

# COMPETITION & REGULATORY NEWSLETTER

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## European Court of Justice clarifies boundaries around disclosing leniency statements

In its recent [judgment](#) in *FL und KM Baugesellschaft* the European Court of Justice (CJ) has clarified key questions around the protection afforded to leniency statements and settlement submissions under EU law - specifically, whether such documents can be shared with national prosecutors in criminal proceedings, what constitutes a “leniency statement” and “settlement submission” for these purposes, and who else may be able to access the documents in the criminal proceedings.

The judgment follows a request for a preliminary ruling from the Higher Regional Court in Vienna, in the context of a dispute between Austrian construction company FL und KM Baugesellschaft m.b.H. & Co. KG et S AG (the applicants) - one of the companies involved in the conduct - and Austria’s public prosecutor.

### Background

A number of Austrian construction companies and their managers are suspected of having, between 2006 and 2020, engaged in conduct including price fixing, market sharing and information exchange in respect of public and private tenders. Criminal corruption proceedings were initiated by the public prosecutor’s office in Austria, while in parallel the Austrian Federal Competition Authority (BWB) initiated cartel proceedings. The applicants submitted a leniency application to the BWB in 2019, and received a reduced fine from the Austrian cartel court in 2021.

In the interim, in accordance with a mechanism for mutual administrative assistance provided for by national legislation, the cartel court and the BWB transmitted various documents relating to the cartel proceedings - including leniency statements and settlement submissions - to the public prosecutor, which added them to its criminal investigation file.

When the public prosecutor refused the applicants’ request not to use or add the documents to its file, and to exclude them permanently from access to the file in the criminal proceedings, the applicants lodged an objection before the public prosecutor’s office. The objection was dismissed at first instance, but on appeal the Higher Regional Court in Vienna stayed proceedings to refer certain questions to the CJ.

### CJ’s judgment

In essence the CJ was asked to consider: (i) whether Article 101 TFEU precludes national legislation requiring the national competition authority and cartel court to transfer files, including leniency statements and settlement submissions, to the public prosecutor; (ii) what constitutes a “leniency statement” and “settlement submission” for these purposes; and (iii) who else in the criminal proceedings may be able to access those documents.

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*Does Article 101 preclude the transfer of leniency statements and settlement submissions to a public prosecutor?*

The CJ began by noting that establishing a mechanism for administrative assistance, such as the one in the present case requiring the transmission of files to the public prosecutor, is a matter for Member States. Nevertheless, the court considered that Member States must exercise that competence in a way that is consistent with EU law, including ensuring that the rules they establish do not jeopardise the effective application of Articles 101 and 102 TFEU. The court noted in this respect that the effectiveness of leniency programmes - which aim to ensure the effective application of Article 101 TFEU - could be compromised if companies are deterred from participating due to the possibility that leniency documents might be disclosed to others, in particular those seeking compensation.

It concluded that Article 101 TFEU does not preclude a mechanism requiring transmission of leniency statements and settlement submissions to the public prosecutor, *provided* that the mechanism is structured in such a way as to preserve the effectiveness of Article 101 TFEU - in particular, such a mechanism should not “rende[r] meaningless” the protections afforded to leniency statements and settlement submissions under EU law.

*Meaning of “leniency statement” and “settlement submission”*

The CJ then considered the extent of the protection afforded to leniency statements and settlement submissions - specifically, whether that protection extends also to documents and information that accompany leniency statements or settlement submissions.

It drew a clear distinction between leniency statements and settlement submissions in the strict sense - being documents which have been prepared specifically for submission to the relevant authority with a view to obtaining a fine reduction or achieving settlement - and other materials, including those provided to explain, specify or prove the content of those statements or submissions, which are not subject to the same protections.

*Who else can access leniency statements and settlement submissions?*

Having found that national legislation may - subject to ensuring the effectiveness of Article 101 TFEU - require the transmission of leniency statements and settlement submissions to a *public prosecutor*, the court turned to the question of whether - and if so which - *parties* to the criminal proceedings may be able to access those documents.

The court engaged in a balancing exercise, weighing up the protection afforded to leniency statements and settlement submissions on the one hand against the right to a fair trial and rights of defence enshrined in EU law on the other. The court ultimately distinguished between those who are under investigation in the criminal proceedings - who have a right to access leniency statements and settlement submissions for their rights of defence, and cannot be refused access except on public interest grounds such as confidentiality or the effectiveness of EU competition law - and other parties to proceedings (including injured parties who could bring an action for damages), who should not be granted access.

## Conclusion

The CJ’s careful consideration in this case highlights the key role that leniency programmes play in uncovering cartels.

The judgment has implications for the preparation of leniency statements and settlement submissions - companies under investigation and their advisors should bear in mind that while information within the leniency statement or settlement submission will be protected, supporting materials or attachments will not.

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## OTHER DEVELOPMENTS

### MERGER CONTROL

#### Taiwan proposes higher merger filing thresholds

The Taiwan Fair Trade Commission (TFTC) has [initiated](#) the first major update to merger control thresholds in Taiwan in nearly a decade, in an attempt to encourage growth in the domestic economy and improve the efficiency of the merger control regime. The TFTC has launched a public consultation on the proposed amendments, which will run until 5 January 2026.

The key changes relate to increases to the three revenue thresholds for triggering a merger filing in Taiwan, which are summarised in the table below:

|                                                       | CURRENT VERSION                                                                                                                                                                                       | PROPOSED REVISIONS                                                                                                                                                                                    |
|-------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Turnover threshold - general</b>                   | (a) Combined worldwide turnover exceeds TWD 40 billion (approx. £975 million); and<br>(b) each of at least two of the parties has domestic turnover exceeding TWD 2 billion (approx. £50 million)     | (a) Combined worldwide turnover exceeds TWD 50 billion (approx. £1.2 billion); and<br>(b) each of at least two of the parties has domestic turnover exceeding TWD 3 billion (approx. £75 million)     |
| <b>Turnover threshold - non-financial enterprises</b> | (a) At least one party has domestic turnover exceeding TWD 15 billion (approx. £365 million); and<br>(b) at least one other party has domestic turnover exceeding TWD 2 billion (approx. £50 million) | (a) At least one party has domestic turnover exceeding TWD 20 billion (approx. £490 million); and<br>(b) at least one other party has domestic turnover exceeding TWD 3 billion (approx. £75 million) |
| <b>Turnover threshold - financial enterprises</b>     | (a) At least one party has domestic turnover exceeding TWD 30 billion (approx. £730 million); and<br>(b) at least one other party has domestic turnover exceeding TWD 2 billion (approx. £50 million) | (a) At least one party has domestic turnover exceeding TWD 40 billion (approx. £975 million); and<br>(b) at least one other party has domestic turnover exceeding TWD 3 billion (approx. £75 million) |

A transaction which meets any of the above thresholds must be notified to the TFTC. In addition to these revenue thresholds, the regime currently also includes two alternative market share thresholds, which are not affected by the proposed amendments. The TFTC had [previously proposed](#) removing these market share thresholds, but it remains to be seen if this change will also be implemented.

### ANTITRUST

#### European Commission policy brief declines to extend legal professional privilege to in-house lawyers

On 10 November 2025, the European Commission published a [policy brief](#) written by staff of the Directorate-General for Competition in which it declined to extend legal professional privilege (LPP) to cover certain in-house

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lawyer advice in competition law investigations. LPP in the context of the Commission's competition law investigations currently extends only to communications with, or advice from, independent, EU-qualified lawyers.

The main conclusion of the policy brief is that, in competition law investigations by the Commission, LPP continues to apply only to communications with, or advice from, independent lawyers qualified in an EU Member State. The policy brief supports this position on several grounds: (i) there is no evidence that companies in jurisdictions recognising in-house LPP are more compliant with competition laws; (ii) defining the scope of "in-house" LPP would be difficult and could invite abuse; and (iii) extending LPP to in-house counsel would likely make investigations longer and more cumbersome, given many in-house lawyers' broad roles that extend beyond providing legal advice.

The policy brief does not break new ground; it reasserts case law of the EU courts extending back to *Akzo* in 2010. The case law confirms that only correspondence which involves independent lawyers who are not bound to a client by a relationship of employment is covered by LPP. The recent calls to revisit LPP arose in the context of the recent evaluation of antitrust Regulation 1/2003. In particular, the policy brief is a response to calls by a number of stakeholders - mostly, but not exclusively, representing views of industry and in-house lawyers - for an extension of LPP to in-house lawyers. In support of their position, some of those stakeholders argued that an increasing number of EU Member States are recognising LPP for communications involving in-house lawyers. This was rejected in the policy brief, on the basis that there is no such predominant trend in EU Member States: only five Member States (Belgium, Ireland, Hungary, the Netherlands and Portugal) currently recognise in-house LPP for EU competition law investigations. The brief also recalls that - as set out in *Akzo* - national law is not determinative of this issue.

Those in favour of extending LPP to in-house lawyers also argued that extension - in the context of the self-assessment regime as laid out in antitrust Regulation 1/2003 - would enhance compliance with Articles 101 and 102 TFEU. The policy brief however does not support this argument and concludes that the self-assessment brought in by Regulation 1/2003 does not justify a change to the requirement of "full independence". It also recalls that the EU courts have already ruled that the self-assessment regime under Regulation 1/2003 did not warrant extending the case-law to introduce in-house LPP.

In their final conclusion, the authors confirm that full independence from the client is a "*key requirement*" for LPP to be recognised in EU competition proceedings and the CJ has ruled that "*by its very nature*", a relationship of employment precludes the required full independence. In addition, the arguments for an extension to in-house LPP remain "*unconvincing*" and "*vague*" as regards the claimed potential benefits.

## CONSUMER PROTECTION

### European airlines agree to modify their practices regarding environmental claims

On 6 November 2025, following a dialogue with the European Commission and the Consumer Protection Cooperation (CPC) network - a network of EU national authorities responsible for the enforcement of EU consumer protection laws - 21 airlines [agreed](#) to stop claiming that a specific flight's CO<sub>2</sub> emissions could be neutralised, offset or directly reduced through consumer financial contributions to climate protection projects or for the use of alternative aviation fuels. Under the CPC Regulation, and with the coordination of the Commission, the CPC network can take action to address cross-border issues at EU level.

The 21 airlines are as follows: Air Baltic, Air France, the Lufthansa Group (Lufthansa, Air Dolomiti, Austrian Airlines, Brussels Airlines, Eurowings, and Swiss), Easyjet, Finnair, KLM, Luxair, Norwegian, Ryanair, SAS, TAP, Transavia France, Transavia CV, Volotea, Vueling and Wizz Air.

The commitments discussed with the airlines included the clarification that the CO<sub>2</sub> emissions of a specific flight cannot be neutralised, offset or directly reduced by contributions to climate protection projects or alternative aviation fuels; the use of the term "sustainable aviation fuels" only with clear, substantiating qualifiers; avoiding vague "green" language or implied environmental claims; providing detailed support for forward-looking

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environmental claims (such as net-zero goals) with clear timelines, realistic steps and the specific emissions covered; presenting any CO<sub>2</sub> emissions calculations in a transparent, easy-to-understand manner; and supporting claims of improved environmental impact with robust scientific evidence.

A [table](#) published by the Commission confirms that all airlines either resolved or committed (to the Commission's satisfaction) to resolve these identified practices, save in the case of Easyjet, the Lufthansa Group and SAS, where some of the identified practices had not been fully addressed. The Commission found that the Lufthansa Group's practices were still insufficient in continuing to use the term "SAF" without appropriate substantiation, failing to replace the term "Green fares", referring to non-validated environmental targets and continuing to make unsubstantiated claims of the group's comparative environmental performance. As to Easyjet, the Commission found that some of the airline's references to future "net zero" environmental targets remained unclear, while SAS was found to have failed to put forward suggestions related to clarifying the polluting nature of flying.

The commitments announced by the airlines mark the end of a process which began in June 2023 when the European Consumer Organisation (BEUC) and 23 of its member organisations [issued an alert](#) to the Commission and the CPC network denouncing misleading climate-related claims by 17 European airlines. Subsequently, on 30 April 2024, the Commission and the CPC network [started action](#) against 20 airlines identifying several types of potentially misleading green claims, inviting the airlines to bring their practices in line with EU consumer law within 30 days.

As a next step, the CPC authorities will oversee the implementation of the commitments according to each airline's stated timeline. The CPC authorities may take enforcement action against carriers that offered insufficient commitments or those who fail to implement them properly. To preserve fair competition and a level playing field in the Single Market, the CPC authorities will also review other airlines' practices and, where appropriate, require the same commitments.

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