

Leniency Regimes

Jurisdictional comparisons

Fourth edition 2012

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Jacques Buhart McDermott Will & Emery**



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BACKGROUND

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

A leniency programme was introduced in Italy by Law 287/1990 (Article 15, 2 bis) as amended by Law Decree No. 223, 4 July 2006, empowering the Italian Competition Authority (ICA) to adopt a leniency regime.

The policy was first set out in a Notice on the non-imposition or reduction of fines adopted by the Authority in February 2007 (*Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'art. 15 della legge 10 ottobre 1990, n. 287* – the Leniency Notice), which was partially amended on 6 May 2010 with regard to corporate statements.

The Leniency Notice is essentially modelled on the scheme of the European Commission leniency programme and is enforced by the ICA.

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

The Leniency Notice provides both full immunity and reduction from fines and sets out the conditions for eligibility for beneficial treatment. Full immunity is granted to the first cartel participant who, on a voluntary basis, discloses to the ICA information or documentary evidence on the existence of an agreement, provided that: (i) in the ICA's opinion, the information/evidence submitted is decisive to find an infringement; and (ii) the ICA does not already have information/evidence sufficient to prove the existence of an infringement.

The Leniency Notice does not rule out the possibility to file immunity requests even after the ICA has conducted targeted inspections (type 1B immunity) although it does not set a different threshold for such type of immunity.

Despite the fact that the reading of the provision might suggest that the threshold set by the Italian programme is higher than the Commission's, which provides that type 1A immunity is granted to the first undertaking that submits evidence which enables the Commission to carry out targeted inspections (and even if the information so gathered does not prove to be decisive), in practice, these criteria seem to be the same. Indeed, the ICA's evaluation of the contribution in order to determine whether it is decisive is made *ex ante*, notwithstanding the result of the inspections: for instance, on one occasion, the ICA considered to be decisive a type 1A immunity that

allowed it to carry out inspections on the premises of all the companies involved in the proceeding, without taking into account the information gathered during the inspections (see case I649, *Wooden Chipboard Panel*, 30 May 2007).

Subsequent applicants may obtain a reduction of applicable fines, usually not exceeding 50 per cent of the total amount, but it is not excluded that it may be higher. To date, the ICA has never exceeded the 50 per cent threshold, except where partial immunity was awarded (see question 7). For instance, on one occasion the second applicant benefited from a substantial reduction in fine, as the ICA granted partial immunity for a considerable period of the infringement (case I722, *International Freight Forwarding*, 15 June 2011).

According to section 1 of the Leniency Notice, leniency is available for horizontal agreements, in particular agreements and/or concerted practices between two or more competitors aimed at restricting competition through the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets (it does not apply to other competition infringements including vertical restraints and abuse of dominant position).

Recently, the leniency programme was applied in a case mainly concerning an information exchange, which was considered by the ICA as a facilitating behaviour in the context of a concerted practice. In particular, in case I701, *Cosmetics* (15 December 2010), the ICA found that 16 of the most important undertakings operating in the manufacturing and retailing of cosmetic products achieved a general alignment of price increases for personal care products, which was above the inflation rate and was unrelated to increases in production costs. An important role in the cooperation between the cartel participants was played by the Italian Association of Branded Products Industries which provided its continuous support to its members by facilitating the widespread and detailed exchange of information.

3. How many cartels have been unveiled and punished since the adoption of the leniency programme?

The first case in which the ICA did not impose any fine on a company which voluntarily disclosed the existence of an anticompetitive agreement dates back to before the introduction of the Leniency Notice. In 1997, the ICA granted immunity to a company that reported the existence of an agreement before the opening of the investigation (case I239, *Cartel of explosives for civil use*, 26 June 1997).

To date (April 2012), the ICA has adopted five decisions under the leniency programme.

In three cases, the leniency applications were filed in Italy and no previous applications were submitted to the European Commission:

- Case I649, *Wooden Chipboard Panel*, 30 May 2007, concerning a cartel in the manufacture of particleboard, where the ICA granted full immunity to the first leniency applicant. It is noteworthy that the leniency programme was introduced only during the course of the investigation

and after the applicant made its first submission. All the other eight companies investigated benefited from a 30 per cent reduction in fines for having effectively cooperated with the ICA outside the leniency programme;

- Case I700, GPL price for *Sardinia's heating*, 24 March 2010, concerning a price-fixing cartel among suppliers of liquefied petroleum gas cylinders and small tanks. The ICA granted immunity to ENI which, after the opening of the investigation, provided relevant evidence and offered its cooperation allowing the ICA to extend the product and geographical scope of the cartel.
- Case I733, *Maritime agency service*, 16 March 2012, where the ICA fined sixteen shipping agents and two trade associations mainly active in the Port of Genoa that have engaged in an anticompetitive agreement concerning the market for shipping agency services. The ICA granted full immunity to Maersk Italia, that informed the ICA of the existence of the cartel, and a 50 per cent reduction to Hapag-Lloyd Italy, as it confirmed and strengthened the evidential framework provided by the immunity applicant.

In the other two cases, infringements were initially reported by applicants to the European Commission and afterwards to the ICA – in addition to other national competition authorities through a summary leniency application (pursuant to Paragraphs 16-18 of the Leniency Notice):

- In case I701, *Cosmetics*, 15 December 2010, the ICA alleged that 16 undertakings operating in the manufacturing and retailing of cosmetic products coordinated their actions with regard to the wholesale prices of such products. The first leniency applicant obtained total immunity from fines, while subsequent applicants (who filed their applications after the opening of the investigation) were awarded a fine reduction of respectively 50 and 40 per cent.
- Case I722, *International Freight Forwarding*, 15 June 2011, concerned colluding behaviour between 20 freight forwarders and the trade association FEDESPEDI aimed at fixing and passing on various fees and surcharges in the market for international overland freight forwarders to and from Italy. The ICA granted immunity from fines to the first leniency applicant and a reduction of respectively 50, 49 and 10 per cent to the following leniency applicants. In addition, the second applicant was also granted partial immunity from fines for a period of four years, because it was the first to inform the ICA and to provide evidence of the existence of the cartel in that period.

It seems that about 60 leniency applications have been filed to date, although it is unknown how many were effectively followed by pre-investigation activity or opening of proceedings.

4. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient?

In order to obtain full immunity or reduction of fines, the leniency applicant must collaborate fully and continuously with the ICA. In particular it

must: (i) provide on time all the relevant information and evidence that comes into its possession; (ii) answer without delay any request for information from the ICA; (iii) allow the ICA, where necessary, to interview its employees/executives and, to the extent possible, its former employees/executives; and (iv) refrain from altering, destroying or hiding any information or documents or informing anyone of the leniency application before the statement of objections (SO) is issued.

In addition, the applicant must interrupt its participation in the alleged cartel, save for those cases where according to the ICA's assessment, such a course of action would jeopardise the investigation.

With regard to the obligation to keep the leniency application confidential, the ICA has showed in the past a positive attitude when discussing the specific needs of the company, for instance, granting a waiver to promptly inform an insurance company with regard to issues concerning the coverage of the legal risks stemming from the application.

As for what constitutes the evidence to be submitted by the applicant, according to the Leniency Notice, the submission of testimonial evidence (in the ICA's practice so far, also through corporate statements made by external lawyers) may be sufficient to benefit from immunity. Such testimonial evidence should be decisive to find a cartel infringement, possibly through a targeted inspection. However, submissions are usually supported by documentary evidence, especially because a leniency applicant has an obligation to provide the ICA with all the relevant documentary evidence in its possession at the time of the submission.

To date, the ICA has on one occasion granted immunity to a company that submitted a leniency application with little documentary evidence. The statement was mainly based on oral information provided by a former CEO and other employees and filed through the company's external lawyers: the credibility and probative value of such application was strongly contested by the other parties to the proceeding. However, the ICA recognised that such information provided a clearer indication as to the duration, activities and functioning of the cartel and its value could thus not be limited to mere circumstantial evidence. It was noted that the absence of documentary evidence is not sufficient to put into question the reliability of a leniency application, since it is increasingly rare to discover 'smoking gun' documents, and collusive behaviour can also be proved on the basis of indirect evidence (case I700, *GPL price for Sardinia's heating*, 24 March 2010, confirmed by TAR Lazio, n. 36126/2010, 13 December 2010).

TIMING

5. What are the benefits of being 'first in' to cooperate?

Only the first applicant may profit from full immunity from fines.

6. What are the consequences of being 'second'? Is there an 'immunity plus' or 'amnesty plus' option?

Undertakings which are not the first to come forward are not eligible for immunity (full exemption from fines).

However, subsequent applicants may benefit from a reduction of their fine usually not exceeding 50 per cent of the total amount. To this end, the Leniency Notice does not set a maximum number of applications that may be filed and, unlike the Commission Leniency Notice, it does not provide for fixed rates of reduction for subsequent applicants.

There are no leniency plus or amnesty plus options or other benefits. However, a company may seek partial immunity (see question 7).

7. Are subsequent firms given any beneficial treatment if they make a useful contribution? How are ‘useful contributions’ defined?

Yes, cartel members that come forward subsequent to another leniency applicant may receive a reduction in the fine (usually not exceeding 50 per cent) where they provide the ICA with evidence that, due to its nature or level of detail, significantly strengthens the evidence already in the ICA’s possession, thus appreciably contributing to the ICA’s ability to prove the infringement.

In setting the fine reduction, the ICA takes into account: (i) the effective value of the evidentiary materials provided; and (ii) the timeliness; and (iii) the degree of cooperation offered by the undertakings.

In order to qualify for the reduction, companies are required to fully cooperate with the ICA (to the same extent as companies applying for immunity).

In addition to fine reductions, if a subsequent firm provides evidence relating to facts previously unknown to the ICA which have a direct bearing on the gravity or duration of the suspected cartel, the ICA will not charge the applicant with the further elements or further duration of the cartel so revealed (so-called ‘partial immunity’).

SCOPE/FULL LENIENCY

8. Is it possible to receive full leniency? If so, what are the conditions required to receive full leniency? Can ringleaders/coercers receive full leniency? If there a requirement to ‘cooperate fully and on an ongoing basis’ what does it entail? Does the regulatory authority require the applicant to cease participation in the cartel conduct after its application?

Apart from the requirements set forth by Paragraph 2 of the Leniency Notice (ie new and conclusive information or evidence), a company should collaborate fully and continuously with the ICA (see question 4 above).

Different from the Commission’s leniency programme, which excludes coercers from the benefit of immunity, the Leniency Notice does not explicitly bar any company from the benefit of immunity. Thus, in principle, ringleaders and coercers are eligible for immunity. In the ICA’s practice, immunity was effectively granted to companies that played a leading role (see case I722, International Freight Forwarding, 15 June 2011) or a primary role in the infringement (see case I701, Cosmetics, 15 December 2010). On the contrary, there are no cases reported so far in which coercers have applied for immunity.

It is a condition for access to both total or partial immunity that the applicant cease participation in the cartel, save for those cases where, according to the ICA's assessment, such a course of action would jeopardise the investigation.

9. How many companies have received full immunity from fines to date?

To date (April 2012), in the five cases closed by ICA under its leniency programme, the first applicant in line has always been granted full immunity.

PROCEDURE

10. What are the practical steps required to apply for leniency?

Before filing a leniency application, a company may seek informal contact with the ICA – even on an anonymous basis – in order to seek informal guidance on the application of the Leniency Notice (the ICA has established a dedicated phone line). In the context of such informal contact, the ICA has on some occasions also discussed with companies the elements which, if provided, would allow them to profit from immunity.

Leniency applications should normally be filed in writing. If a leniency applicant wishes to submit an oral corporate statement, it should provide adequate reasons for its request in order to obtain the ICA's authorisation, which is broadly discretionary. Oral corporate statements can also be made by external lawyers.

In the case of an oral submission, the company's statements are taped and the applicant is requested to check the accuracy of the written transcript as compared to the recording.

The ICA is known to have adopted special internal rules of procedure for dealing with leniency applications, although they are kept confidential.

So far, the ICA has always accepted oral corporate statements, although the submission of an oral corporate statement does not exempt the applicant from providing the ICA with all the relevant documentary evidence in its possession.

Recently, when filing their submissions, companies have been requested to explicitly admit their responsibility.

With regard to the content of the statement, it should normally include:

- the name and address of the company submitting the immunity/leniency application;
- the names and addresses of the other companies involved in the alleged cartel;
- a detailed description of the cartel including: (i) its aims, activities and functioning; (ii) the product or service concerned; (iii) the geographic scope; (iv), the duration; and (v) the names of the individuals who, to the applicant's knowledge, were involved in the alleged cartel;
- evidence relating to the alleged cartel in the possession of the applicant;
- information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in

relation to the alleged cartel.

Article 15 of the Leniency Notice provides for a marker system whereby, upon request from the immunity applicant, the ICA may indicate to the applicant a deadline for completing the application. Obviously, the request for a marker should include a minimum set of information: a brief description of the infringement (ie the affected products and territories, the estimated duration and the nature of the cartel conduct) and the other cartel participants. In addition, the company shall inform the ICA of the other competition authorities approached or intended to be approached. If the company complies with the deadline set by the ICA for completing the application, it is considered to have been submitted on the date when the marker was granted. Otherwise, if the undertaking does not comply with the marker deadline, other companies having filed complete submissions will be considered first and the information presented by the company may only be considered by the ICA for the purpose of a reduction of the fine (Paragraph 15 of the Leniency Notice).

According to Paragraphs 11-13 of the Leniency Notice, once a formal application has been made, the ICA will verify and confirm to the applicant whether immunity is available. Should conditional immunity not be available, the applicant may either withdraw its application or request the ICA to consider its application as a request for a reduction of its fine.

Later on in the proceedings, the ICA will grant conditional immunity/reduction of fines, subject to fulfilment in the course of the investigation by the company of the other obligations set out in the Leniency Notice (however, the Leniency Notice does not set a time limit for such confirmation).

With its final decision, the ICA will grant definitive immunity and set the final amount of the fine reduction.

11. Is there an optimal time to approach the regulatory authority?

There is no specific optimal time to approach the ICA, although a company that intends to file a leniency application should bear in mind that timeliness is essential in order to qualify as ‘first in’ to benefit from immunity or to obtain the best rank in the queue to benefit from the highest fine reduction.

12. What guarantees of leniency exist if a party cooperates?

Applicants have a legitimate expectation that where the conditions and obligations attached to leniency are fulfilled, they will benefit from favourable treatment under the programme.

It is noteworthy that the evaluation of whether the conditions are met is, to a certain extent, discretionary. This is the case, for instance, on the decisive nature of the information and documents provided and their usefulness to enable the ICA to make a targeted inspection (Paragraph 2 of the Leniency Notice).

So far, no case has been reported in which the ICA found a failure to comply with such conditions and consequently refused to grant immunity/leniency.

CONSEQUENCES

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

The Italian system does not provide for criminal liability nor for personal liability of the company's employees for antitrust infringements.

However there is an isolated precedent concerning a state owned company, in which members of the board of directors and of the board of auditors were sentenced to pay damages to the shareholders of the company (ie the municipality of Rome) after the ICA had imposed an antitrust fine on it (see Court of Auditors case n. 325/2011, 22 February 2011, *Trambus*).

14. Does leniency bar further private enforcement?

No, it does not. Leniency applicants are not protected from the risk of follow-on actions for damages.

To date, the ICA has implemented some procedural safeguards to offer protection to the leniency applicant, ie the limitation of the right to access the procedure file only to the investigated parties and the possibility to make corporate statements orally, thus limiting the risk of disclosure of leniency documents in civil proceedings.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

15. Is confidentiality afforded to the leniency applicant and other cooperating parties? If so, to what extent?

The Leniency Notice provides that access to corporate statements must be postponed until the ICA has issued an SO. The parties under investigation who exercise their right of access to corporate statements have to commit not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted, and to ensure that the information obtained will be used solely for the purposes of judicial or administrative proceedings for the application of competition rules.

With regard to access to the documentation supporting the leniency statements, it may be postponed at the ICA's discretion until the SO. Accordingly, the ICA has, in a number of cases, effectively delayed the right of access to the case file.

Is the identity of the leniency applicant/other cooperating parties disclosed during the investigation or in the final decision?

The identity of the leniency applicants is protected only during the investigations, until an SO is issued, which reveals the name(s) of the leniency applicant(s) to all defendants. Furthermore, the final decision, which is a public document, generally reports the applicants' names.

Is information provided by the leniency applicant/other cooperating parties passed on to other undertakings under investigation?

See above.

Can a leniency applicant/other cooperating party request anonymity or confidentiality of information provided?

Leniency applicants benefit from the ordinary procedural rules protecting their business secrets (Article 13 of Presidential Decree 217/1998). Accordingly, leniency applicants may request confidentiality of personal, commercial, industrial and financial information; should such information be essential to establish the existence of an infringement, parties will be granted access within the limits that are necessary to exercise their right of defence.

The ICA has however shown a cautious attitude, and in one case denied requests from other investigated parties to access documents submitted by the applicants (see Case I701, *Cosmetics*, 15 December 2010). Such approach was confirmed by the administrative courts (TAR Lazio, n. 8015/2010, 22 April 2010 and *Consiglio di Stato* n.6481/2010, 6 September 2010).

16. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities with whom the authority in question cooperates? If so, how?

The Leniency Notice does not provide specific rules on the matter. According to the Commission Notice on cooperation within the Network of Competition Authorities (C 101, 27.4.2004) and the ECN Leniency Model, information submitted by a leniency applicant or collected on that basis may only be exchanged between national competition authorities if: (i) the applicant consents to the exchange; or (ii) the applicant has applied for leniency with both competition authorities in the same case; or (iii) the receiving competition authority commits not to use the information to impose sanctions on the applicant.

As a matter of fact, the ICA usually requests applicants, at the beginning of their cooperation, to expressly consent to the exchange.

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

The Leniency Notice bars third parties not under investigation, such as competitors, consumers and clients, from access to corporate statements or to the attached documentation in the ICA's file. Accordingly, third parties' requests to access the file submitted to the ICA will presumably be rejected.

An interested party may seek a court order to obtain disclosure of information by the ICA, although failure to comply is sanctioned with a negligible sum.

Can leniency information be subjected to discovery orders in the domestic courts?

Civil courts may in principle order a party to present documentary evidence upon request from other parties: in such a case, however, the requesting party has to describe the document and its contents (see Article 210 of the Italian Code of Civil Procedure).

To date, as far as we know, discovery orders have never been issued with regard to a leniency application. On the contrary, discovery orders were granted in cases concerning follow-on actions based on commitment decisions of the ICA (Tribunale di Palermo, 15 July 2011) or based on a final decision in a proceeding without leniency applicants (Corte di Appello di Roma, 8 May 2011).

Please note that there is no institution of discovery in Italian law comparable to discovery procedures in the United States and no ‘fishing expeditions’ are allowed.

Can leniency information be subjected to discovery orders in foreign courts?

There are no specific rules on the discovery of information submitted to the ICA under the Leniency Notice as a result of an order issued by a foreign court.

In the case of discovery orders issued by courts of other EU member states in relation to evidence located in Italy, the general rules on the taking of evidence set by Council Regulation (EC) No 1206/2001 apply. According to the Regulation, requests from foreign courts are executed in accordance with Italian law within 90 days of receipt.

In order to limit the risk of disclosure, applicants may apply for leniency orally (see above including question 10).

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

There are no specific rules on the discovery of leniency applications submitted to a foreign competition authority on the basis of an order issued by an Italian court.

In such a case, the general rules on the taking of evidence in civil or commercial matters set by Council Regulation (EC) No 1206/2001 would apply (see above).

18. Are there any precedents in which evidence from a leniency application has been discovered in a private enforcement claim?

We are not aware of any Italian case in which the injured party requested a discovery order with regard to evidence provided by a leniency applicant.

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

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

Yes, according to Paragraph 16 of the Leniency Notice, the applicant who has, or is in the process of filing an application for immunity to the European Commission, may also file a summary application for the non-imposition of fines to the ICA if it believes that the ICA may have jurisdiction to deal with such case.

Please note that, on one occasion, parties have raised an issue concerning coordination between applications filed at the EU and national level. The ICA held that the parties have to identify the scope of the infringements in the summary applications, with a description of all the relevant elements, such as the relevant conduct, the geographic scope, duration and the names of cartel participants. (See case I722, *International Freight Forwarding*, 15 June 2011, confirmed by TAR Lazio, No 3034/2012, 29 March 2012).

20. Does the policy address the interaction with applications for leniency in other EU member states? If so, how? Does the authority accept summary applications in line with the ECN Model Leniency Programme?

The Leniency Notice does not contain provisions with regard to the application for leniency in other EU member states.

The ICA accepts summary applications. In addition, contrary to the ECN Model Leniency Programme, the ICA also accepts summary applications filed by subsequent leniency applicants.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

21. What is the relationship between leniency and applicable settlement procedures? Are they mutually exclusive?

The settlement procedure is not available in Italy for antitrust cases investigated by the ICA.

REFORM/LATEST DEVELOPMENTS

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

No reform of the leniency policy is currently being discussed in Italy.