Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance)

COMMISSION REGULATION (EU) 2015/1348

of 3 August 2015

amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[(1)], and in particular Article 33 thereof,

After consulting the Advisory Committee on 19 June 2015,

Whereas:

(1) Commission Regulation (EC) No 773/2004[(2)] lays down rules concerning — among others — investigations undertaken by the Commission and access to the Commission's file.

(2) Cartels are agreements or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers including bid-rigging, restrictions of imports or exports and anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 101 of the Treaty.

(3) By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. Therefore, the Commission considers that it is in the Union interest to reward undertakings involved in this type of illegal practices which are willing to acknowledge and to put an end to their participation and to cooperate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers in ensuring that secret cartels are detected and punished outweigh the interest in imposing fines, at a level commensurate with their illegal conduct, on those undertakings that enable the Commission to detect and prohibit such practices. To that end, the Commission has been operating a leniency programme since 1996. In its leniency programme the Commission sets conditions under which it may reward undertakings for their cooperation in the

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Commission's investigation. The leniency programme has proved to be an effective tool for the Commission to uncover and punish numerous secret cartels. Moreover, by helping uncover more infringements and making public enforcement more effective, the leniency programme also serves as a deterrent against cartels and, ultimately, provides a basis for injured parties to claim damages for the harm suffered from those infringements.

(4) As part of their cooperation undertakings may voluntarily submit to the Commission leniency corporate statements, which may include statements by current and/or former employees and representatives of the undertaking. However, undertakings may be dissuaded from cooperating with the Commission if doing so might have negative consequences for their position in civil proceedings.

(5) Parties to proceedings before the Commission as well as third parties, such as complainants and other interested persons, can obtain certain information from the Commission's file pursuant to Regulation (EC) No 773/2004.

(6) Information obtained pursuant to Regulation (EC) No 773/2004 can be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 of the Treaty. However, it should not be possible to use such information in proceedings before national courts where this could unduly affect the effectiveness of the Commission's enforcement of Articles 101 and 102 of the Treaty.

(7) In order to ensure that undertakings are not discouraged from voluntarily acknowledging their participation in infringements of Union competition law in the context of the Commission's leniency programme or settlement procedure, other parties will be granted access to such acknowledgement through access to the file pursuant to Regulation (EC) No 773/2004 only for the purposes of exercising their rights of defence in proceedings before the Commission. This information may only be used in the review proceedings before the European Union courts or before national courts in cases which are directly related to the case in which access has been granted and which either concern the allocation of a fine between cartel participants or the review of an infringement decision adopted by a national competition authority.

(8) Moreover, the use of information obtained pursuant to Regulation (EC) No 773/2004 in proceedings before national courts should not unduly interfere with a pending Commission investigation of an infringement of Union competition law. Where such information was prepared by the Commission in the course of its proceedings for the enforcement of Union competition law (such as a statement of objections) or by a party to those proceedings (such as replies to requests for information of the Commission), a party should not be able to use such information in proceedings before national courts until after the Commission has closed its proceedings against all parties under investigation by adopting a decision under Article 7, 9 or 10 of Regulation (EC) No 1/2003 or has otherwise terminated its administrative procedure.

(9) The rules in this Regulation governing the handling of leniency corporate statements and settlement submissions should also apply where leniency statements and settlement submissions as defined in Article 2 of Directive 2014/104/EU of the European Parliament and of the Council[3] on Antitrust Damages Actions are transmitted to the

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Commission by the competition authorities of the Member States under Regulation (EC) No 1/2003.

(10) Regulation (EC) No 773/2004 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 773/2004 is amended as follows:

(1) the following Article 4a is inserted:

Article 4a

The Commission's Leniency Programme

1 The Commission may set the requirements and cooperation conditions under which it may reward undertakings that are or have been party to secret cartels, for their cooperation in disclosing the cartel and facilitating the establishment of an infringement, with immunity from fines or a reduction in fines which would otherwise be imposed under Article 23(2) of Regulation (EC) No 1/2003 (the Commission leniency programme).

Immunity from fines may be granted to the undertaking that is the first to submit evidence which in the Commission's view would enable it to carry out a targeted inspection or find an infringement of Article 101 of the Treaty in connection with the alleged cartel. A reduction in fines may be granted to undertakings which provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession.

The Commission will only grant immunity from or a reduction of the fine under its leniency programme if, at the end of the administrative proceedings, the undertaking has met the requirements and cooperation conditions set out in the leniency programme. Those may cover, among others, the type of information and evidence the undertakings are required to submit and the further cooperation expected from the undertakings during the administrative proceedings.

2 In order to qualify for immunity from or reduction of the fine which would otherwise be imposed, undertakings shall provide the Commission with voluntary presentations of their knowledge of a secret cartel and their role therein, which may be also in the form of voluntary presentations of the knowledge of former or current employees or representatives of the undertaking (leniency corporate statements). Such leniency corporate statements shall be drawn up specifically for submission to the Commission with a view to obtaining immunity from or reduction of fines under the Commission's leniency programme.

3 The Commission will offer parties appropriate methods of providing leniency corporate statements other than by written submission, including orally. Oral corporate statements may be recorded and transcribed at the Commission's premises. The undertaking shall be granted an opportunity to check the technical accuracy of the recording of its oral statement at the Commission's premises, and, where necessary, to correct the substance of the statement without delay. The rules in this Regulation on leniency corporate statements shall apply to such statements irrespective of the medium on which they are stored. Pre-existing information, i.e. evidence that exists

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irrespective of the Commission proceedings and that is submitted to the Commission by an undertaking in the context of its application for immunity from or reduction of the fine, is not part of a leniency corporate statement.;

(2) in Article 8, paragraph 2 is deleted;

(3) in Article 10a(2), the third subparagraph is replaced by the following:

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of Article 101 of the Treaty as well as their liability. These settlement submissions shall be specifically drawn up by the undertakings concerned as a formal request to the Commission to adopt any decision in their case following the settlement procedure. Before the Commission sets a time limit for the introduction of settlement submissions, the parties concerned shall be entitled to have the information specified in the first subparagraph, disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit.

The Commission will offer parties appropriate methods of providing settlement submissions other than by written submission, including orally. Oral settlement submissions may be recorded and transcribed at the Commission's premises. The undertaking shall be granted an opportunity to check the technical accuracy of the recording of its oral submission at the Commission's premises, and, where necessary, to correct the substance of their submission without delay. The rules in this Regulation on settlement submissions shall apply to settlement submissions irrespective of the medium on which they are stored.;

(4) Article 15 is amended as follows:

(a) the title is replaced by the following
Article 15

Access to the file;

(b) paragraph 1a is replaced by the following:

1a. After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties to introduce settlement submissions, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file pursuant to paragraph 1 after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions. Where settlement discussions have been discontinued with one or more of the parties, such party shall be granted access to the file pursuant to paragraph 1 when a statement of objections has been addressed to it.;

(c) the following paragraph 1b is inserted:

1b. Access pursuant to paragraph 1 or 1a to a leniency corporate statement within the meaning of Article 4a(2) or to a settlement submission