

Competition - European Union

Cooperating in cartel investigations: no half-measures

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On September 9 2011 the EU General Court upheld a European Commission decision of 2005 in which it fined Deltafina and its parent company Alliance One €54 million for participation in a cartel in the Italian tobacco sector. The peculiarity of this case is that Deltafina was the first leniency applicant in the context of the relevant cartel, and therefore could have expected to be granted full immunity from fines. However, as it voluntarily disclosed its collaboration with the commission to co-cartelists before the commission's scheduled dawn raids, the commission – which was informed of the fact by another colluding firm two years later – considered that the conditions for full immunity, most notably with respect to the cooperation obligation, were not met. Thus, the company could not benefit from immunity.

In the case before the court, the main issue was the extent of cooperation that a firm must provide to the commission throughout the administrative procedure. In that respect, it is useful to note the evolution of the qualification for leniency, as evidenced by the three successive notices on leniency issued by the commission. The 1996 leniency notice mentions "continuous and complete cooperation"; the 2002 leniency notice, which was the framework at the time of Deltafina's application, states that "the undertaking cooperates fully, on a continuous basis and expeditiously". On the other hand, the current leniency notice, which took effect in 2006, while requiring that the company cooperate "genuinely, fully, on a continuous basis and expeditiously", also includes a non-exhaustive list of practices which are in line with this obligation, including an obligation of non-disclosure of cooperation with the commission.

The court considered that under the 2002 leniency notice, the cooperation obligation was "a very broad obligation, with imprecisely defined boundaries". However, it appears that it is basically an obligation of good faith in the course of the administrative process. If for any reason a firm has not respected this obligation, it should not try to hide this fact from the commission; while the company might not be granted immunity, its honesty might lead the commission to be relatively lenient when deciding on the level of the respective fine.

With regard to the consequences of the violation of such an obligation, this case confirms that there is no right to immunity for the 'first at the door' company, as stems quite clearly from the wording and structure of the leniency notices. Immunity is granted at the end of the procedure, with due consideration towards a company's behaviour throughout the administrative process.

On the other hand, a breach of the cooperation obligation does not make a company ineligible for a reduced fine. Deltafina was ultimately granted a 50% fine reduction for its cooperation, which represents the maximum reduction under the 2002 notice for a firm that cannot qualify for immunity. In relation to future conduct, under the 2006 notice, where the cooperation obligation applies fully and throughout the procedure, the question arises as to the consequences of a breach of the obligation.

At policy level, it appears inconceivable that, in future cases, the commission will offer no fine reductions to 'first at the door' companies, even if they fail to fulfil all of their cooperation obligations. However, it is clear that partial cooperation only is likely to be an expensive choice compared with full cooperation, given the likely effect of such cooperation on the level of the respective fine.

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