

## Frequently Asked Questions (FAQs) on Leniency

Version of October 2022

*The purpose of these FAQs is to clarify certain concepts and current practices when the Commission applies the Leniency Notice<sup>1</sup> in order to ensure a high degree of transparency and predictability. A further aim is to increase awareness of the additional protections and benefits enjoyed by leniency applicants, beyond the ones described in the Leniency Notice.*

*These FAQs should be read alongside and in conjunction with the [Leniency Notice](#), [the Commission's enforcement decisions](#) and relevant [jurisprudence from the European Courts](#).*

*The FAQs are not intended to constitute a statement of the law and they are without prejudice to the interpretation of Article 101 and the Leniency Notice by the European Courts. The FAQs may be revised as the need arises to reflect changes in policy or practice.*

### **The Concept of a (Secret) Cartel**

#### **1. What is a cartel under the Leniency Notice?**

The Leniency Notice defines cartels as agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports exports and/or anti-competitive actions against competitors.<sup>2</sup>

This definition covers patterns of behaviour involving contacts between competitors that have as their object to influence parameters of competition, including by removing uncertainty about their respective intentions and are capable of restricting competition by their very nature. The examples of cartel conduct listed in the Leniency Notice are not exhaustive and other types of conduct may fall within the scope of the Leniency Notice.

#### **2. What types of conduct fall within the Leniency Notice?**

Besides cartels involving price fixing, market sharing or customer allocation, the Commission has adopted fining decisions, and granted leniency rewards, in cases involving less traditional cartels that included practices such as:

- (i) discussion of price-setting factors on weekly reference prices (e.g. [Bananas](#))<sup>3</sup>;

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<sup>1</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

<sup>2</sup> Point 1 of the Leniency Notice.

<sup>3</sup> Case AT. 39188, Commission Decision of 15.10.2008, C(2008) 5955 final. See also Judgment of the Court (Second Chamber) of 19 March 2015, C-286/13 P - *Dole Food and Dole Fresh Fruit Europe v Commission*, ECLI:EU:C:2015:184.

- (ii) exchanges of precise information on trading positions and attempts to influence benchmark interest rates (e.g. [Yen Interest Rate Derivatives](#)<sup>4</sup>, [Euro Interest Rate Derivatives](#)<sup>5</sup> and [Swiss Franc Interest Rate Derivatives](#)<sup>6</sup>);
- (iii) buyer cartels (e.g. [Car Battery Recycling](#)<sup>7</sup>, [Ethylene](#)<sup>8</sup>); and
- (iv) coordination to restrict competition on technical development (e.g. [Car Emissions](#)<sup>9</sup>).

These cases serve as guidance to businesses on the Commission’s likely approach to these types of situations. Guidance in relation to cartel conduct can be found in the Commission’s Horizontal Guidelines<sup>10</sup> (e.g. on the distinction between illegal and legitimate information exchanges).

### **3. What does the term ‘secret’ cartel mean?**

The Leniency Notice sets out the framework for rewarding cooperation by undertakings, which have been party to a ‘secret’ cartel.<sup>11</sup>

The term ‘secret’ means generally that the existence of the cartel is wholly or partially concealed. It is sufficient that elements of the cartel are not known to the public or the customers or suppliers.<sup>12</sup>

### **The Key Elements of the Leniency Programme**

#### **4. Who can benefit from the leniency programme?**

The leniency programme offers undertakings involved in a secret cartel that self-report and hand over evidence either total immunity from fines or a reduction of the fines, which the Commission would have otherwise imposed on them. It helps the Commission to discover secret cartels and to obtain insider information of the infringement.

<sup>4</sup> Case AT. 39861, Commission Decision of 4.12.2013, C(2013) 8602 final and Commission Decision of 4.2.2015, C(2015) 432 final.

<sup>5</sup> Case AT.39914, Commission Decision of 4.12.2013, C(2013) 8512 final and Commission Decision of 7.12.2016, C(2016) 8530 final.

<sup>6</sup> Case AT.39924, Commission Decision of 21.10.2014, C(2014) 7605 final.

<sup>7</sup> Case AT.40018, Commission Decision of 8.2.2017, C(2017) 900 final.

<sup>8</sup> Case AT.40410, Commission Decision of 14.7.2020, C(2020) 4817 final.

<sup>9</sup> Case AT.40178, Commission Decision of 8.7.2021, C(2021) 4955 final.

<sup>10</sup> Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C11, 14.1.2011, p. 1.

<sup>11</sup> Point 1 of the Leniency Notice.

<sup>12</sup> See recital 53 of ECN+ Directive. Directive 2019/1/EU of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33. The Commission has for example sanctioned buyer cartels that did not operate entirely secretly but at least started in a relative transparent way. See Commission Decision 2003/600/EC of 2 April 2003, *French Beef*, OJ L 209, 19.8.2003, p. 12.

The Commission will grant immunity from fines to the first undertaking that discloses its participation in a cartel and submits information and evidence, which allows the Commission to:

- (i) carry out targeted inspections in connection with the alleged cartel; or
- (ii) find an infringement of Article 101 TFEU in connection with the alleged cartel, if the Commission did not have, at the time of the submission, sufficient evidence in its possession.<sup>13</sup>

Any other cartel participant that applies for leniency<sup>14</sup> after the investigation has started can receive a reduction of any potential fine if it provides evidence that represents "significant added value" (see Question 13 below) and cooperates genuinely.

As with other undertakings involved in a cartel, facilitators can apply for leniency in order to avoid or reduce their exposure to fines.<sup>15</sup>

## **5. What are the conditions to qualify for leniency?**

In order to qualify for leniency, an applicant must:

- (i) cooperate genuinely fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure (e.g. provide the Commission with relevant information as it arises, respond promptly to Commission requests);
- (ii) have ended its involvement in the cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections (for example, if certain actions such as non-attendance at a planned cartel meeting or declining to take calls from co-cartelists could raise suspicions that the applicant is cooperating with the authorities, the Commission may authorise the applicant to continue its involvement in the cartel on a limited basis);
- (iii) not have destroyed falsified or concealed evidence of the cartel, nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities (for example by deleting evidence, withholding evidence from the Commission, disclosing the application publicly or to co-cartelists).<sup>16</sup>

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<sup>13</sup> Point 8(b) of the Leniency Notice.

<sup>14</sup> In these, FAQs 'leniency' is used as an umbrella term to denote both applications for immunity and applications for reduction of fines. The terms 'immunity' and 'reduction of fines' are used when it is necessary to differentiate between the different types of benefits that applicants can obtain under the Leniency Notice.

<sup>15</sup> An undertaking that was not active on the cartelised market but which otherwise actively aided the objectives of the infringement can be held liable as a facilitator and be exposed to significant fines (e.g. Case AT.38589, Commission Decision of 11.11.2009, C(2009)8682 final and Judgment of the General Court of 22 October 2015, *AC-Treuhand AG v European Commission*, ECLI:EU:C:2015:717.

<sup>16</sup> Point 12 of the Leniency Notice.

Failure to comply with one or more of these conditions can lead to leniency being withheld when the Commission decision is issued. As far as immunity applicants are concerned, the Commission has withdrawn conditional immunity only in one case (*Raw Tobacco II*).<sup>17</sup>

A further condition applying exclusively to immunity applicants is that, if they have taken steps to coerce other undertakings to join or remain in the cartel, they are not eligible for immunity. The test has a high threshold and the Commission has never found an immunity applicant to be ineligible on grounds of coercion.

If an immunity or reduction of fines applicant breaches one of the conditions and no longer qualifies for leniency there is no ‘upgrade’ for subsequent applicants i.e. the immunity applicant is not replaced by the first reduction of fines applicant and reduction of fines applicants do not move up a place in the leniency bands (see Question 12).<sup>18</sup>

### **Contacting the Commission**

#### **6. Can an undertaking via a legal representative discuss a potential application on a ‘no names’ basis?**

Undertakings may want to ascertain, while remaining anonymous, via their legal representatives whether the relevant conduct they consider reporting is likely to be considered as a secret cartel and whether reporting it would entitle them to the benefit under the Leniency Notice. In that respect, the Commission is available for informal exchanges about potential immunity applications on a no-names basis and without any requirement to disclose the sector, the participants or other details identifying the cartel. As a result, undertakings can make an informed choice as to whether to apply for leniency (see Question 2).

In addition to these informal exchanges, undertakings have the possibility of making a hypothetical application.<sup>19</sup> Under this hypothetical immunity application procedure, an applicant can first present information and evidence in hypothetical terms by providing a detailed descriptive list of the evidence it proposes to disclose at a later agreed date. The list should accurately reflect the nature and content of the evidence, whilst safeguarding the hypothetical nature of the disclosure. Although the applicant is not required to disclose its identity nor that of its co-cartelists until it submits the evidence described in the hypothetical application, it is still required to identify the sector, geographic scope and estimated duration of the cartel. Once the Commission informs the applicant that the nature and content of the evidence in the list satisfies the requirements for immunity, it must disclose the evidence in

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<sup>17</sup> The circumstances of the *Italian Raw Tobacco* case (Commission decision of 20 October 2005) were particular. Immunity was withheld from Deltafina for disclosing the fact that it had applied for immunity to its co-cartelists prior to the inspections.

<sup>18</sup> See Judgment of the Court (Second Chamber) of 12 June 2014, *Deltafina SpA v European Commission*, Case C-578/11 P, ECLI:EU:C:2014:1742 and Judgment of the Court of 3 June 2021, *Recylex and Others v Commission*, C-563/19 P, ECLI:EU:C:2021:428

<sup>19</sup> Points 16 and 19 of the Leniency Notice.

full. Provided the evidence corresponds to that described in the list the Commission will grant the applicant immunity from fines.

## **7. Is it possible to find out if immunity is available before submitting an application?**

Yes. Legal representatives of potential immunity applicants can contact the Leniency Officer to establish whether immunity is available for the cartel that the potential applicants are involved in. The legal representative has to disclose the product concerned but does not need to disclose the identity of its client.

Although the Leniency Officer may not always be in a position to provide a definitive answer, the legal representative has to commit, on behalf of its client, that if the Leniency Officer confirms that immunity is available its client will immediately submit an application for immunity or an application for a marker.

If an undertaking submits an application for immunity without first contacting the Commission and it transpires that immunity is not available it has the option of withdrawing the evidence disclosed<sup>20</sup> or requesting the Commission to consider its application as an application for reduction of fines.<sup>21</sup>

## **8. What is the role of the Leniency Officer(s)?**

The Leniency Officer is the first point of contact in the Cartels Directorate of the Directorate-General for Competition for any potential leniency applicant. In particular, the Leniency Officer can offer informal advice, provide information on the leniency process and engage with prospective applicants or their legal representatives to discuss potential applications on a 'no-names' basis.

Details of how to contact the Leniency Officer(s) are available [here](#).

## **9. Can leniency applicants disclose that they are cooperating with the Commission?**

Under the Leniency Notice,<sup>22</sup> an applicant may not disclose the existence or content of its application before the Commission has issued a statement of objections in the case.

However, the Commission may agree to a limited disclosure in particular circumstances, for example when the applicant is faced with regulatory or audit reporting requirements or in the event of due diligence in the course of the sale of a business. Should such circumstances arise, the applicant should contact as soon as possible the case manager of the investigation to agree on appropriate measures to be taken.

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<sup>20</sup> This does not prevent the Commission from using its powers of investigation to obtain the information.

<sup>21</sup> Point 20 of the Leniency Notice.

<sup>22</sup> Point 12(a) and point 24 of the Leniency Notice.

Any agreement by the Commission to disclosure will likely relate to the existence rather than the content of the application, will be restricted to a defined group of recipients and will require these recipients to respect confidentiality.

### **Leniency Policy and Practice**

#### **10. How does the marker system work in practice?**

The Commission operates a marker system that allows an immunity applicant the possibility to investigate the facts and gather the necessary information and evidence during a set time period without losing its place as the first in the leniency queue.<sup>23</sup> The Commission has discretion whether or not to grant a marker as well as to determine the appropriate duration for the ‘perfection’ of the marker.

The Commission’s standard policy is to routinely grant markers when the conditions are fulfilled.<sup>24</sup> In recent cases, the Commission generally granted a one-month marker period. This period may be longer in certain cases (e.g. international cartels where multiple jurisdictions are covered). The initial marker period may be extended depending on the particular circumstances of the case and the progress made, and duly demonstrated, by the immunity applicant.

#### **11. What is e-Leniency and what are the benefits of using it?**

eLeniency is an online platform developed by the Commission that allows applicants to submit their leniency applications, including marker applications, through the eLeniency tool.

The applicants type in the statements directly online on the Commission’s secure server and they can also upload supporting documents. The typed information cannot be copied or printed. Once formally submitted, the typed information is only accessible to the Commission and no trace remains on the applicant’s computer. Using eLeniency provides for the same guarantees in terms of confidentiality and legal protection as the traditional procedure of oral statements. Therefore, the statements and submissions filed through eLeniency are protected from disclosure in civil litigation (with the exception of contemporaneous evidence uploaded as supporting documents). The statements typed in eLeniency are also protected from discovery. The platform avoids the need to travel to the Commission’s premises for making oral statements in person.

As of October 2022, the new version of eLeniency also allows the Commission to securely grant access to corporate statements and other leniency material to parties involved in cartel and antitrust proceedings, documents which would otherwise only be accessible at the Commission’s physical premises. In addition, the upgraded tool provides the possibility to notify online letters, decisions and other documents issued by the Commission in the context of the leniency procedure (e.g. letters granting a marker, requests for information under point 12 of the Leniency Notice, immunity or leniency band decisions, no-action letters, etc.). As

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<sup>23</sup> Point 15 of the Leniency Notice.

<sup>24</sup> Point 15 of the Leniency Notice.

with the original version, eLeniency offers the same guarantees in terms of confidentiality and legal protection as the access or notification of such documents at the physical premises of the Commission.

Since its introduction in 2019, e-leniency has become the primary and preferred procedure for leniency submissions (applications and corporate statements). For more information on e-Leniency, please see [here](#).

## **12. How is the level of the fine reductions for leniency applicants set in practice?**

The Commission decides on the appropriate level of fine reductions for leniency applicants, based on the time of submission of the evidence and the extent to which it represents added value.<sup>25</sup> The time of submission determines the “leniency band” in which applicants fall if they comply with the conditions<sup>26</sup> pursuant to the Leniency Notice:

- (i) the first applicant for a reduction of the fine is granted a reduction between 30% and 50% of the fine which would have otherwise been imposed;
- (ii) the second applicant receives a reduction between 20% and 30%; and
- (iii) all subsequent applicants may receive a reduction of up to 20%.

Timely reporting does not only increase the likelihood that an applicant can qualify for a band with a higher reduction range but is also a factor taken into account when setting the actual reduction within that band. The other key factor is the added value that the evidence represents in strengthening the Commission’s ability to prove an infringement.

In recent cases, the Commission used its discretion to reward successful applicants with reductions towards the higher end of the leniency bands.<sup>27</sup> Leniency reductions are always applied on the amount of the fine to be imposed after the 10% cap has been applied having regard to the Guidelines on Fines<sup>28</sup> and Article 23(2) of Council Regulation 1/2003<sup>29</sup>. Accordingly, leniency applicants subject to the application of the maximum amount of the fine maintain the full benefit of fine reductions under the Leniency Notice.

## **13. What is the threshold of “significant added value” that has to be provided by applicants?**

The Leniency Notice refers to the “added value” as “*the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the*

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<sup>25</sup> Point 26 of the Leniency Notice.

<sup>26</sup> Points (12)(a) to (12)(c) and 24 of the Leniency Notice.

<sup>27</sup> In the cartel decisions adopted by the Commission under the 2006 Fining Guidelines until end September 2022, 74% of the leniency applicants in the first band received a reduction ranging from 40% to 50%, for the second band 84% of the leniency applicants received a reduction between 25% and 30%, while for the third band 94% of leniency applicants received a reduction between 10% and 20%.

<sup>28</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2–5, point 30.

<sup>29</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down under Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), consolidated version as last amended by Council Regulation No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

*alleged cartel*".<sup>30</sup> The Leniency Notice further refers to "*significant*" added value as reflecting the actual contribution "*in terms of quality and timing*".<sup>31</sup>

The assessment of the "significant added value" is made on a case-by-case basis. The key element is that the value of the evidence provided by a leniency applicant is assessed against what is already in the possession of the Commission at the time of the submission. The Commission looks at each item of evidence and then makes an aggregate assessment to establish if the evidence attains the requisite threshold. Leniency applicants are rewarded and allocated to respective leniency bands in the order in which they provide significant added value to the case and not necessarily in the order in which they submit their leniency applications.

In past decisional practice, the Commission has generally found that applicants that provided all information in their possession at an early stage of the procedure and fully cooperated satisfied the threshold for significant added value and qualified for a reduction of fines.<sup>32</sup> However, the level of reduction once applicants have qualified within a specific band is determined by the extent of the evidence provided.

In terms of evidential value, evidence contemporaneous to the facts in question will generally have a greater value than evidence established subsequently. Direct evidence (e.g. notes of a cartel meeting) has greater value than indirect evidence (e.g. travel records concerning attendance at meetings). Compelling evidence, i.e. evidence which is stand-alone and conclusive, has greater value than evidence that requires significant corroboration. Corroborating evidence, nevertheless, has significant added value if it allows the Commission to establish the facts of the infringement (e.g. cartel participants, their role in the cartel, existence and content of cartel meetings, duration, scope etc.)<sup>33</sup>, which could not otherwise be established to the requisite legal standard. Corporate statements generally require corroboration, which can be provided by pre-existing documents or another corporate statement from a different leniency applicant.

Depending on the specific features of the conduct and the development of the case, evidence may also be considered to have a significant added value when it gives an overview about the cartel operation, organisation, background and context (market, industry) in which the cartel operated, which the Commission could not readily obtain on the basis of the evidence in the file.<sup>34</sup> Equally, significant added value may derive from submissions which allow the Commission to accelerate its factual investigation<sup>35</sup> (such as to issue information requests with

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<sup>30</sup> Point 25 of the Leniency Notice.

<sup>31</sup> Point 5 of the Leniency Notice.

<sup>32</sup> So far, only in three cases under the 2006 Leniency Notice have applicants failed to reach the threshold for significant added value. In one case, this was also due to the failure to disclose participation in a cartel and in the two other cases, also due to lack of genuine cooperation. In all other cases, all applicants who disclosed their participation in the cartel they reported and cooperated genuinely reached the significant added value threshold.

<sup>33</sup> See for example the Decision of 14.7.2020 in Case AT.40410 – Ethylene, C(2020) 4817 final, recitals (155), (159) and (163).

<sup>34</sup> See for example the Decision of 8.7.2021 in Case AT.40178 - Car Emissions, C(2021) 4955 final, recital (244); and the Decision of 20.5.2021 in Case AT.40324 – European Government Bonds, C(2021) 3489 final, recital (901).

<sup>35</sup> See for example the Decision of 21.3.2018 in Case AT.40136 – Capacitors, C(2018) 1768 final, recital (1079)

tailored questions to the other parties) or to support its legal conclusions, for example to prove a single and continuous infringement.<sup>36</sup>

#### **14. When and how does the Commission inform parties of the outcome of a leniency application?**

Immunity from fines and the precise percentage reduction for subsequent leniency applicants are definitively granted at the end of the Commission's procedure i.e. when the prohibition decision is adopted. However, indications of a successful application, subject to complying with required conditions (see Question 5), are given earlier in the administrative process.

For immunity applicants, the Commission will grant the undertaking conditional immunity from fines in writing once the information submitted allows it to conduct targeted inspections or find an infringement (see Question 4). In practice, the Commission usually issues a letter granting conditional immunity shortly before it conducts inspections or takes other investigative measures.

For reductions of fines applicants, the Commission will allocate successful applicants into bands according to the order in which they qualify for significant added value (see Question 13). In practice, the Commission sends a letter to each successful applicant indicating the relevant band reduction (but not the final reduction within the band) when it initiates proceedings.<sup>37</sup>

The Commission informs all unsuccessful leniency applicants in writing.

Immunity applicants may be informed through one of the following types of letters:

- (i) that they do not qualify/immunity is not available (rejection letter); or
- (ii) that the application does not disclose conduct that would warrant investigative measures by the Commission at this stage and the application will not be further considered (no-action letter); or
- (iii) that, in view of the handling of the matter by one or more NCAs, the Commission does not propose at this stage to take further administrative actions regarding the application (non-processing letter); or
- (iv) that the application does not disclose participation in a secret cartel covered by the Leniency Notice (no-eligibility letter).

Unsuccessful reductions of fines applicants are informed at the same time as successful applicants (i.e. at the initiation of proceedings).<sup>38</sup>

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<sup>36</sup> See for example the Decision of 21.3.2018 in Case AT.40136 – Capacitors, C(2018) 1768 final, recital (1080).

<sup>37</sup> In the case of the normal procedure, this is shortly before the Statement of Objections is issued. In the settlement procedure, this is shortly before the first settlement meeting.

<sup>38</sup> Note that reduction of fine applicants cannot withdraw their application for leniency. See Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, *Air Canada v Commission*, T-326/17, ECLI:EU:T:2022:177.

## **15. What is partial immunity and how is it applied?**

Partial immunity applies to applicants for a reduction of the fine when they are the first to supply compelling evidence used to establish additional facts increasing the gravity or duration of the infringement. These are facts which complement or supplement those of which the Commission is already aware and which alter the material or temporal scope of the infringement, as found by the Commission. In other words, it concerns cases in which a company which has taken part in a cartel provides compelling evidence to the Commission, enabling it to establish new facts relating to the gravity or duration of the infringement, excluding cases in which that company has merely provided information which strengthens the evidence relating to the existence of the infringement.<sup>39</sup>

The Commission will not take such additional facts into account when setting any fine to be imposed on the applicant providing the information.<sup>40</sup> This means that when the evidence would, for example, allow the Commission to extend the duration of the cartel, that additional period will be disregarded when setting the fine against the undertaking that provided that evidence.

## **16. Can the Commission grant additional fine reductions in cases of partial immunity?**

If the award of partial immunity would lead to the applicant being worse off than if the respective evidence had instead been taken into account when setting the leniency reduction<sup>41</sup>, the Commission may use its discretion to grant an additional reduction under point 37 of the Guidelines on Fines.

## **17. Can the Commission still adopt a cartel decision in a time-barred infringement?**

The Commission's power to impose fines on undertakings is subject to a limitation period.<sup>42</sup> For continuing or repeated infringements, the Commission must<sup>43</sup>:

- (i) take investigative measures within 5 years of the infringement ceasing; and
- (ii) adopt a decision imposing fines within a maximum of 10 years of the infringement ceasing.

This may lead certain parties to refrain from applying for immunity in cases where the conduct has ceased and is close to the limitation period to avoid the risk of exposure to follow on

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<sup>39</sup> See for example Judgment of the Court of 3 June 2021, *Recylex and Others v Commission*, C-563/19 P, ECLI:EU:C:2021:428, paragraphs 23-43.

<sup>40</sup> Point 26 of the Leniency Notice.

<sup>41</sup> Such circumstances are rare but can arise, for example, in long running infringements where the additional leniency reduction applied across the whole period of the infringement would lead to a lower fine than would be the case when the additional facts were not taken into account.

<sup>42</sup> Article 25 of Regulation No 1/2003.

<sup>43</sup> Subject to the rules on suspension (see Article 25(6) of Regulation No 1/2003).

damages actions.<sup>44</sup> This is based on the assumption that the Commission will not adopt a decision in time-barred cases.

However, when undertakings are considering whether or not to apply for immunity, they should bear in mind that the Commission may adopt a decision finding an infringement even in cases when no fine can be imposed, provided it can show a legitimate interest.<sup>45</sup> As recent practice shows, the Commission will, in appropriate cases, not hesitate to hold undertakings liable even if the fine is prescribed (e.g. [EGB](#)<sup>46</sup>).

## **18. What does it mean to be a whistle-blower? How does this relate to leniency?**

An individual can help in the fight against cartels and other anti-competitive practices by providing relevant information to the Commission. Whistle-blowers, who report breaches of the EU rules, including breaches of the competition rules, are guaranteed a high level of protection against various forms of retaliation by their employers under the Whistle-blower Directive.<sup>47</sup>

Furthermore, under the Directive, employers may not prevent an employee from contacting the relevant public authorities. More specifically, informants can use DG Competition's anonymous [whistle-blower tool](#) to report competition breaches. The whistle-blower tool protects the informant's identity whilst allowing two-way communication via a secure platform.

Alternatively, if informants are willing to reveal their identity, they can send an e-mail to [comp-whistleblower@ec.europa.eu](mailto:comp-whistleblower@ec.europa.eu) or call: 0032-2-29 74800.

Leniency and whistle blowing are similar in that they both involve the reporting of illegal conduct by undertakings and individuals respectively. Where they differ is that, at EU level, undertakings face significant fines for cartel infringements but individuals do not. The dynamic between leniency and whistleblowing is that undertakings that choose not to report cartel conduct that they have uncovered forego the opportunity to secure immunity and may subsequently face significant fines if the conduct is reported by a whistle-blower who faces no sanctions, enjoys significant protections and may contact the Commission anonymously. Equally, undertakings that delay making an application may find that immunity is not available if a whistle-blower, including one of their own employees, has already reported the illegal cartel conduct to the Commission.

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<sup>44</sup> Actions which are brought subsequent to the Commission infringement decision and on which claimants can rely on its binding nature.

<sup>45</sup> *Sumitomo Chemical – Sumika Fine Chemicals v Commission*, Joined cases T-22/02 and T-23/02 (ECLI: EU: T: 2005:349), *Villeroy & Boch AG v Commission*, case C-625/13 P (ECLI:EU:C:2017:52).

<sup>46</sup> Case AT.40324, Commission Decision of 20.5.2021, C(2021) 3489 final.

<sup>47</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. Under the directive, the employees enjoy a high degree of protection for example against dismissal, demotion or other forms of retaliation.

## **Further protections of leniency applicants outside the Leniency Notice**

### **19. What protections are granted to leniency applicants under the Damages Directive?**

The Damages Directive<sup>48</sup> provides protections to leniency applicants against exposure to civil damages. In particular, it prohibits the disclosure of leniency statements submitted to the European Commission or a national competition authority in damages proceedings before national courts of the EU.<sup>49</sup> The Commission also assists in the protection of such statements in non-EU jurisdictions (see Question 22).

Furthermore, the Damages Directive provides that an immunity recipient is only jointly and severally liable to its direct and indirect customers and to other cartel victims only if full compensation cannot be obtained from the other cartelists<sup>50</sup>. This is a derogation from the rule that co-infringers can be held jointly and severally liable for the entire harm caused by the infringement. Each of them can be requested to compensate the harm in full and any injured party has the right to require full compensation from any of them until it has been fully compensated. This privileged treatment of immunity recipients is safeguarded by a corresponding protection against contribution claims by other co-cartelists.

### **20. Are protections from prosecution available to employees of immunity applicants?**

Individuals are not held liable for breaches of EU competition law. However, in a number of Member States there are criminal, administrative or civil sanctions on individuals for their participation in a secret cartel.

Under the ECN+ Directive, Member States have to ensure that employees (current and former directors, managers and other members of the staff) of immunity applicants of national competition authorities and the Commission are protected from sanctions at Member State level, provided that they cooperate with the relevant authorities.<sup>51</sup>

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<sup>48</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349 of 5.12.2014, p. 1-19.

<sup>49</sup> Article 6 of the Damages Directive. Given the voluntary and self-incriminatory nature of these statements, such protection is warranted.

<sup>50</sup> Article 11 of the Damages Directive.

<sup>51</sup> Article 23 of the ECN+ Directive.

## **21. Does being a leniency applicant assist in avoiding exclusion from public procurement contracts, as well as avoiding financial penalties under the early-detection and exclusion system, following a cartel infringement?**

The EU Financial Regulation<sup>52</sup> ('the Financial Regulation') and the Public Procurement Directive<sup>53</sup> ('the Directive'), as transposed into national law, provide that when entities have been found guilty of grave professional misconduct by, *inter alia*, having entered into agreement with other persons or entities with the aim of distorting competition, they may be excluded from EU and/or national public tender procedures or be made subject to a financial penalty. However, a benefit for leniency applicants is that they may still be able to participate in these procurement or award procedures at both EU and national level, since active collaboration with the competition authority constitutes an element to be taken into account when the tendering authority assesses the grounds for exclusion.

The Financial Regulation provides that where it has been established by a final administrative decision that an entity is guilty of grave professional misconduct, which includes entering into agreement with other entities with the aim of distorting competition, the authorising officer responsible<sup>54</sup> shall exclude the entity from participating in EU award procedures or from being selected for implementing EU funds.<sup>55</sup> However, any decision to exclude an entity is made in compliance with the principle of proportionality taking into account a number of factors. One of these factors is the degree of collaboration of the concerned entity with the relevant competition authority and the contribution of that entity to the investigation, as recognised by the authorising officer responsible.<sup>56</sup> The same circumstances may be considered by the responsible authorising officer, having regard to the recommendation of the panel referred to in Article 143 of the Financial Regulation, as a reason for not excluding the entity concerned from participating in award procedures or from being selected from implementing EU funds where this would be disproportionate.<sup>57</sup>

The Directive provides that where a contracting authority can demonstrate by appropriate means that an economic operator is guilty of grave professional misconduct, which includes a breach of the competition rules<sup>58</sup>, it may exclude the economic operator from participation in a procurement procedure.<sup>59</sup> More specifically, the Directive also provides that an economic operator may be excluded where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic

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<sup>52</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union.

<sup>53</sup> Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement. Directive 2014/23/EU for concession contracts and Directive 2014/25/EU for procurement by entities operating in the water, energy, transport postal services sectors include similar provisions with regard to the possibility to exclude entities from tender procedures where they have committed a competition offence.

<sup>54</sup> The exclusion is normally adopted by decision of the authorising officer responsible for any tender or award procedure with which the entity in question is concerned.

<sup>55</sup> Articles 136(1)(c)(ii) and 138(1) of the Financial Regulation.

<sup>56</sup> Article 136(3)(f)(i) of the Financial Regulation.

<sup>57</sup> Article 136(6)(c) of the Financial Regulation.

<sup>58</sup> See recital 101 of the Directive.

<sup>59</sup> Article 57(4)(c) of the Directive.

operators aimed at distorting competition.<sup>60</sup> However, an economic operator shall not be excluded from the procurement procedure where it provides evidence that measures it has taken demonstrate its reliability despite the existence of a relevant ground for exclusion and the contracting authority considers these measures as sufficient for this purpose. One of the measures taken into account in this assessment is that the economic operator has clarified the facts and circumstances in a comprehensive manner by actively collaborating with investigating authorities.<sup>61</sup>

### **European/International Cooperation**

#### **22. How are leniency cases coordinated between the Commission and the Member States?**

In the system of parallel competences between the Commission and the National Competition Authorities (NCAs) of the Member States, an application for leniency to one authority is not considered as an application to another authority. Accordingly, applicants have an interest to apply for leniency to all competition authorities, which have competence to apply Article 101 in the territory of the infringement and are considered well placed to act.<sup>62</sup>

The ECN Model Leniency Programme and the ECN+ Directive which incorporates its key elements into law ensure the alignment of leniency programmes within the European Competition Network.<sup>63</sup> Furthermore, under the summary applications system, leniency applicants that consider that the Commission is particularly well placed to deal with their case because their application covers more than three Member States as affected territories may submit a full application to the Commission and only a (short) summary application to the NCAs of the relevant Member States. This protects their position in the leniency queue if their case is subsequently re-allocated to one or more NCAs because the Commission does not intend to pursue it or intends to pursue it only partly.

If the Commission pursues the case, by formally initiating proceedings, there are no coordination issues as the NCAs are relieved of their competence to apply Articles 101 and 102 TFEU.<sup>64</sup>

In recent cases where the Commission did not pursue the case and a number of NCAs pursued leniency cases in parallel, the Commission, in agreement with the NCAs, assumed a coordinating role in order to reduce the administrative burden on applicants and to facilitate consistent outcomes from the NCAs.

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<sup>60</sup> Article 57(4)(d) of the Directive. For an explanation of the interaction of Articles 57(4)(c) and 57(4)(d) and for more general guidance on the application of the exclusion, see Commission Notice on tools to fight collusion in public procurement and on guidance how to apply the related exclusion ground (OJ 2021/C 91/01).

<sup>61</sup> Article 57(6) of the Directive.

<sup>62</sup> Point 38 of the Notice on Co-operation within the Network of Competition Authorities of Competition Authorities, OJ C 101/47.

<sup>63</sup> Made up of the Commission and the National Competition Authorities of the Member States.

<sup>64</sup> Article 11(6) of Regulation 1/2003.

### **23. Can the Commission assist if a court in a third country requires disclosure of an applicant's leniency material?**

If a damages lawsuit is brought against a leniency applicant in a third country, the Commission may support the applicant against a request for disclosure of leniency submissions produced to the Commission. The Commission is prepared to explain to non-EU courts that not protecting leniency submissions may undermine a key element in the policy of the EU and that such protection should accordingly be recognised in light of the principle of international comity. The Commission has successfully invoked principles of international comity in a number of interventions<sup>65</sup> before courts in the United States or in connection with proceedings before US courts.

The Commission can provide the leniency applicant with a letter outlining the concerns about disclosure with its express authority that the applicant may pass the letter on to the competent court. In certain exceptional cases, the Commission may also be willing to act as *amicus curiae* before the court in support of the leniency applicant.

### **24. What are waivers of confidentiality?**

The Leniency Notice makes leniency conditional on applicants informing the Commission about any other applications they have filed or intend to file with other competition authorities.<sup>66</sup> The Commission expects the applicants to provide a [full waiver of confidentiality](#). This enables the Commission to share the applicant's confidential information with such other authorities and facilitates the coordination of the respective investigations. A uniform template has been developed by the International Competition Network in this respect.

Applicants should give the waiver immediately when making their first submission under the Commission Leniency Notice.

#### **The benefits of leniency**

### **25. What savings have businesses operating in the EEA made by cooperating under the Leniency programme?**

Businesses operating in the EEA that successfully cooperated under the current Leniency Notice (since 2006) have seen their fines decrease by EUR 16 billion (immunity applicants EUR 10 billion and reduction of fines applicants EUR 6 billion).

The total amount of fines imposed during the same period was EUR 15 billion.<sup>67</sup>

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<sup>65</sup> At the time of production of these FAQs the Commission or its services have intervened in a number of cases, for example in (i) *Re Jeffrey Laydon v. Mizuho Bank, Ltd.*; Case No. 12-CV-3419 (S.D.N.Y. 2014); (ii) *re Air Cargo Shipping Services Antitrust Litigation*, M.D.L. No. 1775 (E.D.N.Y.); (ii) *re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M: 07-1827 (N.D. Cal. 2011), Special Master's Order Denying Motion of Direct Purchaser Plaintiffs to Compel Hitachi to Produce Foreign Regulatory Documents, No. M:07-cv-01827-si (April 26, 2011); (iii) *Re Vitamins Antitrust Litigation*, Misc. No. 99-197, Docket No. 3079 (D.D.C. May 20, 2002) or (iv) *Re: Methionine Antitrust Litigation*, No. C-99-3491, MDL no. 1311 (N.D. Cal. June 17, 2002).

<sup>66</sup> Point 9(a) of the Leniency Notice.

<sup>67</sup> Data up to October 2022.