

Commission issues practical guidance for cartel confessions

December 9, 2013

The European Commission has issued practical guidance for leniency applicants on how to deliver oral corporate statements. These are often preferable to written corporate statements, as they reduce the risk of disclosure in subsequent civil damages claims by cartel victims. After choosing the leniency path, it is wise to opt for oral confessions where possible.

The [practical guidance](#) specifies that an oral corporate statement should be “clear, factual and to the point, with precise and sufficiently detailed information” of the alleged cartel activity. It should not include any product and market descriptions, general market information and publicly available information, which should be submitted in writing instead. The oral statement must be recorded, and the leniency applicant has to check the accuracy of the recording as well as the Commission’s transcript “within a given time limit”, upon the risk of losing any beneficial treatment under the [Commission’s leniency notice](#).

The practical guidance may soon be obsolete as far as the EU is concerned due to its proposed absolute ban on disclosure of oral and written leniency statements in the Commission’s [draft Directive](#) on antitrust damages. With a disclosure ban on all statements, the need for oral statements may slowly fade away. The question is, however, whether this outright ban will make it through. The European Parliament’s Committee on Economic and Monetary Affairs [finds](#) the per se protection of leniency statements contrary to EU [case law](#) according to which it is up to the national courts to determine, on a case-by-case basis and in accordance with national law, whether the interests of disclosure of information outweigh the interests of protection of information voluntarily provided by the leniency applicant. The Committee recommends amending the draft Directive to enable national courts to disclose leniency statements if claimants have plausibly suffered harm as a result of the infringement, and the leniency statement is indispensable to supporting their claim and contains evidence that cannot be otherwise provided.

The leniency path may thus be winding: even though it will provide cartel participants with the benefit of no or reduced fines, the leniency statements themselves may increase the risk of having to pay damages claims. Competition Commissioner Almunia recently [underlined](#) that there can be no trade-off between public and private enforcement of competition law: competition authorities should not compensate companies with reduced fines only because they have “voluntarily” paid damages to some of their cartel victims.
