contrast



A personal look at leniency

Imagine…

The head of the legal department knocks at your door and asks if he can come in for a minute. Without waiting for your response, he enters and carefully shuts the door behind him. The feeling in the pit of your stomach tells you this is not a courtesy call. The lawyer sits down in front of you and explains that evidence has been found within the company of practices that might constitute competition law infringements. Your name came up, and he is asking for your full cooperation to clarify a number of actions and e-mails. He says that the company has filed a leniency application with the competition authorities and has to be able to present the full story together with a maximum number of supporting documents as quickly as possible. You feel like you have been pole axed: how should you deal with this situation?

A brief clarification

The European and national competition procedures provide for leniency programs. Companies can admit to serious competition law infringements (generally only cartels) to the competition authorities in exchange for immunity from or a reduction of the fines normally imposed for said infringement. The speed with which a leniency application is filed and the added value offered to the investigation are decisive factors here. For example, only the *first* leniency applicant qualifies for immunity from fines. Later leniency applicants can only hope for a reduction of the fine. The percentage of this reduction is determined by their place in the line-up of leniency applicants, and the quality of the evidence they put on the table.

Fines for cartel infringements can quickly add up to several million euros. The highest cartel fine the European Commission ever imposed on a single company amounted to over 700 million euros, so a

successful leniency application can translate into clear financial and economic advantages.

And it is not just companies that can incur sanctions for cartel infringements. Although this is not the case for cartel procedures at the European Commission, the competition laws of numerous EU Member States provide for *personal* sanctions against employees found to be involved in cartel infringements. The required degree of involvement and the potential sanctions are not the same in all Member States. For example, certain Member States provide exclusively for administrative fines (such as Belgium and the Netherlands), while others go so far as prison terms (such as France and the United Kingdom).

Although the approach differs from Member State to Member State on this point as well, the competition laws of numerous Member States provide for the possibility of submitting a personal leniency application to exempt the employees involved from punishment.

The important point is that the prizes are only awarded at the finish line, after the competition authorities have assured themselves of the full cooperation of the companies and employees involved throughout the course of the cartel investigation. Only in the event of full cooperation will they definitively grant the benefits of leniency, so cooperation is not a luxury, it is a must.

Concretely

- As an employee, your best option is to give full and immediate cooperation. It makes little sense to play hide-and-seek. Cartel proceedings not only give rise to painstaking internal investigations, but also to investigations at *all* of the competitors involved, so it would be naive to think that you can keep information secret. If it later appears that you intentionally withheld your cooperation, there can be serious labour-law consequences.
- Use common sense when you cooperate on the internal investigation. Speculate as little as possible, and do not exaggerate or minimize the facts. Neither of these will help, and in fact will only make it more difficult for the company to fulfil its obligations as a leniency applicant.
- Written proof is of decisive importance in the kind of cooperation expected by the competition authorities, so make every necessary effort to find relevant documents and electronic files, even if it takes a flashlight and a pickaxe to find them again.
- The leniency procedure has a strictly confidential character. If the employees of a company do not respect this confidentiality, the company can lose the hoped-for benefits of the leniency application. Therefore always maintain absolute secrecy, even concerning the very fact that your company has applied for leniency. Contact your legal department in case of the slightest doubt about what you can and cannot say, even to a colleague.
- Expressly request that your personal situation be secured (for example, via a personal leniency application). If the response you get does not seem adequately reassuring, consult your own lawyer, and have him or her talk with your company.

More information

The European rules on leniency are contained in the *Commission notice on immunity from fines and reduction of fines in cartel cases* (Official Journal of the European Union C 298/17 dated 8.12.2006).

On the Belgian level, the relevant text is the *Communication of the Competition Council on complete or*

partial exemption from fines in cartel cases (Belgian Official Journal dated 22.10.2007) which is regarded as determinative by the Belgian Competition Authority until it is explicitly retracted, and which the Belgian Competition Authority has indicated that it will apply by analogy to leniency applications by natural persons. A proposal was recently made to modify the Belgian guidelines, and you can find the draft proposal here (in Dutch) and here (in French).