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SIGNIFICANT NEWS FOR THE FRENCH LENIENCY PROGRAM



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After 10 cases originated from leniency applications brought to an end since 2009 and at least as much ongoing cases, the study of April 2014 on the French leniency program and the public consultation launched early 2015, the French competition Authority issued last April 3 a new version of the procedural notice relating to the French leniency program ("the guidelines").

In order to encourage operators to use leniency, the guidelines clarify some procedural issues and reinforce the summary application system.

Clarifications of procedural issues

One of the major innovation of the guidelines concerns the will of the French competition Authority ("the FCA") to issue, like the European Commission ("the Commission"), a press release after each dawn raid it performs. Such press release aims at suppressing the information asymmetry between the raided and the non-raided companies and at allowing the later to apply for leniency. The FCA's press release will however be different from the Commission's ones as it will not mention the raided companies' names in order to preserve the presumption of innocence (this precaution was not in the first version of the guidelines and should not however prevent the press from identifying the companies concerned). Should the FCA consider the case ungrounded, it will issue a new press release.

The FCA also wishes to provide the leniency Advisor with more visibility. His functions and contact details are mentioned and he now appears clearly as the "entry point for leniency applicants". As the "markers" used by the Commission, the appointments asked to the leniency Advisor to file a leniency application with the FCA's general rapporteur or one of its assistant will be granted in the order they were made to ensure, in case of multiple requests, the applications processing in their order of arrival. In the event of ongoing dawn raids whereas a company asks for an appointment to file a leniency application, the appointment will be fixed after the end of all the dawn raids performed (to avoid any advantage for non-raided companies or those which dawn raids are swifter).

When applying for leniency, "the applicant must accurately identify the entities covered by this request". This means that, in accordance with the FCA's case law, the sole "economic entity" which filed the leniency application and transmitted the decisive evidences can benefit from it, i.e. most of time, the company and its parent company at the moment of the application, excluding former parent companies. To qualify for the reduction of sanction granted, former parent companies should apply themselves and distinctly for leniency.

Another important input of the guidelines consists for the FCA to put a – final ? - end to the debate on the possible accumulation by the same company of leniency and non-contest procedures for the same infringement. For its application to be favorably received, the leniency applicant shall not "challenge (...) the factual elements it revealed (...) which are the basis of the leniency decision, the materiality of the facts it disclosed or the existence of the practices". This should lead the leniency applicant to automatically waive any challenge of the notified objections which relates to the facts and practices he revealed. The FCA demonstrates its will to fully enforce the conditions for the accumulation of the two procedures it has itself enacted in its guidelines on the non-contest procedure and reminded in its recent case law. Then, the accumulation is only possible if the choice for the non-contest procedure generates real procedural efficiencies from the FCA's standpoint. This is particularly the case when the scope of the objections notified to the company concerned differs in one or more important point(s) from the practices it revealed to the FCA (material, temporal or personal scope). Otherwise, the FCA may consider that the non-contestation of the objections does not present enough significant procedural efficiencies to be granted.

Extension of summary applications

The new guidelines also take into account the adoption on 22 November 2012 of a new version of the model leniency program of the European competition network ("ECN"), which strengthens the mechanism of summary applications for the benefit of business and competition authorities.

As the ECN model program, the new French guidelines extends the possibilities of summary applications to every leniency applicants, and not only to first applicants which provide the FCA with information whereas it does not hold any information about the alleged anticompetitive agreement (type 1 A cases).

Summary applications allow leniency applicants before the Commission to file parallel "shorter" applications before other competition authorities which would be concerned, should the Commission decide not to process the application.

As their name suggests, summary applications contain a brief description of the alleged anticompetitive agreement (companies and practices concerned, market(s) and product(s) concerned, duration). In its new guidelines, the FCA indicates that the company which filed a summary application before its services has to bring to its notice any information provided to the Commission which would be likely to significantly modify the summary application. The company may also inform the FCA of its leniency application rejection by the Commission.



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