways, the Commission’s new guidance is modeled on the *Frequently Asked Questions* (“FAQs”) published by the U.S. Department of Justice, which have successfully offered clarity about the DOJ’s practices and procedures for implementing its Corporate Leniency Policy for the past 25 years.

The Commission’s guidance is consistent with a broader effort across competition authorities, such as the Brazilian competition authority CADE, to reinvigorate leniency programmes.

The Commission’s Guidance Aims at Making the Leniency Programme More Attractive

The Commission’s guidance seeks to further clarify the rules applicable to companies potentially involved in a cartel who wish to cooperate with the Commission and disclose their participation in exchange for full immunity or a partial reduction in fines.

While the Commission’s guidance sheds light on various aspects of the leniency programme, the most notable changes relate to the possibility of approaching the Commission on a “no-names” basis and the introduction of a Leniency Officer – both of which illustrate the Commission’s willingness to engage in informal discussions with potential applicants to reduce the uncertainty that may arise in a specific matter.

First, the Commission’s guidance sets out that *“the Commission is available for informal exchanges about potential immunity applications on a no-names basis and without any requirement to disclose the sector, the participants or other details identifying the cartel.”*

The ability to engage in informal discussions, on a no-names basis, to explore whether particular conduct qualifies under the leniency programme will be helpful for potential leniency applicants – especially *“if the conduct is novel.”*^[3]

In recent years, the Commission has imposed fines in cases that differ from traditional hardcore cartels. This includes, for example, fines imposed on companies that engaged in restraints on innovation, which effectively restricted competition on technical development. The Commission has also signaled its desire to expand its cartel enforcement to no-poach and other labor market agreements.^[4]

With the Commission’s guidance, companies will have more certainty when assessing whether their conduct creates legal risks that could be avoided or mitigated if they decide to come forward.

Second, the Commission’s guidance introduces a Leniency Officer who will be the first point of contact for any potential leniency applicant. Although novel with the Commission, the position of Leniency Officer was established in France in 2011 and has existed in the Netherlands since at least 2006.

As explained in the Commission’s guidance, “*the Leniency Officer can offer informal advice, provide information on the leniency process and engage with prospective applicants or their legal representatives to discuss potential applications on a ‘no-names’ basis.*” The Leniency Officer can also inform potential immunity applicants if immunity is available for the cartel that these potential applicants are involved in.

The Leniency Officer will constitute a helpful point of contact for potential and actual leniency applicants going forward and is designed to provide leniency applicants with additional reassurances as they consider self-reporting their conduct.

Conclusion

The Commission’s guidance is a valuable acknowledgement that its leniency programme must evolve and a notable step toward reducing uncertainty and building trust that can help to ensure its continued success. This guidance offers potential leniency applicants the opportunity to make a more informed decision about the need for and desirability of seeking leniency, which should result in an uptick in utilization of the leniency programme. Conversely, the Commission may receive more leniency applications in novel areas it wants to pursue while simultaneously avoiding undesirable leniency applications that may otherwise occupy its resources.

Companies who are party to agreements or other forms of collaboration with their competitors that they suspect may constitute a potential cartel should immediately seek the guidance of external counsel in order to review the nature of their involvement and avoid potentially significant fines.

Any potential whistleblower should act swiftly, as the first participant to come forward is eligible for full immunity from fines and subsequent participants being eligible for increasingly smaller fine reductions.

[1] Speech by EVP Vestager at the Italian Antitrust Association Annual Conference, “*A new era of cartel enforcement,*” available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

[2] GCR, “*EU is reviewing leniency policy amidst drop in first-in applications, enforcer says,*” available at: <https://globalcompetitionreview.com/article/eu-reviewing-leniency-policy-amidst-drop-in-first-in-applications-enforcer-says>.

[3] Antitrust: Commission provides guidance on its leniency policy and practice, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6373.

[4] EU Competition Commissioner Signals Tougher Enforcement of No-Poach and Other Labor Market Agreements, available at: <https://www.gibsondunn.com/eu-competition-commissioner-signals-tougher-enforcement-of-no-poach-and-other-labor-market-agreements/>.



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