EU General Court Rules European Commission Wrong to Reject Summarily Claimants’ Requests for Access to Investigation Files

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In its latest judgment on the issue of access to antitrust investigation files by third party claimants (EnBW Energie Baden-Württemberg v Commission [2012] T-344), the EU General Court has reminded the European Commission that it may not reject summarily private claimants’ requests for access. Subject to certain exceptions, the Commission must instead undertake an individual and specific review of the requested documents and provide strong and reasoned justifications before it can deny a claimant access. The point was also made that actions for damages before national courts can also make a significant contribution to the maintenance of effective competition.

The EnBW judgment comes hot on the heels of another ruling by the General Court (CDC Hydrogene Peroxide v European Commission [2011] T-437/08), which held that the Commission had been wrong in refusing to disclose the index of its investigative file to a damages claimant following an infringement decision in the Bleach cartel. The judgment of the General Court in EnBW deals a serious blow to the restrictive approach of the Commission at a time when prospective plaintiffs are increasingly seeking access to investigation files not only from the Commission, but also from EU national competition authorities. At the same time, national competition authorities are showing increased resistance towards a weakening of their respective leniency programmes. One example is the recent pledge by the heads of EU competition authorities to do their utmost to ensure that their leniency programmes are not compromised (See Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012).

The Decision of the Commission to Deny Access to the File

Documents Requested

On 27 January 2007, the Commission issued its decision in the Gas Insulated Switchgear cartel. Pursuant to the decision, 20 companies were found to have infringed the EU antitrust rules (Article 101 of the Treaty on the Functioning of the European Union). For the purposes of substantiating its claim against the cartel perpetrators, EnBW—a publicly-traded electric utilities company—sought access to a swathe of documents held by the Commission. The Commission, on the basis of the transparency rules (see further below), refused outright to grant EnBW’s request. For the purposes of its assessment, the Commission grouped the documents requested into the following categories:

1. Documents provided in connection with an immunity or leniency application, namely statements from the undertakings in question and all documents submitted by them in connection with the immunity or leniency application
2. Requests for information and parties’ replies to those requests
3. Documents obtained during inspections, namely documents seized at on-the-spot inspections at the premises of the undertakings concerned
4. Statements of objections and parties’ replies
5. Internal documents divided into the following two sub-categories:
Documents relating to the facts, that is i) background notes on the conclusions to be drawn from evidence gathered, ii) correspondence with other competition authorities and iii) consultation of other Commission departments in the case

Procedural documents, that is, inspection warrants, inspection reports, lists of documents obtained in the course of inspections, documents concerning the notification of certain documents, and file notes

**Rationale for the Commission’s Decision**

The Commission's decision to refuse outright access to the documents sought by EnBW was based on its interpretation of exceptions to Regulation 1049/2001 (the Transparency Regulation).

The Transparency Regulation confers on all EU citizens and companies the right to request copies of documents held by the Commission, the EU Council and the European Parliament. It is designed to confer on the public access that is as wide as possible to documents from these institutions. That right of access is nevertheless subject to certain limits, i.e., exceptions based on reasons of public or private interest. It is a fundamental tenet of EU law that since such exceptions derogate from the principle of widest possible public access to documents, the exceptions to the right of access laid down in Article 4 of Regulation 1049/2001 must be interpreted and applied strictly.

Within the context of EnBW's request for access to the documents, the following exceptions to disclosure are of particular relevance:

- Article 4(2) third indent: access to a document must be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits
- Article 4(3) second subparagraph: access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned must be refused, even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision making process unless there is an overriding public interest in disclosure.

The Commission found that each of the categories of documents requested by EnBW, i.e., categories 1 to 5(b) above, fell within the exception provided for in the third indent of Article 4(2) of Regulation 1049/2001 and that the documents in category 5(a) also fell within the exception in Article 4(3) of Regulation No 1049/2001. The Commission stated that it could see nothing that indicated there was an overriding public interest in granting access to the documents requested. It gave as its reason for refusing to grant partial access to the case file the fact that all the documents contained in the file were covered in their entirety by the exceptions listed in Regulation 1049/2001.

**The Ruling of the General Court**

In its assessment of the refusal by the Commission to provide access to the documents requested, the General Court assessed the overarching issue of whether the Commission had met the conditions that must be fulfilled for it to dispense with the requirement to undertake an individual and specific review of the relevant documents. In this context, the General Court noted that there are exceptions to the obligation to undertake such a review. These include:

- Situations in which it is obvious, on the basis of a general presumption, that access must be refused or granted
- When a single justification may be applied to documents belonging to the same category, if they contain the same type of information
- Exceptional cases where the administrative burden entailed by a specific, individual review of the documents would prove particularly heavy, thus exceeding the limits of what may reasonably be required

With regard to the obviousness of the refusal, the General Court held that the Commission should not have assumed, without performing a specific analysis of each document, that all the documents requested were covered by the exception provided for in the third indent of Article 4(2) of Regulation 1049/2001.

With regard to the exception pertaining to the examination of documents by category, the General Court held that a single justification may be applied to documents belonging to the same category, particularly if they contain the same type of information. Document categories must therefore be defined on the basis of criteria that enable the Commission to apply a single line of reasoning to all the documents within one category. However, the General Court noted, inter alia, that the reasoning of the Commission was essentially identical for each of categories 1, 2, 4 and 5(a). For example, it found that the Commission had acted, for each of those
categories, on the basis of the consideration that disclosure of the documents would make leniency applicants less likely to come forward to apply for leniency. As a result, it was held that the Commission's division of the documents into categories was artificial: it did not reflect real differences in the content of the documents within the various categories.

As far as the exception pertaining to an unreasonable amount of work in dealing with the request for access to the relevant documents was concerned, the General Court held, inter alia, that the European Commission may only dispense with the individual and specific review after it has investigated thoroughly all other options and explained in detail its decision the reasons why those other options involve an unreasonable amount of work.

The General Court held that the Commission was entitled to carry out an examination by category solely in relation to the exception concerning the protection of the purpose of investigations and only in the case of category 3 documents, i.e., the documents obtained during inspections. However, the General Court noted that in EnBW the Commission had already adopted the decision in Gas Insulated Switchgears, as a result of which there was no investigation in progress that would have been jeopardised by the disclosure of the requested documents. Furthermore, the General Court held that the concept of “purpose of investigations” does not extend beyond the particular cartel proceedings at hand so as to cover the whole of the Commission’s policy with regard to the punishment and prevention of cartels. Moreover, the General Court recalled that leniency programmes—the effectiveness of which the Commission was seeking to protect—are not the only means of ensuring compliance with EU competition law. Actions for damages before national courts can also make a significant contribution to the maintenance of effective competition.

With regard to Article 4(3), second subparagraph, of Regulation 1049/2001, the General Court observed that the Commission had failed to establish to the required legal standard that all the documents within category 5(a) had the status of “opinions” within the meaning of the Regulation. Furthermore, insofar as the documents within category 5(a) contained actual opinions, the Commission was found to have held incorrectly that their disclosure would seriously undermine its decision-making process.

**Implications**

The *EnBW* judgment represents another manifestation of the fine balance that needs to be established between ensuring the robustness of the leniency programmes of the competition authorities on the one hand, and the ability of damages claimants to be able to build a credible case against cartel perpetrators on the other. Going forward, we can be sure that the Commission will be likely to implement with more rigour its assessment of whether to grant access to documents on file.

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