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Leniency program under french law: Conditions and procedure

On March 2, 2009, the Competition Authority (formerly the Competition Council) issued a procedural notice regarding leniency program “à la française”, which is governed by Articles L.464-2 IV and R.464-5 of the French Commercial Code.

Pursuant to Article L.464-2 IV, “immunity from any fine or a reduction of fines may be granted to a company or a body which has, with others, implemented a practice prohibited by the provisions of Article L.420-1 (Article 81 of the EC Treaty), if it has contributed to establish the existence and reality of the prohibited practice and to identify its perpetrators by providing information that the Authority or the Administration did not have beforehand (...)”.

Introduced by the Law on New Economic Regulations (“NER”) dated May 15, 2001, the leniency program has been periodically improved, taking inspiration from, in particular, all the work of the European Competition Network (“ECN”). After all its efforts, on September 29, 2006, the ECN issued a leniency “model program”, which the competition authorities in member states belonging to the ECN undertook to implement to harmonize their respective policies and thereby render this program attractive to companies.

The French leniency program, which conforms with that of the ECN model, provides a permanent framework in which companies, parties to cartels and concerted practices prohibited by Article L.420-1 of the French Commercial Code, are rewarded for their cooperation. Specifically, cartels between companies consisting of, in particular, price fixing, production or sale quotas and the sharing of markets, including during invitations to bid, or any other similar anti-competitive behavior between competitors, are considered prohibited agreements or practices.

To date, the Competition Authority has rendered only four decisions on leniency cases^[1] but, the unanimous opinion is that the cases brought before them will increase within the next few years.

As the immunity or fine reduction is proportionate to the company’s contribution to proving the case, the

eligibility conditions for immunity from or reduction of fines varies depending on the quantity and quality of the information that the “repentant” company may provide to the Authority on the alleged cartel. Please see the following table for details on the conditions of eligibility and substantive conditions that the company must meet to make a plea for leniency (I). Further, the plea for leniency is subject to a strict procedure before the Competition Authority (II).

I- Conditions of eligibility and substantive conditions

Immunity (Type 1 full immunity)

Reduction of fines (Type 2 partial immunity)

CONDITIONS OF ELIGIBILITY

• Case in which the Competition Authority does not have any information on the alleged cartel ("type 1-A immunity"):

The first company to provide the Authority with the information and evidence of the existence of a cartel will benefit from complete immunity provided that:

- the Authority did not have sufficient information or evidence beforehand to be able to carry out targeted inspections

- the information and evidence provided justify such investigative measures to be carried out.

To meet this condition, the company must at a minimum provide the following information:

- name and address of the legal entity applying for full immunity,
- name and address of the other members of the alleged cartel,
- detailed description of the alleged cartel: nature and use of the products in question, territories concerned by these practices, and nature and duration of the practices,
- information relating to this cartel that the company has sent or will send to other competition authorities, any documents in its possession that can identify the locations, dates, and purpose of the contacts or meetings between the cartel members.

Case in which the Competition Authority already has information on the alleged cartel ("type 1-B immunity"):

The company may benefit from a complete immunity if all three of the following conditions have been met:

- the company is the first to provide sufficient evidence to demonstrate a breach of Article L.420-1 of the French Commercial Code and/or Article 81 of the EC Treaty,
- at the time of the application for leniency, the Authority did not have sufficient information to prove a cartel exists within the meaning of Articles L.420-1 of the French Commercial Code and/or Article 81 of the EC Treaty,
- no other company has obtained complete type 1-A immunity for the alleged cartel.

Companies that have not fulfilled the conditions for type 1-A or 1-B immunity may still request to benefit from a reduction of fines (up to a maximum of 50% of the fines incurred) provided that:

- the company in question provides evidence that the alleged cartel exists, which represents significant added value (by its very nature and/or its level of detail) with respect to the evidence already in the Authority's possession. For example, the following are considered to have "significant added value":

- written evidence contemporaneous with the alleged cartel (that has greater value than prior evidence)
- evidence showing a direct link and relevance with the facts in question
- compelling evidence.

To grant partial immunity, the Authority will also take into account when the application for leniency is made and the extent of the significant added value of the information provided.

In addition to conditions of eligibility, substantive and cumulative conditions must be met for either full immunity f or partial immunity from fines:

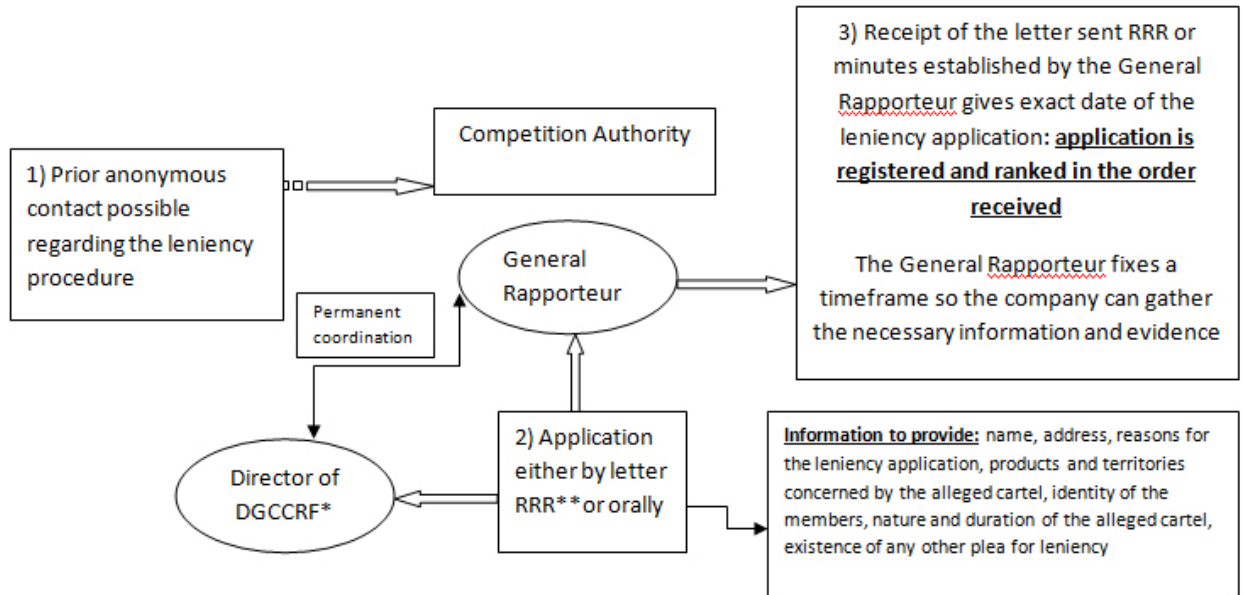
SUBSTANTIVE CONDITIONS

- the company must, immediately and no later than from the notification of the Competition Authority's leniency opinion, put an end to its membership/involvement with the alleged cartel (the date may be pushed back to safeguard the efficiency of the investigation measures)
- the company's cooperation with the Authority must be real, total, permanent and prompt, on a continuous basis, throughout the entire investigation and examination procedures, and therefore, the company must:
 - provide without delay all information and evidence that would come into the applicant's possession
 - be available to respond promptly to any request of the Authority;
 - make available, insofar possible, its legal (current and former) representatives and employees for interrogation by the Authority;
 - not destroy, falsify or conceal any relevant information or evidence;
 - not disclose the existence or contents of its leniency application (prior to the notification by the Authority of its statement of objections)
- the company must not have destroyed or falsified evidence prior to filing the leniency application.

2. Procedure

a) Initiating the procedure

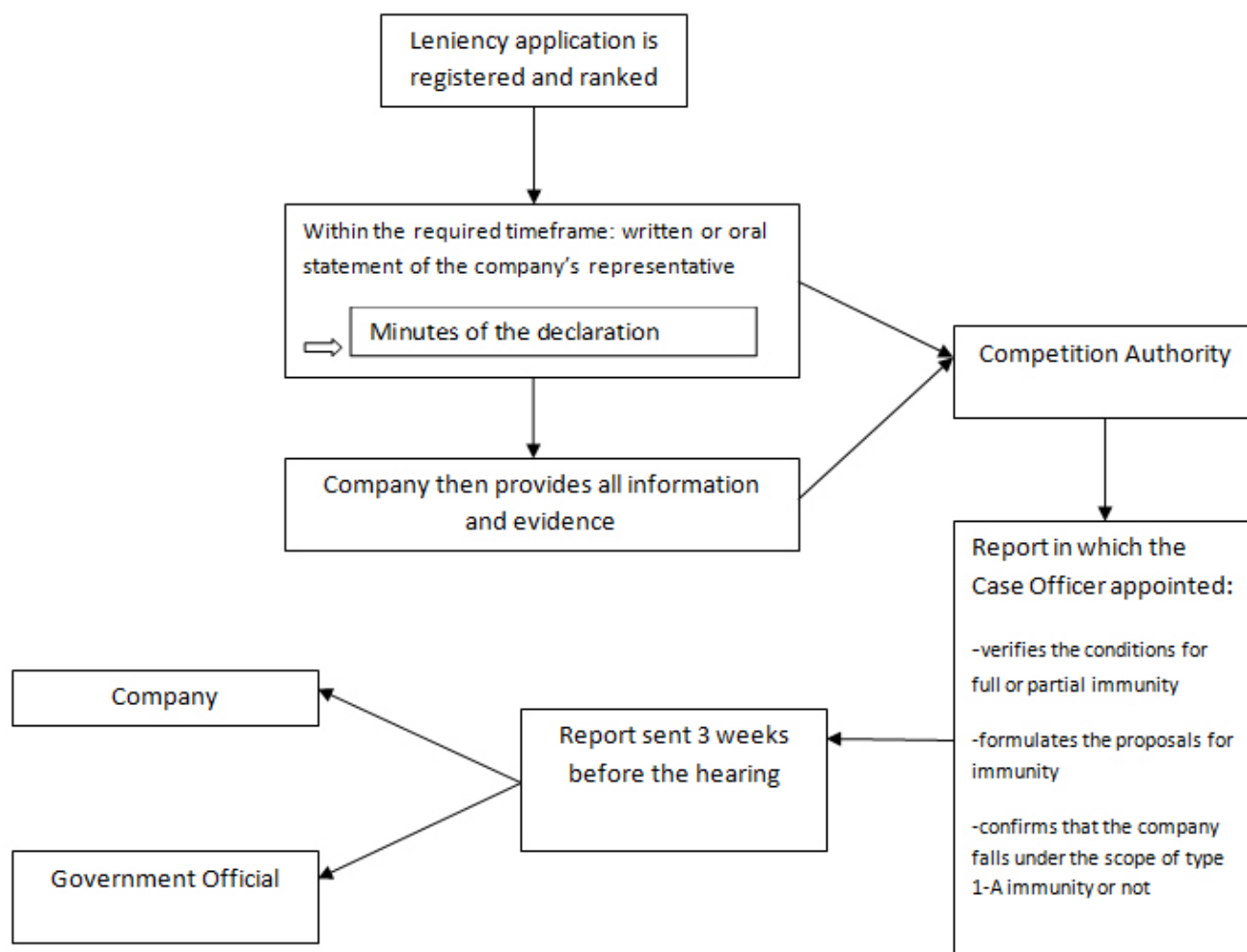
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* French General Directorate for Competition Policy, Consumer Affairs and Fraud Control

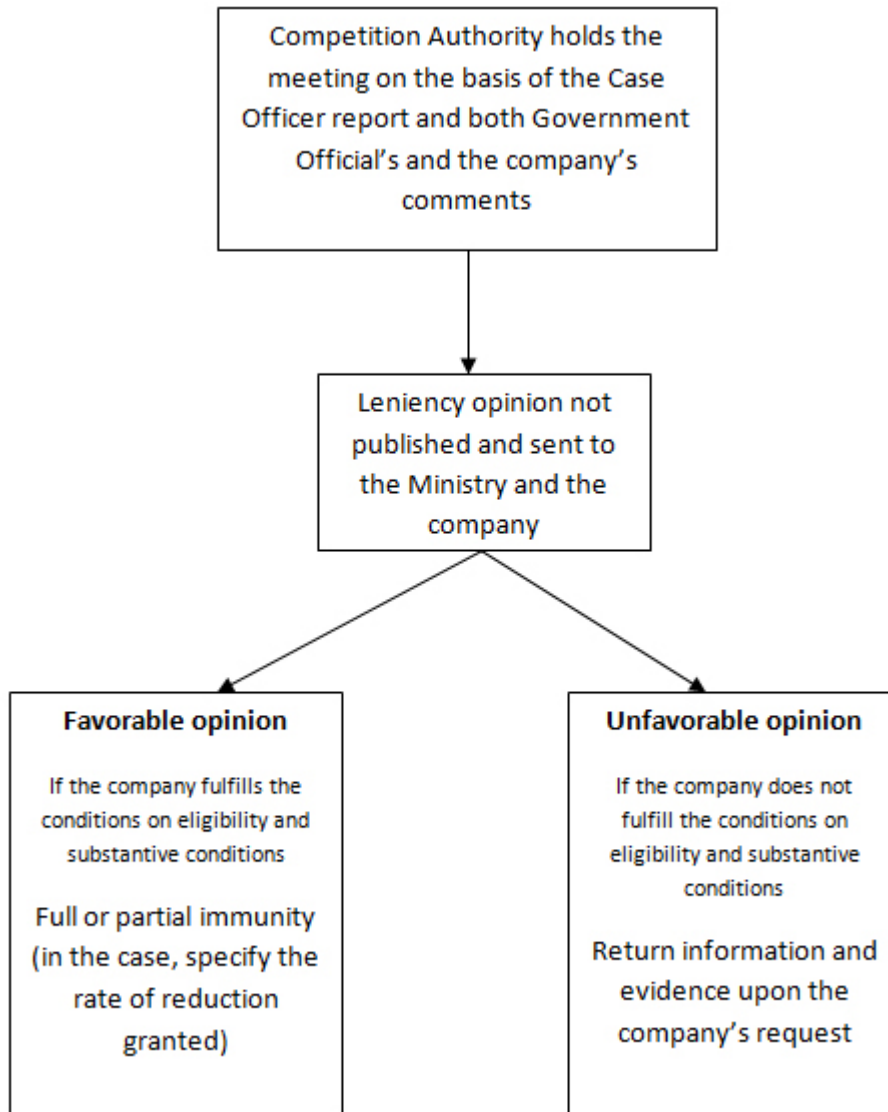
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b) Examination of the leniency application



c) Leniency opinion

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3. A few comments on the consequences of the leniency procedure on parallel civil / criminal law procedures

- Immunity (even full) from fines granted by the Competition Authority does not protect the company receiving this leniency from any civil law consequences that may result from its participation in a cartel: a third party that considers itself a victim of the cartel or the illegal concerted practice in which the “repentant” company took part can always initiate legal proceedings against it claiming for damages for the harm suffered. The company cannot hide behind the immunity granted to escape from civil proceedings and damage awards.
- Faced with an illegal or allegedly illegal cartel, the Competition Authority may pass the case file on to the French State Prosecutor if it considers that the facts are likely to prove a criminal breach within the

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meaning of Article L.420-6 of the French Commercial Code.

Pursuant to the aforementioned Article L.420-6, *“an individual who fraudulently and personally played a decisive role in the conception, organization or implementation of the practices set forth in Articles L.420-1 [illegal cartels] and L.420-2 [abuse of a dominant position], shall be punished with four years’ imprisonment and a fine of 75,000 Euros”*.

There is a significant advantage to leniency: for individuals belonging to a company that received full or partial immunity from fines, leniency is one of the legitimate motives not to seek criminal prosecution against them under Article L.420-6.

[1] Decision 06-D-09 dated April 11, 2006 on practices implemented in the sector of door manufacturing, Decision 07-D-48 dated December 18, 2007 on practices implemented in the sector of national and international moves, Decision n°08-D-12 dated May 21, 2008 on practices implemented in the sector of plywood production, Decision n°08-D-32 dated December 1, 2008 on practices implemented in the sector in the iron and steel trade.

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