

EU Court Affirms Independence of EU and National Leniency Programs

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On January 20, 2016, the Court of Justice of the European Union (CJEU) issued a judgment concerning the interrelationship between EU and member state cartel leniency programs in response to a reference from Italy's highest court, the Council of State (Case C-428/14, *DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del Mercato*).

In response to three questions posed by the national court, the CJEU affirmed the independence of the EU and national leniency programs, ruling that:

- The EU's Model Leniency Program, which was adopted in the context of the European Competition Network and provides "best practice" guidelines for a model leniency program, is not binding on national competition authorities.
- There is no legal connection between an application for immunity submitted to the European Commission and a summary application submitted to a national competition authority in respect of the same cartel that would require the national authority to assess the summary application in light of the application at the EU level. In particular, where the national application has a more limited scope than the EU immunity application, the national authority is not required to contact the European Commission or the applicant in order to establish whether the applicant has discovered illegal conduct that is covered by the EU immunity application but not by the national summary application.
- A national competition authority is not precluded from accepting a summary application for full immunity from an undertaking that had not applied for full immunity with the European Commission but had only sought a reduction in fines at EU level.

In the case at hand, DHL had secured conditional immunity at the EU level for its participation in a price-fixing cartel for international freight forwarding that covered maritime, air and road transport. In parallel, DHL submitted a summary application for immunity with the Italian Competition Authority (AGCM) concerning the international sea and air freight sectors of this market, but not with respect to road transport. The European Commission limited its investigation to the air freight forwarding sector, leaving the national competition authorities the possibility of pursuing the infringements in relation to the sea and road freight forwarding services at a national level. Subsequently, DHL supplemented its Italian application with another summary application for immunity in order to extend its application to the international road transport sector. However, prior to that second submission, Schenker Italiana SpA had already submitted an application for immunity covering road freight forwarding in Italy and was awarded conditional immunity for the road sector by the AGCM.

DHL appealed the AGCM's decision, arguing, *inter alia*, that it should have received immunity in Italy for all three freight forwarding sectors, including road transport, and that the AGCM was required to assess its summary application for immunity in Italy, in light of the application for immunity filed at the EU level.

In response to the Italian court's reference, the CJEU reaffirmed the independence of national and EU leniency programs under which national and EU-wide application are treated separately by the European Commission and by the national competition authorities pursuant to their own national legislation. In particular, the court reaffirmed that the European Commission's notice on cooperation between it and the national competition authorities and its notice on immunity from fines do not bind EU member states.

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The court's judgment does not create new law, but it does reaffirm the independence of the EU and national immunity and leniency regimes, as well as reaffirming the resulting obligation of firms seeking immunity from fines to satisfy the terms of both the EU and any relevant national immunity programs in parallel in order to obtain full immunity or fine reductions under EU and national law. The court's ruling reaffirms that immunity and leniency applicants cannot rely on their application to the European Commission vis-à-vis national competition authorities. As

a result, immunity and leniency applicants need to file summary applications in all potentially relevant national EU jurisdictions and provide sufficient information to the national competition authorities to keep those summary applications updated in order to ensure that they are covered in the event that the European Commission limits its investigation to only certain aspects of a cartel, leaving the national authorities to pursue other aspects of the cartel at the national level.

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