

# EUROPEAN COMMISSION ADOPTS A REVISED LENIENCY NOTICE

March 2007

With the benefit of ten years' experience in implementing its leniency program, introduced in 1996, the European Commission adopted, on 8 December 2006, a new leniency notice,<sup>1</sup> aiming at increasing the efficiency and attractiveness of this policy which, according to the Commission, is "*a powerful tool to detect, destabilise and terminate cartels.*"

The leniency program, which also exists under French law,<sup>2</sup> allows the Commission to offer complete immunity or a reduction of fines for undertakings involved in an anti-competitive practice, in exchange for disclosure of information concerning that practice and cooperation in the investigation conducted.

The changes in the new notice primarily pertain to the level of evidence required. To obtain immunity from fines, the undertaking requesting immunity must provide the Commission with information and evidence necessary to enable a targeted inspection in connection with the alleged cartel, or find an infringement of Article 81 of the Treaty in connection with the alleged cartel. In particular, the undertaking must issue a statement which includes the information and useful evidence listed in the notice. Regarding the simple reduction in the fines, the notice specifies that compelling evidence will be attributed a greater value (and will thus be better rewarded) than evidence which requires corroboration.

The new notice goes on to specify the conditions under which immunity can be enjoyed or a fine reduced. Hence, the time as of which the undertaking must cease all participation in the cartel is made more flexible: so as to protect the useful effect of a request for immunity, the Commission may in fact authorise the undertaking concerned to continue its participation in the cartel during the course of the inspections. The new notice also specifies the scope of cooperation of the undertaking required by the Commission. It prohibits the undertaking from destroying, falsifying or concealing relevant information or (unless authorised) disclosing to the other cartel participants the existence or the content of its application for leniency.

The new notice also introduces a novel feature in the form of a distinction based on the order of submission of applications. Indeed, complete immunity is only available to the first undertaking to submit information and evidence of the existence of an alleged cartel, while the following undertakings can only benefit, if all of the conditions are met, from a reduction in fines. In that aim, the Commission has introduced a "marker" system such as already exists in the United States, which allows undertakings to secure a marker protecting an immunity applicant's place in the queue for a period to be specified in order to allow the gathering of the necessary information and evidence to obtain immunity.

Another innovation is the procedure introduced to protect access to the statements made by undertakings in the context of the leniency program, and to the Commission's file. This measure, essential to guarantee the efficiency of the leniency program, is intended to avoid that undertakings that cooperate with a Commission investigation be placed, in the context of civil litigation for damages, in a less favourable position than undertakings that do not cooperate.

This review of the leniency program is part of a broader plan to harmonise the leniency programs applicable within the Member States of the European Union. On 29 September 2006, a "model leniency program" was adopted by the European Competition Network formed by all of the national competition authorities of the Member States as well as the European Commission. Lastly, so as to minimise the issue of multiple leniency applications, this program introduces a model for a uniform summary application system when the application for immunity is made in cases involving more than three Member States. In practice, the undertaking will submit an application for full immunity to the Commission and may then make a summary application to any/all national competition authorities that may have a cause of action.

<sup>1</sup> OJ C 298/11 of 8.12.2006, p. 17.

<sup>2</sup> Article L.464-2 IV of the Commercial Code, introduced by the law on new economic regulations of 15 May 2001.

**AREAS OF LEGAL PRACTICE**

• **MERGERS & ACQUISITIONS**

Engineering of takeovers and deal structuring, legal due diligence, restructuring operations, joint ventures, obtaining necessary administrative permits and licenses, drafting and negotiation of documentation (letters of intent, sale & purchase agreements, warranties that assets and liabilities are as stated, bank guarantees, shareholders' agreements, etc.), merger deals, takeovers of companies in difficulty or in the framework of collective procedures.

• **CAPITAL INVESTMENTS AND LBOs**

Representation of investment funds, issuers, targets and company officers, during the due diligence, advisory and negotiation processes.

• **COMPANY LAW**

"Long-term capital" transactions, capital increases, issuance of composite securities (convertible or repayable in shares, investment certificates, priority dividend shares etc.), stock option agreements, company founder share plans, temporary business combinations, management fees and cash management agreements, changes to charter/by-laws and legal secretariat services.

• **SECURITIES LAW**

IPOs and preparatory work, drafting of prospectuses, legal secretariat services for listed companies, relations with market authorities, securities litigation.

• **BANKING AND FINANCE**

Advice on loan and financing agreements, warranties/guarantees, syndication, banking regulations, financing of acquisitions and structured asset financing (particularly of real estate).

• **COMMERCIAL CONTRACTS / ECONOMIC LAW**

Advice and litigation with commercial contracts, i.e. service, sale, distribution, concession, franchise, commercial agent agreements, distributor/supplier relations, general terms of purchase/sale, commercial partnerships, manufacturing and subcontracting agreements, business sale agreements, management leases, consumer law, public and private procurement contracts.

• **LABOUR AND EMPLOYMENT LAW**

Advice and litigation work in collective and individual disputes as well as in social security law and criminal labour law.

• **INTERNATIONAL LITIGATION / ARBITRATION**

Advice and litigation work covering all facets of business, company and securities law, as well as collective procedures and white-collar crime. Representation at all stages of the dispute, from pre-litigation to litigation before judicial or arbitral courts, protective measures and enforcement.

• **REAL ESTATE LAW**

Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

• **COLLECTIVE PROCEDURES**

Alert, restructuring and reorganisation procedures, amicable composition and ad hoc representation procedures. Court-ordered reorganisation, continued operation, sale and continuation plans, liquidation.

• **INDUSTRIAL PROPERTY**

Advice and litigation in the field of trademarks, patents and/or design and model applications, transfers of technology and/or know-how, unfair competition and passing off.

• **COMPETITION LAW (FRENCH AND EU)**

Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. Representation before the competition authorities and courts in cartel, anti-competitive practices, abuse of a dominant position and unfair competition cases. Advice on the control of concentrations (conduct of feasibility studies, preparation of notification files, negotiation with the national and Community control authorities) and on State aids/subsidies.

• **IT LAW**

Development and integration of software, licenses, assignments and other software contracts, facilities management, maintenance of IT systems and software, appraisals of the compliance of IT services, anti-piracy fight.

• **ELECTRONIC COMMUNICATIONS**

Regulatory domain; construction of networks, co-localization of facilities, agreements and general terms of supply of services, access and interconnection agreements, judicial or administrative litigation (against the decisions of the regulatory authority).

• **INTERNET**

Creation and hosting of websites, affiliation, partnership, audit of websites, application for and defence of domain names, market shares, online auctions, ASP licenses.

• **MEDIA**

Advertising (protection, operation) and marketing; sponsoring; regulation of broadcasting and of electronic communication services (TV, mobile phone TV, Internet TV, video on demand etc.).

• **PROTECTION OF PERSONAL DATA AND PRIVACY RIGHTS**

Relations with the CNIL; specific regulations on electronic communications (geolocalization services, storage of traffic data); breach of privacy rights, defamation.

• **LITERARY AND ARTISTIC PROPERTY RIGHTS, COPYRIGHT AND NEIGHBOURING RIGHTS**

Protection and licensing of copyright and neighbouring rights; audiovisual (cinema, TV) and multimedia (online and offline video games, cd-roms etc.) production and co-production; motion picture regulations; distribution licenses (TV, merchandizing, video distribution, derivative rights); rights of performing artists, sports law; infringement litigation (customs seizures, infringement seizures, proceedings before civil and criminal courts).

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