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Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Note by France

13 June 2023

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. News of the French leniency programme

1. The purpose of this note is to describe recent developments in the leniency programme of the *Autorité de la concurrence* (hereinafter "the *Autorité*") (1), and identify the issues at stake in the interaction between the leniency programme and the other mechanisms applicable to the enforcement of competition rules (2).
2. The French leniency programme was introduced by Law 2011-420 of 15 May 2001 on new economic regulations.
3. The IV of Article L.464-2 of the French Commercial Code (Code de commerce), which presents the principles and outlines of the leniency procedure, provides that "*a full or partial exemption from financial penalties may be granted to an undertaking or association of undertakings which has, with others, implemented a practice prohibited by the provisions of Article L. 420-1 if it helps establish the reality of the prohibited practice and identify its authors, by providing information not previously available to the Autorité or the administration. [...]*"
4. A decree of 10 May 2021¹ and a procedural notice from the *Autorité* specify the scope of the programme and the procedure followed for registering and processing leniency applications.
5. The *Autorité* has received nearly 170 leniency applications since the introduction of the leniency programme in 2001. While the annual number of applications has fluctuated, there has recently been a slight upward trend (see diagram *below*).

Table 1.

	2016	2017	2018	2019	2020	2021	2022
Leniency applications	7	1	6	2	1	3	3
<i>(summary applications submitted to the ECN)</i>	8	5	0	3	1	1	2

6. The implementation of horizontal agreements is becoming increasingly sophisticated with the rise of the digital economy. The importance of the leniency applicant's declarations and their level of precision is growing in parallel. The onus is on the applicant to guide the competition authority towards the discovery of cartel evidence, which requires a great deal of preparatory work on the part of the applicant.

7. The leniency programme is an essential tool in France. French taxpayers have benefited from the payment to the Public treasury of over 2 billion euros in fines imposed under the French leniency programme over the last decade. Between 2013 and 2022, almost

¹ Decree 2021-568 of 10 May 2021 on the procedure for full or partial exemption from financial penalties provided for in IV of Article L. 464-2 of the French Commercial Code (Code de commerce).

30 % of the total number of sanctions handed down by the *Autorité* in litigation cases were based on this programme.

2. Revision of the French leniency procedure

2.1. The origins of the revision

8. The *Autorité* regularly consults the market stakeholders on the implementation of its leniency procedure. This is an opportunity for companies and their advisors to express their views and suggest possible changes to the procedure applied by the *Autorité*.

9. In this context, the market stakeholders complained that the procedure was "cumbersome" and "took too long". Unlike most other systems in the European Union, the French programme was unique in that it involved the adoption of an opinion by the Board, on the proposal of the *Autorité's* Investigation Service, granting an exemption under the leniency procedure, before the opening of proceedings on the merits. This leniency notice was subject to strict formalities, with minimum procedural deadlines to be met. Depending on the complexity of the case, the investigation and then the adoption of a leniency notice could take several months. During this period, the leniency applicant was therefore left uncertain about whether their application would be accepted or rejected.

10. The leniency notice was abolished by Law 2020-1508 of 3 December 2020². The aforementioned Decree of 10 May 2021 and Ordinance 2021-649 of 26 May 2021 transposing Directive 2019/1 of 11 December 2018 then provided further details on the implementation of this procedure without notice, and introduced into domestic law the changes required by the "ECN +" Directive.

11. To date, a first decision has been adopted under the revised procedure³, and the processing time has been the shortest in the *Autorité's* entire leniency decision-making practice, thereby attesting to the effectiveness of the reform.

2.2. Changes to the exemption conditions

12. The practices covered by the French leniency programme are, in principle, agreements between companies to fix prices and production or sales quotas, and to share markets, including during invitations to tender, or any other similar anticompetitive behaviour between competitors, and in particular the concerted practices implemented through stakeholders in a vertical relationship with the authors of the practice ("hub and spoke"). All these infringements fall within the scope of Article L. 420-1 of the French Commercial Code (Code de commerce) and, where applicable, Article 101 of the Treaty on the Functioning of the European Union.

13. Leniency applicants must provide the *Autorité* with a corporate statement containing all the relevant details known to them, as well as evidence or clues relating to the cartel – in particular contemporaneous evidence of the reported practices.

14. The aforementioned Decree of 10 May 2021 has somewhat modified the eligibility conditions for applications for full immunity. Previously, this was the only case where, at

² Law 2020-1508 of 3 December 2020 containing various provisions for adapting to European Union law on economic and financial matters.

³ Decision 23-D-04 of 12 April 2023 regarding practices implemented in the sector of the sale of subscriptions to business intelligence and corporate information products.

the time the request was received, neither of the two French competition authorities (*Autorité de la concurrence* and DGCCRF) yet had in their possession information which they considered sufficient for carrying out a dawn raid. Now, there are also cases where no such raids have been carried out, nor have raids been carried out in the context of criminal proceedings relating to the practice in question.

15. In such cases, the *Autorité* grants full immunity from financial penalties to the undertaking that first provides it with information on the existence of a practice, enabling it to carry out a dawn raid, or enabling a criminal raid.

2.3. Changes to the *Autorité's* approach

16. The Decree of 10 May 2021 extended the range of ways in which leniency applications can be submitted.

17. Until then, a leniency application could be submitted either by registered letter with acknowledgement of receipt (hereafter "LRAR") or orally, at the *Autorité's* premises. It is now possible to apply for leniency using a secure electronic form available on the *Autorité's* website⁴. For potential applicants, this represents an evolution which, although material, is no less significant.

18. The *Autorité* is therefore particularly careful, in the event of multiple applications, to ensure that the date of each application and its place in the order of arrival are secure.

19. The order of arrival of an application is determined essentially by the date and time at which the application, by registered letter, telephone or electronic means, is received by the *Autorité*, as acknowledged by the latter. The date of the application is linked to the time at which the required information and evidence are submitted to the *Autorité*.

20. In this respect, the notion of a "marker" application – a term expressly included in the ECN + directive, but not reproduced as such in the French Commercial Code (Code de commerce) – is key. If an undertaking submits a marker application with its leniency application, and if it submits the required information within the allotted timeframe, the information is "deemed to have been submitted on the date of receipt of the [marker] application"⁵. Otherwise, in the – very exceptional – case where the undertaking has not submitted a marker application, the arrival rank of its leniency application will be affected, as it will be marked at the time when all the information required to meet the required standard has effectively been transmitted to the *Autorité*. This is why, wherever possible, the *Autorité* seeks to draw the attention of leniency applicants to the benefit of applying for a marker, for example by expressly mentioning this on the secure electronic leniency application form.

21. In principle, the leniency declaration and evidence are collected on the *Autorité's* premises, or via a secure document exchange platform. The report recording the submission of this declaration and this information is an opportunity to remind the applicant of the conditions of its cooperation with the *Autorité*.

2.4. Changes to the leniency application investigation

22. In place of a leniency opinion by the Board, the new text provides that, if the General Rapporteur considers that the conditions for benefiting from the leniency

⁴ Article R. 464-5, paragraph 1 of the French Commercial Code (Code de commerce).

⁵ Article R. 464-5-3.-I of the French Commercial Code (Code de commerce)

programme have been met, they will inform the undertaking in writing of its eligibility for a full or partial exemption from the financial penalties incurred, and remind it of the conditions of its cooperation⁶. Fine reduction bands are allocated according to the rank of the application, as set out in the Procedural Notice.

23. If the General Rapporteur considers that the standard has not been met, or that there is no reason to open an investigation or formulate a proposal to start proceedings ex officio, or that the facts revealed are clearly time-barred, they inform the undertaking concerned in writing.

24. At the end of the procedure, if during the examination of the case on the merits the Board considers that the applicant has fulfilled its obligations to cooperate in order to benefit from the leniency programme, it grants the applicant a full or partial exemption of the financial penalties. To determine the actual level of partial exemption from financial penalties to which the undertaking is entitled within the range predefined by the Procedural notice, the Board takes into account the rank of the application, the time at which it was submitted, and the degree of significant added value provided by the evidence supplied by the undertaking.

3. Interaction between the leniency programme and other mechanisms of competition rules enforcement

3.1. Interaction between the leniency programme and the whistleblower mechanism

25. The Law of 21 March 2022⁷ strengthened the protection of whistleblowers in France.

26. Under the terms of its Article 1, which amends those of Article 6 of the Law of 9 December 2016⁸, a whistleblower is recognised as "an individual who reports or discloses, without direct financial consideration and in good faith, information concerning a crime, an offence, a threat or harm to the general interest, a violation or attempted concealment of a violation of international or European Union law, the law or regulations".

27. The law now states that whistleblowers can choose between internal and external reporting to the competent authority, the Défenseur des droits, the courts or a European body. Under a decree dated 3 October 2022⁹, the *Autorité* was designated as the body competent to receive alerts concerning anticompetitive practices, particularly in the fields of public procurement, and State aid.

28. To encourage whistle-blowing and make it more secure, the law strengthens the confidentiality guarantees that apply to whistleblowing and adds to the – non-exhaustive – list of prohibited retaliation measures (intimidation, damage to reputation, particularly on social networks, improper referral for care, blacklisting, etc.).

⁶ Article L. 464-2, IV of the French Commercial Code (Code de commerce).

⁷ Law 2022-401 of 21 March 2022 to improve the protection of whistle-blowers.

⁸ Law 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.

⁹ Decree 2022-1284 of 3 October 2022 on procedures for collecting and processing whistleblower alerts and establishing the list of external authorities set up by Law 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.

29. In addition, whistleblowers are no longer liable for their actions. If the whistleblower's report meets all the conditions laid down by law, they cannot be held civilly liable for any damage caused by their reporting in good faith¹⁰, nor criminally liable for having infringed a secret protected by law, or for having removed, misappropriated or concealed "the documents or any other medium containing the information of which they have lawfully become aware"¹¹.

30. The whistleblower mechanism serves a dual purpose for the *Autorité*. The majority of recent leniency applications have originated from an internal tip-off regarding a cartel that an employee had reported to their company's management. In addition, as a point of contact for whistleblowers, the *Autorité* can receive cartel-related clues directly. This is an additional means of detection that can increase the pressure on the perpetrators of these practices and encourage more of them to reveal their existence.

3.2. Interaction between the leniency programme and the settlement procedure

31. Some leniency applicants try to increase their partial financial penalty reduction by offering to settle.

32. In certain circumstances, the *Autorité* allows the same undertaking or association of undertakings to benefit from both the settlement procedure and the leniency procedure. The appropriateness of such a combination is examined by the General Rapporteur on a case-by-case basis, taking into account the procedural context of the case and the procedural gains that would result from this combined implementation.

33. In any event, the reduction in penalties that may be granted under the settlement procedure – either in the event of a combination of the two procedures or as a general rule – must remain lower than that likely to be granted, under the leniency programme, to applicants eligible for only a partial exemption from penalties. The two types of procedure do not have the same objective: a leniency application involves recognising the implementation of a prohibited practice, identified in concrete terms from the point of view of the products or services concerned, its geographical scope, its participants, its duration and its operating methods, to the full extent of the interested party's knowledge. This involves a greater investment than under the settlement procedure, which only involves not contesting the reality of the notified objections. As a result, it is essential that the incentive for undertakings to choose leniency in the first instance is preserved, and that the relationship between the two procedures, in cartel cases where both may be implemented, is coherent.

3.3. The relationship between the leniency programme and actions for damages

34. There have been frequent debates at European level recently regarding the impact of damage actions on the effectiveness of leniency programmes, as a potential leniency applicant may be deterred from filing such an application for fear of follow-on civil actions.

35. The need to protect the effectiveness of leniency programmes against these risks was behind the European Directive of 26 November 2014¹², known as the "Damages

¹⁰ Article 10-1.-I. of the amended Law of 9 December 2016.

¹¹ Article 122-9 of the French Penal Code (Code pénal).

¹² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

Directive", transposed into French law by an Ordinance of 9 March 2017¹³, which provides special protection for an undertaking that has obtained a full exemption from financial penalties, in follow-on actions following a decision by the *Autorité de la concurrence*. This protection covers two aspects in particular.

36. Firstly, this text introduces provisions into the French Commercial Code (Code de commerce) concerning the protection of leniency declarations, insofar as they involve self-incrimination on the part of the undertaking. As explained in the circular of 23 March 2017 presenting the provisions of the aforementioned ordinance, Article 483-5 of the French Commercial Code (Code de commerce) has established a blacklist of "*documents in the file of a competition authority that may never be communicated or produced in the course of legal proceedings aimed at compensating for damage caused by an anticompetitive practice*", which include documents drawn up for the purposes of a leniency application - as well as those drawn up in the course of a settlement procedure.

37. Secondly, this text limits the extent of the joint and several liability of an undertaking that was granted full immunity from financial penalties. This means that the victims of the anticompetitive practices in question, other than its direct or indirect co-contractors, can only claim full compensation from it after having first unsuccessfully sued the other co-debtors, who are jointly and severally liable for compensation.

3.4. The relationship between the leniency programme and criminal sanctions for individuals

38. The ECN+ Directive limits the criminal risk for leniency applicants. It introduced an innovation into French law, in that "*persons who have played a personal and decisive role in the conception, organisation or implementation*" of anticompetitive practices, and who as such would be liable for the fines or imprisonment provided for in Article L. 420-6 of the French Commercial Code (Code de commerce), are exempt from these criminal penalties if the undertaking to which they belong has obtained full immunity from financial penalties from the *Autorité*, and if they themselves have actively cooperated with both the *Autorité* and the public prosecutor¹⁴.

¹³ Ordinance 2017-303 of 9 March 2017 relating to actions for damages as a result of anticompetitive practices.

¹⁴ Article L. 420-6-1 of the French Commercial Code (Code de commerce).