

Cartel leniency in EU: overview

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REGULATION

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

Article 101 of the Treaty of the Functioning of the European Union (TFEU) prohibits anti-competitive agreements and concerted practices. At the European level, it is administered by the European Commission (Commission), although member state competition agencies are also empowered to apply Article 101 of the TFEU in parallel with their national rules, under Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation).

The European Commission's leniency programme, which covers certain violations of Article 101 of the TFEU (see *below*), is governed by its Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2006 C298/17*) (2006 Leniency Notice), which was published on 8 December 2006 and subsequently amended on 5 August 2015. The Commission's leniency programme is also recognised in primary legislation as a result of Regulation (EU) 2015/1348 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

The regime is complemented by national leniency programmes of member state competition agencies, which can also apply Article 101 of the TFEU. Undertakings making immunity and leniency applications to the European Commission often choose to make parallel applications (potentially in summary form) to relevant member state agencies. This is in case the Commission decides not to pursue an investigation into all or part of the relevant conduct. The parallel operation of these leniency regimes is addressed in the Commission's Notice on co-operation within the network of competition authorities (*OJ 2004 C101/43*) (ECN Notice).

Regulatory authority

The Commission's Directorate General for Competition (DG COMP) is responsible for investigating and sanctioning infringements of Article 101 of the TFEU and of administering the EU leniency programme.

SCOPE OF APPLICATION

2. What infringements of competition law does the leniency programme cover?

The Commission's leniency programme is only available for breaches of competition law that constitute cartels. The Commission defines cartel conduct to include any agreement or concerted practice between two or more competitors aimed at co-ordinating their competitive behaviour on the market and/or influencing the parameters of competition through any of the following ways:

- Fixing purchase or selling prices.
- Fixing other trading conditions.
- Allocating production or sales quotas.
- Sharing markets, including through bid-rigging.
- Restricting imports or exports.
- Anti-competitive actions against other competitors.

The Commission's leniency programme does not apply to other categories of horizontal conduct, vertical conduct (including hard-core restrictions such as resale price maintenance), or abuses of a dominant position.

RECENT CASES AND TRENDS

3. What notable recent cases have applied the leniency programme?

The Commission routinely grants immunity and/or leniency discounts in cartel cases. According to its 2017 Report on Competition Policy (www.ec.europa.eu/competition/publications/annual_report/2017/part1_en.pdf), "most cartels have been detected through the Commission's leniency programme". The Commission's following three cartel infringement decisions issued in 2019 are illustrative:

- **Canned Vegetables (Case COMP/AT.40127)**. On 27 September 2019, the Commission announced a EUR31.6 million settlement decision with Cooros, Groupe CECAB, and Bonduelle related to cartel infringements in the canned vegetables market. Bonduelle received immunity for revealing both cases to the Commission, while Groupe CECAB and Cooros received leniency discounts of 30% and 15%, respectively.
- **Forex (Case COMP/AT.40135)**. On 16 May 2019, the Commission announced settlement decisions in two cases in which it imposed fines totalling EUR1.07 billion on several banks for participating in cartel conduct in the foreign exchange markets. UBS received immunity for revealing both cases to the Commission. All banks involved in the first case received leniency discounts. The first and second applicants (Barclays and RBS) provided the Commission with significant added value and received discounts of 50% and 30%, respectively; subsequent discounts were capped at 20%. In the second case, Barclays received a 50% discount. RBS, as the second leniency applicant, was awarded a discount of 25%. MUFG Bank did not apply for leniency.
- **Occupant Safety Systems (Case COMP/AT.40481)**. On 5 March 2019, the Commission announced a settlement decision imposing fines totalling EUR368.2 million on Autoliv and TRW for two sets of cartel conduct in relation to the automotive seatbelt, airbag, and steering wheel markets. Takata received immunity for revealing both cases to the Commission. TRW and Autoliv received discounts of 50% and 30%, respectively.

The Commission's historic reliance on immunity applications is apparent from the fact that its most recent cartel decision in a case

that was not initiated by an immunity applicant dates back to December 2014, when the Commission announced a EUR19.4 million settlement decision with five envelope producers in the Paper Envelopes case (*COMP/AT.39780*). However, this case was also triggered by an informant, and four of the five producers involved benefitted from fine reductions for their co-operation under the 2006 Leniency Notice.

AVAILABILITY OF LENIENCY

Administrative liability

4. Is full immunity from administrative penalties available? What conditions must be met for immunity to be granted?

Total immunity from administrative fines is available to the first undertaking to submit information and evidence that enables the Commission to either:

- Carry out a targeted inspection in connection with the alleged cartel.
- Find an infringement of Article 101 of the TFEU in connection with the alleged cartel.

As regards the first test (which is the relevant threshold in the majority of cases), the Commission requires the submission of the following to grant immunity:

- A corporate statement which provides:
 - a detailed description of the alleged cartel including: its aims, activities and how it functioned; the product or service concerned; its geographic scope; its duration; the volumes affected; the dates, locations, content of, and participants in relevant contacts; and all relevant explanations in connection with the evidence provided in support of the application;
 - the name and address of the entity submitting the application, and of the other undertakings that participated in the alleged cartel;
 - the names, positions, office locations and, where necessary, home addresses of all individuals involved in the alleged cartel;
 - information on other competition agencies that have been approached or that are intended to be approached in relation to the alleged cartel.
- Other evidence relating to the alleged cartel, in particular any available contemporaneous evidence.

As regards the second test, the Commission requires contemporaneous, incriminating evidence of the alleged cartel and a corporate statement containing the same types of information described above, which together enable the Commission to find an infringement of Article 101 of the TFEU.

Subsequent to the immunity applicant, other cartel participants can benefit from reductions in administrative fines where they provide evidence that represents "significant added value" to the Commission's investigation. For that purpose, the Commission will generally look for evidence that:

- Is contemporaneous.
- Is directly relevant to the facts in question.
- Does not require corroboration from other sources.

Finally, immunity and leniency applicants must adhere to certain behavioural requirements which survive beyond their initial application. That is, applicants must:

- Co-operate genuinely, fully, continuously, and expeditiously throughout the investigation.

- End their involvement in the cartel, except as reasonably necessary to preserve the integrity of the Commission's investigation.
- Not have destroyed, falsified, or concealed evidence of the alleged cartel, or disclosed the fact of the immunity application (except to other competition agencies).
- Failure to adhere to these requirements can result in the withdrawal of otherwise successful immunity or leniency applications.

5. Is there a sliding scale of available leniency from administrative penalties?

Successful immunity applicants will receive total immunity from administrative fines. The Commission then offers reductions in fines to leniency applicants on a decreasing scale, based on the order in which the leniency applicants provide significant added value:

- The first successful leniency applicant will receive a reduction of between 30% to 50%.
- The second successful leniency applicant will receive a reduction of between 20% to 30%.
- Subsequent successful leniency applicants will receive a reduction of up to 20%.

When determining the applicable leniency band, the Commission will take into consideration the time at which the applicant provided evidence of significant added value and not the time of the submission of the initial leniency application. Even if a company is first to submit a leniency application, if a second applicant provides significant added value more quickly, the second applicant will qualify for the fine reduction of between 30% to 50%.

When determining the precise percentage reduction to be granted to each applicant, the Commission will take into consideration the time at which the applicant provided evidence of significant added value and the extent of that added value.

6. Is immunity or leniency for administrative penalties available to individuals? If so, what conditions apply?

Cartel conduct does not give rise to criminal or administrative sanctions on individuals as a matter of European law.

7. Is immunity or leniency available for companies and/or its employees in relation to criminal prosecution? What are the implications for employees when an undertaking has been granted immunity or leniency?

Circumstances

There is no criminal liability at EU level.

Proceedings against employees

Not applicable.

Employees' interests

Not applicable.

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

The 2006 Leniency Notice does not specify when an application for leniency should be made. However, immunity and leniency applications should generally be submitted as soon as possible.

The first undertaking to meet the relevant criteria is granted total immunity from administrative fines (see *Question 4*). The Commission then offers reductions in fines to leniency applicants on a decreasing scale, based on the order in which the leniency applicants provide significant added value (see *Question 5*).

9. What are the procedural rules for leniency applications?

Relevant authority

Applications for immunity or leniency must be submitted to DG COMP.

Applicant

Undertakings can submit leniency applications themselves or (more commonly) through legal advisors.

Informal/confidential guidance

It is generally advisable to contact the Commission's cartel division in advance, including to confirm whether immunity or leniency is available in a particular market. The Commission is willing to conduct these exploratory discussions on an anonymous and hypothetical basis.

Form of application

There is no prescribed form for applications. Applications can be made in writing, orally, or electronically. In recent years, most applications have been made orally (albeit with accompanying written evidence) to protect their content from disclosure in civil litigation. In 2019, the Commission introduced a new *eLeniency* portal (www.ec.europa.eu/competition/cartels/leniency/eleniency.html) which enables electronic submissions in an attempt to alleviate logistical difficulties associated with the oral submission of (often lengthy) leniency applications. This seeks to ensure applications enjoy similar protection from disclosure (because submissions cannot be printed, copied, or retained), but with a reduced logistical burden. However, it remains untested as to whether the *eLeniency* path will ultimately offer the levels of protection from eventual disclosure in courts, as contemplated by the Commission.

Markers

If an applicant wants to submit an immunity application but does not yet have sufficient supporting evidence, it can submit an application for a "marker" that temporarily preserves its position as the first undertaking to come forward. The Commission may grant a marker provided the applicant submits the following information:

- The name and address of the applicant.
- The identity of the other participants in the alleged cartel.
- The affected products and territories.
- The alleged cartel's estimated duration.
- The nature of the cartel conduct.
- Any information on past or possible future leniency applications to any other competition authorities, in or outside the EU, in relation to the alleged cartel.

The Commission will set a date by which a full immunity application must be provided (that is, by when the marker must be "perfected").

If/when that takes place, the full application is deemed to have been submitted on the date of the marker. The marker procedure is not available for subsequent leniency applications.

Information/evidence

See *Question 4*.

Oral statements

See above, *Form of application*. The Commission allows applicants to check the accuracy of recorded oral statements and transcripts and submit corrections within a prescribed time limit.

Short-form applications

Not applicable.

10. What are the applicable procedures and timetable?

On receipt of an immunity or leniency application, the Commission will verify whether the application meets the substantive requirements set out in *Question 4*.

For immunity applications, the Commission will typically communicate its assessment to the applicant within a matter of days. In doing so, the Commission can either:

- Grant conditional immunity.
- Explain that immunity is not available (because of a prior immunity application).
- Explain that the applicant has not yet met the relevant requirements.

If immunity is not available, the applicant can withdraw the evidence disclosed (although the Commission can use its investigative powers to reacquire the information) or request that its application be considered for a fine reduction. If the applicant has not yet met the relevant requirements, it can supplement its application with further information until all requirements are met (while asking the Commission to issue a marker holding its place in the queue).

For leniency applications, the 2006 Leniency Notice only obliges the Commission to communicate its decision before notification of a statement of objections (that is, much later in the case). As a practical matter, the Commission tends to delay communicating leniency rankings to provide an ongoing incentive for leniency applicants to continue to submit evidence, both to ensure that they have met the relevant standard, and to maximise the discount that they may receive within a given leniency band.

The final grant of immunity or leniency is only made at the end of the administrative procedure, to ensure that applicants adhere to the behavioural obligations set out in *Question 4*.

WITHDRAWAL OF LENIENCY

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

The Commission only formally grants immunity and leniency at the end of the administrative procedure. Until that point, applications are conditional on continued adherence to the behavioural requirements set out in the 2006 Leniency Notice (see *Question 4*).

Applicants can in theory forfeit the benefit of otherwise successful immunity or leniency applications by:

- Failing to co-operate with the Commission's investigation.

- Continuing their involvement in the cartel (except as reasonably necessary to preserve the integrity of the Commission's investigation).
- Destroying/falsifying/concealing evidence of the alleged cartel.
- Disclosing information concerning their application.

In *Raw Tobacco Italy (Case COMP/C.38.281/B.2)*, Commission decision of 20 October 2005, Deltafina, an Italian tobacco company, revealed to its co-cartelists that it had been granted conditional immunity before the Commission had conducted dawn raids. This resulted in the loss of immunity. However, the Commission did grant Deltafina a 50% discount, in recognition of its broader co-operation.

The withdrawal of immunity or leniency from one applicant does not have any direct bearing on reductions available to other applicants. For example, in *Raw Tobacco Italy*, Deltafina forfeited its conditional immunity, but the Commission refused to grant such immunity to the other applicants. This approach was confirmed by the General Court in *Recylex SA and Others v European Commission (Case T-222-17)*, where the court rejected the proposition that leniency applicants should be upgraded where an applicant further up the queue is disqualified, on the basis that it was not required by the logic or wording of the 2006 Leniency Notice.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted?

A successful immunity or leniency application results in the total or partial reduction of the administrative fine that would otherwise be imposed by the Commission with respect to the scope of the alleged cartel. It does not provide any protection against the finding of another competition law infringement or third-party civil claims.

However, Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive), which has now been transposed into national law in all member states, will apply. Under the Anti-trust Damages Directive, a successful immunity applicant is only subject to joint and several liability with the other cartel participants (that is, is liable for damages caused to customers other than the immunity applicant's own direct and indirect customers) in follow-on damages actions by its own (direct or indirect) customers, or where other customers cannot obtain damages from the other cartel participants.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

The Commission does not offer additional fine reductions for information on other markets.

However, the 2006 Leniency Notice does offer protection to the applicant where it submits compelling evidence which the Commission uses to establish additional facts increasing the gravity or duration of the infringement. In those circumstances, the Commission does not take those additional facts into account when setting the fine to be imposed on the applicant providing the evidence. In *Thermal Systems (Case AT.39960)*, for example, automotive air conditioning supplier and leniency applicant Valeo provided information demonstrating that the infringement concerned two additional customers; the Commission excluded the value of Valeo's sales to those customers from "affected sales" when calculating its fine. This form of partial immunity can represent an effective discount relative to the fines imposed on the other participants.

14. Does the grant of leniency affect a third party's ability to bring a follow-on damages action against a leniency applicant?

A successful immunity or leniency application only results in the total or partial reduction of the administrative fine that would otherwise be imposed by the Commission.

However, under the Anti-trust Damages Directive, an immunity applicant is only subject to joint and several liability in follow-on damages actions by its own (direct or indirect) customers, or where other customers cannot obtain damages from the other cartel participants (see *Question 12*).

CONFIDENTIALITY AND DISCLOSURE

15. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

The Commission typically publishes the identity of immunity and leniency applicants (and their fine reductions) in infringement decisions at the end of the administrative procedure. Until that point, the Commission keeps this information confidential. Immunity and leniency applicants are therefore prohibited from disclosing the existence or content of their applications (and indeed can lose their immunity or leniency benefits if they do so).

Information disclosure

The Commission only provides access to leniency submissions (including recordings, transcripts and annexed evidence) to addressees of the statement of objections during the administrative procedure (after redacting business secrets and confidential information). That access is conditional on a commitment by the undertaking to only use it for the proceedings at issue. Access does not extend to internal Commission documents (*Article 27(2), Modernisation Regulation; Article 15(2), Regulation (EC) 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty)*).

Confidentiality requests

See above, *Identity disclosure* and *Information disclosure*.

Immunity and leniency applicants cannot prevent the Commission from publishing their identities at the end of the administrative procedure. Business secrets and other confidential information can, however, be redacted from leniency submissions before they are shared with other addressees of the statement of objections, as well as from public Commission documents.

16. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

The Anti-trust Damages Directive prohibits courts from ordering the disclosure of leniency statements in follow-on damages claims in the EU.

Domestic submissions and foreign discovery

The Anti-trust Damages Directive does not provide protection against disclosure in litigation outside the EU, nor does it prevent the disclosure of contemporaneous documentary evidence attached to leniency statements. In principle, damages claimants could seek to obtain disclosure of submissions to the Commission in foreign jurisdictions, though this could be frustrated by, amongst other

things, oral submission of evidence (see Question 9, Form of application).

Foreign submissions and domestic discovery

Not applicable.

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The Commission co-operates with member state competition agencies through the European Competition Network (ECN), which provides a framework for the co-operation required by the Modernisation Regulation. This co-operation is principally governed by the ECN Notice, which enables the Commission and member state agencies to exchange confidential information for the purposes of Article 101 (or Article 102) of the TFEU enforcement. However, the exchange of immunity or leniency applications made under the 2006 Leniency Notice is restricted. The Commission can only share applications with the applicant's consent, except where either:

- The applicant has made an immunity or leniency application to the receiving agency in respect of the same conduct.
- The receiving agency commits not to use the information to sanction the applicant (or its employees).

The Commission's leniency programme is independent of any similar programmes of member states. Accordingly, immunity or leniency applications made to the Commission are not treated as simultaneous applications to national agencies, and immunity or leniency grants by the Commission do not entitle the applicants to the same treatment by member state agencies investigating the same case.

Undertakings making immunity and leniency applications to the Commission often make parallel applications to relevant member state agencies, in case the Commission decides not to pursue an investigation into all or part of the relevant conduct.

WHISTLEBLOWERS

18. Are there any whistleblower tools for individuals to report competition violations/cartels?

Whistleblower tools

The Commission introduced a whistleblower tool in 2017. Individuals can now report suspected violations of competition law by email (comp-whistleblower@ec.europa.eu), telephone (+32 2297 4800), or anonymously by encrypted message (<https://comp-eu.whistleblownetwork.net>). Further details are available on the website of the DG COMP (<https://ec.europa.eu/competition/cartels/whistleblower>).

Whistleblower protection

Individuals can report on an anonymous basis. Where they choose not to do so, EU Court precedent (*Case 145/83 Stanley George Adams v Commission*) obliges the Commission to keep the identity of a whistleblower confidential where the information is supplied voluntarily and under a confidentiality request. More generally, whistleblowers should generally benefit from Directive (EU) 2019/1937 on the protections of persons who report breaches of Union law (Whistleblower Directive).

19. Is there a reward for individuals who report competition violations/cartels?

There are no rewards for individuals who report cartels or other competition violations to the Commission. However, according to the Commission, whistleblowers can "help put things right by providing information" (2017 Report on Competition Policy).

PROPOSALS FOR REFORM

20. Are there any proposals for reform?

The Commission has not published any proposed reforms to its leniency programme. However, the Commission introduced a whistleblower tool in 2017 to allow individuals to report cartel activity (see Question 18). The Commission's 2017 Report on Competition Policy revealed that the tool is being used regularly.

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Professional and academic qualifications. Admitted to the bar in District of Columbia, Illinois; JD, Harvard Law School, 2003; BA, Yale University, 2000

Areas of practice. Anti-trust law; litigation and arbitration.

Recent transactions.

- 3M Company in its USD2.5 billion acquisition of Capital Safety Group from affiliates of KKR.
- Altana in merger control proceedings before the German FCO and US FTC with respect to the USD635 million acquisition of the Rheology Additives Business from Rockwood Holdings Inc., USA.
- Atlantic Tele-Network representation in AT&T's acquisition of certain ATN assets.
- Deutsche Telekom in subsidiary T-Mobile USA's USD1.5 billion acquisition of MetroPCS, and its previously proposed USD39 billion sale of T-Mobile USA to AT&T.
- Dollar Thrifty in its USD2.3 billion acquisition by Hertz and through multiple competing offers by Hertz and Avis.
- GlaxoSmithKline on the global anti-trust aspects of its game-changing multibillion-euro, three-part transaction with Novartis involving its consumer health care, vaccines and oncology businesses.

Languages. German, English, French

Publications.

- *Getting the Deal Through's 2017-2020 Dominance Guide. Getting the Deal Through- 30 April 2017; 30 May 2018; April 2019; 3 August 2020.*
- *The Merger Control Review, 8-10th Edition. 8th Edition, 13 September 2017, The Law Reviews; 9th Edition, 2 October 2018, The Law Reviews; 10th Edition, 30 August 2019, The Law Reviews; 11th Edition, August 2020, The Law Reviews.*

Professional and academic qualifications. England and Wales, Solicitor; Brussels, Avocat; LPC, Oxford Institute of Legal Practice, 2004; Graduate Diploma in Law, Oxford Brookes University, 2003; MA, University of Oxford, 2002

Areas of practice. European and UK competition law; foreign investment review.

Recent transactions.

- ArcelorMittal on its bid for the steelmaking group Ilva.
- The Dow Chemical Company on its USD130 billion merger of equals with DuPont.
- General Motors on the sale of Opel/Vauxhall and GM Financial's European operations to Peugeot.
- Molson Coors in its acquisition of assets from AB InBev and SABMiller.
- Sony Corporation of America on its acquisition of EMI Music Publishing.
- UTC on its combination with Raytheon, and on its earlier USD18.4 billion acquisition of Goodrich Corp.

Languages. English, French, Spanish

Publications.

- *The Failing Firm Defence in the Age of COVID-19, November 2020, Concurrences.*
- *"'Exploitative' Abuse of Dominance and 'Price Gouging' in Times of Crisis," 30 April 2020, Concurrences.*
- *"Bigger Isn't Always Better -- The Trend Towards More Extensive Investigations In European Merger Control," May 2019, IBA - Competition Law International.*
- *Privacy Considerations In European Merger Control: A Square Peg For A Round Hole, May 2015, CPI Antitrust Chronicle.*