Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 7 February 2013 [1]

Case C-536/11

Bundeswettbewerbsbehörde
v
Donau Chemie AG
Donauchem GmbH
DC Druck-Chemie Süd GmbH & Co KG
Brenntag Austria Holding GmbH
Brenntag CEE GmbH
ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH
ASK Chemicals Austria GmbH, formerly Ashland Südchemie Hantos GmbH

(Request for a preliminary ruling from the Oberlandesgericht Wien (Austria))

(Competition — Action for damages — Evidence — Admissibility — Third party access to completed public law competition proceedings to support civil action — Access request by an association representing third parties potentially affected by a cartel — Legislative ban on access without the consent of all parties to public law competition proceedings — Absence of a judicial power to weigh relevant factors, including protection of evidence gathered in leniency proceedings as against effet utile — Principles of equivalence and effectiveness — Article 19(1) TEU — Article 101 TFEU — Charter of Fundamental Rights of the European Union — Article 47)

I – Introduction

1. Paragraph 39(2) of the Austrian Federal Law of 2005 on Cartels and Other Restrictions of Competition (Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen) ('KartG') precludes third party access to court files of public law competition proceedings absent the consent of the parties to the proceedings. *Verband Druck & Medientechnik* ('the Association') represents the interests of undertakings in the printing sector. It has sought an order from the *Oberlandesgericht Wien*, acting in its capacity as a cartel court (the 'Cartel Court') to secure access to documents of completed public law competition law proceedings that have taken place between, on the one hand, the *Bundeswettbewerbsbehörde* (the 'Federal Competition Authority') and, on the other, Donau Chemie AG and six other economic operators that are active in the market in the wholesale distribution of printing chemicals.

1 — Original language: English.

2. The present case calls on the Court to draw on the principles developed in Case C-360/09 *Pfleiderer*,[2] which concerned access to the files of a national competition authority for third parties wishing to bring civil actions in damages against undertakings that have been found to have breached Article 101 TFEU, when some of the information contained in the files was gathered under the authority's leniency programme.

3. Well-established case-law of the Court limits the national procedural autonomy of the Member States in the application of EU law, whether the dispute concerns competition law or otherwise. The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union ('EU') law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness, or effective judicial protection, obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.

4. The first of these principles is relevant to the resolution of the dispute because, under Austrian law, neither general civil proceedings, nor criminal proceedings impose an absolute requirement of the consent of all of the parties before others can gain access to court files. Does this mean that the relevant Austrian rules of procedure are placing a condition on civil claims for damages for breach of EU competition law[3] that does not apply to analogous claims of a purely domestic nature?[4]

5. The restriction of third party access to the Cartel Court file also raises the problem of effective judicial protection of claims based on EU law. In the present case the classical principle of effectiveness, which I have detailed above, needs to be reconsidered in light of the Article 19(1) TEU, which was introduced by the Lisbon Treaty. Article 19(1) states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This in turn requires consideration of the right of access to a court, as protected by Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted in the light of Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms ('the ECHR') and the case-law of the European Court of Human Rights related to this provision.[5]

6. Finally, Article 47 of the Charter of Fundamental Rights also comes into play in deciding whether allowing interested third party access to closed public law competition proceedings would infringe the right to a fair hearing, at least when some of this information has been provided under a public law guarantee of leniency. This has ramifications with respect to the privilege against self-incrimination and the protection of business secrets.

II – Legal framework

A – *EU legislation*

7. The first sentence of recital 1 in the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[6] states that, in order to establish a system which ensures that competition in the common market is not distorted, Articles 81 [EC] and 82 [EC] must be applied effectively and uniformly in the Community.

2 — [2011] ECR I-5161.

3 — See Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619 and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

4 — See for example Case C-326/96 *Levez* [1998] ECR I-7835.

5 — See similarly the Opinion of Advocate General Mazák in *Pfleiderer*, point 3.

6 — OJ 2003 L 1, p. 1.

8. Article 11(1) of Regulation No 1/2003, headed ‘Cooperation between the Commission and the competition authorities of the Member States’, is worded as follows:

‘The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.’

9. Article 35(1) of Regulation No 1/2003 states:

‘The Member States shall designate the competition authority or authorities responsible for application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.’

B – *National legislation*

10. Paragraph 39(2) of the KartG states:

‘Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties.’

11. Pursuant to Paragraph 219(2) of the Austrian Zivilprozessordnung (‘Code of Civil Procedure’):

‘With the consent of both parties, third parties can gain access in the same way, make copies thereof and obtain extracts (print-outs) therefrom, on their own costs, in so far as this is not precluded by the legitimate overriding interests of another individual or overriding public interests within the meaning of Paragraph 26(2), first sentence, of the DSG 2000. In the absence of such consent, the third party is entitled to access and to obtain copies only in so far as it can adduce prima facie evidence to show that it has a legal interest in so doing.’[7]

12. According to Paragraph 273 of the same law:

‘(1) If it is certain that one party is entitled to compensation for damage or interest or otherwise has a claim, but the proof of the amount in dispute of the damage to be compensated or of the interest or of the claim cannot be brought or can only be brought with disproportionate difficulties, the court can, upon request or of its own motion, determine this amount in the court’s free conviction, even without considering the proof suggested by the party. The determination of the amount can be preceded by the examination under oath of one of the parties regarding the circumstances relevant for the determination of the amount.

(2) If, among several claims, asserted in the same lawsuit, individual claims, that are in proportion to the total amount inconsiderable, are disputable and the complete clarification of all circumstances relevant for them creates difficulties, which are disproportionate to the importance of the claims in dispute, the court can decide thereupon in the same way (paragraph 1), in the court’s free conviction. The same applies to individual claims, if the amount claimed in each case does not exceed EUR 1 000.’

13. According to Paragraph 77(1) of the Austrian Strafprozessordnung (‘Code of Criminal Procedure’):

‘In case of a justified legal interest, the public prosecutors and the courts shall, also in cases which are not specifically referred to in this Code, grant access to the findings of the preliminary investigation or prosecution proceedings, which are available to them, in so far as this is not precluded by overriding public or private interests.’

7 — Paragraph 219(2) of the Code of Civil Procedure is not applicable to public law competition proceedings.

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

14. On 26 March 2010 the Cartel Court made an order imposing fines on the defendants in the main proceedings for participation in agreements and concerted practices contrary to Article 101 TFEU. These proceedings ('the cartel proceedings') had been brought by the Federal Competition Authority on the basis of applications for leniency made by one of the defendants. The Cartel Court found that there had been a breach of the ban on cartels, and that a prohibited cartel was operating in Austria in the market in the wholesale distribution of printing chemicals. That decision was confirmed by the *Oberster Gerichtshof* ('Supreme Court'), in its capacity as higher cartel court, by order of 4 October 2010 and has become final.

15. The Association is applying for access to the file (*Akteneinsicht*) held by the Cartel Court of the cartel proceedings.[8] The Association says that, in conformity with its articles of incorporation, it is entitled to represent the interests of its members, including undertakings in the printing sector. According to the order for reference, at the request of its members, the Association is examining in particular the level of damage arising from the infringement of competition law with a view to preparing an action to compensate it.

16. The Association says that it needs access to the Cartel Court file to establish the nature and importance of the prejudice suffered, or to calculate this on the basis of the information contained in the file. This, it argues, provides it with a legitimate interest.

17. All parties to the cartel proceedings, with the exception of the Federal Competition Authority, have refused consent. The Federal Competition Authority would have agreed to provide the applicant with access to the order of the first instance proceedings; i.e., the Cartel Court ruling, but no more. As a matter of Austrian law, and, more specifically, due to Paragraph 39(2) of the KartG and its rules on 'protection of business secrets', this means that neither the file nor the order of the Cartel Court can be turned over to the Association to assist in the pursuit of damages actions against the defendants, or for any other purpose.

18. In the light of the ruling of the Court of Justice in *Pfleiderer* and the indications given in that case that EU law requires all the interests to be weighed on a case–by-case basis when a third party alleging harm resulting from breach of Article 101 TFEU seeks access to a file gathered in public law proceedings concerning the same, and even when compiled in the context of leniency, the Cartel Court wonders whether Austrian law is compatible with the principle of *effet utile* and the obligation on Member States to allow individuals to bring actions for damages for breach of competition law.[9] The Cartel Court also entertains doubts on the compatibility of Paragraph 39(2) of the KartG with the principle of non-discrimination, when the consent of all parties is not required, as a matter of Austrian law, in ordinary civil law cases such as torts or in criminal law with respect to files held by the courts.

19. In the light of the foregoing, the Cartel Court referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) Does European Union law, in particular in the light of the judgment of the Court of Justice of 14 June 2011 in Case C-360/09 *Pfleiderer*, preclude a provision of national antitrust law which, (inter alia) in proceedings involving the application of Article 101 or Article 102 TFEU in conjunction with Regulation No 1/2003, makes the grant of access to documents before the cartel court to third persons who are not parties to the proceedings, so as to enable them to prepare actions for damages against cartel participants, subject, without exception, to the condition that all the parties to the proceedings must give their consent, and which does not

8 — In the application for access to documents, the Association has referred to [Kartellakt], 29 Kt 5/09.

9 — *Courage and Crehan* and *Manfredi*.

allow the court to weigh on a case-by-case basis the interests protected by European Union law with a view to determining the conditions under which access to the file is to be permitted or refused?

If the answer to Question 1 is in the negative:

(2) Does European Union law preclude such a national provision where, although the latter applies in the same way to purely national antitrust proceedings and, moreover, does not contain any special rules in respect of documents made available by applications for leniency, comparable national provisions applicable to other types of proceedings, in particular contentious and non-contentious civil and criminal proceedings, allow access to documents before the court even without the consent of the parties, provided that the third person who is not party to the proceedings adduces prima facie evidence to show that he has a legal interest in obtaining access to the file and that such access is not precluded in the case in question by the overriding interest of another person or overriding public interest?'

20. Written observations have been submitted by the Association, the Federal Competition Authority, Donau Chemie AG and Donauchem GmbH, Brenntag CEE GmbH, Ask Chemicals GmbH and ASK Chemicals Austria GmbH,[10] DC Druck Chemie Süd GmbH & Co KG, the Governments of Austria, Belgium, Germany, Spain, Italy, the Commission, and the EFTA surveillance authority. All the above mentioned except for the Italian Government appeared at the hearing which took place on 4 October 2012, along with the French Republic.

IV – Legal analysis

A – *Admissibility of the order for reference*

21. In its written observations, the Commission questions the admissibility of the order for reference. The Commission notes that the order for reference provides no indication as to whether the national referring court is satisfied that the conditions laid down in Paragraph 219(2) of the Code of Civil Procedure have been met. This provision seems to be the national measure that would govern access to the file if Paragraph 39(2) of the KartG were held to be incompatible with EU law. Paragraph 219(2) of the Code of Civil Procedure requires the demonstration of a legal interest in accessing the file. The Commission wonders, therefore, whether the answers to the questions referred might end up being hypothetical if the Association is unable to show a sufficient legal interest.

22. I would also note that several other comments are made in the Commission's written observations which, although directed to answering Question 1, are also relevant to the question of admissibility. This is so because the Commission queries, for example, whether there are alternative avenues under Austrian law for gathering the evidence required. The Commission notes that it is important to be aware of the extent to which the tribunal that has been seised of an application for damages takes account of written proof, or if it gives priority to oral testimony. If the latter is the case, the documents contained in the file will be of less importance. Another key question is the extent to which indirect proof, as opposed to direct proof, is both authorised by national law and sufficient to support a claim in damages.

10 — As indicated on the front page of this Opinion, ASK Chemicals GmbH was formerly Ashland-Südchemie-Kernfest GmbH and ASK Chemicals Austria GmbH was formerly Ashland Südchemie Hantos Ges.m.b.H.

23. Similarly the Federal Competition Authority argues that the matrix of Austrian law provides sufficient avenues for gathering evidence and securing effective enforcement of damages claims grounded in competition law. For example, the Federal Competition Authority questions, inter alia, the difficulties that might be faced by the Association's members with respect to quantifying loss. They have pointed out that, pursuant to Paragraph 273 of the Code of Civil Procedure, if the amount of the loss suffered cannot be determined, or can only be determined with considerable difficulty, a free assessment can be made by the tribunal.

24. Under established case-law, it is not for the Court, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct.[11] It is also for the national referring court to check the correctness of statements that are made to it.[12]

25. Here it is important to make a conceptual distinction between three different dossiers, namely, (i) the documents of the competent competition authority relating to an antitrust investigation; (ii) the documents relating to the proceedings before a competent court or tribunal deciding on the matter which may comprise, inter alia, (some or all) documents of the antitrust investigation; and (iii) documentary evidence before a civil court competent to hear any eventual private law claims based on the restriction of competition.[13]

26. Whatever may be the distribution of decision-making powers between the different organs in this legal architecture,[14] we are faced with three different issues; (i) access to the antitrust investigation documents held by a competition authority, which concerns access to administrative documents; (ii) access to the file of the Member State court or tribunal with competence in competition proceedings, which concerns access to judicial documents; and (iii) the availability of these administrative or judicial documents for the purposes of launching civil litigation. This may entail pre-trial discovery or obligations to disclose documents in the context of civil proceedings.

27. According to the unequivocal wording of the preliminary questions, the present case belongs to the second category, i.e. access to documents held by a court that is competent to rule in cartel proceedings of a public law nature. The application for these documents, even if it seems to have been registered (technically) by the Cartel Court as a continuation of the cartel proceedings, is separate from both the substantive infringement of EU law and/or national competition law, and any private law litigation that might eventually be brought before competent civil courts for damages.[15]

11 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos* [2004] ECR I-5257, paragraph 42 and the case-law cited.

12 — *Orfanopoulos*, paragraph 45.

13 — At the EU level I would refer to (i) the Commission documents; (ii) the file of the General Court, and (iii) the evidence before a national court deciding on the civil law consequences of an illegal restriction of competition. See also Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden* v *API* [2010] ECR I-8533. At paragraphs 79 to 82 the Court points out that judicial activities are excluded from the right of access to documents guaranteed by Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding access to European Parliament, Council, and Commission documents (OJ 2001 L 145 p. 43) and the transparency obligations of Article 255 EC (now Article 15(3) TFEU). The Opinion of Advocate General Maduro in that case, at points 21 to 39, explores the different national and international approaches to access to court documents.

14 — See, for example, the ECN Working Group, Co-operation Issues and Due Process 'Decision Making Powers' Report, 31 October 2012. At pages 5 and 6 of the report it is pointed out that there are three basic institutional models for competition enforcement in the EU; (i) the monist administrative model where a single administrative authority investigates cases and takes enforcement decisions – in some jurisdictions, the authority may not have the power to impose fining decisions; (ii) the dualist administrative model, where investigation and decision-making are divided between two bodies – one body is in charge of the investigation into cases, which are later referred to the other body which is responsible for deciding the case; (iii) the judicial model, where either a court takes the decision both on substance and on fines, or only the latter, with the former left to the competition authority. At page 9 of the report it is explained that Austria falls within the first of the two judicial models, namely the pure judicial model.

15 — The Cartel Court uses the registry file number that is reproduced above in note 8. The Association is registered as the intervener in the present proceedings.

28. Therefore, the present dispute before the Cartel Court is by no means hypothetical, and EU law is clearly capable of affecting its outcome, namely whether access to the requested documents should be granted or denied. Moreover, the issues relating to capacity or interest of action of the Association or its members in any civil proceedings that may eventuate, or evidential standard applicable therein, are irrelevant for the admissibility of the present preliminary reference, albeit they are clearly capable of affecting the application of the principle of effectiveness, the latter being a matter for the national court.

29. In my opinion, with due consideration of both the relevant law and the facts to hand, the Court has all of the information before it to enable it to answer the question referred. For these reasons the order for reference is admissible.

B – *The answer to Question 2*

30. I have decided to answer the preliminary questions in reverse order because I find it more logical in this case to discuss the principle of equivalence first, even though it was the second question referred by the national court. This is so because, in my opinion, from the point of view of the limits of national procedural autonomy, the question of equivalence logically precedes the question of effectiveness. Notwithstanding what the national court has said at the beginning of Question 2, from the point of view of EU law both questions need to be examined in order to give a useful answer.

31. The second preliminary question can be given a quite straight-forward answer. I agree with the position defended by all parties, except for the Association, to the effect that Paragraph 39(2) of the KartG is simply not a provision that is analogous, in the sense of the Court's case-law relating to the principle of equivalence, to either Paragraph 219(2) of the Code of Civil Procedure or 77(1) of the Code of Criminal Procedure, in the context of the application of Competition law. It must be added that this finding is not based on the general principle of non-discrimination but that of equivalence which, according to established case-law, limits national procedural autonomy. The first mentioned principle provides that comparable situations are not to be treated differently. This does not seem to be applicable to the present facts, given that the principle of equivalence serves the same objective.

32. Compliance with the principle of equivalence requires that the national rule in question applies, without distinction, to actions based on infringement of EU law as it does to those based on infringement of national law 'having a similar purpose and cause of action'.[16] However, the principle of equivalence cannot be interpreted as requiring a Member State to extend its most favourable rules in any area to all actions brought in a certain area of law.[17]

33. Normally the task of comparing the different national procedures, in terms of equivalence, is left to the national referring court, which must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics.[18] In order to determine whether a national procedural provision is less favourable, the national court must take account of the role of the provision in the procedure, viewed as a whole, of the content of that procedure and of its special features.[19]

16 — Case C-591/10 *Littlewoods Retail* [2012] ECR, paragraph 31.

17 — *Littlewoods Retail*, paragraph 31.

18 — *Littlewoods Retail*, paragraph 31, citing Case C-63/08 *Pontin* [2009] ECR I-10467.

19 — Case C-177/10 *Rosado Santana* [2011] ECR I-7907, paragraph 90 and the case-law cited.

34. The Court has, however, occasionally taken a stand on whether the national provision in question is compatible with the principle of equivalence. On some occasions the Court has given an indication of its view, while still leaving the issue for the national court to decide, [20] while on others it has made a definitive finding on the compatibility or otherwise of the relevant national rule with equivalence requirements. [21] In my opinion the case to hand merits the latter approach.

35. Here the ban on third party access to cartel court files applies to both cases based on EU competition law and Austrian competition law. In other words, there is no difference in treatment arising from the exercise of a claim derived from EU law that has been classified or treated differently from a purely internal situation. [22]

36. In my opinion it is inarguable that such proceedings are comparable to either ordinary civil or criminal procedures, given that neither is concerned with the protection of leniency programmes or other specific features of public law proceedings in the context of enforcing competition policy.

37. I propose therefore that the second question should be answered by stating that the principle of equivalence under EU law does not preclude a national provision like Paragraph 39(2) of the KartG.

C – *The answer to Question 1*

1. Preliminary observations

38. By the first question referred, the Cartel Court seeks guidance on the compatibility with EU law of a Member State law imposing a ban on third party access to documents which have been placed before the Cartel Court, absent the consent of the parties to those public law competition proceedings. The concerns of the national court lead, more specifically, to the question of the compatibility of such a ban with the right to seek compensation for the harm caused by a prohibited agreement or practice, in civil proceedings against the parties to that agreement, as was established by the Court in *Courage and Crehan* [23] and affirmed in *Manfredi*. [24]

39. The matter to hand is rendered more complex by the fact that some of the information sought by the Association was gathered, in the context of a leniency programme, from one of the undertakings against whom the Association would like to institute legal proceedings.

40. The Court followed an approach in *Pfleiderer* that in my opinion is equally valid for the present dispute. It stated that neither the provisions of the EC Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency or common rules on right of access to documents relating to a leniency procedure which have been voluntarily submitted to a national competition authority pursuant to a national leniency programme. [25] The Court went on to find that, in the absence of a binding regulation under EU law on the subject, it is for Member States to establish national rules on right of access, by persons adversely affected by a cartel, to documents relating to

20 — For example, *Rosado Santana*, paragraph 91, and Case C-34/02 *Sante Pasquini* [2003] ECR I-6515, paragraphs 64 to 73.

21 — Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 46.

22 — *Sante Pasquini*, paragraph 59.

23 — Paragraph 26.

24 — Paragraph 78.

25 — Paragraph 20. The Court observed at paragraph 21 of *Pfleiderer* that neither the Commission notice on Cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) nor the notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), both of which related to leniency, are binding on Member States. At paragraph 22 of *Pfleiderer* the Court noted that, within the ECN, a model leniency programme, designed to achieve the harmonisation of some elements of national leniency programmes, was adopted and drawn up in 2006. Likewise, this model programme had no binding effect on the courts and tribunals of the Member State.

leniency programmes,[26] subject to the requirement that they do not render the implementation of EU law impossible or excessively difficult, and, specifically in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardize the effective application of Articles 101 TFEU and 102 TFEU.[27]

41. This led the Court to a conclusion in *Pfleiderer* that is equally pertinent to the case to hand, despite the different institutional context of the *Pfleiderer* case, which concerned access to administrative rather than judicial documents. Namely, it stated that in the consideration of an application for access to documents in the context of a national leniency programme, it is necessary to weigh the protection of information provided voluntarily by an applicant for leniency (the effectiveness of which could be compromised, and therefore the effective application of Articles 101 and 102 TFEU, if leniency documents were disclosed to persons wishing to bring an action for damages),[28] against the necessity to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation.[29] This weighing exercise, the Court held, could only be conducted by the national courts on a case - by - case basis.[30] I will return to the significance of these findings shortly.

42. Further, as the Court held in Joined Cases C-430/93 and C-431/93 *van Schijndel*, each case which raises the question whether a national procedural provision renders application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.[31] Due account therefore also needs to be taken of this principle.

43. However, while the findings in *Pfleiderer* are relevant to the current dispute, it is equally important to be mindful of the differences. In that case the national referring court sought guidance on the impact which access by an aggrieved party to *information communicated by a leniency applicant* to a national competition authority may have on the system of cooperation and exchange of information laid down in Articles 11 and 12 of Regulation No 1/2003 in the context of leniency proceedings.[32]

44. But Question 1 in the case to hand concerns a ban imposed by national legislation on *all* of the documents contained in the files of the Cartel Court in the absence of the consent of the parties, whether they appertain to leniency procedures or not, and pursuant to which the national court is precluded from undertaking the weighing exercise prescribed by the Court in *Pfleiderer*.

45. In other words, the present dispute is, in some respects, closer to the problem considered by the Court in *Courage and Crehan*, which addressed a ban under English law on applications for damages by parties to unlawful contracts, including agreements that were in breach of Article 101 TFEU. In my opinion the key idea appeared in paragraph 26 of *Courage and Crehan*.

26 — *Pfleiderer*, paragraph 23.

27 — *Pfleiderer*, paragraph 24 and the case-law cited.

28 — *Pfleiderer*, paragraphs 25 to 26. I would further endorse the observation of Advocate General Mazák at point 34 of his Opinion in *Pfleiderer*, to the effect that where 'a Member State, through its competition authority(ies), operates a leniency programme in order to ensure the effective application of Article 101 TFEU, I consider that despite the procedural autonomy enjoyed by the Member State in enforcing that provision, it must ensure that the programme is set up and operates in an effective manner'.

29 — *Pfleiderer*, paragraph 30.

30 — *Pfleiderer*, paragraph 31.

31 — [1995] ECR I-4705, paragraph 19.

32 — See the Opinion of Advocate General Mazák at point 22.

'The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not *open* to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[33]

46. Therefore, the crucial question is as follows: does the Austrian restriction, as described by the Cartel Court, mean that it is not open to the Association or its member undertakings to claim damages for the loss caused to them by an unlawful cartel, in the sense that the Austrian ban renders it impossible in practice or excessively difficult?[34] Following the Court's findings in *DEB*, it needs to be asked whether there is available to the Association a legal remedy which ensures effective judicial protection of the rights which it derives from EU law;[35] is it able to assert its EU law rights before the Austrian courts?[36]

47. Finally, due account needs to be taken of Article 19(1) TEU, and the extent to which it supplies a supplementary guarantee to the principle of effectiveness. Pursuant to Article 19(1), Member States are bound to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law'. In other words, in the light of that Treaty provision, the standard of effective judicial protection for EU based rights seems to be more demanding than the classical formula referring to practical impossibility or excessive difficulty. In my opinion this means that national remedies must be accessible, prompt, and reasonably cost effective.[37]

48. From the competition policy point of view, the present case relates to the debate concerning so-called private enforcement of competition rules. Unlike the situation in the United States, the concept is perhaps not the most appropriate option here, taking into account the fact that, within the EU competition law, arrangements such as pre-trial discovery, class actions, and punitive damages do not exist. In my view, victims of restrictions on competition in the European Union are, unlike perhaps their United States counterparts, simply seeking legal protection of a private law claim-right rather than enforcing a public policy.

2. The Court's case-law on national rules of evidence and general principles concerning *effet utile*

49. It is apparent from the case-law that the Member States must ensure that evidential rules and, in particular, the rules on the allocation of the burden of proof applicable to actions relating to a breach of EU law do not make it impossible in practice or excessively difficult for individuals to exercise rights conferred by EU law.[38]

50. For example, the Court has held that it is for the national court to make certain that an individual wishing to bring an action for damages under EU State liability law is able to benefit from an exceptional procedure permitting witness evidence, failing which he must be able to lead other evidence, in particular documentary evidence, to attest to the damage suffered.[39] Otherwise rules of evidence would make it impossible in practice or excessively difficult, and in particular the former, for

33 — Emphasis added.

34 — As was found to be the case, for example in Case C-279/09 *DEB* [2010] ECR I-13849, where it was held that a national rule requiring an advance payment of costs before the institution of an EU state liability claim, when legal aid was not available, could breach the right of access to a court. The assessment of whether this occurred on the facts was left to the national court.

35 — Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 54.

36 — See the Opinion of Advocate General Mengozzi in Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, point 84, citing paragraphs 38 to 40 of the Court's judgment in Case C-432/05 *Unibet* [2007] ECR I-2271.

37 — See by analogy *DEB*.

38 — Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 69 and the case-law cited; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 44; Case C-55/06 *Arcor* [2008] ECR I-2931, paragraph 191 and the case-law cited. See also with respect to rules of evidence Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7259, paragraphs 52 to 57; Case C-35/09 *Speranza* [2010] ECR I-6581, paragraph 47.

39 — *Dounias*, paragraph 71.

an individual to exercise rights conferred by EU law.[40] In other words, restrictions on evidence that are 'critical to the claimant's case'[41] are incompatible with *effet utile*. Other rules of evidence that have been held by the Court to be subject to scrutiny by national courts for breach of the principle of *effet utile* include those that imperil the principle of equality of arms.[42]

51. In my opinion subjecting access to public law competition judicial files to the consent of the infringer of the competition rules amounts to a significant deterrent of the exercise to a right to claim civil damages for breach of EU competition law.[43] The Court has ruled that if an individual has been deterred from bringing legal proceedings in good time by the wrong-doer, the latter will not be entitled to rely on national procedural rules concerning time limits for bringing proceedings.[44] I can see no reason for confining the application of this principle to limitation periods, and would advocate its extension to onerous rules of evidence that have an analogous deterrent effect.[45] I would further query the compliance of remedies that deter enforcement of EU law rights with Article 19(1) TEU.

3. Article 47 of the Charter

52. As the Court has recently observed, the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.[46] Moreover, the right of access to a court also includes, according to the case-law of this Court, a 'power' in the hands of national courts to consider all the questions of fact and law that are relevant to the cases before them.[47] In my opinion a national tribunal deciding on civil law consequences of an illegal restriction of competition cannot have such 'power' if it is in practice precluded from accessing key evidential material, such as files compiled in public law competition proceedings, and in which an unlawful restriction of competition, such as a cartel, has already been established.

53. Hence, limiting availability of critical evidential material undermines the right of litigants to a judicial determination of their dispute.[48] It also impacts on their rights to bring cases effectively.[49]

54. The right of access to a court is not, however, absolute.[50] It can be subject to limitations, provided that they do not undermine the very core of the right of access, pursue a legitimate aim, and where there is a relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[51]

40 — *Dounias*, paragraph 71.

41 — *Dounias*, point 50 of the Opinion of Advocate General Jacobs.

42 — See for example Case C-276/01 *Steffensen* [2003] ECR I-3735 and Case C-199/11 *Otis and Others* [2012] ECR.

43 — Case C-542/08 *Barth* [2010] ECR I-3189, paragraph 40.

44 — See for example, *Levez*, paragraph 32, where the deceit of an employer with respect to the amount of remuneration being received by male employees doing like work was held to have 'caused' Mrs Levez's delay in bringing proceedings.

45 — See Case 199/82 *San Giorgio* [1983] ECR 3595.

46 — *Otis and Others*, paragraph 48.

47 — *Otis and Others*, paragraph 49.

48 — See the Opinion of Advocate General Darmon in Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* [1991] ECR I-3757, point 33.

49 — *DEB*, paragraph 45, citing the judgment of the European Court of Human Rights in *Steel and Morris v. the United Kingdom*, no. 68416/01, § 59, ECHR 2005-II.

50 — *DEB*, paragraph 45.

51 — *DEB*, paragraph 47, citing the European Court of Human Rights judgments in *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 59 to 67, Series A no. 316-B, and *Kreuz v. Poland*, no. 28249/95, § 54 and 55, ECHR 2001-VI. See also point 38 of the Opinion of Advocate General Sharpston in *Unibet*.

55. Article 47 is also relevant to the case to hand because it guarantees the fairness of hearings, which serves to protect the interests of the undertakings that have participated in the cartel. In my opinion, access by third parties to voluntary self-incriminating statements made by a leniency applicant should not in principle be granted.[52] The privilege against self-incrimination is long established in EU law,[53] and it is directly opposable to national competition authorities that are implementing EU rules.[54]

56. It is true that leniency programmes do not guarantee protection against claims for damages[55] and that the privilege against self-incrimination does not apply in private law contexts. Despite this, both public policy reasons and fairness towards the party having given incriminating declarations within the context of a leniency programme weigh heavily against giving access to the court files of public law competition proceedings where the party benefiting from them has acted as a witness for the prosecuting competition authority.

4. Application to the present case

57. The Court has held that EU law obliges Member States to ensure that national legislation does not 'undermine' the right to effective judicial protection;[56] those concerned cannot be prevented from asserting their rights before the national courts. Does the Austrian ban on access to Cartel Court proceedings, absent the consent of all the parties, carry such an effect?

58. It has been held by the Court that disclosure to third parties of documents exchanged between the Commission and undertakings during merger control proceedings would undermine, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure, even when those proceedings have been completed and closed.[57] Principles of this kind,[58] however, compete at the EU level with rules on access to documents and the obligation of transparency, as provided for in both EU legislation and in primary EU law.[59]

59. As a result, the Court of Justice has developed a body of case-law, and which has included cases falling within the field of access to documents held by the Commission in competition investigations,[60] which essentially entails balancing imperatives of this kind one against the other, and by reference to assessment of each individual document requested. This means that, at the EU level, an outright ban on access to Commission documents that have been collected in the context of a cartel investigation is inconceivable.

60. These principles, which have been developed in the context of access to documents held by the European Commission, are not directly transposable to the national level. However, they provide context, setting, and perspective in assessing the compatibility of the absolute ban on Austrian law with the principle of *effet utile*.

52 — Point 46 of the Opinion of Advocate General Mazák in *Pfleiderer*.

53 — See Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575.

54 — Re-stated recently in Case T-135/09 *Nexans France and Nexans* v *Commission* [2012] ECR, paragraph 128 and the case-law cited. See also Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals* v *Commission* [2010] ECR I-8301

55 — See the Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298 p. 17, paragraph 39: 'The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC'.

56 — *Mono Car Styling*, paragraph 49 and the case-law cited.

57 — Case C-404/10 P *Commission* v *Editions Odile Jacob* [2012] ECR, paragraphs 123 and 124.

58 — To this could be added, for example, the related concept of the protection of business secrets. Case C-1/11 *Interseroh* [2012] ECR, and Case C-305/05 *Ordre des barreaux francophones et germanophones* [2007] ECR I-5305

59 — See in particular Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents (OJ 2001 L 145, p. 43).

60 — For example, *Commission* v *Editions Odile Jacob* and Case T-344/08 EnBW *Energie Baden-Württemberg* v *Commission* [2012] ECR.

61. Similarly, and as was apparent in the Court's ruling in *Pfleiderer*, due account also needs to be taken of the imperative of the protection of leniency programmes. In accordance with point 26 of the Commission Notice on the co-operation between the courts of the EU Member States in the application of Articles 81 and 82 EC,[61] '… [t]he Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant', although, as I have already mentioned, conferral of leniency by the Commission of the European Union provides no guarantee in the context of civil damages proceedings.[62]

62. Considerations of this kind are equally pertinent in assessing the compatibility of Paragraph 39(2) of the KartG, especially when civil damages proceedings perform a complementary role in the European Union[63] for the enforcement of competition law. That being so, the *Courage and Crehan/Manfredi* right of private parties to seek damages from economic operators that have breached EU competition law should not, in my opinion, be developed to a point that would imperil the efficacy of public law enforcement mechanisms, whether they be European or national.

63. The Austrian provision has been defended by an argument to the effect that the Austrian legislator has performed the necessary balancing exercise between the competing public and private interests, and found it appropriate to give absolute precedence to the public interest relating to efficient enforcement of competition rules. However, in my opinion, except for certain situations falling outside the scope of competition law, a balancing exercise that leaves no room for one of the competing interests is not compatible with the principle of proportionality.

64. Therefore, from the point of view of proportionality, in my opinion a legislative rule would be more appropriate that provided absolute protection for the participants in a leniency programme, but which required the interests of other participants to a restrictive practice to be balanced against the interests of the alleged victims. In Austria, the scope of the protection of the confidentiality of the Cartel Court file is not limited to the business secrets of the participating undertakings. Furthermore, in my view and except for undertakings benefiting from leniency, participation in and of itself in an unlawful restriction on competition does not constitute a business secret that merits protection by EU law.[64]

65. Hence, in my opinion an absolute ban on access to the court files held by the Cartel Court, absent the consent of the parties, is a disproportionate impediment to the right of access to a court as guaranteed by Article 47 and particularly when, as is indicated in the case file, the judgments of the Cartel Court are not made available to the public.

66. In my opinion, what is required, under the imperative of *effet utile*, is a facility in the hands of a national judge deciding on third party access to the court file to conduct a weighing exercise of the kind foreshadowed in *Pfleiderer*. Such an exercise would allow the national judge to set all of the competing factors against each other, such as the protection of legitimate business secrets of the undertakings having participated in the restriction against the duty of Member States under Article 19(1) TEU to provide remedies 'sufficient to ensure effective legal protection in the fields covered by Union law'. The national legislator may regulate the factors to be taken into account in such a balancing exercise, but not preclude it from taking place, except for, perhaps, the information provided by undertakings benefiting from leniency.

61 — OJ 2004 C 101, p. 54.

62 — It is worth noting that the General Court has recently found it necessary to permit the parties to consult the Commission files at its registry where the case was founded on information provided by an undertaking within the context of leniency: see Case T-140/09 *Prysmian* [2012] ECR.

63 — See submissions, Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 404, paragraph 2, page 7.

64 — See the observations concerning business secrets at point 33 of my Opinion in Case C-136/11 *Westbahn Management* [2012] ECR. The Commission has always published its decisions in which it applies EU competition law, withholding where necessary the elements constituting business secrets.

67. That said, it is established under the Court's case-law that although 'the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law… It will be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law.' [65]

68. Therefore, in conducting its assessment, the Cartel Court is bound to give due consideration to alternative means of gathering evidence that are available under Austrian law. This includes, for example, procedural rules on disclosure of documents within the context of civil proceedings or rules regulating access to administrative documents of the Federal Competition Authority, along with Paragraphs 219(2) and 273 of the Code of Civil Procedure, before deciding which parts of its files are to be released to third parties, if any, in order to comply with effective judicial protection in the context of *Courage and Crehan/Manfredi* damages actions against economic operators that have been found to be in breach of Article 101 TFEU. The same exercise needs to be undertaken with respect to quantification of damages. [66]

69. In conclusion, within parameters that may be set by the national legislator, and provided that it respects the EU law principles developed above, there must be some room for balancing the public interest relating to effective implementation of competition rules against the private interests of the victims of infringements of the same rules.

70. I therefore propose that the Court should answer Question 1 to the effect that the principle of effective judicial protection, as applied in the light of Article 19(1) TEU, precludes a provision of national competition law like Paragraph 39(2) of the KartG which prohibits access to the files of the Cartel Court to third parties wishing to bring civil damages claims against the cartel participants, absent the consent of the latter.

V – Conclusion

71. I therefore propose the following answers to the questions referred by the Cartel Court.

(1) The principle of effectiveness under European Union law, as applied in the light of Article 19(1) TEU, precludes a provision of national competition law which makes the grant of access to documents of a national court, gathered within competition law proceedings involving the application of European Union competition law, to third persons who are not parties to those competition law proceedings, but who wish to prepare actions for damages against participants in an agreement that has been the object of the competition law proceedings, subject to the condition that all parties to the competition law proceedings provide their consent thereto. The answer will only be different if national law provides such alternative avenues for securing proof of breach European Union competition law and the determination of damage that supply effective legal protection for the right to claim civil damages for breach of those provisions and comply with Article 47 of the Charter of Fundamental Rights of the European Union.

(2) The principle of equivalence under European Union law does not preclude a national provision that makes grant of access to documents before a national court, and which have been gathered within competition law proceedings involving the application of European Union competition

65 — *Unibet*, paragraphs 40 and 41 and the case-law cited.

66 — Advocate General Sharpston has argued that practical problems of quantification are insufficient to make a damages claim 'virtually impossible or excessively difficult'. See point 49 of her Opinion in *Unibet*. In my opinion this is a question of the degree of difficulty, which is to be assessed by the national court in the light of Article 19(1) TEU.

law to third persons who are not parties to those competition law proceedings, subject, without exception, to the condition that all the parties to the competition law proceedings must give their consent thereto, when the rule applies in the same way to purely national competition law proceedings but differs from national provisions applicable to third party access to judicial documents in the context of other types of proceedings, in particular contentious and non-contentious civil proceedings and criminal proceedings.