No one wants to be a smoking duck - a commentary on Case C-162/15 P - Evonik Degussa

Cartels - Leniency programme - Private Damages Directive - Evonik Degussa - publication of leniency information - competences hearing officer

Marc Veenbrink, Lecturer and PhD Candidate at Radboud University Nijmegen, j.veenbrink@jur.ru.nl, 3 April 2017

Introduction

"Duck. Take refuge, sitting duck

or you'll be soup, or stew,

a dead duck, in any case.

And no one wants to be a smoking

duck, even if those duck tales

did become you."[1]

This (part of a) poem by Kotsilidis shows perhaps how leniency applicants feel with the Grand Chamber judgment of 14 March 2017. In *Evonik Degussa* the Court clarified the boundaries which the Commission needs to adhere to when disclosing leniency information. This approach by the Court is closely related to the distinction made between leniency statements and leniency documents in the Private Damages Directive.[2] This distinction is in clear contrast to the *Pfleiderer*[3] and *Donau Chemie*[4] judgments in which the Court referred in general to leniency documents without making any distinction between documents and statements. The *Evonik Degussa* CJEU ruling provides further clarification on disclosure of leniency information, hereby affirming and fine-tuning the General Court's approach in *Evonik Degussa*,[5] but also in *AKZO Nobel*.[6] Nevertheless, the Court did annul the judgment of the General Court insofar as it relates to the competences of the hearing officer in competition law procedures. This post will discuss the *Evonik Degussa* judgment and the interaction between the leniency programme of the Commission and the private

damages claims. The aspect of the *Evonik Degussa* case dealing with the hearing officer will marginally be discussed.

Status quo

The *Evonik Degussa* case does not deal with disclosure of leniency documents at the national level, but with the decision of the Commission to publish a non-confidential decision containing information obtained under the leniency programme. The Court of Justice had to deal with two issues. First of all, the Court had to explain the competences of the hearing officer. Secondly, the Court dealt with the argument whether information obtained under the leniency programme could be published. On the first aspect, the Court annulled the General Court's judgment, since the General Court interpreted the competences of the hearing officer in a too limited way.[7] The General Court limited the competences of the hearing officer, just as the hearing officer itself did, to a decision on the confidential nature of the information on the basis of business secrets and privileged information. The Court of Justice, however, ruled that confidentiality of information is not merely limited to business secrets and privileged information, but might also be given to information when there is another principle of EU law at stake.[8] The grounds of Evonik Degussa relating to the non-disclosure, however, were not accepted by the Court. The presumption of the General Court that information, which is over five years old has lost its confidential nature, unless rebutted by the undertaking concerned, was correct.[9] So far, the Court approved of the General Court's judgment. However, in par. 87 of the judgment the Court introduced a rule, which cannot be found in the General Court's judgment,[10] but which fine-tunes that judgment. The Court provided: "[I]t must be pointed out that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances."[11] This thus means that information from corporate statements can never be quoted by the Commission in a published decision. By contrast, quotes from other documents might still be published, as long as the information cannot benefit from a confidentiality rule. The argumentation by Evonik Degussa that this might diminish the effectiveness of the leniency programme was merely dismissed by the Court of Justice.[12] By contrast, the General Court in *Evonik Degussa* and in *AKZO Nobel* did deal with this argument,

but dismissed it on the ground that the effectiveness of the leniency programme is an interest for the Commission to protect. The weighing of the effectiveness of the leniency programme against transparency which is ensured by publishing the non-confidential decision belongs to the decision of the Commission whether or not to disclose leniency information.[13]

Discussion

The leniency programme is of great value for the Commission. In 2014 former commissioner Almunia mentioned in one of his speeches that the leniency programme produces "a consistent stream of good applications; on average four per month, including immunity applications."[14] Without the leniency programme it would be very difficult for the Commission to catch cartels. As the Court provided in the *Aalborg Portland* case: "Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum."[15] Detecting cartels without inside information is therefore difficult for the Commission.

In order to streamline the leniency programme, the Commission adopted multiple Notices. The 2002 Notice, which was replaced in 2006, is the document applicable in the *Evonik Degussa* case. Both Notices provide the conditions for a leniency applicant to obtain immunity or a reduction of a fine. In order to obtain immunity from a fine, the undertaking should, generally speaking, (i) be the first to apply for leniency,[16] without the Commission having sufficient information to start an investigation or adopt a decision,[17] and (ii) provide sufficient evidence for the Commission to order a dawn raid or to prove an infringement.[18] Reduction of the fine is still possible for all succeeding leniency applicants, as long as they provide evidence with significant added value.[19]

Publication of leniency information might make of leniency applicants "sitting ducks". This type of information is a good source for private damages litigants to substantiate their claims. The Union legislator decided to negate problems for *immunity* recipients by limiting their liability.[20] Furthermore, the Private Damages Directive prohibits in general disclosure of leniency statements.[21] A leniency statement is "an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a

natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information".[22] This definition from the Private Damages Directive is similar to the definition of a corporate statement under the 2006 Leniency Notice, which provides that "[a] corporate statement is a voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice."[23] We can therefore make a distinction between two types of information which can be provided to the Commission in a leniency application, namely (i) corporate statements and (ii) pre-existing documents.[24] This distinction was not made in the 2002 Leniency Notice which merely refers to "evidence".[25] Corporate statements are especially important for immunity applicants, whereas leniency applicants generally rely on pre-existing documentation.[26] The Private Damages Directive therefore provides advantages for immunity recipients by reducing their liability and by preventing corporate statements from being disclosed. Pre-existing leniency documents can still be disclosed in private damages proceedings on the basis of Article 5 and Article 6(4) of Directive 2014/104/EU.

The *Evonik Degussa* case clarifies the competences of the hearing officer and the powers of the Commission to disclose leniency information. It seems that the focus of the protection for leniency applicants is, once more, on the immunity recipient and not on the other leniency applicants. In general, it is only the immunity recipient which can benefit from providing corporate statements. Other leniency applicants should produce evidence with significant added value, which will in general only be accepted when it is documentation produced at the time of the participation in the cartel. Obviously, the distinction made by the Court between corporate statements and other documents, whereby the first type of information might never be published and the latter only when the information is not confidential, negates the effect that all leniency information is made public. This, in its turn, reduces the negative effects of the General Court's judgment for the leniency programme and thus reduces the "victory for damage claimants who should now expect more detailed non-confidential versions of cartel decisions".[27]

Conclusion

Overall, the judgment of the Court is a balanced approach towards publication of leniency information. The judgment emphasises the protection of corporate statements, in which undertakings might have provided sensitive incriminating evidence. Therefore, it is logical that corporate statements are protected. The perhaps unintended result of this judgment is, again, an increased protection for *immunity* recipients, whereas applicants for reduction of a fine come off badly. The first "snitch" therefore receives the most protection. It remains the case though that both immunity recipients and recipients of a reduction of a fine already obtained an advantage by way of a reduction of the fine in the public enforcement. Private enforcement is, in the EU, meant to compensate victims of cartels.[28] It seems therefore suitable that those victims have effective means to claim damages. Publication of leniency documentation, which existed during participation in the cartel, might help them out substantially.

[1] Leigh Kotsilidis (2011) *Hypotheticals*, Toronto: Coach House Books, p. 60.

[2] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5 December 2014.

[3] Case C-360/09 (*Pfleiderer*), par. 30.

[4] Case C-536/11 (*Donau Chemie*), par. 42-43.

[5] Case T-341/12 (*Evonik Degussa*).

[6] Case T-345/12 (*AKZO Nobel*).

[7] Par. 54.

[8] Par. 55.

[9] Par. 64-67.

[10] See e.g. par. 110 where the Court interpreted certain paragraphs in the General Court's judgment in light of its own statement in par. 87 by making a distinction between corporate statements and other documents provided under the leniency programme. The General Court, however, did not make this distinction.

[11] Par. 87.

[12] Par. 101.

[13] Case T-341/12 (*Evonik Degussa*), par. 119; Case T-345/12 (*AKZO Nobel*), par. 89.

[14] J. Almunia, Fighting against cartels: A priority for the present and for the future, speech at at *Studienvereinigung Kartellrecht Brussels, 3 April 2014, available via* http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm*, accessed on 31/3/2017*

[15] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P (*Aalborg Portland*), par. 55.

[16] Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 45/3, 19 February 2002 (2002 Leniency Notice), par. 8; Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C298/17, 8 December 2006 (2006 Leniency Notice), par. 8.

[17] 2002 Leniency Notice, par. 9-10; 2006 Leniency Notice, par. 10-11.

[18] 2002 Leniency Notice, par. 8; 2006 Leniency Notice, par. 8.

[19] 2002 Leniency Notice, par. 21; 2006 Leniency Notice, par. 24.

[20] See e.g. Editorial Comments (2014) ""One bird in the hand …" The Directive on damages actions for breach of the competition rules", *Common Market Law Review*, 51, p. 1339.

[21] Article 6(6)(a) Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5 December 2014.

[22] Article 2(16) Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5 December 2014.

[23] 2006 Leniency Notice, par. 31.

[24] See also 2006 Leniency Notice, par. 6

[25] See e.g. 2002 Leniency Notice, par. 8.

[26] The relevance of corporate statements for other leniency applicants is diminished, since those statements need further corroboration with documentation if contested. This means that they are less likely to be considered of "significant added value" by the Commission, see 2006 Leniency Notice, par. 25.

[27] A. Kafetzopoulos (2015) "European Commission policy on publication of cartel decisions: the latest victory of damage claimants against leniency applicants", *European Competition Law Review*, 36, 7, p. 297.

[28] See Article 3 of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5 December 2014.