



# PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012

## COMPETITION AND CARTEL LENIENCY

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# Italy

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## REGULATION

### 1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

#### Applicable laws and guidance

The Italian Competition Authority (ICA) is empowered to determine cases where undertakings may benefit from full immunity or fine reduction in light of their co-operation (*Article 15(2) bis, Law 287/1990*). The ICA adopted its leniency notice (Notice on the non-imposition and reduction of fines under section 15 of law no. 287 of 10 October 1990) (Notice) on 15 February 2007 and modified it on 6 May 2010.

The Notice is largely based on the leniency programme of the European Commission (Commission) and the Model Leniency Programme adopted by the European Competition Network (ECN) on 29 September 2006 (Model Leniency Programme).

An English version of the Notice is available on the ICA's official website ([www.agcm.it](http://www.agcm.it)).

#### Regulatory authority

The leniency programme is administered by the ICA.

## SCOPE OF APPLICATION

### 2. What infringements of competition law does the leniency programme cover?

The leniency programme applies to secret horizontal agreements and concerted practices in violation of either Article 101 of the Treaty on the Functioning of the European Union (TFEU) or Article 2 of Law 287/1990, particularly those concerning price fixing, market sharing and/or limits on production or sales (*section 1, Notice*).

## RECENT CASES

### 3. What notable recent cases have applied the leniency programme?

As of 31 December 2011, the Notice has been applied by the ICA in four cases only:

- *Case 1649* dated 17 May 2007 concerning the wood chipboard market. When the ICA opened the case, the Notice had not been adopted yet. The Notice entered into force a few months before the ICA issued its final decision, following which one of the involved undertakings (*Trombini*) was granted full immunity for its co-operation during the investigation.
- *Case 1700* dated 24 March 2010, concerning the market for liquefied petroleum gas (LPG). These proceedings were opened by the ICA on its own initiative and initially concerned a limited part of the Italian territory (Sardinia). One of the undertakings involved, *ENI*, decided to co-operate with the ICA, providing evidence showing that the infringement regarded the whole national territory and had a more extensive duration and scope (that is, it affected not only LPG in cylinders but also bulk LPG). *ENI* was rewarded with full immunity.
- *Case 1701* dated 15 December 2010, concerning the retail cosmetics market. This was the first case formally opened on the basis of a leniency application. *Henkel*, as the first leniency applicant, received full immunity. *Colgate* and *P&G* were granted a fine reduction equal to 50% and 40%, respectively. *P&G* was granted a further reduction for its additional co-operation outside the scope of the Notice.
- *Case 1722* dated 15 June 2011, concerning the international logistics industry. *Schenker* was granted full immunity for its co-operation with the ICA. *Agility*, *DHL* and *Sittam* were granted a fine reduction equal to 50%, 49% and 10%, respectively.

## AVAILABILITY OF LENIENCY

### Civil liability

### 4. Is full immunity from civil fines available? What conditions must be met for immunity to be granted?

Full immunity from fines is available for the first cartel participant who voluntarily comes forward to report the illegal activity and to submit information or documentary evidence to the ICA, provided the following conditions are met (*section 2, Notice*):

- In the ICA's opinion, given the nature and the quality of the applicant's submission, the information or evidence provided is decisive to finding of an infringement, possibly through a targeted inspection.
- The ICA does not already have in its possession sufficient information or evidence to prove the existence of the infringement.



- The applicant fulfils the requirements set out in section 7 of the Notice (*see below*).

To benefit from immunity or a fine reduction (*see Question 5*), as applicable, a leniency applicant must also (*section 7, Notice*):

- Cease its participation in the infringement immediately after submitting its application, unless it is otherwise agreed with, or requested by, the ICA.
- Co-operate fully and on a continuous basis with the ICA for the entire duration of the procedure, including by:
  - timely providing the ICA with all relevant information and evidence that comes into its possession;
  - timely answering any requests for information that may contribute to establishing the relevant facts;
  - making its employees and, to the extent possible, its former employees available for interviews with the ICA staff, where necessary; and
  - refraining from destroying, altering or hiding relevant information or documents, or from informing anyone of the existence of a leniency application or its content before the statement of objections is issued, unless the ICA consents to such disclosure.

Moreover, any undertaking intending to submit a leniency application must refrain from informing anyone of its intentions, with the exception of other possible competent competition authorities.

#### 5. Is there a sliding scale of available leniency from civil fines?

No immunity is available where the ICA already knows about the existence of the cartel at the time when the applicant comes forward, including on the basis of an earlier immunity application. Nevertheless, the ICA may grant a reduction of fine “generally not exceeding 50%” (unlike the Model Leniency Programme, the Notice does not provide for fixed reduction bands) if the following conditions are met (*section 4, Notice*):

- The evidence provided by the applicant, due to its nature or level of detail, significantly strengthens the evidence in the ICA's possession, therefore considerably contributing to the ICA's ability to prove the infringement. (This notion mirrors that of “significant added value” provided by the Notice on immunity from fines and reduction of fines in cartel cases (*OJ 2006 C298/17*) (2006 Leniency Notice).)
- Requirements set out in section 7 of the Notice are met (*see Question 4*).

To assess the percentage of the fine reduction, the ICA must take into consideration (*section 5, Notice*):

- The value of the evidence provided by the applicant.
- The timing of submission of added value evidence.

Disclosure of previously unknown facts bearing directly on the gravity or duration of the cartel is not taken into account by the ICA when setting the amount of any fines to be imposed on undertakings providing evidence relating to such facts (*section 6, Notice*).

#### 6. Is immunity or leniency for civil fines available to individuals? If so, what conditions apply?

Italian competition law does not provide for fines for individuals, such as managers and employees of undertakings involved. Only undertakings can be fined.

#### Criminal liability

#### 7. Is immunity or leniency available for companies and/or individuals in relation to criminal prosecution? What are the implications for individuals when an undertaking has been granted immunity or leniency?

##### Circumstances

Italian competition law does not provide for criminal sanctions. The only instance when a violation of competition may lead to criminal liability is where individuals collude in the context of public bids (*Article 353, Criminal Code*). The sanctions include both fines and imprisonment.

No immunity from criminal sanctions is available in this case.

##### Proceedings against individuals

Not applicable (*see above, Circumstances*).

##### Employees' interests

Not applicable (*see above, Circumstances*).

### APPLICATION PROCEEDINGS

#### 8. When should an application for leniency be made?

Since full immunity is only available to the first undertaking coming forward, and the timing of submission is relevant when determining the amount of fine reduction for any subsequent applicant, a leniency application (or a request for a marker) should be filed with the ICA as soon as practicable.

The Notice does not set out a precise time limit within which a leniency application can be filed. Accordingly, a leniency application can in theory be filed even at a very late stage of the investigation, and possibly even after the adoption by the ICA of the statement of objections. However, in this case, the chances to be granted a fine reduction become inevitably limited since the ICA is likely to have already a detailed picture of the alleged infringement.

#### 9. What are the procedural rules for leniency applications?

##### Relevant authority

Leniency applications must be filed with the ICA.

## Applicant

Leniency applications can be filed by the legal representative of the company, or other individuals duly empowered to do so, such as external legal counsel. A power of attorney from the company is required.

## Informal guidance

Undertakings are encouraged to establish early contacts with the ICA staff, including in anonymous form, to obtain possible guidance and clarifications (*section 9, Notice*). In this respect, prospective applicants can use an ICA dedicated helpline at +39 06 85 82 18 72. Potential applicants may also schedule an *ad hoc* meeting with competent officials at the ICA premises, to discuss such preliminary matters.

## Form of application

There is no official form for leniency applications. Leniency applications may be filed either in writing or, following an applicant's reasoned request and subject to the ICA's consent, orally. The applicant's oral statements are taped and transcribed by the ICA staff. Oral applicants are not exempted from the obligation to provide the ICA with all documentary evidence in their possession (*section 10, Notice*).

Written statements and documents may be hand-delivered to the ICA by scheduling an appointment with competent officials, or sent via fax to +39 06 85 82 11 77.

At the applicant's request the ICA can confirm in writing the date and time of the receipt of leniency application. The ICA must assess the leniency applications in chronological order (*section 8, Notice*).

## Markers

Section 15 of the Notice serves as the basis of a marker system. An applicant's place in the queue may be secured for a limited period of time, while it gathers all the required information and evidence to support its application. Markers are only available with respect to applications for full immunity. On reasoned request by the immunity applicant, the ICA may grant a marker and determine the deadline within which the applicant must submit the additional information required to meet the evidence threshold for immunity under section 3 of the Notice.

When applying for the marker, the applicant must at least provide the following information to the ICA:

- Its business name and legal address.
- The business name and legal address of the other parties to the cartel.
- A description of the cartel, including its nature, geographic scope, duration and the affected product(s).
- The details of any other leniency applications the applicant submitted or intends to submit, in relation to the same cartel, to other competition authorities, in or outside the EU.

If the applicant perfects the marker within the set period, the information and evidence provided must be deemed to have been submitted on the date when the marker was granted. Where the marker is not perfected timely, the evidence provided by the undertaking can be assessed for the purposes of granting a fine reduction.

## Information/evidence

Generally, an undertaking that hopes to benefit from immunity from fines must provide the ICA with the following information (*section 3, Notice*):

- Its business name and legal address.
- The business name and legal address of the other parties to the cartel.
- A detailed description of the cartel, including:
  - its nature, geographic scope, duration, purpose, and functioning;
  - the product(s) involved;
  - the date, place and content of contacts among the parties;
  - the name and position of individuals, including the applicant's employees and agents, who, to the best of its knowledge, play (or have played) a role in the collusive conduct.
- Any evidence of the cartel in its possession, or which it can have access to, accompanied by all necessary explanations and observations.
- The details of any other leniency applications the applicant submitted or intends to submit, in relation to the same cartel, to other competition authorities, in or outside the EU.

To obtain a reduction of fine, leniency applicants must provide the ICA with the evidence that, due to its nature or level of detail, significantly strengthens the evidentiary set already in the ICA's possession, thereby significantly contributing to the ICA's ability to prove the infringement.

## Oral statements

Oral statements can be submitted (*see above, Form of application*).

## Short-form applications

A short-form immunity application may be submitted where the Commission appears to be the best placed authority to deal with the case and the undertaking has already submitted, or is about to submit, an immunity application to the Commission, but nonetheless believes that the ICA may also be well-placed to intervene in the case (*section 16, Notice*).

The content of the short-form application is broadly similar to that of a marker request (*see above, Markers*). It does not need to be supported by documentary evidence. By filing a short-form application, the applicant protects its position as the first in the queue with the ICA in relation to the alleged cartel, and must comply with any specific information requests from the ICA.

The ICA does not process the short-form application immediately after its submission. If the ICA subsequently acquires jurisdiction over the case, the applicant must complete the full application within a given deadline, by submitting the information and documents required under section 3 of the Notice (*see above, Information/evidence*). Where the short-form application is successfully and timely completed, the immunity application will be deemed to have been submitted in its entirety on the date of filing of the summary application.

A short-form leniency application is possible only where immunity is still available at national level.



## 10. What are the applicable procedures and timetable?

There is no formal deadline for submitting a leniency application. When conditions set out by the Notice are met, the ICA grants a conditional immunity or reduction of fine to the applicant within a few days or weeks, depending on the amount of evidence to be analysed and the complexity of the case. The precise amount of fine reduction to which the undertaking may be possibly entitled is not specified at this stage. Conditional benefits must be confirmed by the ICA in its final decision, provided that the applicant, during the proceedings, complies with the requirements set out under section 7 of the Notice (see *Question 4*).

## WITHDRAWAL OF LENIENCY

### 11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

The ICA may withdraw leniency in the course of the proceedings if the undertaking does not comply with requirements under section 7 of the Notice (see *Question 4*). In this case, information and documentary evidence already filed in the context of the leniency programme cannot be withdrawn, and this material may be used by the ICA for the purposes of the final decision.

The Notice does not state whether the withdrawal by the ICA of the conditional leniency initially granted to an undertaking would automatically benefit other applicants. There are not yet relevant precedents on this point.

## SCOPE OF PROTECTION

### 12. What is the scope of leniency protection after it has been granted?

Immunity protection extends also to those features of the violation (such as an extension of duration or geographic scope of the violation) not reported by the immunity applicant and discovered by the ICA through other applicant's submission or its own investigation, as far as these omissions are not the result of malice or fault of the immunity applicant.

This approach has been implicitly confirmed by *Case 1700* and *Case 1701* (see *Question 3*).

### 13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

There is no leniency plus under Italian competition law.

## THE REGULATORY AUTHORITY

The Italian Competition Authority  
(*Autorità Garante della Concorrenza e del Mercato*)

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**Responsibilities.** The Italian Competition Authority has three main areas of activity:

- Anti-trust (including cartels, vertical agreements, abuses of dominant position and merger control).
- Protection of consumers (including unfair commercial practices).
- Conflict of interests.

**Person/department to apply to.** Leniency applications can be filed either by fax (see *above*, *Contact details*), or through scheduling an *ad hoc* appointment at the premises of the ICA.

**Procedure for obtaining application documents.** There is no official form for leniency applications.

## CONFIDENTIALITY AND DISCLOSURE

### 14. What are the rules relating to confidentiality during a leniency application?

#### Identity disclosure

The identity of the leniency applicant is generally kept confidential by the ICA until the adoption of the statement of objections. The latter identifies undertakings that have applied for leniency.

Leniency applicants can request the ICA to keep confidential the identity of individuals, such as managers and employees, who have co-operated for the purposes of preparing the leniency application.

#### Information disclosure

Parties to the proceedings are granted access to the non-confidential version of the leniency statements only following the adoption of the statement of objections. Access to non-confidential version of documents attached to the leniency statements can be granted even before the adoption of the statement of objections. Parties cannot make any mechanical or electronic



copy of leniency statements. In addition, information contained in the leniency statements can only be used in the context of administrative or judicial proceedings aimed at the application of competition rules on which the proceedings before the ICA are based. Leniency statements and documents cannot be accessed by third parties (*section 10bis, Notice*).

Although this is not expressly stated by the Notice, the aim of this provision is to protect leniency applicants in the context of possible actions for damages. However, the Notice is soft law only.

### Confidentiality requests

Leniency applicants can request the ICA to keep information confidential from other parties to the proceedings as far as this information is not used against them when reaching the final decision, or is otherwise relevant for the purposes of the applicant's defence.

This principle has been confirmed by the Italian Administrative Tribunal of Lazio (*n. 8015/2010 and n. 8016/2010, 22 April 2010*), and the Italian Supreme Administrative Court (*n. 6481/2010, 6 September 2010*). In the same judgments, the courts also stated that the ICA can treat as confidential information contained in leniency statements on its own initiative.

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## 15. What are the rules concerning disclosure of statements made in support of a leniency application?

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### Domestic submissions and domestic discovery

Italian courts may issue discovery orders under Articles 210 and 213 of the Italian Code of Civil Procedure, requesting the ICA to provide documents and information in its possession that both:

- Are relevant and necessary for the purposes of the court proceedings.
- The parties cannot obtain otherwise.

In any case, the court cannot adopt discovery orders where the disclosure of relevant information and documents would cause the party(ies) or third persons a "serious damage", or imply the breach of professional or state secrets, as defined by Articles 200, 201 or 202 of Italian Code of Criminal Procedure.

The authors are not aware of any case where an Italian court has adopted a discovery order in relation to leniency material filed with the ICA.

### Domestic submissions and foreign discovery

Courts of EU member states can address requests to take evidence to Italian competent authorities on the basis of Regulation (EC) No. 1206/2001 on co-operation between the courts of the member states in the taking of evidence in civil or commercial matters. Under Article 17(5)(c) of this Regulation, such a request can be rejected when it is contrary to fundamental principles of Italian law.

The authors are not aware of any case where a foreign court has made this kind of request in relation to leniency evidence filed with the ICA.

### Foreign submissions and domestic discovery

Italian courts can address requests to take evidence to competent authorities of other EU member states on the basis of Regulation 1206/2001.

The authors are not aware of any case where an Italian court has put forward this kind of request in relation to leniency evidence filed with foreign competition authorities.

## INTER-AGENCY CO-OPERATION

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### 16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

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The ICA is part of the ECN. Leniency information and documents may be exchanged within this network according to rules, and subject to limitations, set forth by Articles 11(3) and 12 of Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU and the European Commission Notice on co-operation within the Network of Competition Authorities, in particular points 40-43.

There is no available data in relation to information exchange agreements entered into between the ICA and competition authorities of non-EU member states.

## PROPOSALS FOR REFORM

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### 17. Are there any proposals for reform?

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There are currently no proposals for reform.



## CONTRIBUTOR DETAILS



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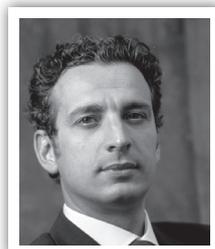
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**Qualified.** Naples, Italy, 2000; New York, 2003

**Areas of practice.** Anti-trust; telecommunications; media; and energy law.

#### Recent transactions

Has represented clients:

- Before the EU Commission and the ICA in anti-trust investigations and merger filings.
- In proceedings before the Italian Communication Authority and the Italian Energy Authority.
- In arbitration and litigation before civil and administrative courts involving complex anti-trust or sector regulation issues.

**Qualified.** Bergamo, Italy, 1995

**Areas of practice.** EU and Italian anti-trust law.

#### Recent transactions

- Appears frequently before the Directorate General for Competition of the Commission, as well as the ICA and Italian administrative courts.
- Advises numerous major international companies in relation to merger control procedures, and cartel and abuse of dominant position matters.
- Speaks at numerous conferences and has authored several publications in competition law matters.



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#### Recent transactions

- Advises on a wide range of anti-trust matters, including merger control, cartels, anti-competitive agreements and practices, abuse of dominant position and private anti-trust enforcement.
- Wide experience in leniency matters, both at European and national level.
- Has authored publications and regularly lectures on anti-trust matters.

# CLEARY GOTTLIEB

Cleary Gottlieb's antitrust and competition group has been practicing antitrust law on both sides of the Atlantic for more than 60 years, and has extensive experience advising on the national competition laws of the major European countries. One of the few global firms with an equally strong and distinguished competition practice in Europe and the United States, Cleary Gottlieb offers clients a unique transatlantic perspective that is invaluable in today's increasingly borderless business landscape.

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