

A lenient approach

Italian courts are on the verge of resolving two whistleblower cases that could provide greater clarity of the competition authority's approach towards leniency applications. **Luca Toffoletti and Emilio De Giorgi** report

The Italian Antitrust Authority published a notice a little more than three years ago on the non-imposition or reduction of fines and two current cases have very much thrown it into the spotlight.

In many respects the 2007 Leniency Notice is similar to the corresponding Notice adopted by the European Commission in 2006. That said, there are certain differences that seem to be discouraging potential applicants from disclosing the existence of secret cartels to the authority.

Since 2007, participants in alleged cartels have blown the whistle only three times. In two cases the possible existence of the alleged cartel was still unknown to the authority and the applications resulted in the opening of investigations (one involving Vendita al dettaglio di prodotti cosmetici, and another Logistica Internazionale).



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In the other case (involving Prezzo del GPL per riscaldamento Regione Sardegna), the applicant ENI filed its request to obtain full immunity or, in the alternative, a reduction in a possible fine six months after the opening of the investigation. The authority decided to grant full immunity on the basis of the 'decisive contribution provided by ENI that has reported the existence of a wider cartel wider both in scope and in duration'. This conclusion is evidence of a quite relaxed application of the 'decisive evidence' criterion set out in the 2007 notice.

The adoption of the decisive evidence criterion for the granting of full immunity was subject to criticism when the 2007 Leniency Notice was first adopted. The experience of the Commission under the first of its leniency notices had already shown that the 'decisive evidence' criterion provided insufficient incentive for a whistleblower to seek immunity. In fact, it is stricter and more subjective than the criterion currently used with great success by the Commission according to which complete immunity from fines may be obtained where the applicant is the first to submit evidence that may enable either an on-the-spot investigation or

to establish an infringement of article 101 of the Treaty of the Functioning of the EU.

Despite the experience gained by the Commission, the authority did not adopt the 'sufficient evidence' test. To obtain full immunity the authority expressly requires the submission of information/evidence that in the authority's view is deemed decisive for finding a cartel. Moreover, under the 2007 notice, the applicant does not satisfy the evidential threshold for immunity even if it provides information that enables the authority to carry out an unannounced inspection. The decisive evidence test still has to be satisfied.

Fine reduction

Another relevant difference is that under the 2007 notice, the authority has a wider discretion compared with that of the Commission in setting the amount of the reduction of a fine. The reduction may be greater than 50 per cent and the percentage of the reduction is not directly linked to the timing of the application. The authority may also consider the quality and the nature of the evidence submitted and in theory may grant a greater reduction to a later applicant. This uncertainty may induce undertakings under investigation to withhold relevant evidence because the benefit of disclosure is not easily determined.

Observers are watching closely

to see how the remaining two cases mentioned will be resolved. This would give greater understanding of the authority's approach towards leniency applications.

In the meantime, the case of *Vendita al dettaglio di prodotti cosmetici* – which involves an alleged cartel among manufacturers of cosmetics products – is attracting attention because of a dispute between the authority and the addressees of the statement of objections on the access to the authority file that includes certain documents submitted by the leniency applicants. Last April, TAR Lazio (the lower administrative court) published its decision rejecting the petition filed by the certain addressees of the statement of objections. The court held that the application for immunity may include documents not decisive for the finding of the infringement and that the authority is therefore not obliged to disclose them.

Moreover, TAR Lazio acknowledged the power of the authority to classify as confidential certain leniency documents even where a specific request for confidentiality had not been submitted by the applicant.

Oral statements

The authority has also demonstrated its intention to protect leniency applicants by virtue of an amendment to the 2007 Leniency Notice published last month. Under that amendment, the addressees

of the statement of objections may access oral statements subject to the conditions that they will not make any copy by mechanical or electronic means and that they use the information contained in the oral statements only for the purposes of judicial or administrative proceedings for the application of the competition rules at issue in the related administrative proceedings. Third parties, even if admitted to the proceedings (such as complainants), will not be granted access to oral statements.

This clarification of the procedure related to access to oral statements reflects the position at Community level. It could be considered useful since it may increase the confidence of potential whistleblowers that they will receive an adequate protection – even if not absolute – against disclosure of evidence that may be used by victims in the follow-on damages actions.

To incentivise applicants to approach the authority more frequently, it seems that the 2007 Leniency Notice would have required more substantive changes, including the lowering of the evidentiary threshold necessary for full immunity and reducing the discretion of the authority in the assessment of the quality of the applications filed by whistleblowers.

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