

Want to confess your involvement in a cartel? Check your timing

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The Rotterdam District Court recently ruled that the Authority for Consumers & Markets should have granted a leniency applicant full immunity from fines upon confessing to its involvement in a cartel in the flour industry. The ACM was unable to convince the district court that the leniency applicant was only eligible for a fine reduction instead of full immunity because the ACM had launched an investigation into the cartel before the leniency applicant had filed its application. Companies applying for leniency should therefore always check the documents on which the ACM is basing the commencement date of the cartel investigation.

The [district court](#) had to rule on the validity of the document used by the ACM to prove that it had already started to investigate the cartel prior to the leniency application being filed. Whether the Leniency Guidelines 2007 applied was not in dispute in this case. Paragraph 2 of these Guidelines states the following: “The guidelines are implementation rules which provide a basis for the Dutch competition authority’s (formerly NMa, currently [ACM](#)) management board to grant fine reduction or immunity from fines to companies that have been part of a cartel (...)”. The Leniency Guidelines further mention that the NMa grants immunity from fines to a company applying for leniency if, among other things, it is the first to apply for leniency for a cartel prior to the start of an investigation by the NMa. In this connection, the Guidelines state that “an investigation commences at the first moment the NMa records its suspicion of a cartel in writing”.

The leniency applicant had been granted a marker – a provisional ranking in the order of entry of leniency requests – on 27 February 2008 and claimed that the NMa document titled “*Initial memorandum – Determination of the commencement of an investigation as meant in the Leniency Guidelines*” (Initial Memorandum) proved that the NMa’s investigation started after that date, on 4 March 2008. The ACM argued that the Initial Memorandum was only used to record the commencement date as meant in the Leniency Guidelines but was not meant to serve as an official kick-off of the investigation. Its “first moment of suspicion of a cartel” as meant in the Guidelines was sooner: the document titled “*draft investigation proposal*” of 22 February 2008 proved that the cartel was already under investigation.

The district court found that it follows from the wording of the Leniency Guidelines as mentioned above that NMa is not meant to refer to just any NMa official, but to the NMa’s management board. Given that the “*draft investigation proposal*” was sent as an attachment to an e-mail by one NMa official to another, it could not qualify as the moment at which the NMa’s board documented its first suspicion of a cartel. As a result, the date of commencement of the investigation should be based on the *Initial Memorandum*. Since the leniency application was submitted prior

to the *Initial Memorandum*, the district court concluded that the ACM should have granted the leniency applicant full immunity from fines.

To ensure that a leniency application pays off, leniency applicants should keep track of not only their ranking in the order of leniency requests, but should also keep tabs on which documents the ACM is basing the commencement date of a cartel investigation.