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EU AND COMPETITON LAW

THE PROTECTION OF INFORMATION CONTAINED IN LENIENCY APPLICATIONS: THE END OF A PARADIGM?

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On 28 January 2015, the General Court issued a judgement[1] concerning a key issue in the area of practices that restrict competition: the protection afforded to information provided by leniency applicants. In fact, given their secretive nature, the dismantling of cartels depends to a large extent on whistleblowing by the participants in cartels themselves, in exchange for total or partial immunity from fines. Up to now, the Commission's practice had been to not broadly disclose the information provided by leniency applicants, which made civil liability claims brought by injured third parties more difficult, due to the fact that proving the damage was problematic.

The facts of the case are the following. In 2006, the Commission had imposed fines on several undertakings for their participation in the so-called hydrogen peroxide and perborate cartel ("HPP decision"), following information received through the leniency programme. In 2007, the first non-confidential version of the HPP decision was published on the Directorate-General for Competition's website. Later, in 2011, the Commission notified the undertakings in question of its intention to publish a more detailed version of the decision, inviting them to present their observations. In 2012, the Commission rejected the requests for confidential treatment presented by the undertakings, thus authorising the publication of information disclosed to the Commission in the context of the leniency programme. Afterwards, the undertakings filed an action for annulment of the latter Commission decision at the General Court.

The Court concluded, firstly, that the interest of an undertaking fined by the Commission for a breach of competition law in the details of its illegal behaviour not being disclosed to the public does not deserve special protection. The Court reached this conclusion in light of the public interest in the transparency and openness of the Commission's decisions, the economic operators' interest in knowing in the greatest possible detail what behaviours are prohibited by competition law, and also the interest of injured third parties in receiving compensation for the losses suffered.

1 Case T-345/12, *Akzo Nobel NV at al. v. Commission*.

Regarding the argument that such a disclosure would compromise the effectiveness of the leniency programme, by dissuading undertakings from reporting cartels in which they take part for fear of having to pay high civil damages to the injured parties, the Court highlighted that it is up to the Commission to preserve the full effect of its leniency programme, by weighing the various conflicting interests on a case-by-case basis.

The Court also rejected the argument that the Commission communications of 2002 and 2006 on cooperation had created in the applicants a legitimate expectation of the non-publication of any *information* contained in leniency applications. The Court took the view that, in its communications, the Commission had only undertaken not to disclose the *documents* voluntarily submitted by undertakings in the context of the leniency programme.

Regarding the existence of a consolidated practice on the part of the Commission of not disclosing such information, the Court held that economic operators have no basis to assume a legitimate expectation of the continuance of a given previous administrative practice, since the Commission has a broad margin of discretion regarding what information it decides to publish, without prejudice to the protection of the parties' commercial secrets.

Finally, the Court held that the publication of a non-confidential version of the decision in 2007, together with the fact that the decision did not mention it had a preliminary nature, did not preclude the subsequent publication of a more detailed version of it by the Commission, given that no specific assurances as to the non-disclosure of the information in question had been given to the undertakings concerned.

This change in the consistent practice of the Commission of not publishing the information provided by leniency applicants is somewhat surprising, especially considering that a non-confidential version of the decision had already been published by the Commission. The very effectiveness of the leniency programme could, therefore, be jeopardised if this uncertainty lasts. However, the General Court did admit that the Commission may give undertakings specific assurances that, in a given case, it will not disclose the information in question, and this may raise significant issues concerning respect for the principle of equal treatment.

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