

CLIENT ALERT

Immunity from Antitrust Fines or How to Maximize the Effects of a Leniency Application: the ECJ Provides Additional Guidance

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Leniency programmes offer companies involved in a cartel the opportunity to self-report in exchange for either total or partial immunity from fines or a reduction in the amount of the fine. At the EU level, the main characteristics of the leniency programme are described in the European Commission (“**Commission**”) Notice on Immunity from fines and reduction of fines in cartel cases of 8 December 2006 (“**Leniency Notice**”). In a judgement of 3 June 2021, the European Court of Justice (“**ECJ**”) provides guidance to companies that consider a leniency application after already being subject to a Commission investigation.¹

Background: The European leniency programme in a nutshell

While full and continuous cooperation is expected from all leniency applicants, the key element differentiating the outcome of an application is the timing of the submission:

- The first company that informs the Commission of the existence of a cartel and submits sufficient evidence allowing the Commission to carry out a targeted inspection may be granted immunity from fines;

¹ ECJ, 3 June 2021, *Recylex SA e.a. v. Commission*, case C-563/19 P, ECLI:EU:C:2021:428.

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- Companies that are coming later through the door of the Commission can only obtain a reduction of the fine, if they provide evidence representing “*significant added value with respect to the evidence already in the Commission’s possession*” (Leniency Notice, point 24). The first company to provide significant added value is eligible for a reduction of 30% to 50%, the second for one of 20% to 30%, and all subsequent applicants for a maximum of 20%.

However, irrespective of the ranking based on the date of the application, if a company submits compelling evidence allowing the Commission to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting the company's fine. In other words, the Commission will grant partial immunity for that additional scope of the infringement.

The ECJ's Decision

Partial immunity was at the heart of the appeal of Recylex against the Commission's decision fining Recylex more than EUR 26 million for its participation in a cartel in the car battery recycling sector.²

In short, Recylex applied for leniency less than a month after the Commission carried out inspections at its premises. The Commission had already received a leniency application from two companies, the first received full immunity and the second was eligible for a reduction of 30% to 50%. Recylex was, therefore, the second company to apply for a reduction of a fine and was granted the maximum 30% reduction from the applicable range of 20% to 30%.

However, Recylex argued it was eligible to partial immunity for some aspects of the infringement because it had provided evidence allowing the Commission to establish the existence of the first cartel meeting and the extension of the cartel to France.

The General Court rejected Recylex' action, holding that the Commission was already aware of these facts. Thus, the elements provided by Recylex only strengthened the evidence already in the hands of the Commission relating to the existence and scope of the infringement.³

Leniency programme primarily rewards the speed of cooperation

In its judgement, the ECJ made clear that the Leniency Notice needs to be interpreted in light of the objectives that it pursues, which is to encourage companies to cooperate as quickly and effectively as possible with the Commission for a fast dismantling of cartels.

² Commission decision of 8 February 2017, case AT-40018.

³ General Court, 23 May 2019, *Recylex SA e.a. v. Commission*, case T-222/17, ECLI:EU:T:2019:356.

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With this objective in mind, the ECJ confirmed that partial immunity must be limited only to situations where the applicant provides evidence increasing the scope of the infringement, either extending its duration or expanding its geographic or material scope. In contrast, additional facts strengthening the existing body of evidence in the Commission's possession are not eligible to partial immunity and only allow the leniency applicant to increase the chances of receiving the highest possible reduction of the fine within the applicable range.

According to the ECJ, the purpose of partial immunity is to incentivise companies to submit incriminating evidence as soon as possible without the need to weigh the pros and cons of submitting such evidence, as the applicant will be granted immunity concerning the additional facts. This would not be the case should a company be granted only an additional reduction of the fine, in which case it would be logical to calculate first whether such additional reduction compensates for the increased basic amount of the fine because it results from a higher gravity of the infringement.

Lessons learned: new may be better than an upgrade

When a company realises that it is involved in a cartel which is not under investigation and wishes to avoid antitrust fines from the Commission, a leniency application can provide full immunity from fines, which may amount to as much as 10% of the company's total revenues.

If a company is already subject to an inspection, full immunity is no longer available. Nonetheless, a leniency application could result in a significant reduction of the fine. A successful application requires the submission of evidence with a significant added value, full and continuous cooperation with the Commission, and a very quick decision-making process for it to be eligible to the highest range of reduction possible. The assessment of the chances of success is complex, because the company has only a limited knowledge of the existing evidence based on the inspection at its premises. The ECJ judgement in *Recylex v. Commission* clarifies the following points:

- If the Commission appears to already have knowledge of certain facts, any element strengthening the probative value of such facts will only be relevant for the setting of the reduction within the applicable range because it merely provides an "upgrade" to the body of existing evidence.
- The leniency ranking is based only on the date of the submission. Even if a company's cooperation is better than that of another applicant, there is no possibility to move up in the ranking and become eligible to a higher range of reduction, unless the higher ranked company loses its leniency status.
- New facts extending the duration or expanding the material or geographical scope of the infringement may qualify for partial immunity for such additional duration or scope. This could result in a higher fine for the other cartel members without increasing the fine of the applicant.

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In the recent past, the number of leniency applications was declining. The complexity of the process could be one reason for this decline. Another reason could be seen in the increasing follow-on damage litigation activity in Europe, which could discourage companies from reporting a conduct or additional evidence, being concerned that higher reductions of fines or partial immunity could be eaten up by higher damages. The ECJ provided useful clarification on the different paths for cooperation.

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