The devil is in the detail: Commission may publish more detailed cartel decisions

The General Court sees no harm in the European Commission publishing a more detailed version of an earlier cartel decision that includes further information that was voluntarily submitted to the Commission under its leniency programme. A more detailed non-confidential version of the cartel decision is likely to help damages claimants establish civil liability of the cartel participants more easily. At the same time, it will probably make companies seeking leniency think twice before putting in an actual leniency request.

In 2007, the European Commission published a first non-confidential version of its decision to fine seven companies more than EUR 388 million for participating in a bleaching chemicals cartel. In line with the Commission’s Leniency Notice, Evonik Degussa was granted full immunity from being fined, while Akzo/EKA, Total/Elf Aquitaine/Arkema and Solvay had their fines reduced in return for information that they had provided. In 2011, the Commission wanted to publish a new, more detailed, non-confidential version of its cartel decision containing information that had been voluntarily provided in the context of these leniency applications. Evonik Degussa and Akzo argued that this information should be protected from disclosure to safeguard, amongst other details, the proper functioning of the Commission’s leniency programme, but this fell on deaf ears at the General Court.

The General Court considered that the interest of a company in the non-disclosure of details of its cartel participation does not, in principle, merit any particular protection, given:

- the public interest in knowing the reasons for any Commission action as fully as possible; and
- the interest of economic operators in knowing the sort of behaviour for which they can be penalised; and
- the interest of persons harmed by the infringement in being informed of the details of the infringement so that they may, where appropriate, assert their rights against the undertakings punished; and
- the fined company’s ability to seek judicial review of such a cartel decision.

In addition, it is up to the Commission, based on the specific circumstances of the case, to weigh the effectiveness of its leniency programme against the interests of persons seeking damages in civil antitrust actions. According to the General Court, the Commission may publish a new non-confidential version of a cartel decision that includes further details of the collusive contacts and anti-competitive agreements. Those details may include names of the products involved in those contacts and agreements, figures concerning the prices
applied, and the objectives pursued by the applicants in relation to prices and the allocation of market shares.

The ruling is likely to be welcomed by damages claimants, since the additional details published will likely allow them to establish cartel participants’ civil liability more easily. However, potential leniency applicants will probably think twice before seeking leniency. They will first need to consider whether a possible leniency grant will outweigh the risk of further detailed disclosure in a future non-confidential version of the cartel decision, with a potentially larger group of damages claimants as a result.