

FIFTH EDITION

LENIENCY REGIMES

INTERNATIONAL SERIES

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BACKGROUND

1. What is the relevant legislation concerning leniency policy and who is the enforcing body? Has the enforcing body issued any supplementary guidance in support of the relevant leniency legislation?

The leniency regime in Cyprus is governed by the Regulations on Granting Immunity and Reducing Administrative Fines in Cases of Concerted Practices that Infringe Section 3 of Law No 13(1)/2008, (subsequently amended to become the Protection of Competition Laws 2008 and 2014) and/or Article 101 of the Treaty on the Functioning of the European Union (“Leniency Programme” or “Regulations”), issued in November 2011. The enforcing body is the Cyprus Commission for the Protection of Competition (the Commission).

The Commission has not issued any supplementary guidance.

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

The leniency programme is based on section 24 of the Protection of Competition Laws 2008 and 2014 (the Competition Law), which empowers the Commission to impose fines on any enterprise or group of enterprises found to be in violation of section 3 (restriction of competition) and section 6 (abuse of dominant position) of the Competition Law. Section 24 also gives the Commission the power to waive or reduce the fine in accordance with certain criteria and conditions which are now determined by the Regulations, where the enterprise or group of enterprises co-operates or provides a contribution or evidence which assists the Commission in proving the violation.

The leniency programme is not available for competition law violations other than cartels, that is, anti-competitive agreements between two or more undertakings or undertakings who act together with a view to co-ordinating competitive market behaviour or to influence parameters of competition, for example by price fixing, the setting of production or sale quotas, bid rigging and the like.

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?

There is no “immunity plus” or “amnesty plus” option under the leniency programme. Indeed, the leniency programme has never been used. As a result there is no established practice on this issue or any other issue pertaining to the leniency programme for that matter.

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?

There have been no leniency applications to date.

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?

The Commission will grant immunity to an enterprise on which it would otherwise have imposed a fine if the enterprise concerned discloses its participation in a suspected infringement in either of the following circumstances:

- The enterprise discloses new evidence which is sufficient for the initiation of an investigation procedure into a cartel.
- The enterprise presents first testimonial evidence which allows the Commission to establish the existence of a cartel.

Immunity will not be granted if at the time the application was submitted the Commission already had in its possession adequate evidence to issue instructions to carry out an investigation into cartel conduct or had already started an investigation.

Similarly, immunity will only be granted if at the time the application was submitted the Commission did not have in its possession adequate evidence to establish the existence of a cartel or if conditional immunity had not been granted to any other enterprise.

Added value

The Regulations refer to the concept of “evidence of significant added value”. This is assessed according to the degree to which the evidence concerned enhances, by reason of its nature, level of detail or other factors, the Commission’s ability to prove the potential infringement. Written evidence that is contemporaneous with the events in question and that is directly related to those events generally has greater value than evidence that relates to a later period or that is only indirectly related. In addition, the extent to which evidence requires verification from other sources in order to be considered credible against the other undertakings involved also affects its value, in that irrefutable evidence has greater value than evidence such as statements that require confirmation if contested.

False, inaccurate or misleading statements

False, inaccurate or misleading statements on the part of the applicant undertaking or failure to comply with any term or condition referred to in the Regulations or in the decision of the Commission at any stage of the procedure may result in withdrawal of benefits awarded under the programme.

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?

Applicants for leniency must provide the Commission with the following information (specified in detail in Appendix 1 of the Regulations) to the extent that it is known to the applicant undertaking and does not jeopardise the effectiveness of the investigations:

- A detailed description of the potential cartel and, in particular, its aim, its activities and operations, the product or service it concerns, the geographical area it covers, its duration, and the extent to which the market is estimated to be affected, the specific dates, places, content and participants of the meetings with regard to the alleged cartel, together with an explanation of the evidence submitted in support of the application.
- The name and address of the legal entity submitting the application, as well as the names and addresses of all other undertakings that participated (or that have participated) in the alleged cartel.
- The name, position, office address, and, where necessary, home address of all the individuals (to the extent that the applicant is aware of such individuals) who are involved or have been involved in the possible cartel, including those involved on behalf of the applicant.
- Details of other national competition authorities, within and outside the EU, which the applicant has approached, or intends to approach, with regard to the alleged cartel.
- Any other information regarding the alleged cartel that the applicant has in its possession or at its disposal at the time of the submission of the application, especially if that evidence dates to the time of the suspected infringement.

An undertaking that wishes to benefit from a reduction of fines must submit the relevant application to the Commission accompanied by evidence with regard to the purported cartel which has important additional evidential value over and above any material which the Commission has in its possession and which meets the requirements set out in Regulation 5 (see question 12 below).

The application must formally confirm that the evidence is provided voluntarily by the undertaking in order to support its application for preferential treatment under the leniency programme.

The Competition Service of the Commission provides the applicant with proof of receipt of the application and for every document subsequently submitted, confirming the date and time that such documents are submitted.

The Commission does not determine an application for reduction of a fine until it has decided on any possible application for full immunity with regard to the same suspected infringement.

With the receipt of an official application for the reduction of a fine, the Commission directs the Competition Service to examine and determine whether the evidence submitted by the applicant constitutes evidence of significant added value and complies with Regulations 5 and 16, and to submit a reasoned recommendation with regard to the application to the Commission within seven days.

Undertakings may anonymously approach the chairperson of the Commission for unofficial guidance before submitting a formal application for leniency.

7. Is there a marker system?

An undertaking applying for full leniency may request a marker from the Commission while it gathers all the necessary information. Once the Commission allots a marker it sets a deadline for the applicant undertaking to complete its formal submission of the information and evidence to support its application for immunity. If the undertaking meets this deadline, the information and supporting evidence which it submits are considered to have been submitted at the date on which the marker was allotted.

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

This option is available only to undertakings applying for immunity.

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 applicant undertaking must provide the Commission with all the following information:

- Relevant product or service.
- Relevant geographic market.
- Time frame.
- The parties involved.
- Nature of the alleged infringement.
- Organisation and structure of the cartel, concerted practice or agreement.
- The nature of the existing evidence.
- Other competition authorities which the applicant undertaking has approached, particularly any competition authority to which a full application has been submitted.
- A signed declaration that all the information submitted within the application is true.

Given that the programme has not been used there is no “typical” time for perfecting the information.

TIMING/BENEFIT

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

Full immunity is available for the first applicant, provided it meets all the other specified conditions. For subsequent applicants only a partial reduction of the fine is available.

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?

An undertaking that is second to provide evidence with regard to a violation of section 3 of the Competition Law is not eligible to receive full immunity but may benefit from a reduction of the fine. For the first enterprise that satisfies the relevant requirements under the Regulations, that is, the first enterprise after the immunity applicant, a reduction of between 30 and 50% is available. The level of reduction within the specified range will be determined on the basis of the point in time that the evidence was submitted, the added value it provided and the extent and consequence of the undertaking’s subsequent co-operation.

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

The reduction will be between 20 and 30% for the next applicant (third overall) and for all subsequent enterprises (theoretically there is no limit to the number) the reduction will be up to 20%, assuming they meet the requirements of Regulation 16. Regulation 22(2) provides that the point in time at which the evidence was submitted and the added value of the evidence will also be taken into account, as well as the extent and contribution of the undertaking's ongoing co-operation after the initial submission of the evidence.

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?

As there has been no reported use of the programme to date, there are no precedents in this regard.

SCOPE OF LENIENCY

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

An undertaking may be granted full immunity from a fine if it fully satisfies all the following requirements:

- The applicant undertaking must co-operate fully, actively and continuously with the Commission from the date of submission of the application until the end of the procedure and specifically:
 - must willingly and immediately provide the Commission with all relevant information and evidence in its possession or at its disposal or which subsequently came into its possession;
 - must remain available to and at the disposal of the Commission in order to answer any request which will contribute to proving the relevant true facts;
 - must make its current and former employees and managers available for interview by the Commission or a member of the Competition Service of the Commission;
 - must not destroy, falsify or conceal any relevant information or evidence in relation to the suspected infringement; and
 - must keep secret the existence and the content of the application until the Commission publishes its report concerning the case, unless otherwise agreed with the Commission.
- The undertaking concerned must cease its participation in the potential infringement at the latest when it submits its evidence unless continuing participation is requested by the Commission in order to ensure the efficiency of its investigations.
- The undertaking must not have encouraged or prompted other undertakings to take part in the infringement.

12.1 Can ringleaders or coercers receive leniency or full immunity?

No, an undertaking that has encouraged other undertakings to take part in the infringement cannot be awarded immunity, although it can request a reduction of its fine, if it fulfils the criteria and conditions set out in the leniency programme.

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?

Please see question 12 above.

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

As stated above, the undertaking concerned must stop participating in the potential infringement no later than when it submits its evidence, unless the Commission requires its continued participation in order to ensure the efficiency of its investigations.

13. Is there any guarantee of obtaining the final benefit of a leniency application (immunity or reduction of fine) if a leniency applicant co-operates fully with the enforcing body?

If an applicant co-operates and complies with the criteria and conditions set out in the leniency programme, the Commission is obliged to grant either full immunity or reduction of a fine depending on the criteria the undertaking fulfils. It may only refuse immunity or reduction of a fine if the applicant fails to meet the conditions set out in the programme, for example by failing to co-operate with the Commission or by providing false or misleading statements. If failure to co-operate fully with the Commission is cited as a ground for refusal of benefits under the programme, the applicant may apply to the Supreme Court of Cyprus for judicial review. Otherwise the Commission's decision becomes final.

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)?

Once the application and all the requisite supporting evidence have been submitted, the administrative support service of the Commission has seven days to determine whether it complies with the Regulations and to report its findings to the Commission. If the Commission is satisfied, it issues its decision to grant an exemption from the administrative fine under certain conditions (conditional approval). Regarding immunity, the Commission must communicate its conditional decision no later than the day on which the statement of objections is notified. The conditional approval for the reduction of a fine must be communicated to the applicant within “a reasonable time”. However, there are no precedents as to what constitutes a reasonable time for this purpose.

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.

There are no practical precedents to give guidance on this question.

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?

There is no mention in the programme of employees, other than that the undertaking applying for leniency is required to make its current (and, if possible, past) employees available to the Commission for questioning. Sanctions under the Competition Law may not be imposed on natural persons (not falling within the meaning of undertaking), but this does not rule out other forms of liability. There are no practical precedents to give guidance on this question.

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.

Sanctions under the Competition Law may not be imposed on natural persons (not falling within the meaning of undertaking) and there is no scheme in place 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)?

The programme requires applicants to co-operate fully with the Commission. However, it does not make clear whether such co-operation extends to giving up their rights to dispute the Commission's findings, and there are no precedents regarding the issue.

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

There are no precedents to give guidance on this question.

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

Immunity from a fine or a reduction of a fine does not absolve the undertaking from any other liability it may have due to its involvement in an infringing activity.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

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

The Commission may not use any information or material submitted by an undertaking in connection with an application for immunity or leniency which has been rejected by the Commission, unless the undertaking gave its consent or the information or material was available to the Commission by other means.

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

The Commission does not disclose the identity of the applicant or the fact that it has co-operated with the Commission until final drafting of its leniency report, except where the Commission is bound by another legal obligation or has the consent of the applicant.

Furthermore, the Commission can decide whether or not to accept applications by third parties seeking to gain access to information of the undertaking applying for immunity or reduction of an administrative fine, or to any material or information supporting the application.

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

Although the Commission may withhold information it must nevertheless disclose documents on which it will rely in its decision, apart from documents that constitute confidential business information, or provide a written list of such documents, so that the undertaking or group of undertakings is duly informed of all the documents that will be used by the Commission as evidence. The Commission may not base its decision on a document that has not been disclosed to the undertaking or undertakings under investigation. If it intends to rely on a document that it has not previously disclosed, the Commission must disclose the document and give the other parties reasonable time to examine it and consider its content.

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

Yes, as described above. Furthermore, it is the Commission's policy to protect business secrets and any other information of a confidential nature.

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

The Commission is a member of the EU network of national competition authorities and operates in accordance with the EU Commission Notice on co-operation within the Network of Competition Authorities (2004/C 101/03).

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

Paragraph 40 of the EU Commission Notice provides that except in specified circumstances, information voluntarily submitted by a leniency applicant or other information that has been obtained as a result of a leniency application will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the applicant's consent. Once the leniency applicant has given consent to the transmission of information to another authority, that consent may not be withdrawn.

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?

The Competition Law specifically provides that in the case of a private enforcement claim for damages due to an infringement of the Competition Law or Article 101 or 102 TFEU, the final decision of the Commission, the competition authority of another EU member state or the European Commission represents refutable evidence of the truth of its contents. The decision of the Commission, which will most likely make mention of the information given by the leniency applicant, is therefore discoverable in a subsequent private enforcement claim.

As noted in the answer to question 19.1 above, the Commission could be bound to reveal the identity of the leniency applicant, as well as the contents of the application, where the Commission is subject to a “legal obligation” to do so. The leniency programme does not define such a legal obligation, but a court order in a private enforcement claim would most likely meet the definition.

More specifically, Regulation 28 states that the decision of the Commission to grant leniency does not exonerate the undertaking from any civil liability arising from its participation in an infringement of section 3 of the Competition Law or Article 101 or 102 TFEU.

The Commission has not yet formulated a detailed approach on whether information submitted to a foreign jurisdiction can be subject to discovery orders by domestic courts.

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?

As yet there are no precedents regarding this matter.

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

As yet there are no precedents regarding this matter.

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

As yet there are no precedents regarding this matter.

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?

If a full and complete leniency application has been submitted to the European Commission on the basis of the Commission Leniency Notice, the Cyprus Commission accepts a pro forma summary application for immunity from the imposition of a fine.

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

Yes, as described in the answer to question 23 above.

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

As noted in the answer to question 6 above, applications for leniency should specify any other national competition authorities of the EU or any other authority that the applicant has approached or intends to approach in relation to the alleged concerted practice.

In addition Regulation 30 makes clear that the Commission co-operates with the European Commission and the national competition authorities of other member states on matters relating to the leniency programme. An undertaking's compliance with the leniency programme does not entail the granting of immunity or reduction of a fine from the European Commission or from the national competition authorities of other member states, on the basis of the information provided by the undertaking to the Commission. The undertaking is advised to submit applications for leniency to the European Commission or to the national competition authorities of other member states which are affected by the restriction of competition under investigation.

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?

There are no settlement procedures in Cyprus.

REFORM/LATEST DEVELOPMENTS

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

Following the recent updating of the Competition Law the primary legislative framework is modern and fit for purpose, and unlikely to require significant reform in the near future. We expect that the Commission will now focus on private enforcement and address the lack of take-up of the leniency programme.