

Kluwer Competition Law Blog

New Belgian Leniency Guidelines Open Door to Individual Applicants

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On 1 March 2016, the Belgian Competition Authority (“BCA”) adopted its new Leniency Guidelines (“the 2016 Leniency Guidelines”). The 2016 Leniency Guidelines replace the 2007 Notice of the Competition Council on Immunity from Fines and Reduction of Fines in Cartel Cases (“the 2007 Leniency Notice”). The new guidelines were published in the Belgian Official Gazette on 22 March 2016 and are applicable to leniency applications made from that date onwards, unless an application has already been made in the same case on the basis of the 2007 Leniency Notice (in which case the old guidelines continue to apply).

The revision of the Belgian leniency regime mainly aims to deal with the fact that, since 2013, individuals who are not undertakings can be sanctioned for violations of competition law and therefore can also submit leniency applications. Though in practice the BCA already accepted leniency applications made by individuals, the guidelines now set out how this is done and what the interplay is between leniency applications made by individuals and leniency applications made by undertakings. The guidelines furthermore clarify some of the procedural and practical modalities of the leniency programme under the BCA’s new institutional framework.

What’s New?

Definition of a cartel

The 2016 Leniency Guidelines are only applicable to cartels. They do not cover vertical agreements or horizontal practices that do not correspond to the definition of a cartel. The definition of a cartel has been slightly amended to bring it more in line with the definition in the Private Damages Directive. However, like the 2007 Leniency Notice, the 2016 Leniency Guidelines explicitly state that cartels also cover agreements or concerted practices between competitors in which also one or more “non-competing undertakings” are participating.

The cartel definition does not require a cartel to be secret to fall within its perimeters, but the 2016 Leniency Guidelines nevertheless state that cartel agreements are generally secret and that full or partial immunity from fines is available for

undertakings that have participated in a “secret” cartel. A footnote to this requirement clarifies that the word secret does not imply that all aspects of the conduct have to be secret, but that in particular the elements that make it more difficult to understand the full scope of the conduct and the fact that it is a cartel, are not known to the public, the customers or the suppliers. This may be a point of contention if the BCA continues to venture into the field of non-traditional infringements (such as hub-and-spoke infringements or price signalling).

Immunity applications made by individuals

The main innovation of the 2016 Leniency Guidelines is that they set out the practical modalities for immunity applications made by individuals. This is a consequence of the reform of the Belgian competition law regime through the introduction of book IV of the Code of Economic Law (“CEL”) in 2013. This allowed the BCA to fine individuals up to EUR 10.000 and also extended the leniency regime to individuals. As a consequence, the leniency guidelines needed to be amended on this point.

The CEL provides that individuals can be prosecuted and convicted when they have been involved in price fixing, output limitation or market sharing. The 2016 Leniency Guidelines clarify that this is only possible when an undertaking or association of undertakings is also prosecuted and convicted for the same conduct. The BCA can thus not prosecute individuals who are not undertakings for stand-alone infringements.

To obtain full immunity from fines, the individual has to:

- Be involved in one or more of the prohibited practices of price fixing, output limitation or market sharing; and
- Contribute to prove the existence of these prohibited practices, including:
 - Providing information which the BCA did not have before; or
 - Acknowledging the existence of a prohibited practice.

Unlike undertakings, individuals can obtain immunity regardless of the chronological ranking of their request. Several individuals can thus receive immunity from the fine, regardless of who contacted the BCA first. Furthermore, the fact that an individual has requested immunity does not stand in the way of the undertaking or association of undertakings obtaining immunity or a reduction of the fine. However, it will arguably be more difficult for an undertaking to fulfil the criteria to obtain immunity if an individual has already provided information which the BCA did not have before.

Lastly, the 2016 Leniency Guidelines introduce an obligation for an undertaking that applied for immunity or leniency to inform the Auditor-General of its intention to dismiss an employee who might have information on the cartel.

Leniency applications made by undertakings or associations of undertakings

(a) Full immunity from fines

The conditions to obtain immunity from fines have remained largely the same as under the 2007 Leniency Notice. A participant in a cartel can obtain full immunity from fines

in two situations (type 1A or type 1B).

Type 1A immunity is available for the first leniency applicant to provide information and evidence that allows the BCA to conduct targeted inspections. Although the 2016 Leniency Guidelines remove the alternative condition for type 1A immunity that the BCA has not yet conducted an inspection, they maintain the requirement that the BCA does not yet have sufficient information to conduct an inspection. This change will thus have limited consequences. Nevertheless, in practice, the threshold to obtain type 1A immunity has increased since 2013 because the BCA now has to obtain a mandate from an investigating judge prior to conducting inspections (in the past a mandate from the president of the Competition Council sufficed). The BCA has experienced that the threshold to obtain such a mandate is quite high and it has therefore stated that it will scrutinise type 1A immunity applications more rigorously to ensure that it has sufficient information to convince the investigating judge.

Type 1B immunity is available for the first leniency applicant to provide information and proof that allows the BCA to find an infringement with regard to the alleged cartel. In this respect, the 2016 Leniency Guidelines bring no changes.

The 2016 Leniency Guidelines now codify the practice according to which an aspiring immunity applicant can ask the Auditor-General if full immunity from fines is still available in relation to a specific cartel. Such a request has to be made by telephone and by a lawyer (not the undertaking itself). The lawyer does not need to reveal the identity of the undertaking he is representing but, if the Auditor-General confirms that full immunity is still available, the undertaking has to make an application for immunity or a request for a marker immediately.

Lastly, according to the 2016 Leniency Guidelines, there is no possibility to withdraw an immunity application if immunity is not subsequently granted by the BCA. The immunity application will then automatically be downgraded to an application for a reduction of the fine.

(b) Reduction of fines

The 2007 Leniency Notice offered the BCA the possibility to grant a reduction of the fine (also known as type 2 immunity) for undertakings that provide evidence of significant added value. The first undertaking to provide such evidence received a reduction between 30% and 50%. Subsequent undertakings received a reduction between 10% and 30%.

The 2016 Leniency Guidelines now set forth new ranges of fine reductions: between 30% and 50% for the first undertaking, between 20% and 40% for the second undertaking and between 10% and 30% for any subsequent undertakings. Unlike the more rigid approach in the European Commission's Leniency Notice, the new Belgian fine ranges are overlapping. This allows the BCA to reward undertakings that submit information with more significant added value, but submit that information at a later point in time.

Lastly, the 2016 Leniency Guidelines now specifically mention that a marker can be requested for a reduction of the fine.

Procedure

Under the 2007 Leniency Notice, the Auditor-General appointed an Auditor who was in charge of the leniency application. This function of Leniency Officer has now been abolished. All leniency applications will be centralised with the Auditor-General, who will have a full overview of all leniency applications and requests for markers.

An undertaking wishing to make a leniency application has to ask for an appointment with the Auditor-General. The leniency application is deemed to have been made at the time of the meeting. In case there are numerous requests for a meeting, the meetings will be granted in chronological order based on to the timing of the request. This new regime aims to provide more clarity with regard to the timing of leniency submissions.

Press releases after inspections

In order to remedy the information asymmetry between undertakings that have been subjected to a dawn raid and undertakings that have not, the BCA will in the future issue a press release at the latest at the end of the inspections. This is to avoid that inspected undertakings (usually the largest undertakings in a specific sector) would be in an advantageous position compared to non-inspected undertakings (usually smaller players), because the former would become aware of the investigation because of the dawn raid and would therefore be more likely to apply for leniency. Now, the publication of a press release should allow non-inspected undertakings to be aware of the raids and to make a more timely decision on whether or not to apply for leniency. The 2016 Leniency Guidelines furthermore clarify that if an undertaking wishes to apply for leniency while inspections are on-going at its premises, the BCA will only grant a meeting for the application after the end of the inspections.

Note that the Belgian approach to issue a press release after inspections is in line with the approach taken by the French Competition Authority but differs from the approach taken by the Dutch Authority for Consumers and Markets and the European Commission which do not systematically publish press releases: they will only confirm that inspections have been conducted if this information has become public through other means.

Conclusion

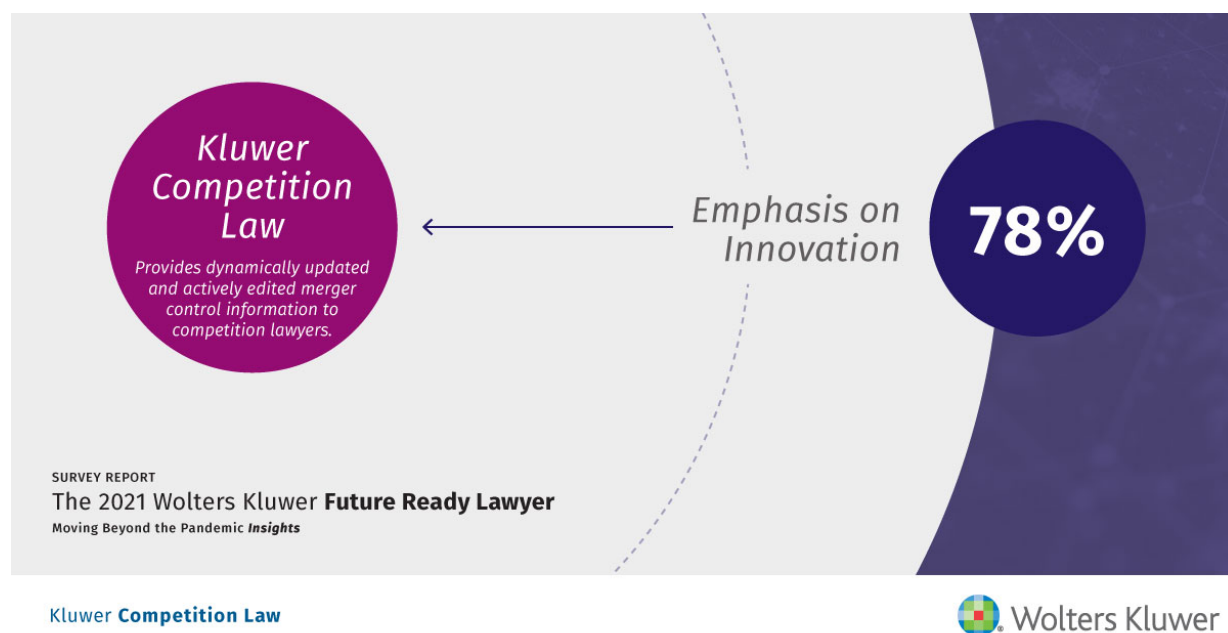
The 2016 Leniency Guidelines are a welcome clarification of the BCA's leniency regime in light of the possibility introduced in 2013 that employees apply for immunity in cartel cases. In most cases, it can be expected that the interests of an undertaking and its employees will be aligned and that they will jointly apply (or not apply) for immunity or leniency. However, for former employees involved in cartel activities, especially those that may have left with a grudge against their previous employer, the new leniency regime may change incentives sufficiently to go to the BCA and cooperate. This becomes all the more likely as former employees will become increasingly aware of investigations because of the press releases the BCA will issue after dawn raids.

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