



EU Leniency applications in horizontal monopoly agreement cases : guidance for leniency applicants

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Leniency in context

- For effective enforcement against cartels, a well-designed and well-functioning leniency programme is essential
- Crucial element in the Commission's enforcement toolbox – vast majority of cartel cases originate from leniency applications
- Approximately three quarters of Commission's cartel decisions imposing fines adopted since 2014 were in cases started by immunity applications
- Of the five cartel decision adopted in 2015 and one so far adopted in 2016, all were based on immunity applications

Elements related to leniency

There are certain core features of leniency programmes : clear & predictable framework, transparency & certainty, automatic immunity for first applicants, ability to grant reductions to subsequent applicants

BUT a successful leniency programme cannot generate cases in isolation – other elements are crucial

- Ability to impose significant sanctions: no one will come forward if the sanction is not sufficient
- Ability to run ex officio cases : no one will come forward if there is little chance of being caught (consider screening markets, whistleblower programmes etc)
- Offering the possibility to potential leniency applicants to settle cases can be an added incentive to come forward
- Developing trust in the institution so applicants feel secure in coming forward

Safeguarding leniency

- Ensure that non leniency applicants are pursued and held strictly accountable
- Ensure that applicants are not worse off because it made a decision to cooperate
 - Protection of leniency material (NB Commission Damages Directive)
 - Avoid relying on information submitted by an applicant which leads directly to an increase in its fine otherwise this operates as a disincentive to come forward (NB Partial immunity under Commission leniency programme)

Damages Directive

- Directive aims at promoting private enforcement but ensures public enforcement is protected
- Protection is given to leniency corporate statements which are never disclosable to plaintiffs in damages actions
- Absolute protection is crucial to avoid a chilling effect on the leniency programme
- Directive further safeguards the attractiveness of leniency by providing that the immunity applicant is only liable to its own customers (usually co-infringers are jointly and severally liable for the entire harm caused by an anti-trust infringement).

Partial Immunity

- Novel feature of the Commission's leniency programme
- Operates where a reduction of fines applicant provides additional facts which increase the gravity or duration of the infringement
- Commission grants partial immunity and does not take such facts into account against that applicant when setting the fine
- Avoids potential increases in the level of fine for applicants

Leniency plus (1)

The Commission has no system of leniency plus

But Commission's system of sanctioning is based on solely on fines on companies and is crucial to ensure that level imposed is sufficient to both punish and deter – already numerous reductions available

- Reductions of up to 50% can be awarded to leniency applicants
- Reductions are applied for mitigating circumstances
- Under the settlement procedure in return for admitting to the infringement parties receive a 10% reduction
- Reductions are available for inability to pay

Leniency plus (2)

- Substantively, procedurally and practically there are issues for the Commission
- Substantively: it is in the parties interest to split cartel conduct up into a number of infringements which runs counter to the Commission's practice characterising such behaviour as a single and continuous infringement
 - Procedurally : immunity is only confirmed at the stage of final decision so would not be possible to give additional leniency plus reductions in an earlier cases without delaying decisions
 - Practically : Commission already generates follow on cases in related markets without leniency plus (e.g. car parts, financial cases)

Leniency Recent case developments: withdrawal of leniency

- In the *Italian Raw Tobacco* case Deltafina was granted conditional immunity
- Prior to inspections Deltafina disclosed to competitors that it was cooperating with the Commission
- Commission withdrew immunity
- On appeal the Court of Justice confirmed the Commission was correct to withdraw immunity and underlined the duty of cooperation on applicants



Thank you for your attention