EU COMPETITION LAW UPDATE

Revised EU Leniency Notice

BRUSSELS
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On December 7, 2006, the Commission adopted a new *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (the "New Leniency Notice"). It replaces the Commission's 2002 Leniency Notice, and applies to all cartels for which no leniency application had been made under the 2002 Notice as of December 8, 2006.

The New Leniency Notice takes account of experience acquired in the application of the 2002 Notice and is in line with the Model Leniency Program recently adopted by the European Competition Network, the organization of competition authorities within the European Union. In announcing the New Leniency Notice, Competition Commissioner Kroes said: "*Secret cartels undermine healthy economic activity. To root out cartels we need heavy sanctions to deter cartels and an efficient leniency policy providing incentives to report them. These changes will further strengthen the effectiveness of the Commission's leniency policy in the detection of cartels and offer clearer guidance for business.*"

The New Leniency Notice maintains the key features of the Commission's existing leniency program but clarifies in more detail what type of information and evidence leniency applicants must provide, and how such evidence will be evaluated. It also codifies a number of procedural innovations that had developed in practice, for example with respect to oral corporate statements. Importantly, the New Leniency Notice introduces a "marker" system that protects an immunity applicant's "place in the queue" during a brief period, allowing it to collect necessary evidence. All in all, the New Leniency Notice underscores the clear premium placed on "getting in first."

I. FULL IMMUNITY

Under the New Leniency Notice, the Commission will grant full immunity from fines:

(1) to the *first* company to provide sufficient information to allow the Commission to launch a targeted inspection on the premises of the suspected members of an undetected cartel. While the Commission enjoys broad

discretion in determining whether evidence is "sufficient" to launch an inspection, the New Leniency Notice clarifies that applicants must provide at least:

- **A corporate statement.** A (written or oral) corporate statement, including a detailed description of the alleged cartel arrangement (including a set of enumerated topics); name and address of the applicant and all other alleged cartel participants; name, position, office location (including, where necessary, home address) of all individuals known to have participated in the cartel); and an indication of other competition authorities that have been or will be contacted about the alleged cartel; and

- **Contemporaneous evidence.** Any other available evidence on the alleged cartel, in particular contemporaneous documentary evidence.

In exceptional circumstances, the Commission may agree that some of this information be provided at a later stage if that is necessary to avoid jeopardizing the effectiveness of its surprise inspections (e.g., if the applicant's internal investigations risk alerting competitors).

(2) to the *first* company to provide evidence that enables the Commission to establish an infringement of Article 81 EC, in situations where the Commission already has sufficient evidence to launch an inspection, but not to establish an infringement. Immunity will only be available in this circumstance if no other company has provided the Commission with sufficient information to launch an inspection and the Commission did not already have sufficient evidence to establish the infringement. Applicants must provide a corporate statement along the lines outlined above, <u>together</u> with contemporaneous, incriminating evidence of the alleged cartel.

To qualify for full immunity, a company must further (a) cooperate genuinely, fully, expeditiously, and on a continuous basis throughout the Commission's administrative procedure; (b) provide all evidence in its possession; (c) make current (and, if possible, former) employees and directors available for interviews; (d) immediately terminate its involvement in the cartel (except if the Commission considers that this would jeopardize the effectiveness of the Commission's surprise inspections); (e) not disclose its leniency application, except to other competition authorities, before a Statement of Objections has been issued, unless otherwise agreed by the Commission (e.g., to the extent necessary for listed companies to respect their disclosure obligations); (f) not have destroyed, falsified, or concealed evidence; and (g) not have taken steps to coerce other companies to participate in the cartel.

II. PARTIAL LENIENCY

Partial leniency continues to be available to companies that submit evidence of "significant added value" to that already available to the Commission, *i.e.*, evidence that by its nature or level of detail strengthens the Commission's ability to prove the infringement. The first successful applicant for partial leniency (which, in practice, will often be the first company to cooperate after a successful applicant for full immunity) is entitled to a fine reduction of 30-50%; the second will receive a 20-30% reduction; and any subsequent applicants are limited to a maximum fine reduction of 20%.

Evaluating what constitutes evidence of "significant added value" has in practice proven to be extremely difficult, both for potential leniency applicants and for the Commission. The New Leniency Notice provides some basic, self-evident guidance. Written, contemporaneous evidence will generally have greater value than evidence subsequently established (e.g., ex post facto oral or written testimony). Directly incriminating evidence will generally have greater value than circumstantial evidence. Finally, evidence that can be relied upon without further corroboration – i.e., conclusive, stand-alone evidence, which is referred to as "compelling evidence" – will have greater value than evidence that requires corroboration.

The introduction of a category of "compelling evidence" has some important implications. Ex post facto testimony from current or former employees – which, if contested, requires corroboration – is not in itself "compelling". This may influence leniency decisions in circumstances where, besides employees' recollections, little or no contemporaneous, corroborating evidence is available. In addition, where a company provided evidence that exacerbated the gravity or duration of the cartel infringement, the 2002 Leniency Notice provided that the Commission would not take this evidence into account in setting fines against the company that provided the evidence. This addressed a concern raised under the 1996 Leniency Notice, which was thought to have diminished companies' incentive to provide additional evidence because the extra discount that could be obtained for providing evidence showing, for example, the earlier start of cartel activities, was largely off-set by the increase in fine levied for the additional duration of the infringement. The New Leniency Notice is a partial step backwards in this regard, since it expressly limits immunity from fine increases only to companies providing "compelling evidence" of aggravating facts.

III. PROCEDURE

The New Leniency Notice contains two key procedural innovations. First, it introduces a so-called "marker system" – since long available in the United States – under which an immunity applicant can secure its first "place in the queue" without offering all evidence upfront. To secure a "marker", the applicant must provide (1) its

name and address; (2) the identity of the alleged cartel participants; (3) the affected products and territories; (4) the nature and estimated duration of the cartel; (5) the other authorities that have been or will be approached with a leniency application; and (6) a justification for the "marker". If a "marker" is granted, the immunity applicant will be provided a brief delay to collect evidence and complete its application. Importantly, the "marker" system only applies to immunity applicants and not to subsequent partial leniency applicants.

(In a related development, the Model Leniency Program of the European Competition Network has introduced a uniform summary immunity application system for cases concerning more than three Member States. Under this system, if a full immunity application has been made with the Commission, national competition authorities can grant a "marker" and accept temporarily to protect the applicant's "place in the queue" on the basis of very limited information that can be given orally. If a national authority subsequently wishes to act on the matter, it will provide the applicant with an opportunity to complete its national immunity application.)

Second, the New Leniency Notice codifies the Commission's practice with respect to oral corporate statements. This procedure has been developed to avoid that potential applicants are dissuaded from making leniency applications by fear of creating a "discoverable" corporate statement that could be used against them in private litigation, principally in the United States. Oral corporate statements are recorded and transcribed at the Commission's premises. The applicants is then given the opportunity to check the technical accuracy of the recording and, if need be, to make any corrections. Ultimately, the applicant is required to listen to the entire recording and check the accuracy of the written transcript.

Finally, access to corporate statements will be provided only to the addressees of a Statement of Objections, subject to the condition that they commit not to make mechanical or electronic copies and to use the information only for purposes of judicial or administrative proceedings for the application of Article 81 EC. Use for different purposes will be sanctioned in various ways: (1) it may be regarded as lack of cooperation within the meaning of the New Leniency Notice; (2) the Commission may, in appeal proceedings before the Community Courts, ask for an increase in the relevant company's fine; and (3) to the extent outside counsel is involved, the Commission may ask the competent bar to take disciplinary action.

IV. PRACTICAL IMPLICATIONS

The New Leniency Notice, especially through the introduction of a marker system and the emphasis on "compelling evidence" for partial leniency applicants,

underscores the existence of a clear premium on informing the Commission before other cartel members do. Companies that are considering cooperating with the Commission should do so quickly (if need be through obtaining a "marker") and comprehensively; if they do not, they risk being left behind by others who have acted earlier, and may no longer be able to provide evidence of added value. At the same time, it should be kept in mind that any information volunteered could ultimately give rise to private claims for damages in Europe and/or the United States. Companies and their legal advisors should therefore consider in each case what would be the most appropriate manner of informing the Commission, including the possibility of providing information orally in the early stages of the Commission's investigation.

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