

# GC RULES AGAIN ON THE ACCESS TO LENIENCY APPLICATIONS

On 22 May, the EU General Court («General Court»)<sup>1</sup> decided to annul a Commission Decision<sup>2</sup> that had refused access to the files of case COMP/F/38.899.

Access to the files composing the above mentioned case had been requested on 9 November 2007 by EnBW Energie Baden-Württemberg AG («EnBW Energie») that considered it had been affected by the actions of a cartel that operated in the gas insulated switchgear market. The Commission imposed fines totalling EUR 750 million on the undertakings that had taken part in that cartel, following a leniency application by one of the companies that took part in the cartel.

EnBW Energie made its request for access to the file under Regulation (EC) no. 1049/2001 regarding public access to European Parliament, Council and Commission documents. According to Article 2 (1) «Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.»

The Commission refused access on the basis of the exception established under the third paragraph of article 4 (2) of the Regulation: «The institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits».

EnBW appealed the Commission's decision to the General Court, disagreeing with the Commission's interpretation of the Regulation.

In its judgment, accepting the arguments made by the EnBW Energie, the General Court pointed out that in order to justify refusal of access to a document under the above mentioned exception it would not be enough for the documents to be related to inspection, investigation or audit activities. It would be up to the Commission to supply explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article. The Court argued that the exceptions provided in the Regulation must be interpreted and applied strictly.

The argument advanced by the Commission that disclosure would undermine the efficacy of its leniency programme did not persuade the General Court. The General Court argued that such interpretation would amount to permitting the

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<sup>1</sup> Case T 344/08 *EnBW Energie Baden-Württemberg AG v. Commission*, Judgment of 22 May 2012.

<sup>2</sup> SG.E.3/MV/psi D (2008) 4931 - 16 June of 2008.

Commission to exclude vast areas of its investigatory activities from public scrutiny. The Court argued that such interpretation was contrary to the duty of interpreting and applying the exceptions strictly.

### Practical implications:

The present ruling extends prior decisions regarding access to documents made available in an application under the leniency programme. In fact, the Court of Justice had already opened the door to the possibility of materials handed to the relevant competition authority by the applicant for leniency being disclosed to claimants in civil actions affected by antitrust infringements.<sup>3</sup> See, on this point our previous [Newsletter](#).

The new ruling states clearly that there is no automatic exemption regarding access to Commission documents obtained under a leniency application. The General Court's decision facilitates future civil actions for damages, severely restricting the possibility of the Commission limiting access to documents needed to prove and justify a civil action. The ruling must therefore be taken in consideration by any company that may request leniency and the risks of any possible subsequent private enforcement actions that may follow a Commission's decision must be evaluated.

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<sup>3</sup> Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, Judgment of the CJ of 14 June 2011.