DAVIES

>perspective

European Commission Considers Changes to Leniency Program

But Concerns Raised About the Proposed Amendments

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The European Commission (the "Commission") is considering possible changes to its leniency program, which is currently set out in the Commission's Notice on Immunity from Fines and Reduction of Fines in Cartel Cases. The Commission's proposed changes are contained in a draft which it issued for comment on September 29, 2006 (the "Draft Leniency Notice"). The comments submitted have raised a number of concerns about the Commission's proposed changes, as described below.

Proposed Changes

The Draft Leniency Notice proposes to, among other things:

- introduce a discretionary "marker" system, pursuant to which an applicant's place in line for leniency can be protected for a limited period of time;
- set out what type of information and evidence immunity applicants should submit as part of their "corporate statements" (which can be made orally);
- describe the procedure for protecting these corporate statements from disclosure;

- link the threshold for immunity to providing the Commission with the information it needs to carry out a "targeted" investigation of an alleged cartel; and
- clarify the cooperation obligation of immunity applicants including the obligation not to destroy, falsify or conceal information.

The changes contained in the Draft Leniency Notice are intended to provide greater guidance and clarity for companies applying to the Commission for immunity from, or a reduction in, fines for competition infringements. They are also designed to streamline the procedures for handling leniency applications so that responses can be provided more promptly. The proposed changes are also supposed to bring the Commission's leniency process into closer conformity with the main features of the leniency programs of other anti-cartel enforcement jurisdictions.

Concerns Raised

However, concerns have been raised about the Draft Notice by some of the parties that have submitted comments to the Commission. (Members of the Davies Competition and Foreign Investment Review group participated in preparing joint comments for the Antitrust and International Sections of the American Bar Association.)

Marker System

One concern relates to the proposed "marker" system. The purpose of a "marker" system is to encourage companies to report potential wrongdoing as early as possible by providing a quick and easy way to initiate the immunity process. The marker guarantees the applicant's place at the "front of the immunity line" while it gathers the information required to ultimately obtain a grant of immunity. In Canada, for example, a marker can be obtained from the Competition Bureau on the basis of very limited information, essentially the nature of the infringement and the product(s) involved (although additional information, to the extent available, is appreciated). There is no requirement in Canada for the applicant to identify itself by name and information may even be provided on a hypothetical basis.

By way of contrast, the Draft Leniency Notice requires a party seeking a marker to provide the Commission with information concerning "its name and address, the parties to the alleged cartel, the affected product(s) and territory(ies), the duration of the alleged cartel and the nature of the alleged cartel conduct". The Draft Leniency Notice also obliges parties to "justify" their request for a marker. The concern with requiring this level of detail at the marker stage is that it will slow down the process or even discourage immunity applicants from coming forward, thus defeating the goal of facilitating early disclosure of anti-competitive conduct.

Protection of Information

Another difficult issue raised by the Draft Leniency Notice is how to protect information provided to the Commission from being used against the immunity applicant in follow-on litigation, particularly if there is potential exposure to civil suits in the United States (where treble damages are available). In Canada, the Competition Bureau has attempted to address this problem by allowing for a "paperless" immunity application process. While immunity applicants are free in Canada to provide their evidence in written form, the Bureau will also accept oral "proffers" of information in order to limit the discoverability of what has been disclosed. Bureau officers will take notes of the oral proffer of information, but there is no requirement for the applicant to create a formal written record of admissions (although any relevant pre-existing documents would also have to be disclosed).

The Draft Leniency Notice also proposes to allow applicants to provide the Commission with an oral "corporate statement" outlining the conduct at issue. However, it falls well short of permitting an entirely paperless process by requiring that (i) a recording be taken of any oral corporate statement, (ii) a transcript be prepared, (iii) the applicant review the transcript for accuracy, and (iv) the transcript form part of the Commission's file, which could subsequently be cited as evidence if the Commission issues a "Statement of Objections" in connection with the infringement. Statements of Objections may be subject to discovery requests in private civil litigation. The prospect that the transcript of an immunity applicant's oral evidence could be used against it in civil litigation is an obvious disincentive to cooperation and conflicts with the fundamental principle that immunity applicants should not be placed in a more disadvantageous position than non-cooperating parties.

Next Steps

Neelie Kroes, the EU Commissioner for Competition Policy, hopes to invite the Commission to finalize the Leniency Notice before the end of the year. It remains to be seen whether the Commission will take to heart the concerns identified above as well as those expressed about other aspects of the proposed changes.

Like the European Commission, the Canadian Competition Bureau is conducting a review of its own immunity application procedures. The Bureau issued a public consultation paper in February 2006 addressing several key issues concerning its Immunity Program, including: confidentiality; the oral application process; restitution; revocation of immunity; and the possible creation of a formal program for granting leniency short of full immunity from prosecution. The Bureau's consultation period closed in May 2006 and the Bureau is aiming to complete its review by March 2007.

If you have any questions regarding the foregoing, please contact George Addy, Mark Katz or Elisa Kearney in our Toronto office (416-863-0900) and Hillel Rosen in our Montréal

office (514-841-6400) or any other member of the Davies Competition and Foreign Investment Review group.

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