

EUROPEAN COMMISSION REVISES CARTEL LENIENCY RULES

On December 8, 2006, the European Commission (the “Commission”) released a revised framework for grants of leniency to firms that voluntarily disclose involvement in a cartel. The new requirements apply to any application for leniency filed with the Commission on or after December 8, 2006.

Background

The Commission and the U.S. antitrust authorities each have distinct policies designed to encourage participants in an unlawful cartel to report that activity to the authorities. The U.S. policy provides eligibility for complete immunity from fines and criminal prosecution, but only to the first cartel member to notify the Department of Justice of illegal activity. By contrast, the Commission may extend full relief from fines to the first informant and a reduction in fines of up to fifty percent to the second and any subsequent informants.

The Commission’s revised guidelines changes to its leniency program (1) qualify the type of evidence an informant must submit, (2) introduce a marker system to preserve an informant’s position as the first to disclose, and (3) protect an informant’s disclosures made pursuant to the new guidelines from discovery by private plaintiffs.

Evidence Required for Leniency

The Commission’s revised guidelines clarify the type of information to be provided by an informant. The guidelines require an informant to submit a “corporate statement” disclosing, among other things, the alleged cartel’s anticompetitive conduct and the identities of all participants. The Commission reserves discretion to determine, at the conclusion of an investigation, whether the informant’s statement was sufficiently detailed and useful to the investigation to qualify the informant for leniency. This discretionary and *ex post* aspect of the program may result in substantial uncertainty for an informant. For example, where the Commission had not yet gathered sufficient information to commence an inspection on its own, immunity from fines is available only if the informant’s submission enabled the Commission to “target” its investigation. Similarly, where the Commission already has commenced an inspection on its own, an informant seeking leniency now must provide enough “contemporaneous and incriminating” evidence to enable the Commission to find the existence of an illegal cartel. Finally, a reduction in fines requires an applicant for leniency to provide information that the Commission determines, in its discretion, “adds value” to the information already in the Commission’s possession.

Marker System

The Commission’s revised guidelines also create a marker system that holds an informant’s place in queue while the informant gathers the evidence required for leniency. This brings the Commission’s leniency program into closer conformity with the U.S. approach by rewarding early disclosure even if the informant is not able to provide all relevant information

immediately. However, the Commission's marker system also leaves it considerable leeway in determining which informant was first to file a proper application as well as how long that informant has to submit all information required for immunity from fines, including a corporate statement and sufficient information either to establish an Article 81 violation or to facilitate a targeted inspection.

Protection from Discovery by a Private Plaintiff

To encourage informants to come forward and seek leniency, the Commission's revised guidelines provide for protection of the informant's corporate statement from disclosure in discovery in civil litigation. An informant may lose this protection by releasing its corporate statement to any third party. The introduction of this protection should prevent informants from being in a worse position than other cartel members in respect of civil claims.

Implications of the New Commission Guidelines

Although they do provide some clarification on the type of evidence to be submitted to benefit from full or partial immunity, the Commission's revised guidelines nonetheless may leave potential informants with uncertainty as to the likelihood and extent of the leniency available. Even if the marker system may enable an informant to preserve its primacy over others while it gathers the requisite information, an informant firm cannot know in advance how much time it will have to complete its submission or whether the Commission will ultimately determine that it has provided information meriting leniency.

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January 3, 2007

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