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ACCESS TO FILE & CONFIDENTIALITY

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THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

- SPEECH -

by

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INTRODUCTION

EU substantive rules regarding access to file and confidentiality treatment are well described in a number of official documents, taking into account the relevant case-law in that regard.

This intervention does not then intent to present these rules[2] but, instead, it will focus on the role of the Court of Justice of the European Union in these issues. Through its case-law, the Court has shaped the rules applicable to confidentiality treatment, access to competition authorities' files and publication of non-confidential decisions[3].

As a preliminary observation for those of the readers that are not familiar with the EU judicial system, two main aspects should be kept in mind:

- first, the Institution "Court of Justice of the European Union" has two degrees of jurisdiction – the General Court is the first instance court, and mainly is competent to review the legality of the EU institutions' decisions, such as the Commission's (Article 256 TFEU). The Court of Justice can review on appeal only the legal aspects of the General Court's judgements (Article 256, para. 1, al. 2 TFEU);

1 All views expressed are strictly personal and solely the responsibility of the author.

2 For this purpose, see the note prepared by the European Union for this event.

3 This last point is based on the direct experience of the author since he personally handled this issue, having been the judge hearing interim measures' requests for the past 12 years.

- second, the Court of Justice has also the exclusive competence to interpret EU law[4] and to decide whether acts of the Institutions are valid (Article 267 TFEU). In that role, it receives from the Member States' courts requests for preliminary rulings whenever the national judge has a doubt on the compatibility of a national rule with regard to EU law.

The following developments are based on cases adopted whether after an application for annulment or a request for preliminary ruling and intend to give an overview of the impact of the EU judicial decisions[5] first on the issue of confidential information and access to file (**I**) and, second, confidential information and publication of decisions (**II**).

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I/. CONFIDENTIALITY AND ACCESS TO COMPETITION AUTHORITIES' FILES

The Court of Justice of the European Union was called to give clarifications with regard to the tension between the protection of confidential information and the right to have access to the file of the competition authorities. The Court adopted judgments regarding both the EU and the national levels, in other words, access to evidence in the European Commission's case file (**A**) and in the EU Member States' competition agencies (**B**).

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4 See however, my article entitled "25 years of the General Court – Looking back and forward" *in* EU Competition and State Aid rules: Public and Private Enforcement, Tomljenović, V. et.al. (eds.), Springer- Verlag, Heidelberg, pp. 3-38 (especially, p. 16-19), 2017.

5 On the role of the EU judge, see my article entitled "Le rôle du juge de l'Union européenne dans le développement de l'Union européenne" *in* Cours du Master International - Droit de l'Union européenne, Vol. IV « Le Tribunal de l'Union européenne », dir. A. Semov, Presse universitaire « Saint Clément d'Ohrid », Sofia, p. 87 – 111 (2014).

A. THE EU JUDGE'S INTERVENTION IN THE COMMISSION'S FILES

On the one hand, pursuant to Article 339 TFEU, the Commission has a general duty to protect confidential information that could seriously harm the company if disclosed. On the other hand, Article 41, paragraph 2, of the Charter of Fundamental Rights of the EU affirms the right of every person to have access to his or her file. Conflicts between these principles resulted in the fact that access to the European Commission's files has been at the center of the attention in a number of cases. Two aspects should be underlined.

First, the ECJ has been sympathetic towards the context in which the access was sought. Indeed, in its judgment of 14 December 2005, *General Electric/Commission*, adopted in Case T-210/01, the General Court made clear that the principles applicable to access to the files in antitrust proceedings, namely the obligation for the Commission to reconcile the opposing interests (right to protection of their business secrets versus rights of the defense) by preparing non-confidential versions of documents containing business secrets or other sensitive information, are also applicable to access to the files in merger cases. However, it recognized that their application may reasonably be adapted to the necessity for speed. Such variations of the rules can also be found in the context of settlement procedures (judgment of 12 January 2017, *Timab Industries and CFPR*/Commission, C-411/15 P).

Second, the ECJ has delineated the reach of access. The most known illustration comes from the judgment adopted in Case T-198/03, *Bank Austria Creditanstalt/Commission* on 30 May 2006 (para. 71), in which the General Court defined the notion of "business secret" and set the standard of appraisal still in use today (see, for instance, judgment of 28 January 2015, *Akzo Nobel*

and Others/Commission, T-345/12; or, more recently in another field than competition law, see judgment of 14 December 2018, *Arysta LifeScience Netherlands/EFSA*, T-725/15, para. 125) : "in order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible."

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B. THE EU JUDGE'S INTERVENTION IN THE NATIONAL AUTHORITIES' FILES[6]

Access to the national competition's files in the Member States has also been an issue for which the opinion of the EU judge was key to the development of the current legal framework.

This intervention took place in the context of damage claims litigation. In Case C-453/99, *Courage and Crehan*, 20 September 2001, the ECJ recognized the right to any victim of antitrust infringement to obtain damages through an action before the national courts. It strongly reiterated the importance of such a right in Joined Cases C-295/04 to C-298/04, *Manfredi and Others*, 13 July 2006.

[6] On this topic, see my article entitled "Échange d'informations confidentielles dans le cadre de l'application privée du droit de la concurrence" *in* Concurrences, 4-2014.

This emphasis on private enforcement obviously led to delicate questions of articulation with public enforcement. To put the issue simply, on the one hand, the question of obtaining access to the information contained in the files of a competition authority became essential to plaintiffs in order to build their case and especially to quantify their damages. On the other hand, the threat to see successful leniency programs put in place at national level becoming less attractive was immense, infringers being then reluctant to provide incriminating evidence to public authorities due to the risk of disclosure.

Through the preliminary ruling procedure, national courts turned to the ECJ in order to get clarification on the best way to deal with access to file's requests ensuring the right to claim damages and the protection of confidential information handed over by infringers to national competition authorities guaranteeing public antitrust enforcement in the context of leniency programs. In Case C-360/09, *Pfleiderer AG*, 14 June 2011, the Court affirmed, first, that the national courts, on the basis of their national law, have the duty to determine the conditions under which such access must be permitted or refused by weighing the interests protected by EU law; second, that such assessment can only be done on a case-by-case basis; and, third, that all relevant factors in the case have to be taken into account. Basically, unlike the Advocate General in this case, the Court clearly did not exclude access to information given in the context of leniency programs.

Two years after, the Court reaffirmed the importance of the weighing test in Case C-536/11, *Donau Chemie*, 6 June 2013, stating that: "the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for damage actions may undermine

the effectiveness of a leniency program cannot justify a refusal to grant access to that evidence."

Following the development of this case law, the European Commission proposed to the European Parliament and the Council the adoption of a new piece of legislation to harmonize the rules applicable to national damage claims and, on 26 November 2014, the 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 was adopted and was supposed to be transposed into Member States' legal systems at the latest on 27 December 2016.

Article 6 of the directive[7] describes in great details the rules regarding the disclosure of evidence included in the file of a competition authority. One would rightly notice that the non-preclusion principle set out by the ECJ has not been enshrined in this text: "Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions."

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II/. CONFIDENTIALITY AND PUBLICATION OF DECISIONS

If access to competition authorities' files is restricted, information may be directly taken from their decisions. However, confidentiality issues will strike again. In this context, the EU judge has often been asked to intervene with regard to the European Commission's decisions. Due to the sensitivity of the matter, the companies wishing to see their information covered by

[7] See the annex for the text of the provision.

confidentiality first appeal to the judge in charge of the interim measures to seek immediate suspension of the publication. A brief analysis of the relevant case law can show that the judicial approach has changed over time as demonstrated below.

A. FIRST PHASE: THE SYSTEMATIC JUDICIAL TEMPORARY PROTECTION[8]

A presumption of legality being attached to the decisions adopted by EU institutions and no suspensory effect being attached when an action for annulment is introduced on the ground of Article 263 TFEU, it is therefore only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged before the General Court or prescribe any interim measures [Article 278 TFEU (suspensory effect); Article 279 TFEU (interim measures)]. Such order would be granted only if it is established that, first, the main action is justified, prima facie, in fact and in law, and, second, that the provisional protection is urgent in order to avoid serious and irreparable harm to the applicant's interests while he must wait for the final decision regarding the main action. When necessary, the judge will also undertake a weighing of the competing interests.

In the context of the protection of potentially confidential information, and in absence of well-established case-law in that regard, to guarantee the full effectiveness of the future final decision, suspension was a must.[9] In several occasion, the judge hearing the application for suspension had to grant the

[8] On this topic, see V. Terrien, "Le référé : problématiques actuelles et derniers développements", *in* Contentieux de l'Union européenne – Questions choisies, dir. S. MAHIEU, ed. Larcier, pp. 339-396 (2014).

[9] See V. Terrien, "La divulgation de documents confidentiels et la protection provisoire en droit de l'Union européenne", *in* L'Observateur de Bruxelles, Larcier ; pp. 39-65 (2016).

request for interim measures to prevent a lacuna in the legal protection afforded by the EU judicature. This approach can be seen, for instance, in the orders in Case T-345/12 R, *Akzo Nobel e.a./Commission*, 16 November 2012 (not appealed), in Case T-341/12 R, *Evonik Degussa/Commission*, 16 November 2012 (not appealed). In Case T-164/12 R, *Alstom/Commission*, 29 November 2012 (not appealed), the suspension of a Commission's decision allowing a national judge to be provided with a decision regarding a competition case potentially containing confidential information in order to share it within a confidentiality ring was even granted.

This cautious approach towards the right not to see confidential information disclosed was confirmed on appeal against an interim order in Case C-278/13 P(R), *Commission/Pilkington Group*, 10 September 2013.

It was even confirmed by the Court after the dismissal of the main action at first instance, finding that the information at stake lack confidential aspect. Indeed, this ruling was appealed before the Court of Justice and, in parallel, the appellant sought to obtain suspension of the publication before the interim measures judge of the Court, who actually granted the request in in Case C-162/15 P-R, *Evonik Degussa/Commission*, 2 March 2016.

B. SECOND PHASE: A MORE BALANCED APPROACH?

The second phase started with the first answers given by the Court of Justice in its judgments adopted on appeal of first instance's decisions.

In its judgments of 14 March 2017 and 26 July 2017, respectively pronounced in Case C-162/15 P, *Evonik Degussa/Commission* and in Case C-517/15 P, *AGC Glass Europe e.a./Commission*, whereas the Court of Justice underlined the importance to protect confidentiality, it dismissed though the relevance of a

number of arguments regularly brought forward to justify the non-publication of the Commission's decision.

Among others, it could be mentioned the existence of a rebuttable presumption of non-confidentiality concerning secret or confidential information that are at least five years old or the ineffectiveness of an alleged harm of the disclosure due to the risk of action for damages.

These clarifications led to major changes in the assessment of requests for interim measures. Already in the order adopted on 23 November 2017 in Case T-345/12 R, *Nexans France and Nexans/Commission*, the findings of the Court were taken into account by the General Court to reject the application for suspension. This order was confirmed on appeal by the Court [Case C-65/18 P(R), *Nexans France and Nexans/Commission*, 12 June 2018].

It must be stressed, however, that, notwithstanding these clarifications, each time a temporary protection is applied for, the interim measures' judge allows "inaudita altera parte" a provisionary temporary protection (Article 157, para. 2, General Court's rules of procedure) is immediately allowed in order to give sufficient time for the judge hearing the request for interim measures (*e.g.*, order in Case T-345/12 R, *Nexans France and Nexans/Commission*, 12 July 2017) or the judge review an appeal against an order dismissing such a request at first instance [*e.g.*, order in Case C-65/18 P(R)-R, *Nexans France and Nexans/Commission*, 2 February 2018] to examine whether or not the alleged confidential information should be protected from disclosure.

This judicial approach has now been reiterated in several cases, for instance, the ones adopted in the context of the publication of the decision related to the infringement concerning Euro Interest Rate Derivatives (orders in Case T-420/18 R, *JPMorgan Chase & Co.*, 25 October 2018 and in

Case T-419/18 R, *Crédit agricole/Commission*, 25 October 2018), both of which were confirmed on appeal [orders in Case C-1/19 P(R), *JPMorgan Chase & Co.*, and in Case C-4/19 P(R), 21 March 2019]. The latest of its kind was adopted on 2 April 2019 in Case T-79/19 R, *Lantmännen ek för*, and confirmed on appeal in Case C-318/19 P(R), 10 September 2019.

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CONCLUSION

This brief overview of the role of the EU judge in the matter of confidentiality and access to competition authorities' files intended to demonstrate the impact of the EU case-law on the practices of these authorities. The most striking example is certainly the adoption of the directive 2014/104/EU on damage claim, which notably reacted to the judicial decisions paving the way to the elaboration of clearer rules regarding the access to the national competition authorities' files.

If the Commission and the national competition authorities have taken steps to contain procedural drawbacks resulting from confidentiality claims, it must be pointed out however that the treatment of such claims remain a true challenge for both the EU Courts and the national courts. Not only it raises questions about the satisfaction of the principle of effective judicial protection (non-disclosure agreements that extend to the client) but it also burden the judicial procedure with heavily time-consuming requests lengthening the duration of the proceedings.

Finally, as a forward-looking comment, attention can be drawn to Article 105 of the General Court's rules of procedure. Criticisms have been formulated recently against competition rules in the context of using the merger rules to build "European Champions" and, even, giving a role to the Member States'

governments…[10] In such situations, it could not then be excluded to see arguments touching on fundamental interests of the Union entering the realm of the antitrust world. As regards confidentiality and access – this time – to the judicial file, one could wonder thus whether Article 105 of the rules of procedure would not play a role. This provision establishes a derogatory regime to adversarial principle (*i.e.*, all information and material must be fully communicated between the parties) where a main party intends to base his claims on certain information or material but submits that its communication would harm the security of the Union[11]. This procedural regime constitute an extreme measure that has not been applied yet since its entry into force on 25 December 2016.

[10] See, in that regard, M. Acton, "Franco-German attacks on competition law are 'unfounded,' EU court president says", MLex Insight, 11 June 2019.

[11] On this provision, see my article entitled "Balancing Security Reasons and the Adversarial Principle: The New Article 105 of the Rules of Procedure of the General Court" *in* An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas, Hart Publishing, pp. 185-199 (2019).

ANNEX

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency statements; and

(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.