L.N. 264 of 2021

COMPETITION ACT
(CAP. 379)

Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations

IN EXERCISE of the powers conferred by articles 33(2)(c) and (d) of the Competition Act, the Minister responsible for tourism and consumer protection, following consultation with the Board of Governors of the Malta Competition and Consumer Affairs Authority, has made the following regulations:-

Title.

1. The title of these regulations is the Immunity from Penalties and Reduction of Penalties in Cartel Investigations Regulations, 2021.

Interpretation.

2. (1) For the purposes of these regulations, unless the context otherwise requires:

" "the Act" means the Competition Act:

"applicant" means an undertaking within the meaning of article 2 of the Act which is party to an alleged secret cartel, including participants in a cartel, whether or not active on the same market, which contributes to the implementation of a cartel in a subsidiary, accessory or passive role, and which, independently of the other undertakings involved in the cartel, applies for immunity from penalties and, or a reduction of penalties in exchange for the voluntary provision of presentations regarding its knowledge of and role in the alleged secret cartel by submitting a leniency application to the Director General:

Provided that the term "applicant" shall also include an association of undertakings which performs an economic activity on its own behalf where it participates in an alleged secret cartel on its own behalf and not on behalf of its members;

"cartel" means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition, through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property

rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

"Directive" means Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers, and to ensure the proper functioning of the internal market;

"inspection" means an inspection under article 12(7) of the Act;

"leniency" means immunity from penalties or a reduction in the amount of the penalty which would otherwise have been requested by the Director General to be imposed on an undertaking on account of its participation in a secret cartel, in order to reward it for its cooperation with the Office within the framework of these regulations;

"leniency application" means an application for leniency which is submitted to the Director General and consists of a leniency statement made by the applicant and any pre-existing information submitted with or attached to it;

"leniency statement" means an oral or written presentation voluntarily provided by, or on behalf of an undertaking to the Director General, or a record thereof, describing the knowledge of that undertaking of an alleged secret cartel and describing its role therein, which presentation was drawn up specifically for submission to the Office under these regulations, with a view to obtaining immunity from or a reduction of penalties, not including evidence that exists irrespective of the investigation by the Office, whether or otherwise such information is found in the file of the Office, namely pre-existing information;

"penalties" means any penalty that may be imposed by the Court in terms of article 21(1) of the Act;

"secret cartel" means a cartel the existence of which is partially or wholly concealed, in particular whereby elements of the cartel that make the full extent of the conduct more difficult to detect are not known to the public or the customers or suppliers"."

(2) Other terms used in these regulations shall have the same

meaning as assigned to them in the Act.

Scope of these regulations.

3. (1) These regulations transpose the provisions of Chapter VI of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

(2) These regulations provide for a leniency programme in relation to the application of article 5 of the Act and, or of Article 101 of the TFEU, on the basis of which a participant in an alleged secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the Office by voluntarily providing presentations regarding that participant's knowledge of and role in the alleged cartel, in return for which the participant receives immunity from, or a reduction of, penalties which would otherwise have been requested by the Director General to be imposed by the Court in terms of article 21(1) of the Act on account of its involvement in the cartel.

(3) These regulations shall only apply to secret cartels, and any reference to a "cartel" in these regulations shall be construed accordingly.

Coercer not eligible for immunity from penalties.

4. (1) Any undertaking which fulfils the conditions laid down in regulation 5(1) shall be eligible for immunity from penalties, with the exception of undertakings that have taken steps to coerce other undertakings to join a secret cartel or to remain in it.

(2) Notwithstanding the preceding sub-regulation, an undertaking that took steps to coerce other undertakings to join a secret cartel or to remain in it shall not be excluded from benefiting from a reduction of penalties.

Immunity from penalties.

5. (1) The Director General shall grant immunity from penalties by refraining from requesting the Court to impose a penalty on an applicant for leniency in terms of article 12A of the Act which discloses its participation in a secret cartel to the Office where the following conditions are met:

(a) the applicant is the first to submit evidence which:

(i) at the time the Office receives the leniency application, enables the Director General to file a request for a warrant in terms of article 12(7) of the Act to carry out a targeted inspection in connection with the alleged secret cartel, provided that the Director General did not yet have in his possession sufficient evidence to file a request for such a warrant, or had not already carried out such an

inspection; or

(ii) in the view of the Director General, is sufficient for him to find an infringement of article 5 of the Act and, or of Article 101 of the TFEU in connection with the alleged secret cartel, provided that the Director General did not yet have in his possession sufficient evidence to find such an infringement and that no undertaking previously qualified for immunity from penalties under the preceding sub-paragraph in relation to that secret cartel; and

(b) the applicant fulfils the conditions laid down in regulation 10.

(2) An applicant who submits evidence to benefit from immunity from penalties in terms of the preceding sub-regulation shall provide the Director General with such evidence to the extent that this, in the view of the Director General, would not jeopardize the inspections.

(3) The decision of the Director General to grant immunity from penalties to an applicant for leniency who satisfies the conditions laid down in sub-regulation (1) shall be made exclusively on the basis of the type and quality of the evidence and information submitted by the applicant, irrespective of whether an inspection was actually conducted or successful.

Only one applicant shall benefit from immunity from penalties.

6. (1) Subject to the provisions of regulation 14, where more than one applicant submits a leniency application, the Director General shall assess the applications in the order in which they have been submitted:

Provided that information submitted in hypothetical terms pursuant to regulation 16 shall not be eligible for any order of classification in terms of this sub-regulation:

Provided further that only the first applicant who fulfils the conditions laid down in regulation 5(1) may benefit from immunity from penalties.

(2) Where a leniency application meets the conditions for immunity from penalties, any applications of other applicants shall be assessed in the order in which they have been submitted for a possible reduction of penalties in accordance with the provisions of regulation 8, unless the applicant has specified that his application is to be considered exclusively for immunity from penalties.

(3) Where the Director General rejects an application for

immunity from penalties, the applicant concerned may request that the Office considers its application as an application for a reduction of penalties.

Conditional immunity from penalties.

7. (1) Where the Director General receives a leniency application, he shall promptly assess the evidence submitted in support of the application in order to ascertain whether the applicant satisfies the conditions laid down in sub-paragraphs (i) or (ii) of paragraph (a) of regulation 5(1).

(2) If an applicant is the first to satisfy the conditions referred to in the preceding sub-regulation, the Director General shall grant the applicant conditional immunity from penalties and shall refrain from considering any other applications for immunity from penalties before he would have taken a final decision on that application. The Director General shall verbally inform the applicant, as soon as reasonably possible, of whether he has been granted conditional immunity from penalties, unless the applicant has requested that he shall be informed in writing.

(3) Subject to the first proviso of sub-regulation (2) of regulation 11, the granting of conditional immunity pursuant to the preceding sub-regulation shall provide assurance to the applicant that the Director General shall grant the applicant immunity from penalties if, at the end of the investigation, the Director General concludes that the applicant has also satisfied the conditions set out in regulation 10.

Reduction of penalties.

8. (1) Applicants who do not qualify for immunity from penalties pursuant to regulation 5(1), may nonetheless benefit from a reduction of penalties, subject to the provisions of this regulation.

(2) In order to qualify for a reduction of penalties, an applicant for leniency shall:

(a) disclose his participation in an alleged secret cartel;

(b) submit evidence of the alleged secret cartel which, in the view of the Director General, represents significant added value for the purpose of proving an infringement of article 5 of the Act and, or of Article 101 of the TFEU to the evidence already in the possession of the Office at the time of the leniency application; and

(c) fulfil the conditions laid down in regulation 10.

(3) For the purposes of paragraph (b) of the preceding sub-regulation, the Director General shall consider that:

(a) written evidence originating from the period of time to which the facts pertain shall have a greater value than evidence subsequently established;

(b) incriminating compelling evidence which is directly relevant to the facts in question, such as written statements, email correspondence between the cartel members and other written documents relevant for the establishment of the facts and circumstances of the case and duration of a cartel, shall have a greater value than evidence which is indirectly relevant; and

(c) compelling evidence shall have a greater value than evidence such as statements of cartel members which if contested require corroboration.

Levels of reduction.

9. (1) Where the Director General concludes that a leniency applicant qualifies for a reduction of penalties pursuant to regulation 8, he shall in proceedings instituted pursuant to article 12A of the Act request the Court to impose a penalty of a specific amount on the applicant, calculated in accordance with article 21(1) of the Act, which shall be reduced in accordance with the following levels of reduction:

(a) for the first undertaking to provide significant added value, a reduction of thirty to fifty per centum (30-50%);

(b) for the second undertaking to provide significant added value, a reduction of twenty to thirty per centum (20-30%);

(c) for subsequent undertakings that provide significant added value, a reduction of up to twenty per centum (20%):

Provided that in specific cases in which the added value of the information or evidence submitted by an applicant is extraordinarily high, the Director General may, in his discretion, request the Court to impose a penalty which is reduced by a higher percentage than the scales specified in this sub-regulation.

(2) In order to determine the applicable level of reduction within each range referred to in the preceding sub-regulation, the Director General shall take into account the time at which the evidence referred to in paragraph (b) of regulation 8(2) was submitted and the extent to which that evidence represents significant added value when compared to the evidence which is already in the possession of the Office at the time of the leniency application.

(3) Where an applicant submits compelling evidence as referred to in regulation 8(3), which the Director General uses to prove

additional facts which lead to an increase in the requested amount of the penalties to be imposed as compared to the amount of the penalties that would otherwise have been requested to be imposed on the participants in an alleged secret cartel, the Director General shall not take such additional facts into account when establishing the amount of the penalty to be requested to be imposed by the Court on the applicant who provided such evidence.

Other conditions for an applicant to qualify for leniency.

10. (1) Without prejudice to regulations 5(1) and 8(2), in order to qualify for leniency pursuant to these regulations, an applicant shall:

(a) end its involvement in the alleged secret cartel, at the latest immediately following its application, save to the extent that its continued involvement would, in the view of the Director General, be reasonably necessary to preserve the integrity of the investigations;

(b) co-operate genuinely, fully, on a continuous basis and expeditiously with the Office from the time of its application until the Court has concluded its proceedings by issuing a judgement against all parties who are subject to proceedings instituted pursuant to the relevant provisions of the Act by delivering judgement, or until the Office or the Court have otherwise terminated their investigation or proceedings respectively; and

(c) prior to making the leniency application to the Office the applicant shall not have:

(i) destroyed, falsified or concealed any evidence of the alleged secret cartel; or

(ii) disclosed its intention to submit a leniency application to the Office, or any of the contents of the envisaged application, to any third party other than competition authorities or competition authorities of a third country.

(2) The co-operation referred to in paragraph (b) of the preceding sub-regulation shall include:

(a) providing the Office promptly with all relevant information and evidence relating to the alleged secret cartel that comes into the applicant’s possession or is accessible to it and any other relevant information and evidence which may come into the applicant’s possession or under its control at a later date, in particular:

(i) the name and address of the applicant,

(ii) the names of all other undertakings that participate or participated in the alleged secret cartel,

(iii) a detailed description of the alleged secret cartel, including the affected products, the affected territories, the duration and the nature of the alleged secret cartel conduct, and

(iv) information on any past or possible future leniency applications made to any other competition authorities or competition authorities of third countries in relation to the alleged secret cartel;

(b) remains at the disposal of the Office to reply to any requests for information that may contribute to the establishment of facts;

(c) ensures that directors, managers and other members of staff are available for interviews with the Director General and making reasonable efforts to ensure that former directors, managers and other former members of staff are available for interviews with the Director General;

(d) does not destroy, falsify, or conceal relevant information or evidence;

(e) does not disclose to any third party, other than a competition authority or competition authority of a third country, the fact or any of the contents of its leniency application before a sworn application has been filed under the Act and it has been served on the undertakings and, or association of undertakings under investigation by the Office, unless otherwise agreed with the Director General.

The final decision on the grant of leniency at the end of the investigation.

11. (1) Subject to the first provisos of sub-regulations (2) or (3), as the case may be, the Director General shall take a final decision regarding the leniency application at the end of the investigation and shall verbally inform the applicant thereof as soon as reasonably possible, but by no later than the date when a sworn application is filed in respect of the infringement in question pursuant to article 12A of the Act, unless the applicant has requested to be informed of the decision in writing.

(2) Where the Director General concludes that the applicant meets the conditions laid down in regulation 5(1), he shall grant the applicant immunity from penalties:

Provided that notwithstanding anything contained in any other law, if during the proceedings before the Court the applicant fails to continue to cooperate with the Office in terms of regulation 10(1)(b), the Director General may file an application requesting the Court to impose a penalty on the applicant pursuant to article 21(1) of the Act and may indicate a specific amount of the penalty for this purpose:

Provided further that the period of prescription laid down in article 26A of the Act for the filing of such an application shall commence to run on the day when the Director General considers that the applicant has failed to co-operate with the Office.

(3) Where the Director General concludes that the applicant meets the conditions laid down in regulation 8(2), he shall, request the Court to impose a reduced penalty on that applicant within a specified scale as provided in regulation 9, in proceedings instituted pursuant to article 12A of the Act:

Provided that notwithstanding anything contained in any other law, if during the proceedings before the Court the applicant fails to continue to cooperate with the Office in terms of regulation 10(1)(b), the Director General may file an application requesting the Court to impose a higher penalty pursuant to article 21(1) of the Act and he may indicate a specific amount of the penalty for this purpose:

Provided further that the period of prescription laid down in article 26A of the Act for the filing of such application shall commence to run on the day when the Director General considers that the applicant has failed to co-operate with the Office.

Form of applications.

12. (1) An applicant shall submit a leniency statement in relation to a full or summary application for leniency either in writing delivered to the address of the Office by hand, or by registered mail in a sealed envelope or by email:

Provided that an applicant may also submit a leniency statement in oral form by making a personal statement to the Director General, which shall be recorded in any form deemed appropriate by the said Director General, or by any other means as may be indicated by the Office that permit applicants not to take possession, custody or control of such submitted statements:

Provided further that an oral statement shall only be accepted by the Director General following a prior appointment with the applicant set by telephone or by email:

Provided further that a hypothetical application submitted

in terms of regulation 16 may not be submitted to the Office by making an oral statement.

(2) Pre-existing information and documents relating to an application for leniency shall be submitted in writing to the address of the Office by hand, by registered mail in a sealed envelope, or by email, or by any other means as may be indicated by the Office, either together with the leniency statement, or as soon as reasonably possible, after the submission of the leniency statement:

Provided that where a leniency statement is made orally the applicant shall, as soon as reasonably possible thereafter, provide the Office with copies of all pre-existing information and documents relating to the cartel.

(3) If so requested by the applicant, the Office shall acknowledge the receipt of the full or summary application in writing, and shall indicate the date and time of receipt.

(4) A leniency statement shall be submitted in the Maltese or English language or in any other official language of the European Union as may be agreed between the Director General and the applicant on a case-by-case basis.

Withdrawal of an application.

13. (1) A leniency application may only be withdrawn by the applicant:

(a) prior to a decision by the Director General to grant conditional immunity from penalties pursuant to regulation 7 or;

(b) within eight (8) days following notification of the Director General's final decision not to grant immunity from penalties to the applicant pursuant to regulation 11(1).

(2) Where an application is withdrawn pursuant to the preceding sub-regulation, the application as well as any evidence submitted by the applicant, together with any copies thereof, shall be returned promptly to the applicant:

Provided that the withdrawal shall not prejudice the investigative powers of the Office under the Act in relation to the secret cartel in question.

Markers for applications for leniency.

14. (1) An undertaking wishing to apply for leniency may where it so requests, at the discretion of the Director General, be initially granted a place in the queue for leniency, for a period to be specified on a case-by-case basis by the Director General permitting the applicant to gather the necessary information and evidence that

meets the requirements of paragraph (a) of regulation 5(1) or of paragraph (b) of regulation 8(2), as the case may be.

(2) An undertaking submitting a request for a marker pursuant to the preceding sub-regulation shall provide such information, as may be required by the Director General, including where available:

(a) the name and address of the applicant;

(b) the basis for the concern which led to the request;

(c) the names of all other undertakings that participate or participated in the alleged secret cartel;

(d) the affected products and territories;

(e) the duration and the nature of the alleged secret cartel conduct;

(f) information on any past or possible future leniency applications made to any other competition authorities or competition authorities of third countries in relation to the alleged secret cartel.

(3) Any information and evidence provided by the applicant within the period specified pursuant to sub-regulation (1), shall be deemed to have been submitted at the time of the initial request.

(4) A request pursuant to sub-regulation (1) shall be submitted in the Maltese or English language or in any other official language of the European Union, as may be agreed between the Director General and the applicant on a case-by-case basis.

Summary application.

15. (1) Where an applicant has already submitted a leniency application to the European Commission which covers more than three Member States as affected territories, either by applying for a marker or by submitting a full application in relation to the same alleged secret cartel, such applicant may submit a summary application for leniency to the Director General.

(2) A summary application pursuant to the preceding sub-regulation shall consist of a short description of each of the following:

(a) the name and address of the applicant;

(b) the names of other parties to the alleged secret cartel;

(c) the affected products and territories;

(d) the duration and the nature of the alleged secret cartel conduct;

(e) the Member State where the evidence of the alleged secret cartel is likely to be located; and

(f) information on any past or possible future leniency applications made to any other competition authorities or competition authorities of third countries in relation to the alleged secret cartel.

(3) Where the European Commission receives a full application and the Director General receives a summary application in relation to the same alleged cartel, the European Commission shall be the main interlocutor of the applicant until the European Commission informs the Office that it intends to pursue the case in whole or in part. During this period, the Director General may request the European Commission to inform him about the state of play of its investigations:

Provided that in such cases, the Director General may request the applicant to provide specific clarifications only regarding the items referred to in sub-regulation (2), before the said Director General requires the submission of a full application pursuant to sub-regulation (5).

(4) When the Director General receives a summary application, he shall verify whether he has already received a full or a summary application for leniency from another applicant in relation to the same alleged secret cartel at the time of receipt of such application. If the Director General did not receive such an application from another applicant and he considers the summary application to fulfil the requirements referred to in sub-regulation (2), he shall inform the applicant accordingly.

(5) Without prejudice to the right of the applicant to voluntarily submit a full application to the Director General at an earlier stage, where the European Commission informs the Office that it does not intend to pursue the case in whole or in part, the Director General shall promptly inform the applicant that a full application for leniency may be submitted, specifying a reasonable time-period within which the applicant is to submit such full application together with the corresponding evidence and information:

Provided that the Director General may, in exceptional cases where strictly necessary for case delineation or case allocation, request the applicant to submit a full application before the said

European Commission has informed the Office that it does not intend to pursue the case in whole or in part.

(6) Where an applicant submits a full application in accordance with the preceding sub-regulation within the time-period specified by the Director General, the full application shall be deemed to have been submitted at the time of the summary application, provided that the said summary application covers the same affected product and territory, as well as the same duration of the alleged secret cartel, as the leniency application filed with the European Commission, which may have been updated.

Hypothetical applications.

16. (1) A prospective applicant intending to apply for immunity from penalties may initially present any information to the Director General concerning an alleged secret cartel in hypothetical terms, in which case the said prospective applicant shall present a detailed descriptive list of the evidence which is proposed to be disclosed at a later date to be agreed with the Director General.

(2) The list referred to in the preceding sub-regulation shall accurately reflect the nature and content of the evidence to be disclosed and shall clearly identify the product or service concerned by the alleged cartel, the geographic scope and the estimated duration of the alleged cartel whilst safeguarding the hypothetical nature of the information. Copies of documents, from which sensitive parts have been redacted, may be used to illustrate the nature and content of the evidence:

Provided that the identity of the prospective applicant and of other undertakings involved in the alleged cartel need not be disclosed until the evidence described in a hypothetical application is submitted:

Provided further that where the prospective applicant intends to remain anonymous until the disclosure of the evidence, a contact person who shall communicate with the Director General until such date shall be designated by the applicant.

(3) Upon receipt of hypothetical information as referred to in sub-regulation (1), the Director General shall assess whether the nature and content of the evidence described in the detailed list is liable to meet the conditions set out in sub-paragraph (i) or (ii) of paragraph (a) of regulation 5(1), and shall inform the prospective applicant or his contact person accordingly:

Provided that such preliminary analysis shall not prejudice the Director General’s eventual decision on the leniency application

which will be taken following the submission of all evidence by the applicant.

(4) Following the disclosure of the evidence by the applicant, where the Director General determines that such evidence corresponds to the description provided in the list referred to in sub-regulation (1), and that it meets the conditions set out in sub-paragraph (i) or (ii) of paragraph (a) of regulation 5(1), he shall grant the applicant conditional immunity from penalties pursuant to regulation 7.

Interplay between applications for immunity from fines and sanctions on natural persons.

17. (1) Current and former directors, managers and other members of staff of an applicant for immunity from penalties to the Office or any other competition authority, shall not incur any sanctions imposed in criminal proceedings in relation to their involvement in the secret cartel covered by the application for immunity from penalties, for violations of any Maltese law that might pursue predominantly the same objectives to those pursued by Article 101 of the TFEU if they meet the conditions set out in paragraph 1 of Article 23 of the Directive and actively cooperate with the Office and, or with the Police, as the case may be:

Provided that if the condition of cooperation is not fulfilled, the Office and, or the Police, as the case may be, may proceed with the investigation against such individuals.

(2) In order to ensure the full effectiveness of the protection from sanctions referred to in the preceding sub-regulation to function in situations where more than one jurisdiction is involved, the Office shall actively cooperate by ensuring the necessary contacts as required by paragraph 4 of Article 23 of the Directive.

(3) This regulation is without prejudice to the rights of victims who have suffered harm caused by an infringement of competition law to claim full compensation for that damage in accordance with Directive 2014/104/EU.

Access to leniency statements.

18. (1) Access to leniency statements submitted pursuant to these Regulations shall only be granted to the parties subject to the relevant investigation by the Office, or are subject to proceedings which have been instituted before the Court under the relevant provisions of the Act, or who are party to any proceedings before the Court of Appeal instituted in terms of article 13B of the Act, and exclusively for the purposes of exercising their rights of defence.

(2) A party who has obtained access to the file concerning investigations by the Office and, or concerning proceedings before the Court or the Court of Appeal may only use information taken from leniency statements, where necessary to exercise his rights of defence

in any proceedings before the courts of Malta, in cases that are directly related to the case in respect of which access has been granted, and only where such proceedings concern:

(a) the allocation between cartel participants of a penalty imposed jointly and severally on them by the Court; or

(b) an appeal before the Court of Appeal instituted in terms of article 13B of the Act from a judgement of the Court finding an infringement of articles 5 and, or 9 of the Act or of Articles 101 and, or 102 of the TFEU.

(3) Leniency statements submitted pursuant to these Regulations shall only be exchanged by the Office with other national competition authorities, pursuant to Article 12 of Regulation (EC) No 1/2003, either:

(a) with the consent of the applicant for leniency; or

(b) where the national competition authority receiving the leniency statement has also received a leniency application relating to the same infringement from the same applicant as that before the Office, provided that, at the time that the leniency statement is transmitted by the Office, it is not open to the applicant to withdraw the information which has been submitted by the applicant to the national competition authority receiving the leniency statement.

(4) The form in which leniency statements are submitted pursuant to regulation 12 shall neither affect the application of the preceding sub-regulations and nor that of article 12D of the Act.

(5) Any party who has obtained access to a leniency statement pursuant to sub-regulation (1) or (2), and their legal counsel shall bind themselves not to make any copies thereof by mechanical or electronic means of a leniency statement.

English language version shall prevail.

19. In the event of conflict or incompatibility between the Maltese and English language versions of these regulations, the English language version shall prevail.

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