

## Parsing European Guidance For Leniency In Cartel Probes

By **Christian Riis-Madsen, Stéphane Frank and Tine Rasmussen**

(January 16, 2023, 8:26 AM GMT)

Global cartel investigations are at an all-time low, which is a direct consequence of the steep decline in the number of leniency applications.

Over the past few decades, the European Commission and other agencies around the world have relied heavily on leniency applications to uncover and sanction cartels.

History shows that a successful leniency program leads to an increased number of cartel investigations. But the opposite is also true.

Recent developments, such as an increase in follow-on damages claims, have had a chilling effect on leniency programs resulting in a drop in the number of cartel investigations.

In response to this, European[1] and foreign antitrust enforcers have taken steps to reinvigorate their leniency programs.

For example, the German Bundeskartellamt issued new leniency guidance in 2021 to make it easier for companies to determine what they can expect and under which conditions they can be considered for immunity.[2] The amendments also create more flexibility in determining the level of fines.

The European Commission itself has also considered changes to make its leniency program more attractive to potential applicants — including by shielding the immunity applicant from follow-on damage claims[3] or providing clearer guidance to companies involved in nontraditional cartels, such as no-poach cartels.

The commission's new guidance on leniency,[4] which the commission says is designed to "facilitate leniency applications in a more complex leniency landscape,"[5] forms part of this global trend.

The guidance seeks to modernize the commission's leniency notice[6] and confirms the commission's commitment to cartel enforcement by strengthening its leniency program.



Christian Riis-Madsen



Stéphane Frank



Tine Rasmussen

The guidance is, in many ways, modeled on the frequently asked questions published by the U.S. Department of Justice, which offer clarity about the agency's practices and procedures for implementing its corporate leniency policy.

The guidance introduces two main changes:

- The possibility for companies to inquire on a no-names basis as to whether they may qualify for leniency; and
- The creation of the new role of leniency officer within the commission.

These developments are particularly interesting in light of the commission's increased focus on nonclassic cartels and are likely to prove useful in the management of legal risk when considering potential leniency applications.

The guidance also provides a number of additional helpful clarifications to the existing rules.

### **Main Changes Introduced by the Guidance**

Companies may struggle to determine if certain conduct qualifies as a cartel for purposes of the leniency program, in particular in cases where the conduct in question does not fall squarely within the category of classic cartels — such as price fixing, market sharing or customer allocation agreements.

This is increasingly relevant given the commission's focus on nonclassic cartels, such as buyer cartels, coordination to restrict competition on technical developments, as well as labor market enforcement.

Indeed, in a 2021 speech, Margrethe Vestager, executive vice president and competition commissioner, stated that the commission was going to expand its cartel enforcement to labor markets, including no-poach and wage-fixing agreements.[7]

While no investigations into labor market conduct have been announced publicly by the commission at this stage, national competition authorities — in. e.g., Portugal, the Netherlands, Poland, France and Italy — are actively pursuing this type of potential infringements.

For example, the Dutch Authority for Consumers and Markets, following indications of potentially anti-competitive arrangements in the Dutch labor market, issued a publication in 2022 specifying that no-poach agreements were strictly prohibited.[8]

Also in 2022, the Portuguese Autoridade de Concorrência imposed sanctions for anti-competitive labor market practices for the first time when it fined 31 sports companies as well as the Portuguese Professional Football League for engaging in no-poach conduct.

Further, when presenting its 2023 enforcement priorities on Dec. 28, 2022, the Portuguese Autoridade de Concorrência stressed that it

will intensify its contribution to the promotion of an open and competitive labor market, keeping a particular eye on horizontal no-poach agreements and wage-fixing agreements.[9]

For these new types of cartel cases, there is no available body of case law that potential applicants can use to determine if their conduct amounts to a cartel in the context of the leniency program. Against this backdrop, two of the changes introduced by the guidance will prove valuable as companies assess whether to come forward or not.

### ***Contact on a No-Names Basis***

The new guidance provides for the possibility of engaging with the commission on a no-names basis, without providing any information that may lead the commission to identify the cartel. According to the guidance:

[T]he 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.

This ability to engage in informal discussions on a no-names basis to explore whether particular conduct qualifies under the leniency program will prove valuable to potential leniency applicants, particularly as it relates to borderline cases.

Companies may still submit a hypothetical leniency application in accordance with the leniency notice, which, however, requires the applicant to identify the sector, geographic scope and estimated duration of the cartel, and present specific information or evidence.[10]

### ***The Leniency Officer***

The guidance also creates the role of leniency officer, which, going forward, will serve as the first point of contact at the commission for any potential leniency applicant.

According to the guidance, the leniency officer will

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.

The role is designed to provide leniency applicants with additional reassurances as they consider self-reporting their conduct.

Potential applicants can also seek guidance from the leniency officer as to whether immunity is still available for a particular cartel. In this case, the applicant's legal representative must commit to immediately submit an application for immunity or a marker if the leniency officer confirms that immunity is available.

As noted by the commission itself, the ability to engage in informal discussions will be particularly helpful if the conduct is novel — e.g., no-poach agreements — or it is unclear whether it falls within the scope of the leniency notice.[11]

### ***Other Notable Changes Introduced by the Guidance***

In addition to the main changes, the guidance provides helpful clarification on various aspects of the leniency program. In particular, the guidance:

- Reiterates the commission's standard policy of routinely granting markers when the conditions are fulfilled and specifies that in recent cases, the commission has generally granted a marker period of one month — potentially longer in certain cases such as international cartels covering multiple jurisdictions;
- Specifies how the level of fine reductions is set in practice — in recent cases the commission has used its discretion to reward reductions towards the higher end of the leniency bands;
- Provides additional information on the threshold of significant added value, specifying which types of evidence will generally have a high or higher value;
- Explains that leniency applicants may still be able to participate in EU and national procurement or award procedures; and
- Specifies that the commission may support leniency applicants against requests for disclosure of leniency submissions produced to the commission in case of damages lawsuits against the applicant in a third country.

## Conclusion

The guidance is a valuable acknowledgment that the commission's leniency program must develop, and an important step toward reducing uncertainty for potential leniency applicants.[12]

The guidance offers potential leniency applicants the opportunity to make a more informed decision about the desirability of seeking leniency, which likely will result in an uptick in utilization of the leniency program.

The guidance will also likely result in the commission receiving more leniency applications in novel areas it wants to pursue such as those relating to labor market practices.

---

*Christian Riis-Madsen is a partner, Stéphane Frank is of counsel and Tine Rasmussen is an associate at Gibson Dunn & Crutcher LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See, e.g., MLex, European enforcers working on ways to attract cartel whistleblowers, French antitrust official says.

[2] [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11\\_10\\_2021\\_Guidelines\\_Liniency.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html).

[3] <https://globalcompetitionreview.com/article/eu-reviewing-leniency-policy-amidst-drop-in-first-in-applications-enforcer-says>.

[4] [https://competition-policy.ec.europa.eu/document/b4ec6442-83b7-41b4-9a97-ba244c013a3b\\_en](https://competition-policy.ec.europa.eu/document/b4ec6442-83b7-41b4-9a97-ba244c013a3b_en).

[5] [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_6373](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6373).

[6] Commission Notice on Immunity from fines and reduction of fines in cartel cases.

[7] [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en).

[8] <https://www.acm.nl/en/publications/acm-warns-employers-non-hiring-arrangements-are-prohibited>. <https://www.acm.nl/en/publications/acm-suspends-investigation-possible-wage-fixing-cartel-between-supermarkets-after-conclusion-collective-agreement>.

[9] <https://www.concorrenzia.pt/en/articles/2023-priorities-adc-strengthens-investigation-capability-context-digital-economy>.

[10] Leniency Notice, points 16 and 19.

[11] [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_6373](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6373).

[12] The Guidance highlights the benefits to potential leniency applicants, specifying that the leniency program have in fact led to a decrease in fines of EUR 16 billion since 2006 – more than 50% of the total amount of fines (EUR 15 billion) imposed during that same period, see, Section 25.