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Competition Law: The European Commission provides guidance on its leniency policy and practice

1. Context of the new leniency guidelines

Since 1996, the European Commission has been implementing the leniency programme. This programme offers companies that have participated or are participating in a cartel the opportunity to bring the existence of such a cartel to the attention of the Commission and to cooperate with the investigations in exchange for the possibility of avoiding the imposition of a penalty or reducing the amount of the penalty.

The terms of the leniency programme were published in the European Commission Notice on immunity from fines and reduction of fines in cartel cases (the "**Leniency Notice**")¹.

Since the introduction in 2006 of the still valid Leniency Notice, the European Commission has received more than 550 leniency applications and adopted 54 cartel decisions in cases initiated on the basis of leniency applications.

Given the complexity of the practical implementation of the leniency programme, the European Commission issued guidelines in question and answer format (the "**Guidelines**") at the end of October 2022, to which we refer in this Legal Briefing.

2. Objective of the Guidelines and main new features

The European Commission has issued the Guidelines in order to (i) provide greater transparency, predictability and accessibility to potential applicants; and, where appropriate (ii) facilitate the submission of leniency applications.

Therefore, the 25 questions and answers in the Guidelines focus on:

- (i) Clarifying the circumstances in which the Leniency Notice may apply and providing details on the legal protection and benefits provided by the leniency programme;
- (ii) Incorporating new practical considerations; and
- (iii) Emphasising that leniency applications are analysed on the basis of anonymity and without the need to disclose the sector, the parties involved or any other information that could identify the potential cartel.

3. Standard of proof required to benefit from the leniency programme

The Guidelines provide clarification on a key issue on which a company's eligibility for the leniency programme depends. This issue is the threshold of "significant added value" that applicants must meet to qualify for full immunity from fines or a reduction of the fine.

¹ Official Journal of the European Union ("OJEU") 8 December 2006.

In this respect, the Leniency Notice already stated that a company which discloses its participation in an alleged cartel but does not meet the conditions provided in Section II of the Leniency Notice (relating to "immunity from fines"), may benefit from a reduction of the amount of the fine.

In order to do so, the company must (i) provide evidence of the alleged infringement that provides "significant added value" with respect to the evidence available to the European Commission; and (ii) fulfil the conditions provided in point (12)(a) to (c) of the Leniency Notice.

The Notice itself already described this "added value" as "*the extent to which the evidence provided enhances the Commission's ability to prove the facts in question, either by its very nature or its level of detail or both*"².

In this regard, the Guidelines provide the European Commission's assessment criteria: for example, that written evidence dating from the period in which the facts occurred will generally be given a greater weight than evidence established later, or that incriminating evidence that directly relates to the facts in question will be considered of greater value than evidence that only indirectly relates to the facts in question. In this respect, the Guidelines provide as an example of direct evidence the notes of a cartel meeting and, as an example of indirect evidence, travel records relating to attendance at such meetings.

Furthermore, the "added value" will also depend on the degree of need for corroboration from other sources in order to be able to use the evidence provided by the company, so that conclusive evidence will be given a greater weight than evidence such as statements, which can be contradicted and would require corroboration.

In view of the above, the Guidelines state that the assessment of "significant added value" is made on a case-by-case basis, with the evidence provided by a leniency applicant being assessed against evidence that may already be in the European Commission's possession. The European Commission examines each piece of evidence and then makes an overall assessment of whether the evidence meets the required threshold. It should be noted that leniency applicants' immunity or reduction of fines is based on the extent to which they bring significant added value to the case and not necessarily on the order in which they submit their leniency applications.

4. Protections for leniency applicants outside the Leniency Notice

The Guidelines refer to additional protections for leniency applicants beyond those contained in the Leniency Notice. In particular, they point out that the Damages Directive³ offers protection to leniency applicants against possible claims for civil damages. Specifically, they stress that Article 6 of the Damages Directive prohibits the disclosure of leniency statements submitted to the European Commission or to a national competition authority in proceedings for damages before national courts of the European Union.

In addition, the Guidelines note that Article 11 of the Damages Directive calls on Member States to ensure that a beneficiary of leniency is jointly and severally liable (i) to its direct or indirect purchasers or suppliers; and (ii) to other injured parties only where full compensation cannot be obtained from the other companies that were involved in the same competition law infringement, the non-beneficiaries of the leniency programme. This is an exception to the general rule that co-infringers can be held jointly and severally liable for all the damage caused by the infringement.

² Paragraph 25 of the Leniency Notice.

³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of competition law of the Member States and of the European Union Text with EEA relevance ("**Damages Directive**").

Furthermore, the beneficiary of the leniency policy can continue to participate in procurement or award procedures at both EU and national levels, as active collaboration with the competition authority is an element to be taken into account in order for the tendering administration to disregard exclusionary conduct. This is also an exception to the general rule provided in the Financial Regulation⁴ and the Public Procurement Directive⁵, which provide that where a company has been found guilty of a serious infringement that could lead to a distortion of competition, the offending company can be excluded from EU and/or national public procurement procedures or be subject to a financial penalty.

⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union amending Regulations (EU) Nos 1296/2013, (EU) Nos. no 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014 and (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 ("Financial Regulation").

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance ("Public Procurement Directive").

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