



Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

17 September 2015*

(Appeal — Order for interim measures — Competition — Agreements, decisions and concerted practices — Order to submit to an inspection — Breach of professional secrecy — Refusal to suspend measures of investigation — Need to adopt interim measures — Absence — Inadmissibility)

In Case C-386/15 P(R),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, brought on 17 July 2015,

Alcogroup SA, established in Brussels (Belgium),

Alcodis SA, established in Brussels,

represented by P. de Bandt, J. Dewispelaere and J. Probst, avocats,

appellants,

the other party to the proceedings being:

European Commission, represented by C. Giolito, T. Christoforou, V. Bottka and F. Jimeno Fernández, acting as Agents,

defendant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing First Advocate General M. Wathelet,

makes the following

Order

- 1 By their appeal, Alcogroup SA ('Alcogroup') and Alcodis SA ('Alcodis') request the Court of Justice to set aside the order of the President of the General Court of the European Union of 16 June 2015 in *Alcogroup and Alcodis v Commission*, T-274/15 R, EU:T:2015:389 ('the order under appeal'), which dismissed their application for interim measures seeking, first, to suspend the enforcement of Commission Decision C(2015) 1769 final of 12 March 2015 ('the first contested decision'), addressed to Alcogroup and all undertakings directly or indirectly controlled by it, including Alcodis, and relating to proceedings under Article 20(4) of 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

* Language of the case: French.

TFEU] (OJ 2003 L 1, p. 1) and its decision of 8 May 2015 ('the second contested decision'), addressed to Alcogroup in investigations AT.40244 — Bioethanol (formerly 'AQUA VIT') and AT.40054 — Oil and Biofuel Markets, and, second, to order the European Commission to suspend all measures whether of investigation or other relating to them in proceedings AT. 40054 and AT.40244.

- 2 It must be clarified, as a preliminary point, that the President of the General Court adopted the order under appeal before the Commission submitted its observations on the application for interim measures and before the period for submitting such observations had elapsed. Consequently, as the Commission rightly observes before the Court of Justice, the order under appeal is based solely on the facts presented in the application for interim measures. Although the Commission challenges some of those facts, it does so only as a subsidiary plea and in the event that the order under appeal is set aside. Thus, for the purposes of the analysis to be undertaken on appeal, this order proceeds from the premiss that the facts found in the order under appeal are established, without confirming or casting doubt on their accuracy.

Background to the dispute as established in the order under appeal

- 3 Alcogroup and Alcodis are active in the production, processing and marketing of ethanol. Following a complaint lodged in March 2013, the Commission carried out inspections, in May 2013, of the premises of an undertaking which had developed and made publicly available a method of evaluating the price of ethanol, as well as the premises of a number of other undertakings active in the crude oil, refined petroleum products and biofuel sectors. That investigation, registered as AT.40054 (Oil and Biofuel Markets), concerned both the operation of that method and possible collusion between undertakings intending to manipulate that method.
- 4 In the context of that investigation, the Commission sent a request for information to Alcodis on 23 May 2014 pursuant to Article 18(1) and (2) of Regulation No 1/2003. Alcodis responded to that request on 14 June 2014.
- 5 On 29 September 2014, the Commission ordered Alcogroup and Alcodis to submit to an inspection under Article 20(4) of Regulation No 1/2003. The inspection took place at their premises between 7 and 10 October 2014. In the context of and following that inspection, Alcogroup and Alcodis sought the assistance of their lawyers to prepare their defence. In that respect, a number of documents were drawn up and exchanged between them and their lawyers. It was stated that those exchanges and the annexed documents were covered by lawyers' professional secrecy, with each exchange being labelled as 'legally privileged' or placed in a file labelled 'legally privileged'.
- 6 In parallel to investigation AT.40054, the Commission opened investigation AT.40244 relating to potential agreements and concerted practices aimed at coordinating the behaviour of undertakings active in the bioethanol marketing sector, the sharing of markets and customers, and the exchange of information. In the context of that investigation, the Commission, by the first contested decision, ordered Alcogroup and Alcodis to submit to an inspection, which took place between 24 and 27 March 2015. At the start of the inspection, the latter's lawyers requested that the Commission's inspectors exclude from their investigation the defence documents drafted following the investigation that took place between 7 and 10 October 2014. It was agreed that all documents labelled as being 'legally privileged' would be immediately set aside, without being examined by the inspectors, and would be examined jointly with the lawyers of Alcogroup and Alcodis.
- 7 However, according to Alcogroup and Alcodis, it subsequently emerged that the Commission's inspectors had analysed the documents concerned in order to assess whether they were relevant to the investigation, and selected various defence documents, labelled as being 'legally privileged', for seizure. Following the protests of Alcogroup and Alcodis, those documents were removed from the list of documents to be seized and the inspectors agreed to place the documents labelled as being 'legally

privileged' in a separate file and to examine them only in the presence of a lawyer from Alcogroup and Alcodis. However, according to the latter, the inspectors had already examined documents which were drawn up for the purposes of the defence of those two companies following the first inspection, which was undertaken within the context of investigation AT.40054.

- 8 Alcogroup and Alcodis sent a letter to the Commission on 21 April 2015 in which they requested the immediate suspension of any measures of investigation concerning them in the context of proceedings AT.40054 and AT.40244, including any consultation or analysis of the documents seized. That request was rejected on 8 May 2015 by the second contested decision.

Findings of the judge hearing the application for interim measures and the order under appeal

- 9 By application lodged at the Registry of the General Court on 29 May 2015, Alcogroup and Alcodis brought an action for annulment of the first and second contested decisions.
- 10 By a separate document, lodged at the Registry of the General Court on the same date, Alcogroup and Alcodis lodged an application for interim measures, by which they requested, in essence, that the President of the General Court:
 - suspend, pursuant to the second subparagraph of Article 105(2) of the Rules of Procedure of the General Court (now Article 157(2) of those rules), the enforcement of the first and second contested decisions until the close of the proceedings for interim measures and, in any event, until the General Court has ruled on the main action;
 - order the Commission to suspend all measures whether of investigation or other relating to them in the context of proceedings AT.40054 and AT.40244; and
 - order the Commission to pay the costs.
- 11 By the order under appeal, the President of the General Court rejected that application as being inadmissible before the expiry of the time limit fixed for the submission of observations by the Commission.
- 12 With regards to Alcogroup and Alcodis' first head of claim, the President of the General Court held, in substance, that the application for the suspension of the enforcement of the first contested decision was inadmissible because, given that that decision had already been fully implemented, its suspension would have been meaningless. Regarding the application for the suspension of the second contested decision, he observed that, in principle, a negative decision, such as a refusal to grant an administrative application, could not be the subject matter of such a suspension. Concerning Alcogroup and Alcodis' second head of claim, the President of the General Court held, in substance, that that claim, which sought that he order the Commission to suspend all measures of investigation or other relating to them, goes beyond the purpose of the action brought in the main proceedings, since the injunction sought, if it were so ordered, would anticipate the measures likely to be adopted by the Commission following a judgment potentially annulling the first and second contested decisions. Furthermore, it could not be established, in his view, that such anticipation was necessary to guarantee the full effectiveness of a judgment for annulment in this case because, if the contested decisions were to be annulled, the removal from the investigation file of all elements used unlawfully would have sufficed to achieve that purpose.

The forms of order sought

- 13 Alcogroup and Alcodis claim that the Court of Justice should:
- set aside the order under appeal;
 - adopt the provisional measures requested by them before the General Court; and
 - order the Commission to pay the costs.
- 14 The Commission contends that the Court of Justice should:
- dismiss the appeal;
 - in the alternative, reject the application for interim measures; and
 - order Alcogroup and Alcodis to pay the costs, including those incurred before the General Court.

The appeal

- 15 In support of their appeal, Alcogroup and Alcodis rely on three grounds of appeal. Their first ground of appeal, alleging an error of law in the assessment of the admissibility of the applications set out in their second head of claim at first instance, is divided into three parts, by which they claim, respectively:
- a distortion of their application for interim measures;
 - an error in the assessment of the necessity of the interim measures sought by their second head of claim at first instance to guarantee the full effectiveness of the judgment to be delivered; and
 - an infringement of the right to effective judicial protection.
- 16 By their second and third grounds of appeal, Alcogroup and Alcodis claim that the President of the General Court erred in law in his assessment of the admissibility of their application to suspend the enforcement of the first contested decision and the second contested decision, respectively.
- 17 As to the remainder, Alcogroup and Alcodis set out the reasons why, in their opinion, it is necessary to grant the interim measures sought before the General Court.
- 18 The Commission calls on the Court to dismiss the appeal in its entirety. It adds that, in any event, the application for interim measures must be dismissed and that the President of the General Court was correct in ruling to that effect.

The first ground of appeal, alleging an error of law in assessing the admissibility of the second head of claim at first instance

- 19 By the first part of their first ground of appeal, Alcogroup and Alcodis criticise the President of the General Court for having found, in the first sentence of paragraph 21 of the order under appeal, that their second head of claim at first instance sought ‘de facto, to forbid the Commission from pursuing investigations AT.40054 and AT.40244 and from using, in that context, the confidential information which it acquired unlawfully ...’ whereas, according to them, their application was more limited. In

reality, they sought only the suspension of any measures of investigation in the context of the proceedings in question, and only in so far as they relate to them, pending a judgment on the substance of the case.

- 20 In that regard, it is clear from a reading of the order under appeal in its entirety that the President of the General Court did in fact take into account the limited nature of the second head of claim at first instance. In particular, this can be seen from the first sentence of paragraph 21 of that order in light, first, of paragraph 12, where the head of claim in question is accurately described, and second, paragraph 20, which notes the temporary nature of the requested suspension and the ancillary nature of the interim measures in relation to the main proceedings, to which they are an adjunct.
- 21 It should be added that Alcogroup and Alcodis stated, both in their written pleadings before the General Court as well as in the section of their appeal relating to the granting of the interim measures sought, that any measures of investigation adopted in their regard on the basis of the unlawfully obtained information increases the harm suffered by them. It follows that, as the President of the General Court correctly pointed out in the first sentence of paragraph 21 of the order under appeal, the purpose of their application for interim measures, and particularly of the second head of claim at first instance, was in reality to avoid such harm from occurring by temporarily preventing the Commission from pursuing investigations AT.40054 and AT.40244 in relation to their possible participation in the infringements covered by them.
- 22 It follows from the foregoing that the first part of the first ground of appeal must be rejected.
- 23 By the second part of their first ground of appeal, Alcogroup and Alcodis submit, in essence, that the President of the General Court erred in law, particularly at paragraph 23 of the order under appeal, by applying in the present case, by analogy, the reasoning set out in *Commission v Akzo and Akros* (C-7/04 P(R), EU:C:2004:566) for the purposes of assessing the necessity of the interim measures sought to guarantee the full effectiveness of the judgment to be delivered. The present case, in fact, differs from that which gave rise to that order. In *Commission v Akzo and Akros*, the status of a limited number of documents was at issue, so that the fact that it would not have been possible for the Commission to use those documents in the event of the annulment of the decision ordering an investigation constituted a sufficient guarantee of the rights of the businesses concerned. In the present case, by contrast, the Commission inspectors deliberately included all of Alcogroup and Alcodis' defence documents within the scope of their inspection and took note of them. It would be impossible for Alcogroup and Alcodis to demonstrate, subsequently, and with sufficient certainty, an actual link between the taking into account of information obtained unlawfully and any measures taken by the Commission following the investigation.
- 24 In this regard, it must be recalled that although, in the case which gave rise to the order in *Commission v Akzo and Akros* (C-7/04 P(R), EU:C:2004:566), only a limited number of documents were at stake, the reasoning set out in that order was not based on that fact as such. The Court ruled, in essence, at paragraphs 41 and 42 of that order, that the mere reading by the Commission of the information contained in the documents allegedly covered by professional secrecy was not sufficient to establish the necessity of adopting interim measures, since that information was not disclosed to third parties and was not used in proceedings concerning an infringement of the EU competition rules. The Court further stated, at paragraph 43 of the same order, that the possibility of a more detailed knowledge of the content of the documents in question, by the Commission, was not such as to determine the existence of serious and irreparable harm on the part of the companies concerned.
- 25 Therefore, *a fortiori*, Alcogroup and Alcodis' arguments, based on the knowledge of the content of the documents covered by professional secrecy gained by the officials of the Commission during the inspection, but not retained by the Commission after that inspection, were not sufficient by themselves to establish the necessity of adopting the provisional measures sought to ensure the full

effectiveness of the judgment to be delivered. There is no possibility that those documents, which the Commission no longer has in its possession, would be disclosed to third parties or that they would be relied on as such in order to prove the existence of an infringement of the competition rules.

- 26 Furthermore, it is necessary to reject the arguments by which, in the context of the present appeal, Alcogroup and Alcodis submit that, if the Commission were to use the information obtained unlawfully, it would be impossible for them, contrary to the situation in the case which gave rise to the order in *Commission v Akzo and Akros* (C-7/04 P(R), EU:C:2004:566), to prove the existence of a link between that usage and any measures of investigation subsequently adopted. As the President of the General Court in fact ruled, without erring in law, at paragraph 24 of the order under appeal, Alcogroup and Alcodis did not establish the existence of such impossibility before the General Court. He therefore correctly concluded, on that basis, that the purported risk had to be regarded as purely hypothetical.
- 27 In this regard, it must be added that the President of the General Court also correctly observed, more generally, at paragraph 21 of the order under appeal, that Alcogroup and Alcodis called on him, in reality, to exceed his powers by anticipating the consequences to be drawn by the Commission if the first and second contested decisions were to be annulled by the General Court. Without prejudice to the decisions to be taken later by the EU Court adjudicating on the substance in the main proceedings, as well as by the Commission at an administrative level, it cannot be excluded that appropriate measures consisting, inter alia, of removing certain documents from the Commission's file will be adopted in the future, if required, in order to repair a possible infringement of Alcogroup and Alcodis' rights of defence. Nor can it be ruled out at the present stage of the proceedings that the Commission may decide not to pursue investigations AT.40054 and AT.40244 in so far as they concern Alcogroup and Alcodis.
- 28 In those circumstances, the arguments of Alcogroup and Alcodis, according to which the President of the General Court erred in law concerning the necessity of the interim measures sought in order to ensure the full effectiveness of the judgment to be delivered, cannot succeed. It follows that the second part of the first ground of appeal must be rejected.
- 29 By the third part of the first ground of appeal, Alcogroup and Alcodis submit that the excessively strict interpretation by the President of the General Court of the conditions of admissibility applicable to requests for interim measures infringes the principle of effective judicial protection. According to them, the only method of assuring such protection in the circumstances of the present case would have been to order the suspension of the measures of investigation that the Commission was and remains likely to undertake following the improper inspection, since a potential future judgment granting their main action would not be able to erase retroactively the harm resulting from such measures of investigation. Thus, the President of the General Court erred in law in rejecting their second head of claim as inadmissible.
- 30 Nevertheless, in accordance with what has been held in paragraphs 24 to 28 of the present order, Alcogroup and Alcodis have established neither that, due to the absence of the provisional measures sought by their second head of claim at first instance, they suffered harm which it would be impossible to erase retroactively, nor that the adoption of those measures would have been necessary to ensure the full effectiveness of the judgment to be delivered. Consequently, their arguments are not sufficient to prove that the President of the General Court infringed the principle of effective judicial protection in finding that the adoption of such measures was unnecessary in this case.
- 31 It follows from the foregoing that the third part of the first ground of appeal cannot succeed.
- 32 The first ground of appeal must therefore be dismissed in its entirety.

The second ground of appeal, alleging an error in law when assessing the admissibility of the application to suspend the enforcement of the first contested decision

- 33 By their second ground of appeal, Alcogroup and Alcodis criticise the President of the General Court for having held that the first contested decision had already been fully implemented by the inspection carried out between 24 and 27 March 2015 and that, therefore, on the date when the application for interim measures was submitted the harm that they claim to have suffered had already occurred. According to them, the harmful effects of that decision did not end when the Commission inspectors left their premises, since that decision granted that institution the right to retain and to analyse the documents seized during that inspection and that it thus had the possibility of taking into account, for the purposes of their analysis, the information gathered by the unlawful consultation of Alcogroup and Alcodis' defence documents.
- 34 In that regard, it is sufficient to note that the harm on which Alcogroup and Alcodis relied to request the President of the General Court to suspend the enforcement of the first contested decision resulted from the consultation of their defence documents by the Commission, in the context of the inspection that took place between 24 and 27 March 2015. However, as the President of the General Court correctly held at paragraphs 16 and 17 of the order under appeal, the harm suffered arose at the same moment that that decision was executed, that is to say, during the conduct of the inspection.
- 35 It is true that a possible future usage, for the purposes of finding an infringement of the competition rules, of the documents seized during the inspection that took place between 24 and 27 March 2015, read in conjunction with the unlawfully obtained information, could cause further harm to Alcogroup and Alcodis. Nonetheless, even if the President of the General Court had ordered the suspension of the first contested decision, which had already been fully executed by conducting that inspection, such a suspension would not prevent new harm from occurring, since it would have neither the purpose nor the effect of preventing the Commission from further analysing the documents already seized.
- 36 Consequently, the second ground of appeal must be rejected.

The third ground of appeal, alleging an error in law when assessing the admissibility of the application to suspend the enforcement of the second contested decision

- 37 By their third ground of appeal, Alcogroup and Alcodis submit that the order under appeal is vitiated by an error of law as the President of the General Court found that the second contested decision could not be suspended, since it constitutes a negative decision. According to them, granting such a suspension was necessary to allow the adoption of the other interim measures sought, in particular, the suspension of any investigation in proceedings AT.40054 and AT.40244, as requested by their second head of claim at first instance.
- 38 In principle, according to the settled case-law of the Court, an application to suspend enforcement is inconceivable against a negative decision, such as the second contested decision, since the granting thereof cannot have the effect of changing the position of an applicant (see the orders of the President of the Second Chamber of the Court of Justice in *S. v Commission*, 206/89 R, EU:C:1989:333, paragraph 14, and of the President of the Court of Justice in *Moccia Irme v Commission*, C-89/97 P(R), EU:C:1997:226, paragraph 45). The application for the suspension of the enforcement of that decision thus had to be dismissed as being inadmissible, as the President of the General Court held at paragraphs 18 and 19 of the order under appeal. An alternative conclusion could be reached only where the granting of such a suspension could be necessary for the adoption of one or more of the other interim measures requested, if the court hearing the application for interim measures held them to be admissible and well founded.

- 39 With regard to the latter, given that the Commission rejected, by the second contested decision, an administrative application of Alcogroup and Alcodis seeking, in substance, the adoption of the same interim measures as those which were subsequently requested by the same companies by their second head of claim at first instance, such necessity might have existed in relation to that head of claim, if it had been held to be admissible and well founded. However, it is sufficient to find that all the arguments of Alcogroup and Alcodis directed against the finding of inadmissibility of their second head of claim in the judgment under appeal have also been rejected at paragraphs 19 to 32 of the present order.
- 40 The President of the General Court was therefore correct in rejecting as inadmissible, in the order under appeal, the application for suspension of the enforcement of the second contested decision. It follows that the third ground of appeal cannot succeed.
- 41 Accordingly, the appeal must be dismissed in its entirety, without it being necessary to examine the arguments put forward by Alcogroup and Alcodis relating to the reasons why, in their view, it is necessary to grant the interim measures which they requested before the General Court.

Costs

- 42 Article 184(2) of the Rules of Procedure of the Court provides that, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to bear the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Alcogroup and Alcodis have been unsuccessful, they must be ordered to bear the costs incurred in the present appeal proceedings.

On those grounds, the Vice-President of the Court hereby orders:

- 1. The appeal is dismissed.**
- 2. Alcogroup SA and Alcodis SA are ordered to pay the costs of the appeal proceedings.**

[Signatures]