Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

16 November 2012*

(Interim relief — Competition — Publication of a decision finding an infringement of Article 81 EC — Rejection of claim for confidential treatment of information provided to the Commission pursuant to its Leniency Notice — Application for interim measures — Urgency — Prima facie case — Weighing up of interests)

In Case T-345/12 R,

Akzo Nobel NV, established in Amsterdam (Netherlands),

Akzo Nobel Chemicals Holding AB, established in Nacka (Sweden),

Eka Chemicals AB, established in Bohus (Sweden),

represented by C. Swaak and R. Wesseling, lawyers,

applicants,

v

European Commission, represented by C. Giolito, M. Kellerbauer and G. Meessen, acting as Agents,

defendant,

APPLICATION for suspension of operation of Commission Decision C(2012) 3533 final of 24 May 2012 rejecting a request for confidential treatment submitted by Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and Eka Chemicals AB pursuant to Article 8 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Case COMP/38.620 — Hydrogen Peroxide and perborate) and application for interim measures seeking the continuation of the confidential treatment accorded to certain information relating to the applicants in respect of Commission Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel, Akzo Nobel Chemicals Holding, Eka Chemicals, Degussa AG, Edison SpA, FMC Corporation, FMC Foret SA, Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate) (OJ 2006 L 353, p. 54),

THE PRESIDENT OF THE GENERAL COURT

makes the following

* Language of the case: English.

Order

Background to the dispute, procedure and forms of order sought by the parties

1 These proceedings for interim measures concern the Commission Decision C(2012) 3533 of 24 May 2012 rejecting a request for confidential treatment submitted by Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and Eka Chemicals AB pursuant to Article 8 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Case COMP/38.620 — Hydrogen Peroxide and perborate) ('the contested decision').

2 By the contested decision the European Commission rejected the request for the continuation of the non-confidential version of its Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel, Akzo Nobel Chemicals Holding, Eka Chemicals, Degussa AG, Edison SpA, FMC Corporation, FMC Foret SA, Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA et Arkema SA (Case COMP/F/C.38.620 — Hydrogen peroxide and perborate), as published in September 2007 on the website of the 'Competition' Directorate General (OJ 2006 L 353, p. 54, 'the 2006 Decision').

3 In the 2006 Decision the Commission found that an infringement of Article 81 EC had been committed by the applicants, Akzo Nobel, Akzo Nobel Chemicals Holding and Eka Chemicals, and by 14 other undertakings between 1994 and 2000 within the European Economic Area (EEE) in relation to hydrogen peroxide and perborate. Since one of the applicants, Eka Chemicals, was the second undertaking to make contact, in March 2003, with the Commission pursuant to its notice on immunity from fines and reduction of fines in cartel cases (OJ 2002, C 45, p. 3, 'the Leniency Notice') and since it submitted evidence which provided significant added value with respect to the evidence in the Commission's possession at that time, the fine which would otherwise have been imposed on it was reduced by 40%. Consequently, a fine of EUR 25.2 million was imposed on the three applicants, who were to be jointly and severally liable.

4 After taking into consideration requests for confidential treatment submitted by the addressees of the 2006 Decision, the Commission published, in September 2007, a full-text non-confidential version of that decision on its website. That publication was not challenged by the applicants.

5 By letter of 28 November 2011 the Commission informed the applicants of its intention to publish, for reasons of transparency, a fuller non-confidential version of the 2006 Decision and offered them the opportunity to identify, in the text, any confidential information. Having ascertained that a large part of the proposed fuller version contained information provided on the basis of the Leniency Notice, information which had not been published in September 2007 for reasons of confidentiality, the applicants formally objected to the Commission's proposal, on the ground that it would cause considerable and irreversible harm to their interests. Nonetheless, they submitted, on a without prejudice basis, a list of confidentiality claims highlighting the passages of the proposed extended version which should in any event remain confidential.

6 By letter of 15 March 2012 the Commission informed the applicants that it intended to reject their objections, and sent to them a revised draft of an extended non-confidential version of the 2006 Decision. The Commission stated to them that the revised draft represented its final position with regard to the confidentiality claims, since all the information which would allow identification of the sources of the information submitted in relation to the Leniency Notice had been redacted. The Commission invited the applicants, should they not agree, to refer the matter to the hearing officer

pursuant to Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29).

7 By letter of 10 April 2012 the applicants informed the hearing officer that they objected to the publication of a non-confidential version of the 2006 Decision which would be more complete than that published in September 2007 and requested that there should be no publication of any information provided on the basis of the Leniency Notice. In that regard, they complained of an infringement of the principles of legal certainty and the protection of legitimate expectations, given that a non-confidential version had, after consultation, already been published in 2007. Further, they asserted that they had been led to expect that information voluntarily provided pursuant to the Leniency Notice would be treated as confidential, the Commission being barred from departing, with retroactive effect, from its former practice, which was precisely to protect the confidentiality of such information.

8 In the contested decision, signed 'For the Commission', the hearing officer rejected the claim for confidential treatment submitted by the applicants. He emphasised the restrictions on his terms of reference, whereby he could determine only whether the information in question might be disclosed, because it did not constitute a business secret or other confidential information or because there was an overriding interest in its disclosure. Further, he stated that the applicants were not claiming that the extended version of the 2006 Decision contained confidential information or business secrets, but were objecting to the publication of that version solely on the ground that it contained information provided pursuant to the Leniency Notice, while failing to demonstrate that the disclosure of that information was likely to cause them serious harm, which, even if that were the case, would in any event not prevent the Commission from proceeding with publication as envisaged.

9 The applicants were notified of the contested decision on 28 and 29 May 2012.

10 By email of 31 May 2012 the Commission informed the applicants that the contested decision was its final position on the matter.

11 By application lodged at the Registry of the General Court on 3 August 2012, the applicants brought an action for the annulment of the contested decision, and that not only in so far as, in that decision, the Commission rejected their claim for confidential treatment, but also in so far as the Commission was to be regarded as having granted access to certain information on the basis of 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). In support of that action, the applicants argue, in essence, that the publication at issue is an infringement of the Commission's duty of confidentiality under Article 339 TFEU and the principles of legal certainty and the protection of legitimate expectations, in that the fuller version of the 2006 decision contains information which they had provided to the Commission in order to have the benefit of the Leniency Notice.

12 By a separate document, lodged at the Court Registry on the same date, the applicants brought the present application for interim measures, in which they claim, in essence, that the President of the General Court should:

— Pursuant to Article 105(2) of the Rules of Procedure of the General Court, suspend the operation of the contested decision until the General Court has ruled on this application for interim measures or, in any event, on the main action,

  — in so far as that decision enables the Commission to publish an extended non-confidential version of the 2006 Decision and, for that purpose, order the Commission to refrain from publishing such a version,

— in so far as that decision grants, under Regulation No 1049/2001, access to the entire text of the 2006 Decision and, for that purpose, order the Commission to refrain from granting such access;

— order the Commission to pay the costs.

13 By order of 7 August 2012 the President of General Court granted, under Article 105(2) of the Rules of Procedure, the interim measures requested by the applicants.

14 In its observations on the application for interim measures, lodged at the Registry of the General Court on 26 September 2012, the Commission contends that the President of the General Court should:

— dismiss the application for interim measures;

— order the applicants to pay the costs.

Law

Admissibility

15 While confessing that they do not know whether the Commission did in fact take a decision to provide access to the full text of its 2006 decision pursuant to Regulation No 1049/2001, the applicants consider that the contested decision may be interpreted as containing an implicit grant of access under that regulation. Consequently, their application for interim relief challenges the contested decision not only in so far as it permits the publication at issue, but also in so far as it may be considered to grant, under Regulation No 1049/2001, access to confidential information which they had submitted to the Commission pursuant to the Leniency Notice.

16 The Commission states that, as matters stand, there is no decision to grant access to the disputed information pursuant to Regulation No 1049/2001. As regards the contested decision, it was expressly based solely on Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), and on Decision 2011/695.

17 In that regard, the judge hearing the application for interim measures cannot but observe that neither the present application for interim measures nor the main action concern a decision previously adopted by the Commission pursuant to Regulation No 1049/2001. It is therefore as a purely precautionary step that the applicants attempt to obtain from the judge hearing the application for interim measures an order prohibiting the Commission from adopting such a decision, which is equivalent to a preventive measure intended to stop the Commission acting. However, while the judge hearing an application for interim measures has jurisdiction to review administrative acts already adopted by the Commission, that jurisdiction does not extend to the review of matters on which the Commission has not yet stated its position. The effect of such a power would be to anticipate the arguments on the substance of the case and confuse the administrative and judicial procedures, in a manner incompatible with the system of the allocation of powers between the Commission and the courts of the European Union (see, to that effect, order in Case T-52/96 R *Sogecable* v *Commission* [1996] ECR II-797, paragraph 39). The judge hearing the application for interim measures can therefore only in exceptional circumstances prevent the Commission from exercising its administrative powers, even before the Commission has adopted the final decision whose operation the applicants want to prevent (see, to that effect, order in Case T-216/01 R *Reisebank* v *Commission* [2001] ECR II-3481, paragraph 52), though the existence of such circumstances has not been demonstrated by the applicants in the present case.

18 It follows that this application for interim measures must be declared to be inadmissible to the extent that it seeks, first, to obtain the suspension of operation of the contested decision in so far as that decision granted, under Regulation No 1049/2001, access to the full text of the 2006 decision and, secondly, an order that the Commission should refrain from granting such access.

Substance

19 In accordance with Articles 278 TFEU and 279 TFEU read in conjunction with Article 256(1) TFEU, the judge hearing an application for interim measures may, if he considers that the circumstances so require, order that the operation of a measure challenged before the General Court be suspended or prescribe any necessary interim measures.

20 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, the judge hearing an application for interim measures may order suspension of operation of an act and other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing the application must also weigh up the interests involved (order of the President in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

21 In the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23, and order of the President of 3 April 2007 in Case C-459/06 P(R) *Vischim* v *Commission*, not published in the ECR, paragraph 25).

22 Having regard to the material in the case-file, the judge hearing the application considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties.

23 In the circumstances of the present case, it is necessary first to weigh up the interests involved and to assess whether the condition of urgency is satisfied.

Weighing up of interests and urgency

24 In accordance with settled case-law, the weighing up of the various interests involved requires the judge hearing the application for interim measures to determine whether or not the applicant's interest in obtaining the interim measures sought outweighs the interest in immediate application of the contested measure by examining, more specifically, whether annulment of that measure by the Court when ruling on the main application would allow the situation which would have been brought about by its immediate operation to be reversed, and, conversely, whether suspension of its operation would prevent it from being fully effective in the event of the main application being dismissed (see, to that effect, the orders of the President in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraph 15, and in Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187* v *Commission* [2003] ECR I-6887, paragraph 142).

25 As regards more particularly the condition that the legal situation created by an interim relief order must be reversible, it must be recalled that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future decision on the main action (see, to that effect, the order

in Case C-7/04 P(R) *Commission* v *Akzo and Akcros* [2004] ECR I-8739, paragraph 36). Consequently, such a procedure is merely ancillary to the main action to which it is an adjunct (order in Case T-228/95 R *Lehrfreund* v *Council and Commission* [1996] ECR II-111, paragraph 61), and accordingly the decision made by the judge hearing an application for interim measures is by its nature interim in the sense that it must not either prejudge the future decision on the substance of the case nor render it illusory by depriving it of effectiveness (see, to that effect, the orders of the President in Case C-313/90 R *CIRFS and Others* v *Commission* [1991] ECR I-2557, paragraph 24, and in Case T-203/95 R *Connolly* v *Commission* [1995] ECR II-2919, paragraph 16).

26 It necessarily follows that the interest defended by a party to interim relief proceedings does not merit protection where that party's request is that the judge hearing the application should adopt a decision which, far from being a merely interim measure, serves to prejudge the future decision on the main action and to render it illusory by depriving it of its effectiveness. Moreover, for that very reason an application for interim measures in which the judge hearing the application was asked to order the 'provisional' disclosure of allegedly confidential information held by the Commission was declared to be inadmissible inasmuch as an order acceding to such an application might have nullified in advance the effects of the decision to be subsequently delivered on the main action (see, to that effect, order of the President of 23 January 2012 in Case T-607/11 R *Henkel and Henkel France* v *Commission*, not published in the ECR, paragraphs 23 to 25).

27 In the present case, the General Court will be called upon to rule, in the main action, on whether the contested decision — whereby the Commission rejected the applicants' claim that it should refrain from publishing the disputed information — should be annulled, inter alia, because of an infringement of the obligation of professional secrecy protected in Article 339 TFEU and because of the disregard of the confidentiality of the information which the applicants had submitted to the Commission in order to have the benefit of the Leniency Notice. In that regard, it is obvious that, in order to protect the effectiveness of a judgment annulling the contested decision, the applicants must be able to ensure that the Commission should not unlawfully publish the disputed information. A judgment ordering annulment would be rendered illusory and would be deprived of effectiveness if this application for interim measures were to be dismissed, since the consequence of that dismissal would be that the Commission would be free immediately to publish the information at issue and therefore *de facto* to prejudge the future decision in the main action, namely that the action for annulment would be dismissed.

28 Those considerations are not called into question by the fact that even were the disputed information actually to be published, the result would probably not be that the applicants would be deprived of an interest in bringing proceedings for the annulment of the contested decision. That is because, inter alia, any other interpretation would make the admissibility of the action dependent on whether or not the Commission had disclosed that information and would enable it, by the creation of a fait accompli, to avoid scrutiny by the courts by making such disclosure even though it was unlawful (see, to that effect, Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraphs 39 to 41). However, notwithstanding that formal continuation of an interest in bringing proceedings for the purposes of the main action, it remains the case that a judgment ordering annulment delivered after publication of the information at issue would no longer have any practical effect for the applicants.

29 Consequently, the interest defended by the applicants must prevail over the Commission's interest in the dismissal of the application for interim measures, *a fortiori* where the grant of the interim measures requested amounts to no more than maintaining, for a limited period, the status quo which has existed for several years (see, to that effect, order in *RTE and Others* v *Commission*, paragraph 15; see also order of the President of 16 November 2012 in Case T-341/12 R *Evonik Degussa* v *Commission*, not published in the ECR, paragraph 24).

30 There is a clear urgency in protecting the interest defended by the applicants where they are likely to suffer serious and irreparable harm in the event of their application for interim measures being dismissed. In that context, the applicants maintain, in essence, that the situation which would result from publication of the fuller version of the 2006 decision could not be undone. Once the confidential information was published, a subsequent annulment of the contested decision because of an infringement of the obligation of professional secrecy protected by Article 339 TFEU would not reverse the effects of publication. Consequently, the applicants' right to an effective judicial remedy would be no more than an 'empty shell' if the disputed information were to be published before the resolution of the main action.

31 In that regard, it is clear that if it were to be established, in the main proceedings, that the publication envisaged by the Commission concerns confidential information the disclosure of which is incompatible with the protection of professional secrecy, under Article 339 TFEU, the applicants could rely on that provision, which bestows on them a fundamental right, in order to object to that publication.

32 As the Court of Justice has recognised in its judgment in Case C-450/06 *Varec* [2008] ECR I-581, paragraphs 47 and 48, referring to the case-law of the European Court of Human Rights, it may be necessary to prohibit the disclosure of certain information which is classified as confidential, in order to protect the fundamental right of an undertaking to respect for its private life, enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and in Article 7 of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389, 'the Charter'), it being made clear that the concept of 'private life' cannot be interpreted in such a way that the commercial activity of a legal person is excluded. Further, the Court of Justice ruled in that case that the undertaking concerned might suffer 'extremely serious damage' if there were improper communication of certain information (see, to that effect, *Varec*, paragraph 54).

33 Given that the Commission, if this application for interim measures were dismissed, could immediately publish the disputed information, there is a risk that the applicants' fundamental right to the protection of professional secrecy, enshrined in Article 339 TFEU, Article 8 of the ECHR and Article 7 of the Charter, would irreversibly lose any meaning in relation to that information. At the same time, it is likely that the applicants' fundamental right to an effective remedy, enshrined in Article 6 of the ECHR and Article 47 of the Charter, would be jeopardised if the Commission were to be allowed to publish the information at issue before the General Court has ruled on the main action. Consequently, since the applicants' fundamental rights may be seriously and irreparably harmed, subject to an examination of the condition that there should be a prima facie case (see, in respect of the close link between that condition and the condition of urgency, the order of the President of 8 April 2008 in Joined Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T-93/08 R *Cyprus* v *Commission*, not published in the ECR, paragraphs 56 and 57), it is clearly urgent to grant the interim measures requested (see also the order in *Evonik Degussa* v *Commission*, paragraphs 26 to 28).

Whether there is a prima facie case

34 According to settled case-law, the condition relating to a prima facie case is satisfied where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, prima facie, to be relevant and in any event not unfounded, in that it reveals the existence of difficult legal issues the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious (order of

19 September 2012 in Case T-52/12 R *Greece* v *Commission*, not published in the ECR, paragraph 13 and case-law cited; see also, to that effect, order in Case C-39/03 P-R *Commission* v *Artegodan and Others* [2003] ECR I-4485, paragraph 40).

35 In the present case, the applicants state that the non-confidential version of the 2006 decision, as published in 2007, was the outcome of a long process in which the Commission took into account, first, the professional secrecy and the legitimate expectations of undertakings which had the benefit of the Leniency Notice and, secondly, the public interest in transparency, and claim that, by the publication of a fuller version of the 2006 decision containing information provided under the Leniency Notice, the Commission is infringing the obligation to protect professional secrecy laid down in Article 339 TFEU, Article 30 of Regulation No 1/2003 and Article 16 of Commission Regulation (EC) No 773/2004, relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18).

36 Referring to the judgment in Case C-145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34, the applicants consider that information voluntarily submitted by undertakings, accompanied by a confidentiality claim based on the Leniency Notice, is in fact covered by the protection of covered by professional secrecy under Article 339 TFEU. In *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* (paragraphs 64 and 66), the General Court stated that the Leniency Notice granted protection to that information as business secrets. The applicants maintain that the Commission has itself advocated the confidential treatment of such information in many cases. Thus, recognising that the disclosure of information deriving from leniency applications would be likely to cause serious harm to the applicants for leniency, since it would place them in a significantly worse position in civil proceedings brought against them for damages, the Commission has stated before the General Court (Case T-437/08 *CDC Hydrogene Peroxide* v *Commission* [2011] ECR II-8251, paragraph 57) and before the Court of Justice (Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR, paragraph 115) that the interest in the non-disclosure of such information is worthy of protection to the extent that it is essential to the functioning of its leniency programme and its cartel enforcement policy.

37 The applicants further complain that the Commission infringed the Leniency Notice which guarantees, in paragraphs 29, 32 and 33, that information provided by undertakings in connection with a leniency application is protected by professional secrecy and that those undertakings can rely on legitimate expectations in that regard. Since the Commission is bound by the Leniency Notice, the decision to publish a fuller version of the 2006 decision and thereby to disclose information deriving from the applicants' leniency application is contrary to the protection conferred by the Leniency Notice.

38 According to the applicants, the version of the 2006 decision, as published in September 2007, already fulfilled the purpose of informing the public of the reasons behind the Commission's actions. Consequently, there is 'no relevant interest or justification' in the intended fuller publication which could outweigh the applicants individual legitimate expectations that the version published in 2007 was final and that the information deriving from their leniency application would be treated as confidential. The publication of a more complete version more than four years after the initial publication also infringes the principle of legal certainty. If the Commission wishes to change its long-standing practice, which involves protecting the confidentiality of information deriving from leniency applications, it should do so in respect of future applications and not retroactively where, as in the present case, the decision at issue has already been published more than four years ago.

39 The Commission's response is that the decision to publish the disputed information had already been taken in its letter of 28 November 2011 (see paragraph 5 above) for reasons of transparency. If the applicants had considered that decision to be unlawful, they should have challenged it by means of an action for annulment, within the time-limit laid down in the sixth subparagraph of Article 263 TFEU.

The applicants failed to do so. In any event, the condition relating to a prima facie case is not satisfied, as there is no substantial prima facie evidence that the application for annulment brought by the applicants is well founded.

40 Referring in particular to the judgment in Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, paragraph 78, and to *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* (paragraph 72), the Commission argues that the applicants could easily have known that, in accordance with Article 30 of Regulation No 1/2003 and settled case-law on that provision, the Commission is, as a general rule, entitled to publish the entire content of a final decision in competition matters. Accordingly, neither the applicants' right to professional secrecy, nor the Leniency Notice, nor the principles of legal certainty and protection of legitimate expectations were infringed in the present case. The disclosure of the disputed information could not cause serious harm to the applicants, since their allegedly less advantageous position in civil proceedings for damages brought against them following the envisaged publication would constitute the legitimate consequence of their offending conduct. Moreover, the applicants' interest to keep secret the details of their participation in the unlawful conduct does not warrant any particular protection, taking into account the public interest in knowing as fully as possible the reasons behind the Commission action and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings penalised.

41 The Commission adds that even information which has been confidential, but is five or more years old and must therefore be treated as historic, does not remain confidential, unless, by way of exception, the information provider demonstrates that, despite its age, that information still constitutes essential elements of its commercial position or that of a third party. All the disputed information is more than five years old. Even if it had been confidential at the time of its submission, that information should now be held to be historic, since the applicants have not demonstrated that, despite its age, that information still constitutes essential elements of its commercial position or that of a third party.

42 According to the Commission, *Adams* v *Commission* and *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* do not support the claim that the Leniency Notice provides for the protection of information deriving from leniency applications as business secrets. Paragraphs 32 and 33 of that notice concern only the disclosure of documents and written statements. By contrast, the information contained in such documents is generally not protected against disclosure. While the Commission accepts that, in certain specific cases, it has opposed, in the past, the disclosure of certain 'documents' provided by undertakings applying for leniency where access to those documents in other countries or jurisdictions, or under Regulation No 1049/2001, could have called into question the restrictions on access to the file laid down by Regulation No 1/2003, the Commission states that, by contrast, it has never given an assurance that it would refrain from disclosing 'information' contained in those documents.

43 Lastly, the Commission states that paragraph 32 of the Leniency Notice grants protection to leniency documents only for 'the purpose of [the Commission's] inspections and investigations', and not in the private interest of the undertakings applying for leniency, and that paragraph 29 of the Leniency Notice creates a legitimate expectation on the part of the undertakings applying for leniency with regard to immunity from fines and reduction of fines in cartel cases that applicants are entitled to under certain circumstances. In order to maintain the attractiveness of its leniency programme the Commission may judge it necessary in individual cases to put the undertakings applying for leniency and other offenders on an equal footing by not providing access to self-incriminating leniency statements. On the other hand, the undertakings applying for leniency should not be placed in a better position than other participants in the cartel by keeping part of their offending conduct secret, given that that secrecy also unduly disadvantages third parties harmed by the cartel who have a legitimate interest in seeking compensation. The disclosure of such self-incriminating statements is integral to the application of

Article 101 TFEU. The fact that individuals may rely on that provision in proceedings before the national courts, a possibility facilitated by such disclosure, is one of the pillars ensuring the effectiveness of competition law.

44 In that regard, the judge hearing the application for interim measures finds, first, that the Commission, by its reference to the alleged decision-making character of the letter of 28 November 2011, seeks either to challenge, in the context of whether there is a prima facie case, the admissibility of the action for annulment to which the application for interim measures is an adjunct (by contending that the contested decision does no more than confirm the already final decision of 28 November 2011), or to allege that the applicants are barred by limitation of time from relying on the confidentiality of the information which they submitted under the Leniency Notice. Whichever is the case, the Commission's arguments must prima facie be rejected. In its letter of 15 March 2012 (see paragraph 6 above), the Commission did not rely on the finality of a decision which, on 28 November 2011, had already rejected the applicants claim for confidentiality, but, quite the contrary, invited the applicants to bring the matter before the hearing officer, if they were maintaining that claim. Moreover, in its email of 31 May 2012 (see paragraph 10 above), the Commission expressly confirmed that the contested decision was its final position on the matter.

45 There is therefore nothing to preclude a full examination of whether the action for annulment brought by the applicants contains a prima facie case.

46 As previously stated in relation to the weighing up of interests, the judgment to be delivered subsequently in the main action will have to resolve, in essence, the question of whether the contested decision infringes the applicants' right to professional secrecy, guaranteed by Article 339 TFEU, Article 8 of the ECHR and Article 7 of the Charter, because the publication planned by the Commission contains information which the applicants sent to it on the basis of the Leniency Notice and which, consequently, because of its origin and its nature, constitutes confidential information which must be protected from publication.

47 As opposed to what the Commission appears to maintain, the case-law is not such that this question can be easily answered; rather the question requires thorough examination within the main proceedings, *a fortiori* where the problems raised by the confidentiality to be granted to leniency applications ('the leniency issue') are not expressly envisaged in either Regulation No 1/2003 or in Regulation No 1049/2001.

48 Of the judgments more specifically referred to by the parties — *Bank Austria Creditanstalt* v *Commission*, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission, Commission* v *Éditions Odile Jacob* and *Adams* v *Commission* — none concerns the leniency issue. As regards the judgment in Case T-344/08 *EnBW Energie Baden-Württemberg* v *Commission* [2012] ECR, paragraphs 8 and 148, which indicates that, in accordance with Regulation No 1049/2001, access to documents submitted in connection with a leniency application cannot be refused to persons harmed by a cartel, because the interest of a company which has been a member of a cartel to avoid actions for damages does not constitute an interest which merits protection, suffice it to say that that judgment is not yet final, since the appeal brought by the Commission is still pending before the Court of Justice (Case C-365/12 P).

49 Moreover, in the judgment of 14 June 2011 in Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 30), concerning the question of the general access of a person harmed by a cartel to documents submitted in connection with a leniency application and held by the national competition authorities, the Court of Justice confined itself to indicating that the national courts must ensure that the respective interests in favour of disclosure of the information provided voluntarily by the applicant for leniency and in favour of the protection of that information are weighed, while, in his Opinion in relation to that case delivered on 16 December 2010, Advocate General Mazák held that, as a general

rule, there should not be access to statements, and related documents, which were voluntarily submitted by applicants for leniency and in which those applicants in fact admitted their participation in an infringement of Article 101 TFEU.

50 Consequently, the question of law to be resolved in the main proceedings has not yet been the subject of a final decision by the courts of the European Union. The answer must be sought in the interpretation of all the relevant provisions, including the Leniency Notice. Contrary to what is stated by the Commission, the case-law relating to Regulation No 1049/2001 should also be of importance in that regard, the more so when the Commission itself refers to that regulation in paragraph 32 of the Leniency Notice and in its letter of 28 November 2011 (see paragraph 5 above). Within the main proceedings, it will be necessary at the very least to investigate whether there can be discerned in the case-law relating to Regulation No 1/2003, on the one hand, and the case-law relating to Regulation No 1049/2001, on the other, any divergences in the assessment of the leniency issue and, if that is the case, how those divergences may be overcome.

51 Within the main proceedings, it will also be necessary to examine the merits of the argument that the applicants' interest in the information which they provided as leniency applicants being kept secret is not deserving of protection, because the Commission's leniency programme contains sufficient incentive by offering the prospect of a reduced fine, and consequently the Commission has no need to grant any further advantage to leniency applicants. It may be that that argument ignores the fact that a leniency applicant runs the risk of not obtaining any significant reduction in the amount of the fine imposed, despite his admissions and the submission of incriminating evidence, where other members of the cartel have given information to the Commission earlier.

52 In that regard, it will be necessary to take into account, as appropriate, the judgment in Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraphs 52 and 53, where it was held that the benefit in the form of a reduced fine for an undertaking which has notified an agreement or a concerted practice constitutes the quid pro quo for the risk run by that undertaking in taking the initiative to give notice of the agreement or concerted practice, because there is a risk that it may be refused the requested reduction in the fine and that it may be penalised for its actions prior to the notification. The Court of Justice held that if Member States could use, as evidence, the information contained in such a notification in order to justify national penalties, that would substantially curtail the scope of the advantage granted to notifying undertakings. The Court concluded that use of such information should be prohibited.

53 Where the Commission claims that all the disputed information is, without exception, more than five years old, so that it has in any case lost its confidentiality, the Commission may in fact rely on the case-law relating to the confidential treatment of documents to be sent to an intervener in accordance with Article 116(2) of the Rules of Procedure. Under that case-law, information on undertakings which has been secret or confidential but is five or more years old must, as a general rule, be treated as historic (see, to that effect, the order in Case T-383/03 *Hynix Semiconductor* v *Council* [2005] ECR II-0621, paragraph 60, and the order of 8 May 2012 in Case T-108/07 *Spira* v *Commission*, not published in the ECR, paragraph 65), since it has lost its commercial value. However, within the main proceedings, it will be necessary to examine whether that assessment, which appears to be concerned particularly with undertakings which are parties to proceedings and are economic competitors, is equally apposite in the present case, which concerns the publication of detailed information relating to an infringement of competition law which, even though it is old, might be important for the persons harmed by the cartel in that such information may, in actions for damages brought against the applicants, make it easier for those persons to submit the facts required in order to quantify the harm and establish the causal link.

54 In the main proceedings, it will also be important to ascertain whether the applicants, in March 2003, when they sent the information at issue to the Commission in connection with the Leniency Notice, could rely on the fact that that information would enjoy, as information which is inherently

confidential, an enduring protection from publication. In that regard, it is legitimate to consider, prima facie, that at that time the Commission's position on the leniency issue was the same, in essence, as that which it defended as follows in the case which gave rise to the judgment in *CDC Hydrogene Peroxide* v *Commission* (paragraph 31): the risk of an action for damages being brought is a serious disadvantage which could in the future lead undertakings taking part in cartels to cease to co-operate, which is why it cannot be accepted that the protection of the professional secrecy of undertakings which cooperate with the Commission in cartel proceedings should be affected by an application for access to documents based exclusively on private law interests. In the case which gave rise to the judgment in *EnBW Energie Baden-Württemberg* v *Commission* (paragraph 70), the Commission extended that position to proceedings under Regulation No 1/2003, to the effect that participants in a cartel who voluntarily disclose information are reasonably entitled to expect that the Commission will not disclose the documents in issue and that those documents will be used only for the purposes of the competition proceedings, including the review carried out by the Courts of the European Union. Moreover, it is not a matter of dispute that, as recently as last year, the Commission opposed similar requests for information made by courts and tribunals of Member States and non-Member States on similar grounds.

55 The court hearing the main action will have to examine whether the applicants, in March 2003, could take the view that that position on the protection of information sent in the context of leniency applications, strongly defended by the Commission, also had an effect on the interpretation of paragraph 32 of the Leniency Notice. Under that provision, the Commission is not to disclose, pursuant to Regulation No 1049/2001, 'documents received in the context of this notice'. If account is also taken of the fundamental right to professional secrecy and the principle relating to legitimate expectations, it might be formalistic to restrict that protection solely to 'documents' covered by Regulation No 1049/2001, when the objective pursued by such protection would also cover, even in the field of competition law, the complete publication of information and passages which derive from such documents. Lastly, it will be necessary to examine, in that regard, to what extent the argument put forward in this case by the Commission, that the implementation of the law on cartels by means of actions for damages is part of the penalty for infringements of competition law for the purposes of paragraph 33 of the Leniency Notice, can be reconciled with the position which the Commission defended in the cases which led to the judgments in *EnBW Energie Baden-Württemberg* v *Commission* and *CDC Hydrogene Peroxide* v *Commission*.

56 In the light of the foregoing, it is clear that this case raises complex questions of law which cannot, prima facie, be considered as of no relevance, while their resolution deserves thorough examination within the main proceedings. It must therefore be held that there is a prima facie case (see also the order in *Evonik Degussa* v *Commission*, paragraphs 38 to 50).

57 It follows that, since all the requisite conditions are satisfied, the application for interim measure must be upheld and interim measures must be granted prohibiting the Commission from publishing the disputed information.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The operation of Decision C(2012) 3533 of the European Commission of 24 May 2012 rejecting a claim for confidential treatment made by Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and Eka Chemicals AB pursuant to Article 8 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Case COMP/38.620 — Hydrogen Peroxide and perborate) is suspended.**

2. The Commission is ordered to refrain from publishing a version of its Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel, Akzo Nobel Chemicals Holding, Eka Chemicals, Degussa AG, Edison SpA, FMC Corporation, FMC Foret SA, Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate), which is more complete, in relation to Akzo Nobel, Akzo Nobel Chemicals Holding and Eka Chemicals, than that published in September 2007 on the Commission's website.

3. The application for interim relief is dismissed for the remainder.

4. The costs are reserved.

Luxembourg, 16 November 2012.

Registrar
E. Coulon

President
M. Jaeger