



Freshfields Bruckhaus Deringer

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## **Leniency, leniency Plus and penalty Plus**

*recent experiences and lessons learned to create incentives for the complete “cleaning” of a company*

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**ICN Cartel Workshop**

**Madrid, 3 October 2016**

# Agenda

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- *The Leniency Programme in Italy*
- *Immunity – top issues in getting there*
- *Recent case law and experiences*

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# The Leniency Programme in Italy (1/2)

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- **Leniency has been introduced in 2006** (Art.15, para. 2-bis of Law no 287/90, introduced by Law no. 248 of August 2, 2006, followed by the IAA's Notice on the leniency programme of 19 February 2007, lastly amended in 2013)
- **Scope:** secret horizontal agreements + concerted practices. In theory, the Notice can apply to vertical aspects of cartels (section 1ter, Notice, which most probably refers to hub and spoke conduct). However, the IAA has not yet addressed the matter in its leniency decisions.
- **Italian Leniency Programme has been applied in 7 cases:**
  - *I649 - Wood chipboard market (2007)*
  - *I700 - LPG (2010)*
  - *I701 - Cosmetics (2010)*
  - *I722 - International logistic industry (2011)*
  - *I733 - Sea Agency services (2012)*
  - *I772 - Concrete in Friuli (2015)*
  - *I789 – Model agencies (ongoing)*



# The Leniency Programme in Italy (2/2)

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- **Full immunity** for the first undertaking which submits evidence that enable the IAA to ascertain a cartel.
  - **Requirement for immunity** (No immunity where the IAA already knows about the existence of the cartel)
    - (i) Time limit - applications can be submitted both prior and following the opening of a proceedings
    - (ii) «Decisive contribution» - documentary evidence, possibly enabling the IAA to carry out targeted inspections
  - «**Marker**» **system** - allows an applicant to reserve its place in the queue for immunity (though not for fine reduction) by providing to the IAA information on the alleged cartel conduct and on the parties involved in it.
- **Fine reduction** for the undertakings which supply information and documents strengthening the value of the evidence already in possession of the IAA. Reductions up to, “ordinarily”, 50% of the sanction. The IAA shall apply the fine reductions relying on the following two criteria:
  - the **timeliness** of the cooperation of the applicant
  - the **significance** of the evidence produced by the applicant.
- **Point. 24 of the IAA’s Guidelines on sanctions** (2014) set a reduction up to 50% of the basic amount - “*amnesty plus*”
- **No penalty plus, no fines for individuals (managers and employees of undertakings involved)**



# Immunity – top issues in getting there

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- **Whether to apply for immunity at all? best case: no fine, but.... risk of:**
  - ✓ *third-party damages claims - discovery*
  - ✓ *significant costs*
- **Ensure discontinuation of infringement down to the last employee**
- **Keep confidential**
  - ✓ *need to avoid inadvertently tipping off co-conspirators*
- **Provide promptly all evidence**
  - ✓ *particular focus on documentary evidence*

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# Recent case law and experiences

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- **Case I722 - *International logistics industry* - Leniency applications simultaneously filed both with the EU Commission and the IAA**
- The ECJ:
  - *The ECN Programme has no binding effect vis-a-vis national authorities;*
  - *No “juridical connection” between leniency application before the EU Commission and simplified application before a national court on the same cartel. The national authority is not obliged to consider the leniency application before the EU Commission*
- **Damage Directive (2014/104/UE) – Implementation in Italy**
  - *Specific limitations to the liability of immunity applicants in the context of damages actions will be introduced following the implementation at national level (in particular Recital 38 and Article 11(4) and (5))*
  - *Discoverability of documentation enclosed to a leniency application*
  - *“Balancing test” : court order to produce the documents vs. effectiveness of leniency programme*
- **The IAA suggested to the legislator to introduce a mechanism of immunity and reduction of criminal sanctions for individuals who collaborate in the context of the leniency programme and whose undertakings are eventually granted full immunity or a reduction of fines (2013 competition law proposal to the Parliament). However, there are no developments in this respect.**

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# Questions & Answers

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