

## **BACKGROUND NOTE**

### **Draft Regulations providing for the power to waive or reduce the applicable fine in cartel investigations**

#### **What is a cartel?**

A cartel is an agreement between competitors not to compete with each other so as to eliminate the risks of competition amongst them. Illegal cartels involve practices such as the fixing of purchase or selling prices, the allocation of production or sales quotas and the sharing of markets, in particular bid-rigging. As reported in the ECN Model Leniency Programme<sup>1</sup>, “Cartel activities are very serious violations of competition law. They injure consumers by raising prices and restricting supply. In the long term, they lead to a loss of competitiveness and reduced employment opportunities”. Through leniency programmes, cartels are uncovered and put to an end, preventing further damage being inflicted on businesses and consumers.<sup>2</sup>

In Malta, cartels are prohibited under Article 5 of the Competition Act. In cases involving an effect on trade, the Director General may also apply Article 101 of the Treaty on the Functioning of the European Union together with Article 5. According to article 21(1) of the Competition Act “any undertaking or association of undertakings which commits an infringement may, by decision of the Director General, be held liable to pay an administrative fine of up to ten per centum of the total turnover of the undertaking or association of undertakings concerned in the preceding business year.”

#### **The legal basis for the introduction of leniency regulations**

Article 33(2) of the Competition Act provides that the Minister, after consultation with the Board of Governors of the Malta Competition and Consumer Affairs Authority, may make regulations providing for the power to waive or reduce the applicable fine in cartel investigations. The Competition Act therefore provides for the introduction of leniency through regulations.

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<sup>1</sup> ECN refers to the European Competition Network, [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf)

<sup>2</sup> Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 - Protection of leniency material in the context of civil damages actions.  
[http://ec.europa.eu/competition/ecn/leniency\\_material\\_protection\\_en.pdf](http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf)

## What is Leniency?

As described in the ECN Model Leniency Programme, the term “leniency”, refers to immunity from a fine as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case.

In announcing the new 2006 Leniency Notice, the then European Union Competition Commissioner Neelie Kroes stated that:

*“Secret cartels undermine healthy economic activity. To root out cartels we need heavy sanctions to deter cartels and an efficient leniency policy providing incentives to report them. These changes will further strengthen the effectiveness of the Commission’s Leniency Programme in the detection of cartels and offer clearer guidance for business”.*<sup>3</sup>

In the European Union, all the Member States have a leniency programme in their competition system, with the exception of Malta.

## Scope of the regulations

The proposed Regulations provide an applicant, i.e. an undertaking involved in secret cartels to either obtain immunity from a fine or a reduction of the fine if it discloses its participation in a cartel to the Director General of the Office for Competition.

The application of the regulations has been limited to secret cartels, i.e. agreements and concerted practices between primarily competitors which are prohibited under article 5 of the Competition Act and Article 101 of the Treaty on the Functioning of the European Union and having elements that make the full extent of the conduct and the fact that it constitutes a cartel more difficult to detect as that conduct is not known to the public or to the customers or suppliers.

## Immunity from fines in cartel cases

An undertaking that participates in a cartel is granted immunity from fines if it is the first one to submit an application to the Director General:

- a. which at the time the Director General evaluates the application enables him to carry out a targeted inspection - the undertaking obtains immunity if the Director

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<sup>3</sup> Competition: Commission adopts revised Leniency Notice to reward companies that report cartels - Brussels, 7th December 2006 IP/06/1705- [http://europa.eu/rapid/press-release\\_IP-06-1705\\_en.pdf](http://europa.eu/rapid/press-release_IP-06-1705_en.pdf)

General did not, at the time of the application, already have sufficient information or evidence to carry out an inspection or had not already carried out an inspection in connection with the alleged cartel; or

- b. which enables the Director General to find an infringement of Article 5 of the Competition Act and, or Article 101 of the Treaty on the Functioning of the European Union and at the time of the submission of the application, the Director General did not have sufficient evidence to prove the infringement and no applicant would have been granted conditional immunity from fines in accordance with the condition set out in point (a) above.

### **Coercion excludes immunity but not a reduction from fine**

If an undertaking took steps to coerce other undertakings to participate in the cartel or to continue to be participants thereof, it shall not be eligible for immunity from fines. However an undertaking that has coerced another undertaking to participate in a cartel can still obtain a reduction from the fine if the undertaking fulfils the conditions for a reduction of the fine referred to in the regulations.

### **Information an applicant must submit to obtain immunity from fines**

In order for an applicant to be eligible for the granting of immunity from fines, it must submit an application to the Director General in accordance with the provisions of the regulations.

The application shall contain *inter alia* the following information:

- the identity of the undertaking submitting the leniency application;
- the identity of all the other undertakings participating in the cartel;
- the identity and home/office addresses of individuals who are, or have been, involved in the alleged cartel (including the individuals who have been involved in the cartel on the applicant's behalf);
- details of the alleged cartel arrangement, including its aims and activities, the product or service concerned and the geographic scope, duration and estimated market volumes affected by the cartel and specific dates, locations and content of the cartel contacts between the participants; and
- evidence relating to the cartel that is available to the applicant at the time of the application, such as written documents and e-mail communication.

### **Reduction of fines in cartel cases**

Undertakings that do not qualify for immunity from fines may benefit from a reduction of any fine that would otherwise have been imposed.

## **Information to be submitted by the applicant in order to obtain a reduction**

In order to qualify for a reduction of fines, an applicant shall disclose its participation in the cartel on its own initiative and must submit to the Director General information and evidence of the alleged cartel which represents significant added value relative to the evidence already in the possession of the Director General at the time of the submission of this information.

The regulations describe 'significant added value' as the extent to which the evidence provided by an applicant strengthens by its very nature and, or its level of detail, the ability of the Director General to prove the alleged cartel.

## **Determining the amount of reduction**

In determining the appropriate level of fines the Director General shall consider whether any other undertaking has already provided the Director General with evidence, which in the view of the Director General, represents significant added value for the purposes of the investigation.

The fine shall be reduced in the following way:

- i) 30–50 per cent for the first undertaking to provide significant added value;
- ii) 20–30 per cent for the second undertaking to provide significant added value; and
- iii) 20 per cent at most for subsequent undertakings that provide significant added value.

## **Further conditions for immunity from fines and a reduction of the fines**

In order to benefit from immunity from fines or reduction of fines the proposed regulations provide that the undertaking must also satisfy the following cumulative cooperation conditions:

- the undertaking must provide all information concerning the alleged infringement;
- it must co-operate genuinely and fully on a continuous basis from the time of its application with the Director General until the conclusion of the investigation;
- it must not destroy, falsify, alter or conceal relevant information or evidence in respect of the alleged cartel;
- it must end its involvement in the cartel once it has submitted the application to the Director General save to the extent that its continued involvement would in the view of the Director General be reasonably necessary to preserve the integrity of the inspections of the Director General; and
- it must keep confidential the content of the application and the fact of having made an application or the fact that it may be considering making an application.

## **Marker**

An undertaking which plans to apply for immunity and is not in possession of evidence and information that would enable it to submit a complete application may initially apply for a 'marker' by filling an application in accordance with the provisions of the regulations and providing the Director General with information concerning its name and address, the parties to the alleged cartel, the affected product and territory, the estimated duration of the alleged cartel and the nature of the alleged cartel conduct.

Therefore when an undertaking wishes to apply for leniency but it is not in possession of all the information and evidence pertaining to the cartel at the time of the application it may nonetheless apply for a marker to secure a position in the leniency queue. In such case, the Director General sets a time-limit for the applicant to complete the application and submit the rest of the evidence.

If no other applicant has applied for immunity, then the applicant applying for marker will have secured a marker for immunity, provided also that the applicant perfects the marker within the time-limit set by the Director General by gathering the necessary information and evidence to submit a formal full application that is required to perfect the marker.

## **Hypothetical application**

Before making a formal full application for immunity from fines, a prospective applicant may initially submit a hypothetical application to the Director General through a contact person. In order to protect the applicant's anonymity, the applicant need not disclose its identity and the identity of other cartel members. However, the application shall contain information on a contact person.

In such cases, the application must include a detailed list of evidence which the applicant proposes to disclose to the Director General within an agreed period of time. Certain information may be disclosed at a later stage such as the identity of the applicant and that of other cartel members but the application must at the outset contain a clear identification of the product or service concerned by the alleged cartel, the geographic scope and the duration of the alleged cartel.

Where an applicant subsequently submits an application for immunity from fines within the agreed period of time and where the application corresponds to the description made in the detailed list of evidence, the application shall be deemed to have been submitted at the time when the hypothetical application was submitted.

## **Summary application**

In cases where the Commission is particularly well placed to deal with a case in accordance with paragraph 14 of the Network Notice<sup>4</sup>, the applicant that has or is in the process of filing a

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<sup>4</sup> Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03)

leniency application, either for immunity or for reduction of a fine, with the Commission may file a summary application with the Director General, where the applicant considers that the Office for Competition is well placed to act in terms of the Network Notice. The summary application shall have an identical substantive scope to the respective application submitted to the Commission.

In the case where the Director General decides to investigate, he shall set a time-limit within which the applicant shall submit an application under the regulations and when the applicant submits such information within the set period, the information provided shall be deemed to have been submitted on the date when the summary application was submitted.

**Disclaimer: This background note is intended solely for information purposes. The full text of the proposed regulations may be accessed at <http://www.mccaa.org.mt/en/consultations-publications>**