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BACKGROUND

1. What is the relevant legislation concerning the leniency policy and what is the enforcing body?

The principal piece of legislation setting out the basic rules on leniency is the Bulgarian Protection of Competition Act (State Gazette, Issue 102 of 2008, as amended) (the Competition Act). The Competition Act contains the basic tenets of leniency, and delegates the adoption of detailed rules to the Bulgarian antitrust authority. The local competition law enforcing body is the Commission for the Protection of Competition (the Commission), an independent body, elected by the Parliament, consisting of seven members, which is supported by an administration of slightly more than 100 civil servants and other staff.

In March 2011, the Commission adopted its latest programme on immunity from fines or reduction of fines where an undertaking reveals its participation in a “secret” cartel (the Leniency Programme). The application of the Leniency Programme is regulated by the rules adopted by the Commission (the Rules) which are available on the Commission’s website at www.cpc.bg. The Leniency Programme repealed the previous one (dating from 2009).

2. What are the basic tenets of a leniency/immunity programme? Is leniency available also for competition law violations other than cartels?

Under the Leniency Programme and the Competition Act, leniency is available only in cases of a “secret” cartel.

A “cartel” is defined as an agreement or concerted practice among two or more undertakings – competitors in the same relevant product market – aimed at restricting competition by fixing prices or pricing conditions for purchase or sale, sharing of production quotas or sales or sharing of markets, including rigging of public bids or public procurement procedures.

Neither the Competition Act, nor the Leniency Programme provide information on when a cartel would be considered secret. This distinction may ultimately be irrelevant, since the Competition Act and the Leniency Programme allow cartels members to apply for leniency even where the cartel is already known to the Commission, but the applicant provides decisive evidence in support of the authority’s cartel investigation.

The main tenets of the Leniency Programme are the ability of the participant in a cartel to obtain full immunity from sanctions, if it is the first to provide important evidence which allows the Commission to prove the infringement, or at least to obtain a court order to conduct a dawn raid in respect of the infringement, as well as the ability of each subsequent participant, which submits evidence adding significant value to the Commission’s case, to obtain a reduction of the sanctions for the infringement which will be imposed upon it. In addition, the applicant must fully co-operate with the Commission during the investigation to obtain full or partial immunity.

Leniency is not available for other antitrust violations that are different from cartels (such as vertical agreements or abuses of a dominant position).

3. Is there an “immunity plus” or “amnesty plus” option? If not, in practice, can a leniency applicant receive a reduction of its fine for its participation in a first cartel if it reports its participation in a second, unrelated cartel?

The Leniency Programme provides for an “immunity plus” option where there are at least two cartels in which the leniency applicant – who has already submitted an application for partial immunity – is involved and during the proceedings in respect of the cartel in relation to which it applies for partial immunity, the leniency applicant provides information regarding its participation in the second cartel. In this case, such leniency applicant may be granted a reduction of fines of up to 10% in respect of its participation in the first cartel. If participation in further cartel(s) is disclosed, for each of them a reduction of up to 10% in the sanctions as regards the first cartel can be obtained, but in total not more than 30% (which is, as the case may be, added to the fine reduction obtained for being a second leniency applicant, that is, between 30 and 50%, or a subsequent leniency applicant, that is, between 10 and 30%). As a result, for example, a second leniency applicant can benefit from a fine reduction of up to 80% in the event that it discloses three cartels separate from the first cartel in relation to which it applied for leniency.

4. How many cartel decisions involving leniency applications have been rendered since 1 January 2013? How many companies have received full immunity from fines during that period?

At the time of writing no cartel decisions involving leniency applications have been rendered since 1 January 2013.

5. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient (can an applicant be awarded leniency by providing the enforcing body with testimonial evidence only)? How are “useful contributions” or “added value” defined? Is there any sanction for misleading or incorrect leniency applications?

Normally the leniency application should be in writing. As an exception to that rule, the Commission will accept an oral application, subject to the applicant giving sufficient reasons for its request not to submit an application in writing. An oral application will still need to be accompanied by a full set of evidence, unless a marker is given and a period during which the application should be supplemented with evidence.

The Rules do not prescribe the form of evidence – written or oral, for most of the facts that need to be disclosed. However they do declare that written evidence will be considered as having higher value in assessing the contribution to the Commission’s case. Therefore one can infer that testimonial evidence can be provided as well, but it is not possible based on the Rules to state whether it will be sufficient alone or not, since the Rules require the applicant to submit all evidence in its possession or control concerning the organisation and the functioning of the cartel.

Even in the case of an oral application, a written document will be prepared in the form of a protocol of the oral submission. The Rules require such protocol to be signed both by the Commission officers making the record and also by a person duly authorised to represent the applicant.

The assessment of whether particular evidence has “significant contribution to proving the offence” is to be made by the Commission, in accordance with the Leniency Programme. This assessment should be made having regard to the evidence collected to date, and the degree to which it facilitates the Commission in proving the infringement, considering its type,

nature, quality, level of detail and time of submission. According to the Rules the assessment is to be made on the basis of the following principles:

- Written evidence originating from the period to which the facts that they establish relate has greater value than evidence created subsequently.
- Direct evidence has greater value than circumstantial evidence.
- The degree to which information is corroborated by other sources will have an impact on the assessment of its significance.
- The level of detail that the evidence provides and the extent to which the evidence corroborates other established facts will also be taken into account.
- There is no specific sanction relating to the provision of misleading or incorrect information in leniency applications. A general rule provides that the provision of incorrect or misleading information may lead to a sanction of up to 1% of annual turnover for the infringing undertaking.

PROCEDURE

6. What are the practical steps required to apply for leniency? Is it possible to have an initial anonymous contact with the enforcing body before actually applying for leniency or do parties have to give full disclosure of their identity at any time?

A leniency application must contain full disclosure of the details of the cartel. This includes:

- The name, address and data on the registration of the applicant.
- The name, address and data on the registration, if known, of the other undertakings involved in the alleged cartel.
- Detailed description of the alleged cartel, including: (i) the affected products and/ or services; (ii) the affected territory(ies); (iii) the nature of the alleged cartel conduct; (iv) the way of functioning of the alleged cartel; and (v) the cartel duration.
- Information on any other past or possible future applications submitted to any other competition authority (within or outside the EU) in relation to the alleged cartel.
- An express admission of participation in the alleged cartel by the applicant.

Initial contact should be made with the officers of the Commission, listed on its website. The Rules allow for first contact on a no-names basis, as well as the giving of informal guidance by the Commission in that respect. Upon filing a leniency application the undertaking is entitled to receive evidence of the date and exact time of submission. A leniency application can also be submitted by e-mail or fax. An application submitted by e-mail must be confirmed by the applicant within five calendar days at the Commission's offices.

Following submission of the application and evidence, and based on its content and its priority, the Chairman of the Commission will grant or refuse to grant full or partial conditional immunity from sanctions. The applicant should be notified in writing of such decision, which cannot be appealed.

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If the Commission's Chairman finds that there are no grounds to grant conditional full immunity, the application will automatically be reviewed and considered as an application for partial immunity, that is, a reduction of the sanctions ranging from 10 to 50%, unless the applicant has specifically objected to such treatment of his application.

Final immunity will be granted with the decision of the Commission at the end of the proceedings. The definitive decision should set out the amount of the sanction from which immunity or reduction is granted. Final immunity/reduction may not be granted, even if conditional immunity was granted, if it is established that the undertaking has coerced other participants into taking part in the cartel or has not fulfilled the other conditions for immunity. Conditional immunity can be withdrawn also before the final decision, on these grounds.

7. Is there a marker system?

7.1 If so, is it available to all leniency applicants to secure their rank or only to the first in line?

7.2 If so, what initial information has to be made available in order to qualify for a marker and what conditions apply to the perfection of a marker? Are there any set deadlines for the perfection of a marker? If deadlines are discretionary, what is the average length of time given by the enforcing body to perfect a marker?

The Rules allow for the setting of the so-called "marker", where, notwithstanding the requirements for completeness of the leniency application, the undertaking will be allowed a period to supplement its submission with evidence and data, while still retaining priority in the order of submission of the applications, provided the information and evidence are submitted within the deadline set by the Commission. In its request to be granted a "marker" the applicant, as a minimum, must submit the application with the minimum data discussed above, without the need to attach at the time of submission, the required supporting evidence. The Commission will then set a deadline within which the application must be supplemented with the missing evidence. If the applicant submits such evidence by such deadline, its application will be considered complete as of the time of its submission, granting it the corresponding priority over subsequent applicants.

A marker application possibility is available to all leniency applicants.

TIMING/BENEFITS

8. What are the benefits of being "first in" to apply for leniency? Is full immunity available for the first applicant?

The Competition Act provides two alternative hypotheses of the "first in" principle.

Firstly, full immunity from sanctions is offered to an undertaking which has provided evidence, on the basis of which the Commission is able to obtain a court order for a dawn raid, provided that, at the time of the application, the Commission was not already in possession of sufficient data to make an application for such court order, and a dawn raid had not

already been performed. In the latter case the undertaking may still be able to obtain full immunity in the second hypothesis below.

Secondly, full immunity from sanctions is offered to an undertaking which was the first to provide evidence allowing the Commission to prove the secret cartel, provided that, at the time of the application, the Commission did not already grant conditional full immunity to another

undertaking in the first hypothesis above, and was not already in possession of sufficient evidence to issue a decision establishing the cartel infringement.

The “first in” leniency applicant can receive full immunity from sanctions in the final decision of the Commission following its investigation, subject to complying with the other conditions of the Leniency Programme. If the input of the applicant is not sufficient to allow full immunity, it can apply for partial immunity on the basis of the content and evidence attached to its original leniency application.

9. What are the consequences of being “second” to apply for leniency? If applicable, what benefits (including the level of fine reduction) can be expected by a leniency applicant in “second position”?

The undertaking that is second can benefit from a reduction of sanctions of between 30 and 50% provided that it has submitted, at its own initiative and before the conclusion of the proceedings before the Commission, evidence that has material significance in proving the cartel infringement. Partial immunity will be granted in the final decision, provided the undertaking has also complied with the other conditions of the Leniency Programme.

In setting the amount of the fines in respect of a leniency applicant, the Commission will not take into account facts relevant to setting the amount of the fines (such as the duration of the infringements), if such facts are proven by “unequivocal” evidence attached to the application. However, no guidance is provided about in which cases the evidence would be considered “unequivocal”.

10. Are subsequent firms given any beneficial treatment? If so, is there a limit to the number of subsequent applicants which may receive such beneficial treatment? If applicable, what benefits (including the level of fine reduction) can be expected by subsequent applicants?

Subsequent undertakings who have submitted, at their own initiative and before the conclusion of the proceedings before the Commission, evidence that has material significance in proving the cartel infringement may receive a reduction of fines (subject to complying with the other requirements of the Leniency Programme) of 20 to 30% for the first subsequent firm, and of 10 to 20% for each subsequent undertaking (with no limit in the number of these subsequent leniency applicants).

PARENTAL LIABILITY

11. Are there any aspects related to parental liability that have played a role in the granting of leniency to applicants and/or their former or current parent companies? Does a former parent company benefit from its former subsidiary’s leniency application for practices implemented by this former subsidiary, which applied for leniency after being divested?

Under Bulgarian administrative law, liability is personal. The Commission has tried, in a few cases, to soften the application of this principle, by regarding several companies as a single undertaking. Nevertheless this has not evolved into the full blown application of the concept of parental liability. For this reason, the concept of parental liability and its correlation with leniency has not been explored or tested in local rules or case law.

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SCOPE/FULL LENIENCY

12. What specific conditions are to be met in order to benefit from leniency or immunity?

12.1 Can ringleaders or coercers receive leniency or full immunity?

12.2 Are there any specifically stated requirements, such as an obligation to “co-operate fully and on an ongoing basis” and what do such requirements entail?

12.3 Does the enforcing body require the leniency applicant to cease participation in the cartel conduct after its application?

To receive full leniency, the applicant must:

- Either be the first to submit evidence, on the basis of which the Commission is able to obtain a court order for a dawn raid, provided that, at the time of the application, the Commission was not already in possession of sufficient data to make an application for such court order and had not already performed a dawn raid.
- Or be the first to provide evidence allowing the Commission to prove the secret cartel, provided that, at the time of the application, the Commission did not already grant conditional immunity to another undertaking and was not already in possession of sufficient evidence to issue a decision establishing the cartel infringement.

The Leniency Programme provides that full immunity from sanctions may be granted to only one undertaking involved in an alleged cartel. In order to benefit from full immunity, the undertaking must also provide full, continuous and expeditious co-operation with the Commission during the entire proceedings, and:

- Must follow the instructions of the Commission with regard to its continued participation in the cartel.
- Must not have been a ringleader, who coerced other participants to join or to continue their participation in the cartel.
- Must not have destroyed or forged evidence relating to the application of the Leniency Programme.
- Must not have disclosed in any way the fact that it is considering or preparing the submission of a leniency application, or its content after it is submitted.
- Must immediately provide to the Commission all information and any evidence relating to the alleged cartel that the undertaking receives in its possession or control.
- Must allow the Commission to take oral statements from all existing and former members of staff or employees of the relevant undertaking as well as current and former managers (including officers and legal representatives).

If the leniency applicant does not comply with any of the above conditions, the Commission will not grant full or partial immunity to such leniency applicant.

13. What guarantees of obtaining the final benefit of a leniency application (immunity or reduction of fine) exist if a leniency applicant co-operates fully with the enforcing body?

13.1 At what stage during the procedure, can a leniency applicant become certain of the benefit he will get from his leniency application (rank in the leniency queue and fine immunity/reduction)?

13.2 What are the possibilities of later leniency applicants moving to a higher position in the leniency queue as a result of the added value they may be able to offer in comparison to earlier leniency applicants? Please provide references to cases where this may have occurred.

Given the conditionality of immunity or a reduced sanction, applicants are advised to make the application as early as possible in the proceedings or before proceedings have been initiated. Later applications should be made only where the applicant is reasonably certain that the evidence it presents would constitute a significant contribution to the Commission's case.

The Competition Act, as well as the Leniency Programme and the Rules, provide for a possibility, but not an obligation on the Commission, to grant full immunity or a reduced sanction. In this respect, while the basic rules are set out in the Competition Act and the Leniency Programme, from a legal perspective the Commission has significant discretion in the assessment of how they are applied. Nonetheless, any failure to abide by the Competition Act or the Leniency Programme should be subject to judicial review within the framework of the appeals process against the Commission's final decision.

Following submission of the application and evidence, and based on its content and its priority, the Chairman of the Commission will grant or refuse to grant full or partial conditional immunity from sanctions. The applicant should be notified in writing of such decision, which cannot be appealed.

A final decision on the granting of full or partial immunity will be made with the decision of the Commission ending the proceedings and ruling on the merits. This decision can be appealed where there is a relevant legal interest.

The Leniency Programme and the Rules generally do not explicitly provide for the possibilities for later leniency applicants to move to a higher position in the leniency queue as a result of the added value they may be able to offer in comparison to earlier leniency applicants. This has also not been explored in practice. In general unless an applicant loses its priority, because of a failure to abide by the rules requiring full co-operation, because it was a ringleader or because its application has not made a significant contribution to the Commission's case, it should be able to keep its position in the leniency queue.

OTHER CONSEQUENCES

14. What effect does leniency granted to a corporate entity have on the entity's employees? Does it protect them from criminal and/or civil liability?

Bulgarian law does not provide for specific criminal liability of individuals participating in a cartel on behalf of undertakings or of undertakings themselves. The Leniency Programme does not lead to a release of individual employees or managers of the applicant from the administrative fines that are provided under the Competition Act for their participation in the commitment of the cartel infringement.

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By eliminating or reducing fines, leniency does, albeit indirectly, reduce the potential liability of such individuals towards the undertaking itself.

15. If individual employees are potentially exposed to administrative or criminal sanctions, is there a separate leniency/whistleblowing system available for individual employees? If so, please explain the system and the interaction between corporate and individual leniency.

At the time of writing there is no separate leniency/whistleblowing system for cartel infringements, available for individuals in Bulgaria, including for employees.

16. Does qualifying for leniency affect the possibility to appeal the decision by which the leniency is granted (are leniency applicants prevented from appealing certain aspects of the decision and if so which ones)?

Leniency applicants (to which leniency has been granted) can appeal the decision in all respects in which they have a legal interest. This may include the finding of an infringement and their participation in it, the amount of the fine, the conditions and the level of reductions granted, their ranking in the leniency queue, an order of the Commission to discontinue certain practices, and so on. They would not generally be capable of appealing the decision insofar as it is beneficial to them. They would also not be capable of appealing the decision insofar as it is beneficial to other respondents, provided that this holding does not affect them negatively.

17. Has there been any landmark case law that has led to a reversal of the leniency originally granted in the decision under appeal?

No.

18. Does the granting of leniency prevent third parties from civil damages or protect the leniency applicant in whole or in part from further private enforcement?

No, leniency does not affect the possibility of parties that have incurred harm as a result of a cartel to bring an action for damages.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

19. Is confidentiality afforded to the leniency applicant and other co-operating parties? If so, to what extent?

19.1 Is the identity of the leniency applicant/other co-operating parties disclosed during the investigation or only in the final decision?

19.2 Is information provided by the leniency applicant/other co-operating parties passed on to other undertakings under investigation?

19.3 Can a leniency applicant/other co-operating party request anonymity or confidentiality of information provided, such as business secrets?

All information and evidence related to the application of the Leniency Programme, as well as the contents of any interviews

held in this regard with the applicant/s are covered by the professional secrecy obligations of the officers of the Commission.

The information about the applicant's identity and its application, where it is to be used to request a court order authorising a dawn raid, are to be submitted separately as a legally protected secret to the court.

During the investigation, information provided by the leniency applicant should not be passed on to other undertakings under investigation. A leniency applicant can request confidentiality of the information provided.

In the final decision, information and evidence provided by the applicant should be disclosed, unless confidentiality has specifically been requested and granted by the Commission. It is questionable whether, if full or partial immunity is granted, this, in itself, would be considered confidential and so would not be revealed in the final decision.

20. Is leniency in any way affected by any bi-lateral/multi-lateral co-operation to which your jurisdiction is a party?

Apart from co-operation within the European Competition Network, leniency is not affected by bi-lateral/multi-lateral co-operation to which Bulgaria is a party.

21. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities? If so, how?

The Leniency Programme expressly provides that the data and evidence provided to the Commission by leniency applicants can be shared within the European Competition Network (the ECN), subject to compliance with the guarantees laid down in paragraphs 40 and 41 of the European Commission Notice on co-operation within the Network of Competition Authorities (the ECN Notice).

22. To what extent can information submitted by the leniency applicant (transcripts of oral statements or written evidence) become discoverable in subsequent private enforcement claims?

22.1 Can the claimant seeking indemnification of antitrust damages in follow-on actions provide to the court this information where he only had access to it because he was party to the previous proceedings before the competent antitrust authority?

22.2 Can this information be subjected to discovery orders in a private enforcement claim before domestic or foreign courts? Are there any precedents?

22.3 Can this information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

The intersection of the obligation of the Commission to protect confidentiality and the power of the courts to demand information from any person or authority is yet to be tested in respect of leniency and leniency documents. No specific provisions regulate the protection of the evidence and information provided in the framework of a leniency application from discovery by the courts. To date the practice of the Commission, upon judicial review, has been to submit its entire file to the court, with the confidential information and evidence being submitted in separate folders to which the parties do not have access. However, nothing prevents the court from forming its judgment on the basis of such confidential information.

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In addition even in judicial review proceedings there have been occasions where the court has waived confidentiality and allowed access or copies of documents submitted as confidential, to other parties in the judicial review proceedings.

Another aspect of the intersection of public and private enforcement of antitrust violations is the binding nature of the Commission's decision upon the courts, once the decision has entered into effect. The grant of immunity from sanctions presupposes the finding of a cartel infringement. Therefore, in a possible civil damages litigation both the body of the offence and its illegality would have been established in a binding manner for the court, where the Commission's decision has come into effect. It would then be for the claimants in the private enforcement action to prove the causal link between the infringement and any damages they may have suffered, as well as the amount of such damages, in order to obtain a favourable award.

Any information to be obtained in respect of discovery before foreign courts would be subject to a letters rogatory request, subject either to a bi-lateral legal assistance treaty (Bulgaria has an extensive network of such bi-lateral treaties both in respect of civil and criminal cases), or of the provisions of Council Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and Council Regulation 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters. Where bi-lateral legal assistance treaties are applied, the primacy of local public interest in enforcement and termination of a cartel with the help of leniency may be a valid ground for refusing compliance with the discovery request by the foreign jurisdiction.

The same applies for the requests of local courts to obtain evidence in respect of a leniency application made outside Bulgaria.

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

23. Does the enforcing body accept summary applications in line with the ECN Model Leniency Programme?

Yes, in cases where a leniency application has already been made or is in the process of being made before the European Commission, and the Commission is also well placed to investigate the case, the leniency applicant can submit a summary leniency application to the Commission. A summary application must contain the same data as a full application, but does not need to be supported by all evidence required for a full application. If it decides to investigate the cartel, the Commission may request the additional evidence and data.

24. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

The Leniency Programme provides specific rules in respect of applications submitted before the European Commission. The submission of such applications is not considered to allow full or partial immunity to be granted by the Commission, unless a summary or a full application is submitted.

A summary application would entitle the applicant to receive a confirmation about whether it has been the first undertaking to request leniency before the Commission, but cannot serve as grounds to initiate proceedings by the Commission in itself. If, however, based on the summary application, the Commission decides that it is also well placed to investigate the case,

and considers the information sufficiently convincing, it will request from the applicant the full scope of information that would be required under the normal leniency process and open a full investigation.

In that case the summary application will serve as a marker, and allow the undertaking immunity, provided it submits the requested additional information within the deadlines set by the Commission.

The Commission may share information received from the applicant with other authorities of the ECN, subject to paragraphs 40 and 41 of the ECN Notice.

25. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

The submission of a leniency application before another competition authority of an EU member state will not be considered a leniency application before the Commission and therefore would not afford the applicant the possibility of obtaining immunity from sanctions if the Commission starts its own investigation.

By contrast to the cases where a leniency application was submitted first to the European Commission, the Leniency Programme and the Rules do not allow specifically for the submission of a summary application where leniency was applied for before other competition authorities (either within the EU or outside the EU). Nonetheless the submission of a marker application could have a similar effect. The alternative would be the submission of a full scope leniency application to the Commission.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

26. If there are settlement procedures in your jurisdiction, what is the relationship between leniency and such settlement procedures? Are their possible benefits cumulative?

The Leniency Programme does not treat the issue of a possible correlation between leniency and a settlement in the framework of cartel proceedings. However, coming from the fact that the Competition Act excludes the possibility for a settlement in the case of grave violations of the law, it would have to be assumed that a settlement is unlikely to be allowed in a cartel case. Given that the settlement process allows, in exchange for commitments, the Commission not to reach a decision on the infringement and impose sanctions, it can be considered that a settlement, even if it were possible for a violation for which a leniency application was made, would preclude the grant of immunity as a result of the leniency process for the same undertaking.

REFORM/LATEST DEVELOPMENTS

27. Is there a reform underway to revisit the leniency policy? What are the latest developments?

The Leniency Programme is the result of an effort to simplify the leniency process and make it more understandable for potential applicants. While this aim is substantially achieved, in order for the Leniency Programme to be really effective, the ability of potential applicants to anticipate more precisely the quantum of sanctions, and the benefits of a leniency application, is important as an encouragement to apply for leniency. In this respect the evolution of the Commission's sanctioning practice in recent years has been positive. In addition, changes to the Competition Act, limiting the personal

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liability of employees and executives of undertakings, which have made a leniency application, as well as changes in line with Directive 2014/104/EU 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, are likely to make the Leniency Programme much more attractive to potential applicants.