Expulsion from the Garden of Eden

THOMAS MUELLER of Wilmer Cutler Pickering LLP investigates the possibility of losing immunity in a cartel investigation, following the revocation of Stolt-Nielson's immunity in the shipping cartel case

Last year, six days after several companies in the chemical tanker shipping business reported that they had received US grand jury subpoenas and had been subject to dawn raids by the European Commission, Stolt-Nielsen SA announced that it had received conditional immunity or amnesty from prosecution and fines from both the European Commission and the Department of Justice ('DoJ'). The Wall St Journal reported that Stolt-Nielsen's cooperation and immunity agreement had been reached well in advance of the subpoenas and dawn raid. No one in the press focused on the fact that the grant was 'conditional'—after all, no company had ever lost its grant of immunity in the Leniency Programme. Yet last month, Stolt-Nielsen issued a press release stating that the Department of Justice had voided its agreement and revoked Stolt-Nielsen's conditional acceptance into the Leniency Programme. What happened? How can a company lose the enviable position of having immunity from fines? What lessons can be learned by others thinking of seeking immunity?

The Department of Justice and the European Commission have made abundantly clear the very significant advantages that companies that apply for immunity can obtain. The programmes rely on clear criteria for a 100 per cent elimination of fines—the notion being that companies applying should be confident that they fulfil the criteria and their application will be accepted. The transparency and complete absolution of governmental liability have prompted countless companies to come forward and have destabilised cartel activity. With each modification of the policy, the agencies are seeking to enhance the transparency of the programme and enhance the benefit that is awarded (as well as increase the penalty for those that do not come forward). Each step is designed to increase the likelihood that some member of a cartel will apply to the Programme. As a result, taking away immunity is a very serious step because it has the potential for deterring applications to the Leniency Programme.

In response to Stolt-Nielsen's press release, the Department of Justice issued a statement that made clear why it believes the revocation is fully consistent with its enforcement priorities and continued promotion of the Leniency Programme. The first sentence says simply that "[a]ll companies that apply to the Corporate Leniency Program must meet certain requirements and make accurate representations to the Division". In short, while the Department is prepared to provide a free pass in exchange for full cooperation, it is not prepared to do so if the immunity applicant does not fulfil the clear requirements of the Programme. The Leniency Programme sets out several requirements, but there are three principal conditions that pose the greatest risk to an applicant that does not abide by them. Analogous requirements are imposed on amnesty applicants before the European Commission, although there are important distinctions.

First, the most apparent way in which a company can be expelled from the Corporate Leniency Programme is if the company makes false representations to the DoJ concerning its role in the alleged illegal activity. The Leniency Policy requires that the corporation report "with candour and completeness" its wrongdoing and "provides full, complete cooperation to the Division throughout the investigation". One of the key questions is what misleading behaviour should be attributed to the company versus merely to an individual employee of the company. It is clear that the Department would be extremely reluctant to withdraw conditional immunity from a company merely for isolated misstatements, even if they were material falsehoods. To do so would seriously undermine the transparency of the Programme—no company could be secure that it had received complete and truthful cooperation from all of its employees. Instead, as the Department statement articulates, "the [Antitrust] Division may expel an applicant after concluding that a company has made false representations..." In short, the representations must be a corporate act. Once it makes the application, the company must come clean and not try to hide, shade or otherwise misrepresent what it has learned in investigating the alleged wrongdoing. That means its cooperation must extend beyond an initial proffer and it must continue to work affirmatively with the Department in exploring and exposing the activity. It cannot rest on an initial proffer, let alone affirmatively mislead or shade the truth. Similarly, the European Commission requires that the company granted amnesty status "cooperate fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure" and provide the Commission "with all evidence that comes into its possession or is available relating to the suspected infringement". The company granted immunity must also be able to "answer swiftly any request" that the Commission may deem relevant to the establishment of important facts concerning the alleged illegal activity.

Second, a company may also lose its immunity from DoJ prosecution if it does not halt the anti-competitive conduct in a timely fashion. The DoJ Leniency Policy requires that, "the corporation, upon its discovery of the illegal activity being reported, take prompt and effective action to terminate its part in the activity". Termination does not require the company to announce withdrawal of the illegal activity to other cartel members, but it must stop its anti-competitive conduct. "Discovery" is measured from the time either the board of directors or counsel for the corporation are first informed of the illegal conduct. A failure to act promptly after discovery would disqualify an immunity applicant from the US Programme. However, the European Commission Leniency guidelines permit a conspiracy to continue up until the time the company applies for amnesty and submits evidence, even if the illegal activity was discovered well before the company applied for leniency.

Third, the DoJ Leniency Policy requires the company not to have coerced a party to participate in the illegal activity and clearly not to have been the leader in, or originator of the activity. If the Department discovers that either has been the case, the immunity agreement could be voided. However, the required level of 'coercion' or 'leadership' is quite high because otherwise immunity applicants might be deterred if their role in the activity extended beyond docile acquiescence. As Scott Hammond, Director of Criminal Enforcement at the DoJ, has publicly stated, an amnesty applicant will be disqualified from the Leniency Programme only if it is the single organiser or ringleader of the cartel activity. Taking simply *a* leading role is not enough to be expelled. The European Commission's 2002 Leniency Notice is even clearer on this, by only requiring the amnesty applicant not to have taken "steps to coerce other undertakings to participate in the infringement".

Expelling an immunity applicant from the Programme will continue to be rare. If an applicant was expelled where the breaches of the conditions were not clear, the Department of Justice and the European Commission would risk undermining their most effective enforcement tool. For that reason, companies should not be deterred from entering the Programme after evaluating whether they qualify. But they should also recognise that their applications are the beginning of an open collaborative effort with the prosecuting authority—only by proceeding on that basis can they protect themselves from expulsion. ■