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Belgian Competition Council adopts new leniency programme

After a round of public consultation, the Belgian Competition Council has issued a new leniency programme¹. The new programme has entered into force on 22 October 2007 and replaces an earlier leniency programme adopted in 2004.

Two elements have prompted the introduction of a new Belgian scheme. The 2006 Belgian Competition Act provided a legal basis for leniency applications and introduced new procedural rules applying in the context of leniency. In addition, there was a need to modernise the existing programme in view of the developments at the EU level that culminated in the adoption of the EU leniency programme in 2006. Overall, the new Belgian programme closely follows the ECN model leniency programme that was issued precisely with the aim to streamline the leniency programmes of the EU Member States.

The new Belgian leniency programme only applies to cartels. Other types of horizontal practices and vertical agreements do not fall within the scope of the programme. Interestingly, the Belgian programme provides that not only undertakings, but also associations of undertakings are entitled to file leniency applications.

As under the ECN model leniency programme and in almost identical terms, the new Belgian programme provides for two types of immunity (Type 1A and Type 1B). In addition, it provides for the possibility to obtain a reduction of fines (Type 2).

- Type 1A immunity is granted to an undertaking or association of undertakings that is the first to submit evidence that will enable the Belgian Competition Authority to carry out targeted inspections in connection with the alleged cartel.
- Type 1B immunity is available when no Type 1A immunity has been granted, and an undertaking or association of undertakings is the first to submit evidence which enables the finding of an infringement of Article 2 of the Belgian Competition Act and possibly Article 81 of the EC Treaty.

¹ Belgian State Gazette, 22 October 2007, p. 54708.

- Finally, undertakings or associations of undertakings that do not qualify for immunity may benefit from a reduction of fines (Type 2) if they provide evidence representing significant added value when compared with the evidence already in the possession of the Belgian Competition Authority at the time of the application. The first undertaking or association of undertakings submitting evidence with a significant added value may obtain a reduction of 30% to 50% of the fine. The undertakings or associations of undertakings that subsequently submit such evidence may obtain reductions ranging from 10% to 30%.

The notice sets out in detail the type of information that applicants should submit in order to qualify for immunity. As under the EU programme, immunity is not available to applicants that took steps to coerce other parties to participate in the cartel.

In addition to the specific conditions relating to the various types of leniency applications, the applicant must satisfy a number of general conditions in order to qualify for leniency, such as (i) prior to making the application, the applicant must not have destroyed, falsified or concealed evidence and must keep the intention to make the application and its content secret; (ii) the applicant must end its involvement in the cartel at the latest at the moment of the application, except if continued involvement would be reasonably necessary to preserve the effectiveness of the inspections; and (iii) the applicant must cooperate genuinely, fully, on a continuous basis and expeditiously with the Belgian Competition Authority until the conclusion of the case. The latter obligation is defined in more detail in the notice and includes, e.g., a continuous secrecy obligation.

One of the procedural novelties at the Belgian level is that in the context of immunity applications, the applicant may apply for a marker protecting the applicant's place in the queue for a specified period of time. The competition prosecutor has discretion as to whether or not granting a marker. Where a marker is granted, the competition prosecutor determines the period within which the applicant has to perfect the marker by submitting the required information.

The Belgian notice provides for formal and summary applications. The formal application consists of a statement with supporting evidence. As under the EU programme, the statement may be provided orally. Access to the statements is restricted and the parties having obtained access must commit to use the information in the statement solely in the procedure concerned. The option to file a summary application is reserved to Type 1A immunity applicants that have or are in the process of filing an immunity application with the European Commission, and where the latter is particularly well placed to handle the case. Summary applications are useful in cases where a reallocation to the national level cannot be excluded. The summary application will have to be turned into a full submission once the College of competition prosecutors decides to act upon a case.

On the basis of a review of the leniency application, the competition prosecutor general will request a chamber of the Competition Council to render a statement confirming its intention to grant leniency (in case of a summary application, the statement will only be issued once College of competition prosecutors has decided to act). The chamber of the Competition Council will strive to issue such a statement within 20 working days after receipt of the report from the competition prosecutor general (interestingly, the notice does not contain a time-limit for the investigation phase). The applicant will have the opportunity to comment upon the findings of the competition prosecutor general. The statement issued by the chamber of the Competition Council will not be published. If the chamber of the Competition Council establishes that the specific conditions for obtaining immunity are not fulfilled, the applicant may withdraw its application.

In its end decision, the chamber of the Competition Council will review the applicant's compliance with all the conditions for granting leniency, and eventually it will grant an immunity or reduction of fines.

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