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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON LENIENCY FOR SUBSEQUENT APPLICANTS

-- Lithuania --

23 October 2012

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 23 October 2012.

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1. General description of Lithuanian leniency programme

Please provide a brief description of your immunity programme, its background and its development over time. Please focus your submission particularly on recent developments and/or changes in your immunity policy.

1. To briefly provide you with legal background and evolution of the leniency program in the Republic of Lithuania, it must be mentioned that the provision on amnesty from fines was first foreseen in the Law on Competition since its adoption in 1999. At that time the Law on Competition had foreseen amnesty from fines not only for the participants of anti-competitive agreements, but also for undertakings, abusing their dominant positions. This provision was abolished in 2009.

2. The more standard leniency programme, as it is understood nowadays *sensu stricto*, was adopted in Lithuania in 2008, when the Competition Council of the Republic of Lithuania ('the CC') adopted Rules on Immunity from Fines and Reduction of Fines ('the Leniency Rules'). These rules were applicable solely to horizontal agreements among competitors.

3. Latest amendment of the leniency rules took place this year, when on the 1st May 2012 new version of the Law on Competition came into force. While the procedure for the assessment of leniency applications as well as applications for a reduction of fine did not change, the new provision widened the scope of the leniency programme so as to include applicants taking part in anti-competitive agreements between non-competitors on direct or indirect price fixing.

4. As to the leniency programme application for subsequent applicants, it must be said that since the adoption of the Leniency Rules in 2008, subsequent leniency applicants have a right to apply for reduction of fines. After the scope of leniency applicants has been expanded recently to participants of vertical agreements, subsequent leniency applications shall be admitted in this scope too.

Please discuss what is/are the policy purpose(s) of your immunity programme. Is the purpose of the immunity programme formally stated in guidelines or notices? If your agency grants some form of immunity to subsequent applicants, what is the policy rationale for doing so?

5. Prior to discussing policy purposes of the leniency programme, it must be mentioned, that since the adoption of the Leniency Rules, the CC had received three leniency applications so far – one each year in 2008, 2009 and 2010. In none of these cases there were applications submitted by subsequent leniency applicants, so the CC has no actual experience of treating this kind of applications.

6. According to the provisions of the Law on Competition, as well as Leniency Rules, in Lithuania the leniency programme offers full immunity to the first-in applicant (in some cases, having regard to various circumstances, the immunity offered can reach up to 75-50 per cent of the fine), and reductions of fines for subsequent applicants (50-20 per cent of the imposed fines).

7. In general, the approach of the CC towards leniency programme and leniency applicants is very favourable and flexible. The CC intends to encourage undertakings to submit their applications by providing them with unofficial guidance, advice and other means of co-operation. The rationale for such a position can be regarded as a reach to detect and reveal as many anti-competitive agreements as possible, spreading information on theory of harm caused by the anti-competitive agreements, also, having in mind a rather small number of administrative staff of the CC and limited human resources which could be used more efficiently and purposefully when undertakings co-operate with the CC, etc. It must be also

mentioned that the CC, being a part of the European Competition Authorities Network, chose to apply a standard leniency programme (which foresees both first-in and subsequent applicants), in order to ensure uniform and harmonized application of the EC competition law in the entire EU.

8. Due to these reasons and, as mentioned above, small number of leniency applications (only three so far), the CC would accept both first-in as well as subsequent leniency applications despite all the possible negative aspects of such applications (lower degree of deterrence, smaller sanctions, possibility for undertakings to strategically set their behaviour, etc.).

2. Issues related to leniency for subsequent applicants

Please discuss the policy advantages and the disadvantages of rewarding subsequent applicants.

9. As already mentioned above, the CC has had no practice yet of subsequent leniency applications. For the possible general advantages and disadvantages of this programme please see answer to question No. 2 above.

Please describe the treatment reserved to subsequent applicants under your immunity program. In particular: - describe the incentives that your immunity program provides to companies or individuals who wish to benefit from the immunity program. Are these incentives different for the first-in and the subsequent applicants, and among subsequent applicants?

10. In Lithuania the leniency programme could be classified as a "traditional" leniency programme as it is provided for by the European Commission (Leniency Rules were adopted in accordance with the requirements of the European leniency programme). Therefore incentives that are provided for the first-in and subsequent applicants differ significantly.

11. The treatment provided for the first-in leniency applicant, meeting all the relevant conditions, is as follows (according to Leniency Rules):

> "An undertaking which is a party to a prohibited agreement (i.e. an agreement, complying with the features provided for in Art. 5 of the Law on Competition or/and Art. 101 TFEU), shall be granted immunity from a fine, which would otherwise have been imposed, if all the following conditions are met:
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> 1. an undertaking submits information before the initiation of investigation of the agreement;
>
> 2. an undertaking is the first of all the parties to an agreement to submit information;
>
> 3. an undertaking submits all the information known to it that concerns the agreement and cooperates with the CC during the investigation;
>
> 4. an undertaking was not the initiator of the prohibited agreement and did not encourage other undertakings to participate in the agreement".

12. It should be mentioned that there are also other kinds of treatment for the first-in leniency applicants: if the CC has already had initiated the investigation and the leniency application is received afterwards, the fine imposed upon the applicant can be reduced by 50-75 per cent. Next, a fine, calculated for an undertaking which was the initiator of the prohibited agreement or which coerced other undertakings to participate in the prohibited agreement, can be reduced by 50 per cent.

13. Subsequent leniency applicants do not have a right to apply for a full immunity from fines, however, the fine imposed upon them may be reduced by 20-50 per cent if certain condition are met (it should be pointed out that there is no requirement to be the first of all the parties to an anti-competitive agreement). The treatment for subsequent leniency applicants is as follows:

> "A fine, calculated for an undertaking which is a party to a prohibited agreement and which does not satisfy the conditions provided for in items 8 and 9 of the Rules (i.e. „traditional" reduction of fines cases), shall be reduced by 20-50 per cent, if the undertaking:
>
> 1. submits the evidence of a prohibited agreement which the CC does not possess and which is significant to prove the prohibited agreement;
>
> 2. exercises all the conditions provided for in items 5.2 and 5.3 of the Rules – i.e. ends its involvement in a prohibited agreement immediately following its submission of information to the CC, except for what would, in the CC's view, be reasonably necessary to preserve the integrity of the investigation; and from the moment of submission of information to the CC until the end of the investigation cooperates with the CC without reservation and on a continuous basis".

14. So, as it can be seen from these different provisions on the treatment of leniency applicants, the fundamental difference between the first-in and subsequent applicants is the amount of fine that can be reduced. The maximum limit of the reduction for the subsequent applicant is, as can be seen, 50 per cent of the imposed fine.

Describe the requirements placed on applicants who wish to benefit from the immunity program. Are these requirements different for the first-in and the subsequent applicants, and among subsequent applicants?

15. Please see the answer to question above.

Discuss how your agency assessed the degree of co-operation from applicants under your immunity program, e.g. in terms of the amount of evidence made available to the agency and the timeliness of co-operation. Is there a different standard (e.g. on the amount and quality of information demanded) for first-in and subsequent applicants, and among subsequent applicants?

16. According to the provisions of the Leniency Rules, cooperation of the undertaking with the CC is one of the cumulative conditions necessary in order to be immuned from a fine or to be reduced a fine. There is a duty upon undertakings from the moment of submission of information to the CC until the end of the investigation to cooperate with the CC without reservation and on a continuous basis. This cooperation purports that an undertaking:

1. provides the CC promptly with all the relevant information and evidence that comes into its possession or becomes known to it;

2. answers promptly to any request of the CC that may contribute to the establishment of the facts relevant to the anti-competitive agreement;

3. assures the possibility to make current and, if possible, former employees and directors available for interviews;

4. does not destroy, falsify and conceal relevant information and evidence relating to the alleged anti-competitive agreement;

5. does not disclose the fact of its application and content of it until the CC has issued a statement of objections to the parties (unless otherwise agreed with the CC).

17. This requirement to cooperate is the same for both the first-in as well as the subsequent leniency applicants.

Describe the criteria that you apply to determine the appropriate level of discount in fines/sanctions to encourage cartelists to enter into the immunity program. If you reward co-operation from subsequent applicants, how did you differentiate the level of discounts for the various applicants?

18. In order to determine the level of fine reduction, the CC will take into account the time at which the evidence was submitted (including whether the applicant was the first, the second or the third etc. to notify the CC) and the significance of the evidence for proving the anti-competitive agreement. The requirement of "significant" evidence is described in the Leniency Rules as follows:

> "submits the evidence of an anti-competitive agreement of competitors which the CC does not possess and which is significant to prove the anti-competitive agreement. The significance of the evidence is estimated having regard to the direct proof of it as for conclusion of an anti-competitive agreement or intention to conclude an anti-competitive agreement. Usually written evidence originating from the period of an anti-competitive agreement, as well as direct evidence confirming the participation of other undertakings in the anti-competitive agreement shall be regarded as significant. Indirect evidence, evidence originating after the period of the anti-competitive agreement or which do not confirm the participation of other undertaking therein, or explanations of the undertakings, unsubstantiated by no means may be regarded as significant subject to their nature and content".

If your immunity program includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be „first in the door" of potential applicants. Are markers available also to subsequent applicants?

19. According to the Leniency Rules, an undertaking wishing to apply for immunity from a fine or reduction of a fine, may in the first place inform the CC of its intention and apply for setting a period within which it would collect all necessary information and evidence. In that case an undertaking usually within 15 days must submit all lacking information and evidence, and of which an undertaking is informed as promptly as possible. If an undertaking submits the lacking information and evidence within the period set, the information and evidence shall be deemed to have been submitted on the day of the receipt of the primary application in the CC.

20. It must be mentioned that the Leniency Rules do not specify between first-in and subsequent applicants on this issue, therefore it can be said that subsequent applicants also have a right to apply for markers.

Please explain if your immunity program is always available during the proceeding, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore.

21. According to the Leniency Rules, applications to be immune from a fine or to reduce a fine shall not be considered if submitted to the CC after the investigation is completed and the parties to the proceedings are sent a Statement of objections, or which do not meet other conditions for being immune from a fine or to reduce a fine provided for in the Leniency Rules. Such applications of the undertakings may be considered as a circumstance extenuating the liability of an undertaking as provided for in the Law on Competition.

Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons.

22. Prior to answering the question it must be pointed out, that due to the provisions of the Law on Competition and the Leniency Rules, there are two types of "revoked" leniency application. The first one is that a fine imposed on the undertaking shall not be reduced if during the investigation it is established that the undertaking when contemplating of or making its application to the CC, destroyed, falsified or concealed evidence of the alleged anti-competitive agreement and/or disclosed the fact or any of the content of its application, except to other competition authorities of the EU and/or the European Commission. In such situation the CC would probably revoke the application and would not consider it without waiting till the end of investigation.

23. The second way to revoke (any) leniency application is the adoption of the final resolution on infringement by the CC. Only in this final resolution all the fines are imposed, and, consequently, undertakings can be immuned or the fines reduced, if the CC is convinced that all the relevant requirements are fulfilled. So, at this phase the CC, having regard to all the important circumstances of the investigation, shall finally grant (or revoke) immunity or reduction of fine.

24. Presumably, there should also be a third way to revoke a granted reduction, if necessary, at the court of first instance. For example, if the CC did not know during the investigation that an undertaking did not meet some necessary requirements, it should have a right to appeal this issue in the court.

If your immunity program does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining).

25. N/A.

3. Relationship between leniency for subsequent applicants and other enforcement policies/tools

Please describe the relationship between your immunity programme and the other enforcement policies discussed in the introduction above. When designing your immunity program, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

26. In the Republic of Lithuania, there is no criminal liability of individuals, foreseen for cartels and other anti-competitive agreements. However, after the new version of Law on Competition was adopted on the 1st May, 2012, a new provision as regards disqualification of directors, who organized or significantly contributed to an anti-competitive agreement, appeared. According to the provisions of this rule, if the undertaking was immuned from a fine, its director shall also not be disqualified.

27. As to early case termination policies (settlements or plea bargaining) or private damage actions, the CC has had no such experience yet, therefore it is difficult to escalate what effect of leniency (especially subsequent applicants) programme would be upon these enforcement policies. Despite of this, it should be mentioned that due to the Leniency Rules, the fact that immunity from a fine or reduction of a fine was granted cannot protect an undertaking from the civil law claims, as far as they concern its participation in an anti-competitive agreement.

28. Regarding other enforcement policies, it should be mentioned that currently there is an incentive to amend the Law on Public Procurement, which foresees that undertakings which were imposed fines for infringements of Art. 5 of the Law on Competition (and/or Art. 101 TFEU), shall be disqualified from

public procurements for three years. By the amendment it is expected to exclude undertakings immuned from fines. However, this amendment is under consideration and is not in force yet.

In particular, discuss if and how early termination policies (such as settlements and plea bargaining) and immunity programs relate to rewarding co-operation from subsequent applicants. Do early termination policies have the same objectives as the immunity program (e.g. to obtain information and encourage co-operation)?

29. No experience yet.