



New EU guidelines on leniency for companies involved in illegal cartels

The European Commission's new guidelines on immunity from fines and the reduction of fines in cartel cases came into force on 8 December 2006. The changes are welcome and continue the Commission's efforts to secure greater transparency and certainty for applicants, and to increase the degree of convergence between leniency systems within Europe and beyond.

The European Commission has finalised revised guidelines on both immunity from fines and the reduction of fines in cartel cases. The changes are welcome and continue the Commission's efforts to secure greater transparency and certainty for applicants, and to increase the degree of convergence between leniency systems within Europe and beyond.

Significant features include the introduction of a 'marker' system and rules that seek to protect from disclosure in court proceedings the statements made by applicants to the Commission.

That said, some aspects of the notice cause concern, primarily because of the potential mismatch with leniency regimes outside the EU. For example, the Commission has not adopted provisions for 'amnesty plus' where leniency applicants could obtain additional benefits by disclosing further cartels of which the Commission was unaware.

Conditions for immunity or fine reduction

Whereas in the past it was sufficient for immunity applicants to produce 'evidence' allowing the Commission to carry out an investigation or find an infringement, the type of information and documents now required are set out in much more detail. On the other hand, the new requirements appear to introduce a higher threshold for evidence needed to obtain immunity. There is a concern that this will mean that

evidence sufficient to secure immunity in, for example, the US might not be enough in the EU. If this discouraged leniency applications it would undermine the leniency programmes in both the EU and the US.

Similarly, a number of conditions for both immunity and reduction of fines are set out in more detail than before, which will assist applicants. In doing so, the Commission has introduced some additional obligations, such as extending the obligation of continuous co-operation to fine reduction applicants: previously this applied only to applicants for immunity.

Marker system

A discretionary marker system, introduced for the first time, allows an applicant to reserve its place in the queue for immunity (though not for fine reduction) by providing limited information, after which it is given a specific period of time during which to supply the additional evidence required to reach the threshold for immunity.

Civil damages claims

Provisions have also been introduced to prevent statements made to the Commission by applicants being used against them in civil damages claims. In spite of these changes, concerns remain that the rules may be difficult to police, particularly where national court disclosure rules currently require disclosure.

Entry into force

The new guidelines entered into force on 8 December 2006 for all applications, unless another company is already co-operating with the Commission regarding the same cartel under the previous notice. Importantly, however, the rules on protection of corporate statements apply from 8 December to all pending and new applications.

Future developments

Other developments in the pipeline in the European Commission's cartel enforcement include the possible introduction of direct settlements, under which a cartel member admitting to an infringement would receive a reduced fine. In addition, in accordance with their recently agreed Model Leniency Programme, most EU member states are implementing a new streamlined procedure that decreases the burden on leniency applicants by allowing a short-form application to be made to national authorities if a full application has already been made to the European Commission.

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