

Leniency Notice: Updated Guidance from the European Commission

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The European Commission recently announced new guidance on its leniency policy and practice in an effort to increase transparency and predictability and to make the leniency process more accessible to potential applicants. The new guidance, which comes in the form of updated Frequently Asked Questions (FAQs), clarifies certain concepts and current practices of the Commission with respect to leniency. It also aims to raise awareness of the protections and benefits available to leniency applicants beyond those described in the Leniency Notice, which governs the Commission's leniency program.

Background

The leniency program allows companies to self-report to the Commission their participation in a cartel and cooperate with the Commission's investigation in exchange for full or partial immunity from fines. The European Union saw a decrease in antitrust enforcement activity during the height of the COVID-19 pandemic. Fines are down in part because of the enforcement challenges created by a remote work environment, but leniency applications have been declining for the past few years. The Commission hopes that the newly published guidance will "facilitate leniency applications in a more complex leniency landscape."

Key Updates

The new guidance allows companies to anonymously disclose conduct through informal exchanges with a leniency officer to determine whether the conduct amounts to participation in a secret cartel, or whether reporting it will entitle the applicant to a benefit under the Leniency Notice. Prospective applicants can discuss would-be applications on a "no-names basis." The guidance specifies that these informal exchanges carry no requirement to disclose the prospective applicant's identity, other cartel participants, the sector, or any details identifying the sector.

The guidance also describes the process for making a hypothetical application, which is distinct from an informal exchange. The applicant may remain anonymous and need not disclose the identities of co-conspirators, but the hypothetical application must describe the sector, geographic scope, and estimated duration of the cartel. Moreover,

if the Commission informs the applicant that the hypothetical application satisfies the requirements for immunity, the applicant is obligated to disclose the evidence in full to the Commission.

The guidance clarifies that leniency statements will not be disclosed to European courts, and the Commission is prepared to support a leniency applicant against requests for disclosure in non-EU courts. Such support from the Commission can be crucial for defendants in U.S. class actions and other civil litigations—for example, where private plaintiffs frequently serve discovery requests seeking disclosure of submissions provided to competition authorities outside the United States, including the Commission.

The guidance explains key factors in determining levels of fine reductions, the availability of partial immunity, and the timing of communications regarding leniency decisions. Cooperating companies that do not qualify for full immunity can receive a fine reduction based on the timing of their qualifying leniency application and the evidence they provide. For example, the first applicant will receive a fine reduction between 30% and 50%; the second between 20% and 30%; and all subsequent applicants could see fines reduced up to 20%. When determining the actual percentage reduction a company will receive within the applicable band, the Commission considers timely reporting as well as the value added by the evidence submitted in helping the Commission to prove an infringement.

Partial immunity is available. For example, if a company provides information that extends the duration of the cartel, then the additional time period will be disregarded for purposes of calculating that company's fine, or the Commission may in its discretion instead grant an additional fine reduction. Final decisions regarding immunity from fines and actual percentage reductions are granted at the end of the Commission's procedure. The Commission will grant a company conditional immunity and indicate successful leniency applications and the related leniency band after initiating proceedings. All unsuccessful applicants are informed in writing.

The Commission also announced upgrades to the eLeniency portal, which was introduced in 2019 to allow applicants to submit their leniency applications by typing statements directly into the Commission's secure server and uploading supporting documents. Typed information is only accessible to the Commission, and information submitted through eLeniency receives the same guarantees of confidentiality and legal protection as that provided under the traditional procedure for oral statements. The new version of eLeniency allows the Commission to securely grant access to corporate statements and other leniency materials to parties involved in the proceedings, which previously would have only been available on the Commission's physical premises.

The Commission has recognized that a company seeking to avoid the risk of exposure to follow-on damages actions may hesitate to submit a leniency application because the limitations period has closed, or has nearly closed, based on a false assumption that the Commission may not pursue the infringement. The guidance emphasizes that the Commission is empowered to adopt a decision finding an infringement even in situations where a fine is time-barred because the limitations period has run.

Takeaway

The Commission has responded to a decline in leniency applications by issuing this new guidance to increase transparency and predictability as well as enhance the accessibility of its leniency process. By clarifying the availability of anonymous reporting as well as the protections from disclosure of leniency statements to civil plaintiffs, the Commission is aiming to decrease the risks for companies that are contemplating whether to disclose their involvement in cartels. It remains to be seen whether the new guidance will encourage more companies to self-report in what the Commission recognizes is a “complex leniency landscape.”

Law Clerk Elayna Napoli also contributed to this blog post.

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