

French Competition Authority Adopts Revised Leniency Procedural Notice

A revised leniency procedural notice enhances the legal certainty and the procedural safeguards governing the French leniency procedure.

On April 3rd 2015, the French Competition Authority (the FCA) issued a revised version of its procedural notice related to the leniency program, which was introduced into French competition law in 2001 under Articles L. 464-2 IV and R. 464-5 of the Commercial Code (the Leniency Notice).

According to the French leniency program, a company that provides the FCA with information contributing to the establishment of an anticompetitive infringement may receive a full immunity from fine (Type 1 leniency) or a reduction in its fine (Type 2 leniency). To date, the FCA has issued 10 decisions under its leniency program and approximately 20 companies have been granted immunity from fine or a reduction of the fine on this basis.

The recently issued Leniency Notice incorporates recent developments in the FCA's decision making and the results of a 2014 study on the effectiveness of the French leniency program. The Leniency Notice also reflects changes made to the European Competition Network (ECN) Model leniency program in November 2012. This will be the fourth revision of the leniency program following the procedural notices of 2006, 2007 and 2009.

The FCA published the Leniency Notice after a three-week public consultation launched in February 2015.

Discount Ranges for Type 2 Leniency Applications

The Leniency Notice introduces overlapping fine reduction ranges for Type 2 leniency applicants. This significant innovation allows such applicants to benefit from the following reductions in their fine:

- 25-50 percent for the first company
- 15-40 percent for the second company
- Up to 25 percent for any subsequent companies

These new overlapping fine reduction ranges enhance the leniency program's attractiveness by increasing the legal certainty relating to the fine reduction, while preserving some flexibility for the FCA to reward the "added value" of the evidence a company provides. For example, the Leniency Notice clarifies that a second company applying for leniency can be granted a higher reduction in its fine than the first applicant, if the evidence the second company provides is more relevant for an infringement finding.

However, a Type 2 leniency applicant may be granted a reduction which can ultimately be lower than the fine reduction applicable to a company that has not submitted any leniency application and has waived its right to challenge the FCA's objections (fine reduction of 10 to 25 percent). Some companies may prefer to wait for the FCA to issue the statement of objections and waive their right to challenge the objections instead of submit a leniency application which requires cooperation with the FCA (although in certain specific conditions a company can benefit from both proceedings). Note that the procedure under which a company may waive its right to challenge the objections likely soon will be replaced by a settlement procedure in which the General Case Manager (Rapporteur Général) should be able to offer a fine reduction which would be easier to anticipate at the beginning of a procedure. This new procedure is included in a draft law (the Macron Law) currently being discussed before French Parliament.

Introduction of “Leniency+”

The Leniency Notice introduces the “leniency +” procedure whereby if a company is the first one to provide clear evidence to establish additional facts which directly impact the FCA's fine setting (*e.g.* additional duration of anticompetitive practices, additional products covered by the practices, etc.), the FCA will not hold these facts against the providing company when imposing fines on that company. Whereas the FCA will take the facts into account when setting the fines of the other involved companies. This ensures that companies are not punished with a higher fine than would have been imposed if they had not come forward with the information.

Clarification on the Entities Covered by a Leniency Application

The Leniency Notice provides that the leniency applicant must provide all details on the entities its application is intended to cover. Only entities belonging to “a single economic unit” at the time of the leniency application may be covered. This means that former parent companies cannot be part of the leniency application of subsidiaries which they would no longer own. To benefit from a leniency application, a former parent company must therefore file its own application with the FCA. This position follows a 2013 FCA ruling in which the FCA refused to grant a former parent company the benefit of its former subsidiary's leniency application, thus imposing a fine on the former parent company for practices implemented by its former subsidiary on the ground of the parental liability (even though the former subsidiary had been granted immunity)¹.

“Hub And Spoke” Practices Covered by The Leniency Program

The Leniency Notice clarifies that the leniency program is also available to companies involved in horizontal practices implemented through vertical contacts, commonly referred to as “hub and spoke” practices.

Press Releases Following Dawn Raids

The Leniency Notice confirms that the FCA will now generally publish — “except in particular circumstances” — a press release on its website announcing that dawn raids have been carried out.

The press release is intended to ensure that companies whose offices were not raided and who are not aware of an antitrust investigation in their industry sector have equal opportunities to access the FCA's leniency program. The Leniency Notice additionally specifies that the names of the companies which the FCA targets will not be announced and that the presumption of innocence will be preserved. In addition, the FCA will publish a second press release in the event that the proceedings are abandoned or closed.

The FCA has already issued two such press releases in 2014. This change to the Leniency Notice aligns the FCA's practice with that of the European Commission.

Leniency Officer's Increased Visibility

The Leniency Notice gives more visibility to the Leniency Officer, a position created in 2011. The Leniency Notice provides the Leniency Officer's contact details and describes his/her role as a point of contact for companies. So companies can obtain from the Leniency Officer general information on the implementation of the leniency program — anonymously and prior to submitting any application. If a company subsequently decides to submit a leniency application, the company must contact the General Case Manager who remains the official contact person entitled by the law to register the leniency application. The Leniency Officer assists the General Case Manager and the service investigations. In particular, the Leniency Officer organizes the meetings with the leniency applicants to maintain the leniency applicants' order of "arrival".

Other Procedural Clarifications

The Leniency Notice states that the General Case Manager may grant a leniency applicant a deadline until which its "rank" is maintained. The leniency applicant must gather and submit probative evidence during this period. The Leniency Notice now specifies that the FCA will consider additional evidence provided by the leniency applicant up until the moment the leniency opinion is issued.

The Leniency Notice adds that if a company decides to submit a leniency application during the dawn raids, the company may contact the FCA and request a meeting to submit its application form. This meeting will be held after the dawn raids.

The Leniency Notice confirms the existing practice, whereby if a company does not comply with conditions in the Leniency Notice, the FCA may issue a negative opinion on the leniency application and return to the company all the evidence the company has provided.

If a company fails to comply with the conditions set out in the leniency opinion, the Leniency Notice confirms that the FCA may withdraw the benefit of the immunity, whether totally or partially, or reduce the amount of the initial reduction that would have been granted to the leniency applicant. The Leniency Notice specifies that, in order to benefit from the immunity or the reduction included in the leniency opinion, a company must refrain from calling into question any factual element disclosed in the framework of its leniency application.

In order to reflect the ECN Leniency Model Program as revised in November 2012, the Leniency Notice now provides that summary applications can be filed with the FCA whether of Type 1 (*i.e.* immunity from fine) or Type 2 (*i.e.* reduction of the fine). Furthermore, the Leniency Notice specifies that, after filing a summary application with the FCA, a leniency applicant must inform the FCA about any new information provided to the European Commission that could significantly alter the summary application or, if relevant, inform the FCA of the European Commission's rejection of the principal leniency application.

Conclusion

Many companies doing business in France will welcome this revised Leniency Notice that enhances the legal certainty and the procedural safeguards governing the leniency procedure. The Leniency Notice brings the EU one step closer to converging leniency policies across the 28 EU countries. While leniency applications can be cumbersome, and may discourage potential whistleblowers from approaching any authorities for leniency, reducing discrepancies between existing leniency programs and the alleviating of the burden of multiple filings is a positive change. Before approaching the FCA to provide information on anticompetitive practices, a company should consult with counsel to weigh the potential risks and rewards of any strategy.

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Endnotes

¹ See Decision No. 13-D-12 of 28 May 2013 relating to practices implemented in the chemical commodities sector (pending appeal).