

A new leniency programme

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– Dr H Papaconstantinou explains the incentives for
cooperating with competition authorities in Greek
antitrust policy and practice

After its last amendment with Law 3373/ 2005, the Greek basic Law 703/177 on the control of monopolies and oligopolies and the protection of free competition has been revisited. This was done to introduce to the Greek legal system the provisions of the Regulation 1/2003, which has constituted the keystone of the modernisation of the European Union's antitrust enforcement rules and procedures, in force since May 1 2004.

The Hellenic Competition Commission (HCC) has earned since then an upgraded status, and has entered on European level into an institutional substantial cooperation with the EC and the national competition authorities, and the courts of the rest of the member states for the application of community legislation. So, today the HCC makes part of the European Competition Network (ECN), which operates as an open and permanent forum for the exchange of information between all national competition commissions of the European Union.

Article nine paragraph four of the revised Law 703/77 foresees the competence of the HCC in introducing a leniency programme for corporations involved in free competition infringements. The leniency policy is generally recognised to enhance investigative effectiveness by the voluntary collaboration of undertakings involved in cartels.

As a reward, collaborating undertakings are granted immunity from fines (the first one to submit information and evidence about an alleged cartel, provided all requirements are met) or a reduction of a fine (for other undertakings that provide the Authority with evidence which has significant added value and meet other requirements). The Community Courts have acknowledged that cooperation with the Commission investigation may be rewarded.

On December 6 2006, the European Commission adopted a revised Notice on immunity from fines and reduction of fines in cartel cases (2006 leniency notice). It was the third Commission leniency notice and sets out the framework for rewarding cooperation in the Commission investigation by undertakings that are or have been party to secret cartels affecting the Community.

It is a revised version of the preceding 2002 leniency notice, which by its turn has replaced the very first leniency notice dating back to 1996. In particular, the 2006 leniency notice clarifies what information and evidence an applicant needs to provide to the Commission to benefit from immunity from fines. It also clarifies the conditions for immunity and reduction of fines.

Based primarily on the 2002 leniency notice, but also taking into consideration the expected modifications of the 2006 notice, the HCC issued on March 17 2006 its Decision 299/V/2006 (the Decision), which contains the Greek leniency rules and procedural regulations. The Decision also implements the Model Leniency Programme (MLP) of the ECN.

This aims to harmonise the substantive and procedural provisions of all members of the ECN on the immunity from and reduction of fines for cartel participants. According to page eight of the explanatory notes to the MLP, while it is highly desirable to ensure that all national competition authorities operate a leniency programme, the variety of legislative frameworks, procedures and sanctions across the EU makes it difficult to adopt one uniform system.

The ECN model programme therefore sets out the principal elements which, after the soft harmonisation process has occurred, should be common to all leniency programmes across the ECN. This would be without prejudice to the possibility for an authority to add further detailed provisions that suit its own enforcement system, or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement.

The Commission and the national authorities are committed to seeking the alignment of the pro-

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grammes in their jurisdictions within the framework specified by the ECN model programme.

In general the Greek leniency programme refers to corporations that have participated in secret horizontal collusive practices that infringe Article 1(1) Law 703/1977 or Article 81(1) EC aimed at fixing prices, production or sales quotas, sharing markets (including bid-rigging or restrictions of imports or exports). The HCC has adopted the distinction of the EU 2002/2006 Notice between complete immunity from fines meaning total discharge of fines and reduction of fines.

Immunity is granted only to the first cartel participant that submits sufficient evidence to the Authority, which in fact is appropriate to lead the HCC to the initiation of investigation procedures. A right to immunity may only be granted if the HCC did not have at the time of the submission of the relevant information sufficient evidence to initiate the investigation procedure or prove the infringement.

The MLP also contains the following statutory regulations concerning either granting of immunity from fines (types 1A and 1B) or granting of fine reductions (type 2):

Type 1A

The authority will grant an undertaking immunity from any fine that would otherwise have been imposed provided:

a) The undertaking is the first to submit evidence which in the authority's view, at the time it evaluates the application, will enable the authority to carry out targeted inspections in connection with an alleged cartel; The HCC Decision repeats this precondition.

b) The authority did not, at the time of the application, already have sufficient evidence to adopt an inspection decision or seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement ;and

c) The conditions attached to **leniency** are met.

With a view to enabling the authority to carry out targeted inspections, the undertaking should be in a position to provide the authority with the following:

- The name and address of the legal entity submitting the immunity application;
- The other parties to the alleged cartel;
- A detailed description of the alleged cartel, including:
 - The affected products;
 - The affected territory (-ies);
 - The duration; and
 - The nature of the alleged cartel conduct;
- Evidence of the alleged cartel in its possession or under

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its control (in particular any contemporaneous evidence);

- Information on any past or possible future **leniency** applications to any other authorities and **competition** authorities outside the EU in relation to the alleged cartel.

The HCC decision adopts here a more general clause without enumerating *in concreto* the content of the required information. The decision states that the concerned undertaking should cooperate steadily, actively and without any omission and remain at the Directorates' General for Competition (DGC) and HCC's disposal to respond without any delay any question or request concerning the infringement under investigation.

Type 1B

In cases where no undertaking had been granted conditional immunity from fines before the authority carried out an inspection or before it had sufficient evidence to adopt an inspection decision or seek a court warrant for an inspection, the authority will grant an undertaking immunity from any fine which would otherwise have been imposed if:

a) The undertaking is the first to submit evidence which in the authority's view, enables the finding of an infringement of Article 81 in respect of an alleged cartel;

b) At the time of the submission, the authority did not have sufficient evidence to find an infringement of Article 81 in connection with the alleged cartel; and

c) The conditions attached to **leniency** are met.

Excluded immunity applicants

An undertaking that took steps to coerce another undertaking to participate in the cartel will not be eligible for immunity from fines under the programme. Similarly, the fact that an undertaking could have persuaded other undertakings to participate in the infringement would constitute a non-eligibility criterion for granting of immunity. According to Law 703/77 the sole ringleader is not eligible for immunity from fines under the leniency programme.

Reduction of fines: Type 2

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

In order to qualify for a reduction of fines, an undertaking must provide the authority with evidence of the alleged cartel that, in the authority's view, represents significant added value relative to the evidence already in the authority's possession at the time of the application.

The concept of significant added value refers to the



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extent to which the evidence provided strengthens, by its very nature or its level of detail, the authority's ability to prove the alleged cartel. Similarly, in the HCC decision it is stated that undertakings that do not meet the conditions for immunity from fines may apply for a reduction of the fine provided they submit evidence of significant added value and terminate their participation to the cartel immediately after submission of the evidence.

In order to determine the appropriate level of reduction of the fine, the authority will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or so on undertaking to apply) and the authority's assessment of the overall value added to its case by that evidence. Reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine that would otherwise have been imposed.

If a Type 2 applicant submits compelling evidence, which the authority uses to establish additional facts that have a direct bearing on the amount of the fine, this will be taken into account when setting any fine to be imposed on the undertaking that provided this evidence.

A reduction in fines is granted only if the submitted evidence possesses a significant added value with respect to the evidence already in the DGC's possession. Significant added value is recognised when the relevant information strengthens, by nature or level of detail, the ability of the HCC to detect and assess an infringement. The Commission is free to evaluate the level of reduction that will depend on the time at which the relevant evidence was submitted and on the importance of the information for the initiation of a procedure.

The HCC may also take into consideration the extent and effect of the undertakings' collaboration subsequent to submitting the evidence. Under the condition that the applicants fulfil the above criteria, the Commission may reduce the amount of the fine as follows: a reduction of 30% to 50% for the first undertaking, a reduction of 20% to 30% for the second undertaking and a reduction of up to 20% for every subsequent undertaking, which in fact has applied for inclusion to the leniency programme.

In order to encourage the undertakings to proceed to disclosures to the maximal extent Decision also foresees that evidence unknown to the HCC concerning the gravity and duration of the infringement shall not be taken into account against the undertaking that provided it in the course of the calculation of the reduced fine.

Conditions attached to leniency

In order to qualify for leniency under this programme, the applicant must satisfy the following cumulative conditions:

(1) It ends its involvement in the alleged cartel immediately following its application save to the extent that its continued involvement would, in the authority's view, be reasonably necessary to preserve the integrity of the authority's inspections; the second hypothesis is not met by Decision, which still insists

on the immediate ending of the participation of the applicant to the infringing circle.

(2) It cooperates genuinely, fully and on a continuous basis from the time of its application with the authority until the conclusion of the case; this includes:

(a) providing the authority promptly with all relevant information and evidence that comes into the applicant's possession or under its control;

(b) remaining at the disposal of the authority to reply promptly to any requests that, in the authority's view, may contribute to the establishment of relevant facts;

(c) making current and, to the extent possible, former employees and directors available for interviews with the authority;

(d) not destroying, falsifying or concealing relevant information or evidence; and

(e) not disclosing the fact or any of the content of the leniency application before the authority has notified its objections to the parties (unless otherwise agreed with the authority).

(3) When contemplating making an application to the authority but prior to doing so, it must not have:

(a) destroyed evidence which falls within the scope of the application; or

(b) disclosed, directly or indirectly, the fact or any of the content of the application it is contemplating except to other authorities or any competition authority outside the EU

If an undertaking fulfils the criteria of the above, it will only be granted immunity provided it also meets the following cumulative conditions according to the below:

4 a) it ends its involvement in the infringement no later than the time of the evidence submission; this regulation contradicts tactically the EU Commission's practice to let the undertaking continue its participation to the meetings of the cartel members, in order not to cause suspicion about the initiation of a secret investigation.

b) it has not persuaded other undertakings to participate in the infringement;

c) it keeps the submission of leniency application confidential until the DGC concludes the relevant statement of objections; and

d) it has not participated in the past in prohibited collusive practices for which either the HCC or the European Commission have issued a decision.

Conditions under (d) and (e) do not rely on the 2002 or 2006 notices and constitute specific criteria of national character.

Two applications per month

According to the Commission's Report on the functioning of Regulation 1/2003, since the 2006 leniency notice entered into force, the Commission has received, on average, two applications for immunity per month. In the same time only one case of application for inclusion to the leniency programme at all has been reported from Greece. It concerned an investigation for cartel activity in the milk sector. The application has been dismissed on the ground that on

the time of the submission, the HCC had already initiated investigation for cartel activity in this sector and the applicant failed to keep the submission of leniency application confidential.

As a response the applicant submitted a new application for reduction of fines, without founding its application with the submission of any further confidential information. In the course of the hearing with the HCC the applicant revoked its application for reduction of fines and applied for withdrawal of all evidence submitted.

The HCC upheld the revocation of the application for reduction of fines and rejected the application for withdrawal of evidence submitted on the ground that the decision does not contain any provision allowing the withdrawal of information submitted with respect to reduction of fines. As a matter of fact, since the beginning of the leniency programme of the HCC in March 2006 no one undertaking has been granted immunity or reduction of fines in Greece.

Considering that leniency programmes constitute alternative methods for effective investigations in the field of competition protection, we should refer to another current alternative procedure, even if it has not yet found its way to the practices of the HCC. It is the so-called Settlement procedure, which was introduced by the EU Commission on June 30 2008 in cartel cases.

This new instrument allows the Commission to adopt a final decision in cartel cases through a simplified and quicker procedure, freeing up resources to handle more cases. The Commission retains a broad margin of discretion to determine which cases may be suitable for settlement. Parties have neither the duty nor the right to settle.

In the settlement procedure, parties may choose to acknowledge their involvement in a cartel and their liability for it, in exchange for a reduction of their fines by 10%.

The Commission does not negotiate or bargain the use of evidence or the appropriate sanctions. However, the Commission effectively hears the parties and gives them an opportunity to argue their case. This form of cooperation is different from the voluntary production of information and evidence under the leniency notice 2006. It is not aimed at collecting evidence, but is a simplified procedure where parties acknowledge their involvement in a cartel and liability for it, having seen the evidence on which the Commission bases its envisaged objections.

Where both a settlement reduction and a leniency reduction are applicable, they are applied cumulatively. In contrast to the commitment procedure under Article nine of Regulation 1/2003, the administrative proceedings always end with a decision finding an infringement and imposing fines, irrespective of whether the standard procedure or the settlement procedure applies. The wide introduction of this new means in the practices of the authorities should be considered to our opinion just as a matter of time.