

BELGIAN COMPETITION LAW UPDATE**The New Belgian Leniency Notice**BRUSSELS
NOVEMBER 16, 2007**I. BACKGROUND**

Belgian Competition Council on October 22, 2007 adopted a new leniency program, updating the existing leniency guidelines which were adopted in June 2004. The new Leniency Notice sets out the conditions and modalities which must be fulfilled in order to benefit from immunity from fines or reductions in fines in cartel cases. The new rules are based on the European Competition Network model program and bring competition enforcement in line with that in other EU member states. Also, the Notice clarifies a number of issues that were raised under the 2004 program.

II. CONTENT OF THE LENIENCY NOTICE**A. SCOPE**

The leniency program only applies to cartels. Cartels are defined as agreements and/or concerted practices between two or more competitors and/or associations of companies, and possibly one or more other non-competing companies and/or associations of companies, aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices, the allocation of production or sales quota, the sharing of markets (including bid-rigging), the restriction of imports or exports and/or anti-competitive actions against other competitors.

Vertical agreements and horizontal restrictions that are not cartels fall outside the scope of the Notice. Also, the Notice does not apply to natural persons or legal entities that are not companies within the meaning of the Act on the Protection of Economic Competition.

B. IMMUNITY FROM FINES (TYPE 1)

1. Immunity Type 1A

The Council will grant a company or association of companies full immunity from fines if the following conditions are met:

- the company or association of companies is the first to submit information and evidence that enables the Belgian competition authority to carry out targeted inspections concerning the alleged cartel;
- at the time of the leniency application, the Belgian Competition Authority did not have sufficient evidence to justify an inspection concerning the alleged cartel or did not yet carry out an inspection; and
- the general conditions for leniency are met.

2. Immunity Type 1B

The Council will grant a company or association of companies full immunity from fines if the following conditions are met:

- the company or association of companies is the first to submit information and evidence enabling the Council to establish an infringement of Article 2 of the Act on the Protection of Economic Competition and, where applicable, to Article 81 EC Treaty, in connection with the alleged cartel;
- at the time of the submission of the leniency application, the Belgian Competition Authority does not have sufficient evidence to establish an infringement;
- no complete immunity from fines was granted to a company or an association of companies concerning the alleged cartel, and
- the general conditions for leniency are met.

3. Exclusion from Immunity

The Council will not grant full immunity to an applicant that took measures to coerce another company or association of companies to participate in or continue the cartel. The applicant may, however, still be eligible for a partial immunity from fines if it meets the specific and general conditions for such immunity.

C. PARTIAL IMMUNITY FROM FINES (TYPE 2)

A leniency applicant will qualify for a reduction in fines if it provides evidence of the alleged cartel which represents significant added value compared to the evidence already in possession of the Belgian Competition Authority at the time of the application.

An applicant may obtain partial immunity as follows:

- the company is the first to submit evidence with a significant added value: a reduction of 30% to 50%;
- the following companies that submit evidence with a significant added value: a reduction of 10% to 30%.

When determining the appropriate level of the partial immunity within these ranges, the Council will take into account in its final decision the time at which evidence was submitted and the assessment of the overall added value of the evidence provided.

In addition, the applicant must meet the general conditions for leniency.

D. GENERAL CONDITIONS FOR LENIENCY

In order to qualify for leniency, the applicant satisfy the following general conditions:

- prior to the application, not to destroy, falsify or conceal any evidence concerning the alleged cartel, and to keep secret the intention to submit a leniency application and the content thereof, except for the other competition authorities inside and outside the European Union,
- to end its involvement in the alleged cartel immediately following the application, except when the auditor in charge of the case finds its continued involvement to be reasonably necessary to preserve the effectiveness of inspections, and
- to cooperate fully, on a continuous basis, genuinely and promptly with the Belgian Competition Authority from the time of the leniency application until the final decision.

E. PROCEDURE

1. The Leniency Application

A company or association of companies wishing to obtain full or partial immunity from fines must submit a full leniency application. A company or association of companies wishing to obtain immunity Type 1A, may submit a summary leniency application in certain cases.

A full leniency application involves the making of a "corporate statement" and the filing of evidence. The corporate statement must contain the information necessary to benefit from full or partial immunity from fines.

The corporate statement may be drafted in one of the official Belgian languages or in English. If the corporate statement is drafted in English, the translation in one of the official languages is submitted within two working days, unless otherwise agreed upon with the auditor. If the evidence is not submitted in one of the official languages, the auditor may request a translation.

The corporate statement. In the corporate statement, the company describes its knowledge of a cartel and its role therein. The statement must be submitted in eight copies. At the applicant's request, the auditor may, however, accept that the corporate statement is made orally.

Request for a marker. A company or association of companies considering applying for complete immunity may in a first phase request orally or in writing for a marker. A marker protects the applicant's place in the queue for a specific period in order to allow the applicant to collect the necessary information and evidence in order to meet the threshold of evidence for full immunity from fines. The auditor grants a marker taking into account the seriousness and the credibility of the reasons given by the applicant.

Summary application for complete immunity Type 1A. In cases where the European Commission is particularly well placed to deal with a case, an applicant that has filed or is in the process of filing a leniency application with the European Commission, may file a summary application with the registry of the Council.

2. Investigation and Leniency Declaration

The auditor-general designates the auditor who will be responsible for the investigation of the application. On the basis of the investigation of the leniency application, the auditor-general requests the Council to adopt a leniency declaration. In the declaration the Council determines the conditions under which immunity will be granted. When the Council decides that the applicant does not fulfill the specific conditions for complete immunity from fines, the applicant may withdraw its application. The Belgian Competition Authorities may nevertheless use their normal investigation powers to obtain the relevant information. The leniency declaration will not be published.

The auditor investigates the alleged cartel in accordance with the procedures of the Act of the Protection of Economic Competition. When taking the decision on the merits, the Council grants full or partial immunity if the conditions stated in the leniency declaration have been respected. In the decision the Council reports the cooperation of the company or association of companies with the Belgian Competition Authorities in order to clarify the reasons for granting immunity from fines.

III. COMMENTS

The new leniency rules are a marked improvement compared to the 2004 rules. The most important innovations are the following:

- The possibility to draft the corporate statement in English, with a Dutch or French translation possibly required later on. This should facilitate making submissions in multi-national situations and ensures a more timely procedure.
- The new rules introduce a marker system that protects the applicant's place in the queue of leniency applicants in order to allow for the gathering of the necessary information and evidence. There is, however, little legal certainty about when the marker will be granted. The margin of appreciation of the auditor is unclear. Presumably a marker will be refused in exceptional and well-defined cases.
- The new leniency program permits oral leniency applications, thus offering a form of protection against discovery in civil proceedings.
- The new leniency rules allow applicants to submit summary applications when they are also applying for leniency with the European Commission.

- The new leniency program is in line with the European model and has taken into account the experience which was gained under the previous leniency guidelines of March 30, 2004.

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For additional information, please do not hesitate to contact Dirk Vandermeersch or Tine Van den Haute in the Brussels office.

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