

The Autorité de la concurrence publishes a new procedural notice on its leniency programme

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Background

The *Autorité de la concurrence* has published a new procedural notice on the leniency programme. This notice consolidates and details the applicable legal framework in order to encourage undertakings to use the leniency procedure by providing greater clarity and predictability about the processing of applications. It replaces the procedural notice of 3 April 2015 to take account of changes arising from the ECN+ Directive, the DDADUE Law and Decree 2021-568 of 10 May 2021.

Firstly, the procedural notice acknowledges the abolishment by the DDADUE Law of the leniency notice issued by the Board, and details the new procedure whereby the General Rapporteur informs the undertaking of its eligibility for full or partial immunity from the fines incurred, which the Board may confirm when it issues its decision on the merits.

Secondly, the procedural notice provides greater clarity on a number of key points. It sets out the new eligibility conditions for the different types of immunity introduced by the decree, clarifies the practice of using a marker so that an applicant can retain its place in the leniency queue, and specifies the guarantees conferred on leniency beneficiaries with regard to their civil or criminal liability.

Lastly, it modernises the procedure for submitting and collecting leniency applications by providing for the possibility of submitting information electronically.

In addition to the recent introduction of the procedure for collecting and processing whistleblower reports, the updated leniency procedural notice provides a new, effective framework for the detection of anticompetitive practices by the *Autorité*.

In 2006, the *Conseil de la concurrence* issued a procedural notice setting out how the provisions of IV of Article L. 464-2 of the French Commercial Code (*Code de commerce*) relating to leniency were implemented.

Following the creation of the *Autorité de la concurrence* by Law 2008-776 of 4 August 2008 *on the modernisation of the economy*, a new leniency procedural notice was adopted on 2 March 2009. A new version was then published on 3 April 2015.

The provisions of the French Commercial Code (*Code de commerce*) on leniency were amended by Law 2020-1508 of 3 December 2020 *on various provisions for adaptation to European Union law in economic and financial matters* (the "DDADUE Law"). This law abolished the leniency notice procedure, under which the Board was responsible for ruling on leniency applications before the case was investigated, in a decision separate from the decision on the merits. This procedure has been replaced by a new procedure whereby the General Rapporteur informs the undertaking of its eligibility for full or partial immunity from the fines incurred, which the Board may confirm when it issues its decision on the merits. This key development, which brings clear procedural savings, will help to speed up the procedure for the benefit of undertakings.

The DDADUE Law also authorised the government to transpose, by means of an ordinance, Directive (EU) 2019/1 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*, known as the ECN+ Directive.

This directive has given national competition authorities enhanced powers, with a view to greater effectiveness and uniformity in the application of European competition rules. Chapter VI is dedicated to leniency, thereby enshrining the rules governing this procedure in European law for the first time.

While most of the provisions of the ECN + Directive were transposed into domestic law by Ordinance 2021-649 of 26 May 2021, Articles 17 to 22 on leniency were primarily transposed by Decree 2021-568 of 10 May 2021, codified

in Articles R. 464-5 *et seq.* of the French Commercial Code (*Code de commerce*). As a result, the principles and details of the leniency procedure, which until now were essentially set out in the soft law that was the *Autorité*'s procedural notice, are now enshrined in positive law.

The new procedural notice published by the *Autorité* today aims to reflect and clarify these new legal and regulatory provisions, in order to encourage the undertakings concerned to apply for leniency, with a view to receiving full or partial immunity from the fines incurred.

What are the benefits of the new procedural notice?

- ***Diversifying the methods for submitting leniency applications***

Under the terms of the new procedural notice, undertakings can now submit their leniency applications to the *Autorité* using a secure electronic form, available on the *Autorité*'s website, or in person at the *Autorité*'s reception desk. As before, applications can still be submitted by registered letter with acknowledgement of receipt, or by contacting the Leniency Officer by telephone.

As a result, undertakings can now choose the method that they consider to be the most practical and secure, depending on the circumstances, while continuing to benefit from the best guarantees of confidentiality.

- ***Explaining the conditions of eligibility for full or partial immunity from fines***

The new procedural notice sets out the conditions of eligibility for full or partial immunity from fines, in application of the new legislative framework. It distinguishes, for the purposes of granting full immunity, between cases where the information provided by the undertaking enables the *Autorité* to carry out dawn raids (Type 1 A cases), and cases where the information provided enables the *Autorité* to establish the existence of the alleged practice (Type 1 B cases).

The procedural notice makes no substantive changes to the conditions of eligibility for full Type 1 B immunity, nor to those for partial immunity (Type 2 cases) – in particular, the fine reduction bands according to the applicant's rank are unchanged.

For the purposes of granting full Type 1 A immunity, the procedural notice, echoing the terms of the decree, introduces the condition that no dawn raid or criminal inspection has already been carried out in relation to the practice in question.

- ***Enshrining the practice of marker applications***

The new procedural notice enshrines the existing marker system, whereby applicants are granted a period of time to collect the information necessary to support their application, during which the place of their application in the leniency queue is maintained.

- ***Modernising the conditions for collecting leniency statements***

Under the terms of the new procedural notice, the leniency statement and supporting documents may be submitted electronically, via a secure document exchange platform. This new procedure, which gives undertakings greater flexibility and security when providing the *Autorité* with the information required for their application, saves resources for both applicants and the *Autorité*.

There has also been an important development in the admissibility of evidence in proceedings before the *Autorité*. In line with European case law (judgement of the General Court of 8 September 2016, Goldfish et al. v. Commission, Case T-54/14), the principle of freedom of evidence, similar to that applicable in criminal proceedings, now applies, so that, for example, covert audio recordings may be produced by leniency applicants.

- ***Consolidating the practice regarding the follow-up given by the General Rapporteur to leniency applications***

The leniency notice abolished by the DDADUE Law has been replaced by a new procedure whereby the General Rapporteur gives follow-up to leniency applications. The new procedural notice consolidates the practice that has

developed since the entry into force of the amendment to IV of Article L. 464-2 of the French Commercial Code (*Code de commerce*).

Depending on the case, the General Rapporteur informs the undertaking in writing of its eligibility – or lack thereof – for immunity, as soon as possible. The General Rapporteur may also indicate, without ruling on the eligibility of the application, that it is considered that there are no grounds to open an investigation or to formulate a proposal to commence proceedings *ex officio*, or that the facts are clearly time-barred.

If an application is deemed eligible, the undertaking concerned is granted immunity from fines by the Board at the same time as the decision on the merits is issued, provided that said undertaking has complied with its obligation to cooperate, under the terms reiterated by the General Rapporteur.

In cases where the General Rapporteur invites the undertaking to temporarily continue to participate in the practice in question, such request is now formalised in a report.

If an application is not accepted, the General Rapporteur may reconsider their initial position, in which case the leniency application is examined according to its previous place in the leniency queue, in the interests of the undertaking concerned.

Within this new framework, undertakings therefore benefit from greater clarity and predictability regarding the procedure and how their leniency application will be processed.

- ***Specifying the guarantees conferred on leniency beneficiaries with regard to their civil or criminal liability***

The new procedural notice develops and clarifies how the scope of the potential civil liability of leniency beneficiaries and the criminal liability of their directors may be limited. These rules have changed significantly since the publication of the previous procedural notice, as a result of the transposition of both Directive 2014/104 of 26 November 2014 *on certain rules governing actions for damages under national law for infringements of competition law provisions* and the ECN +

Directive.

In terms of civil liability, in the event of an action for damages brought by a victim of the anticompetitive practices in question, these provisions provide in particular for the limitation of the joint liability of an undertaking that has obtained full immunity from the fines incurred (Article L. 481-11 of the French Commercial Code [**Code de commerce**]), as well as for the protection of its leniency statement, the disclosure of which cannot be ordered by the judge hearing the action (Article L. 483-5 of the French Commercial Code [**Code de commerce**]).

In terms of criminal liability, the new procedural notice recalls that the directors, managers and other employees of an undertaking that has been granted full immunity from fines are exempt from the penalties provided for in Article L. 420-6 of the French Commercial Code (**Code de commerce**) if they have actively cooperated with the **Autorité** and the Public Prosecutor's office. In such event, the **Autorité** informs the Public Prosecutor, forwards the file to them and mentions the individuals whom it considers eligible for this exemption.

Procedural notice

of 15 December 2023 on the
French leniency programme

Find out more about the leniency programme

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