



Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

11 March 2013*

(Interim relief — Competition — Publication of a decision finding an infringement of Article 81 EC — Rejection of request for confidential treatment of information allegedly covered by business secrecy — Application for interim measures — Urgency — Prima facie case — Weighing up of interests)

In Case T-462/12 R,

Pilkington Group Ltd, established in St Helens, Merseyside (United Kingdom), represented by J. Scott, S. Wisking and K. Fountoukakos-Kyriakakos, Solicitors,

applicant,

v

European Commission, represented by M. Kellerbauer, P. Van Nuffel and G. Meeßen, acting as Agents,

defendant,

APPLICATION for suspension of operation of Commission Decision C(2012) 5718 final of 6 August 2012 on the rejection of a request for confidential treatment submitted by Pilkington Group Ltd 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/39.125 – Car glass), and application for interim measures seeking the continuation of the confidential treatment accorded to certain information relating to the applicant in respect of Commission Decision C(2008) 6815 final of 12 November 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 – Car glass),

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 Commission Decision C(2012) 5718 final of 6 August 2012 on the rejection of a request for confidential treatment submitted by Pilkington Group Ltd 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/39.125 – Car glass) ('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 C(2008)6815 final of 12 November 2008 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 – Car glass) ('the 2008 Decision'), as published in February 2010 on the website of the 'Competition' Directorate General.
- 3 In the 2008 Decision, the Commission found that an infringement of Article 81 EC had been committed between 1998 and 2003 within the European Economic Area (EEA) by the applicant, Pilkington Group Ltd, and other companies belonging to its group, by a number of companies belonging to the French Saint-Gobain group and the Japanese Asahi group – to which AGC Glass Europe, among others, belongs – and by the Belgian company Soliver with regard to sales of glass for new vehicles and replacement parts for motor vehicles ('the car glass cartel'). As a consequence, the Commission imposed fines totalling more than EUR 1.3 billion on the members of that cartel, the applicant's group being fined EUR 370 million.
- 4 After taking into account requests for confidential treatment submitted by the addressees of the 2008 Decision, the Commission published, in February 2010, a full-text provisional non-confidential version of that decision on its website. That publication was not challenged by the applicant.
- 5 By letter of 28 April 2011, the Commission informed the applicant of its intention to publish, for reasons of transparency, a fuller non-confidential version of the 2008 Decision and to reject, to that end, several requests for confidential treatment that it had received concerning (i) customer names, product names or descriptions of products, as well as any other information which might identify individual customers ('category I information'), (ii) the number of parts supplied by the applicant, the share of the business of a particular car manufacturer, pricing calculations or price changes etc. ('category II information'), and (iii) information which, according to the applicant, might identify certain members of its staff who were allegedly involved in implementing the cartel ('category III information'). The Commission invited the applicant, should it 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).
- 6 Noting that the proposed more complete version contained a considerable amount of information which had not been published in February 2010 for reasons of confidentiality, the applicant, by letter of 30 June 2011, informed the Hearing Officer that it objected to publication of a version of the 2008 Decision which would be more complete than the version published in February 2010, maintaining that category I and II information had to be protected since it constituted business secrets, whilst disclosure of category III information would make it possible to identify the natural persons, namely employees of the applicant who had allegedly been involved in implementing the cartel. The applicant thus requested confidential treatment for all that information.

- 7 In the contested decision, signed 'For the Commission', the Hearing Officer, whilst accepting the confidential nature of certain information referred to by the applicant, none the less rejected the majority of its requests.
- 8 The applicant was notified of the contested decision on 9 August 2012.
- 9 By application lodged at the Registry of the General Court on 19 October 2012, the applicant brought an action for annulment of the contested decision. In support of that action, it argues, in essence, that the publication at issue is, on the one hand, an infringement of the Commission's duty of confidentiality under Article 339 TFEU and Article 28 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 TFEU] (OJ 2003 L 1, p. 1) and, on the other, an infringement of its duty to protect personal data under Article 8 of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389, 'the Charter'), inasmuch as the fuller version of the 2008 Decision contains business secrets, covered by the obligation of professional secrecy, and information allowing the applicant's employees to be identified.
- 10 By a separate document, lodged at the Court Registry on the same date, the applicant brought this application for interim measures, in which it claims, in essence, that the President of the General Court should:
- suspend the operation of the contested decision until the General Court has ruled on the main action;
 - order the Commission to refrain from publishing a version of the 2008 Decision which is more complete, in relation to the applicant, than the version published in February 2010 on the Commission's website;
 - order the Commission to pay the costs.
- 11 In its observations on the application for interim measures, lodged at the Court Registry on 11 January 2013, the Commission contends that the President of the General Court should:
- dismiss the application for interim measures;
 - order the applicant to pay the costs.
- 12 After the Commission had lodged its observations, the applicant was authorised to reply to those observations, which it did by a document lodged on 18 February 2013. The Commission then replied by a document dated 6 March 2013.
- 13 By documents lodged at the Court Registry on 17 and 22 January 2013, the German insurance companies HUK-Coburg, LVM, VHV and Württembergische Gemeinde-Versicherung sought leave to intervene in these proceedings for interim relief in support of the form of order sought by the Commission. The latter did not object to the applications for leave to intervene, whilst the applicant, by a document of 12 February 2013, submitted that they should not be granted.

Law

The applications for leave to intervene

- 14 Under the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, a person may intervene in a case submitted to the General Court provided that he can establish an interest in the result of the case.
- 15 On that point, it is settled case-law that the concept of interest in the result of a case must be understood as being a direct and present interest in the grant of the form of order itself and not an interest in relation to the pleas in law put forward. Indeed, a distinction must be drawn between prospective interveners establishing a direct interest in the ruling on the specific act whose annulment is sought and those who can establish only an indirect interest in the result of the case by reason of similarities between their situation and that of one of the parties (see the order of the President of 15 January 2013 in Case C-133/12 P *Stichting Woonlinie and Others v Commission*, not published in the ECR, paragraph 7 and the case-law cited; see also order of the President of 26 July 2004 in Case T-201/04 R *Microsoft v Commission* [2004] ECR II-2977, paragraph 32).
- 16 When an application for leave to intervene is made in proceedings for interim measures, the interest in the result of the case must be understood as being an interest in the result of the interim proceedings. In the same way as the result of the main proceedings, the result of the interim relief proceedings may adversely affect the interests of third parties or be favourable to them. It follows that, in interim relief proceedings, the interests of the parties seeking leave to intervene must be appraised in the light of the consequences which granting the interim relief sought, or rejecting that request, may have on those parties' economic or legal position (order of 26 July 2004 in *Microsoft v Commission*, paragraph 33).
- 17 In any event, the appraisal by the judge responsible for granting interim relief of the interest in the result of the case before him cannot affect the appraisal by the Court when dealing with an application for leave to intervene in the main proceedings (order of 26 July 2004 in *Microsoft v Commission*, paragraph 35).
- 18 Whether the four applicants for leave to intervene have an interest in the result of the present case must be examined in the light of the foregoing considerations.
- 19 The four applicants for leave to intervene, which are all active in the car glass insurance sector, state that in December 2010 and September and December 2011 they brought actions for damages before the Landgericht Düsseldorf (Düsseldorf Regional Court) (Germany) against 'AGC Glass Europe and Others'. By those actions, which are all still pending before the national court, they are claiming compensation for loss sustained on account of the artificially high prices which the members of the car glass cartel charged, in breach of Article 101 TFEU, between 1998 and 2003, and which were the basis for reimbursement in respect of car glass insurance. They state that it is very difficult for them to quantify the loss sustained without having access to the fuller information on the car glass cartel which the Commission now intends to publish. It is important for them that the Commission publishes a more complete version of the 2008 Decision than the version published in February 2010 and that the applicant does not prevent it from doing so.
- 20 In that regard, it is sufficient to observe, first, that the contested decision in these proceedings concerns the rejection of a request for confidential treatment submitted by the applicant alone and, second, that the actions for damages to which the applicants for leave to intervene refer were brought at national level against 'AGC Glass Europe and Others', without the prospective interveners specifying that the applicant was one of those 'Others'. The President of the General Court can thus only assume that 'Others' covers companies belonging to the Japanese group Asahi (see paragraph 3 above). Moreover,

the applicant confirmed, in its observations of 12 February 2013, that it was not a defendant in the national proceedings in question but that it had merely intervened in support of AGC Glass Europe's claims. Accordingly, if the action for annulment of the contested decision were dismissed, the information which the Commission would then be permitted to publish would be of no use to the applicants for leave to intervene in their actions for damages, since that information would not concern AGC Glass Europe. The applicants for leave to intervene do not therefore put forward any direct and present interest in the result of the case for the purposes of Article 40 of the Statute of the Court of Justice. Nor can they be recognised as having such an interest merely because they could potentially decide to bring an action for damages before the national court against the applicant as well, given that such recognition would result in such a large increase in the number of potential interveners that that would risk seriously undermining the effectiveness of the procedure before the Courts of the European Union (see, to that effect, Order of 8 June 2012 in Case C-589/11 P(I) *Schenker v Air France and Commission*, not published in the ECR, paragraph 24).

- 21 In any event, the applicants for leave to intervene have not established that they have a specific interest in the result of the case in the interim proceedings, in that it would be unacceptable for them to wait for a decision on the substance of the case. They have failed to show, *inter alia*, that their economic or legal position would be harmed if the present application for interim measures were upheld. Furthermore, the fact that HUK-Coburg's action for damages has been pending before the national court since December 2010, without it mentioning any imminent risk of an unfavourable outcome for it, rather suggests that the national court may reasonably be persuaded, where appropriate by applications for the proceedings to be stayed, to wait for judgment to be given in the main action before continuing, in the light of that judgment, with the actions for damages.
- 22 Accordingly, the applications for leave to intervene must be dismissed.

The application for interim measures

- 23 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.
- 24 Article 104(2) of the Rules of Procedure of the General Court 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 relief may order suspension of operation of an act, or 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 interests of the party applying for the measures, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim relief must be rejected if one of them is not satisfied. Where appropriate, the judge hearing such an application must also weigh up the interests involved (orders of the President in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30, and in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).
- 25 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 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).

- 26 Having regard to the material in the file, the President of the General Court considers that he has all the information needed to rule on the present application for interim measures, without it being necessary first to hear oral argument from the parties.
- 27 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

- 28 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).
- 29 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 merely to guarantee the full effectiveness of the future decision on the main action (see, to that effect, the order of the President in Case C-7/04 P(R) *Commission v Akzo and Akros* [2004] ECR I-8739, paragraph 36). Consequently, such a procedure is merely ancillary to the main action to which it is an adjunct (order of the President 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 prejudice the future decision on the substance of the case or 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).
- 30 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 prejudice 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).
- 31 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 applicant's claim that it should refrain from publishing the disputed information – should be annulled, inter alia, because of the disregard for the confidentiality of the information in so far as its disclosure would constitute an infringement of Article 339 TFEU and Article 8 of the Charter. In that regard, it is obvious that, in order to protect the effectiveness of a judgment annulling the contested decision, the applicant 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.

- 32 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 applicant 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 applicant.
- 33 Consequently, the interest defended by the applicant 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 since February 2010 (see, to that effect, order in *RTE and Others v Commission*, paragraph 15).
- 34 With regard to the Commission's objection that the public has now been waiting more than four years for the 2008 Decision finally to be published in full and that it is not acceptable that the applicant should be able to delay publication by simply asserting that the information to be published is confidential, it must be noted that the Commission has merely contended that its staff were faced with a time-consuming process which obliged them to deal with numerous confidentiality claims, that contention not being supported, however, by any documentary evidence. The Commission has thus not proved to the required legal standard that it was obliged to wait until 28 April 2011 to decide to publish a full-text version of the 2008 Decision. In those circumstances, it cannot be ruled out that the Commission is, to a great extent, itself responsible for the delay it complains of. In any event, the Commission does not explain why it did not – even if only on a precautionary basis – include with the defence, lodged on 8 January 2013 in the main action, an application for the case to be decided under an expedited procedure in accordance with Article 76a of the Rules of Procedure, in order to try and make up for some of the delay. After waiving the opportunity to seek to have the main case decided under an expedited procedure, the Commission cannot reasonably take issue with the applicant for having exercised its procedural right to seek suspension of operation of the contested decision.
- 35 The Commission also invokes the interest of the potential victims of the car glass cartel who will need the category I and II information in order to establish the requirements of any claim in damages – in terms of causality and quantification of the damage – which they bring against the applicant before the national court. According to the Commission, if publication of that information was deferred until delivery of the judgment in the main proceedings, some of those victims' claims for damages could be time-barred by that date, in particular in Member States with short limitation periods.
- 36 However, although the interests of third parties who would be directly affected by any suspension of operation of the contested decision may be taken into account in the weighing up of interests (see, to that effect, order of the President in Case T-342/00 R *Petrolessence and SG2R v Commission* [2001] ECR II-67, paragraph 51), the Commission's argument does not prevail over the applicant's interest. First, as regards the national limitation rules alluded to, the Commission's assertion is too vague inasmuch as it does not state, *inter alia*, what would prevent the abovementioned victims from bringing their actions for damages in due time, whilst obtaining a stay of national proceedings until judgment is given in the main action. Moreover, the only specific examples mentioned in the present context concern the actions for damages which the four applicants for leave to intervene brought

before the national court in 2010 and 2011, apparently without objections being raised on the ground that the actions were time-barred (see paragraphs 19 and 21 above). Second, as has been pointed out in paragraph 34 above, both delays in the publication of the full text of the 2008 Decision and any lack of expedition in the main action must, to a great extent, be attributed not to the applicant but to the Commission.

- 37 Finally, although it is true that the victims of the car glass cartel can equally rely on a right to an effective remedy as regards their actions for damages against cartel members, such as the applicant, the fact remains that the exercise of that right would merely be delayed if the interim measures sought by the applicant were granted, which would entail a temporal restriction on the exercise of the right, whilst the corresponding right of the applicant would be reduced to nothing if the application for interim relief were dismissed. The applicant's interest must thus prevail over that of the victims of the cartel.
- 38 Since, following the weighing up of interests, the balance is thus in the applicant's favour, there is a clear urgency in protecting the interest defended by it, provided that it is likely to suffer serious and irreparable harm in the event of its application for interim measures being dismissed. In that regard, the applicant maintains, in essence, that the situation which would result from publication of the fuller version of the 2008 decision could not be undone.
- 39 The applicant maintains that publication of the category III information will cause serious and irreparable prejudice to the right to the protection of personal data which Article 8 of the Charter confers on its employees who were allegedly involved in implementation of the cartel.
- 40 In that regard, it must first of all be recalled that, according to settled case-law, an applicant must show that the suspension of operation sought is necessary in order to protect its own interests, whilst it cannot, for the purpose of establishing urgency, plead damage which is not personal to it, such as, for example, damage to the rights of third parties. Accordingly, the applicant cannot rely on the damage which its employees alone would suffer to substantiate the urgency of the suspension of operation sought (see, to that effect, orders of the President in Case T-31/07 R *Du Pont de Nemours (France) and Others v Commission* [2007] ECR II-2767, paragraph 147 and the case-law cited, and of 25 January 2012 in Case T-637/11 R *Euris Consult v Parliament*, not published in the ECR, paragraph 26), rather the applicant must show that such damage is likely to entail - for itself - serious and irreparable personal harm (see, to that effect, order of the President in Case T-213/01 R *Österreichische Postsparkasse v Commission* [2001] ECR II-3963, paragraph 71).
- 41 That is not the case here, since the applicant merely maintains that disclosure of the category III information [*confidential*]¹. The applicant thus confines itself to a vague and speculative assertion but does not provide any details in that regard or substantiate its assertion with any evidence. The same is true of the assertion that its employees might bring actions claiming that it has failed to protect them. In particular, it has not maintained, let alone shown, that it would be in the interests of the sound administration of justice for it to ensure the collective defence of the interests of the employees concerned on the ground that they cannot be required, because there are so many of them, to bring separate actions to secure protection of their personal data. Consequently, the applicant has not succeeded in establishing that the alleged damage to the interests of its employees would entail serious and irreparable harm for its undertaking as such.
- 42 Accordingly, the condition relating to urgency is not met so far as publication of the category III information is concerned. In view of the fact that this condition and the condition relating to a *prima facie* case (see paragraph 24 above) must both be met, the application for interim relief must be dismissed at this point so far as that information is concerned.

1 — Confidential data omitted.

- 43 With regard to the category I and II information, the applicant maintains that, once the confidential information was published, subsequent annulment of the contested decision because of an infringement of Article 339 TFEU would not reverse the effects of publication. Indeed, the applicant's customers, competitors and suppliers, financial analysts and the general public could have access to the information in question and use it as they pleased, which would cause serious and irreparable harm to the applicant. Consequently, the applicant would be denied effective judicial protection if the information at issue was disclosed before the resolution of the main action.
- 44 In that regard, it must be stated that if it were to be established, in the main proceedings, that the information in question is confidential and that its disclosure, as proposed by the Commission, is incompatible with the protection of professional secrecy under Article 339 TFEU, the applicant could rely on that provision, which confers on it a fundamental right, in order to object to that publication. 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 ('ECHR'), 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 ('the Convention'), and in Article 7 of 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. Moreover, the Court of Justice added that it had already acknowledged that the protection of business secrets is a general principle and that the undertaking concerned might suffer 'extremely serious damage' if there were improper communication of certain information (see, to that effect, *Varec*, paragraphs 49 and 54).
- 45 Given that the Commission, if this application for interim measures were dismissed, could immediately publish the category I and II information, there is a risk that the applicant's fundamental right to the protection of its professional secrets, enshrined in Article 339 TFEU, Article 8 of the Convention 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 applicant's fundamental right to an effective remedy, enshrined in Article 6 of the Convention 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 adjudicated on the main action. Consequently, since the applicant's 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 in relation to the category I and II information.
- 46 None of the Commission's arguments to the contrary calls those considerations into question.
- 47 Thus the Commission's assertion that the applicant has not claimed that there is any infringement of a fundamental right has no factual basis. By maintaining that it would be denied effective judicial protection if the information at issue was published before the conclusion of the main proceedings, the applicant has, implicitly but necessarily, relied on Article 6 of the Convention and Article 47 of the Charter which both affirm the fundamental right to an effective remedy. Furthermore, although the applicant has complained of an infringement of Article 339 TFEU, it is sufficient to observe that the protection of professional secrecy, which that provision safeguards, has the status of a fundamental right for the purposes of Article 8 of the Convention and Article 7 of the Charter (see paragraph 44 above), consequently reliance on Article 339 TFEU necessarily entails reliance on those other two provisions.
- 48 The Commission then refers to the case-law of the ECHR (*Gillberg v Sweden* [GC], no 41723/06, §§ 67 and 72, of 3 April 2012) arguing that Article 8 of the Convention does not apply in the present case, as a person cannot rely on that provision in order to complain of damage which is the foreseeable

consequence of acts it has itself committed, such as a criminal offence. The Commission concludes that, since the information at issue in the present case serves only to describe the applicant's infringement, the applicant cannot prevent its publication by relying on its right to private life.

- 49 In that regard, it must be noted that, far from considering whether the Swedish measure complained of had 'breached a right under Article 8 of the Convention not to impart confidential information', the ECHR merely sought to ascertain whether Mr Gillberg's criminal conviction amounted in itself to interference with his right to respect for his private life (*Gillberg v. Sweden*, §§ 56, 64, 65 and 68). It answered that question in the negative inasmuch as the harmful effects in personal, social, psychological and economic terms were 'foreseeable consequences of the commission of a criminal offence [which] can therefore not be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for "private life" within the meaning of Article 8 of the Convention' (*Gillberg v. Sweden*, § 68).
- 50 In these proceedings the issue is not whether the applicant may object, on the basis of Article 8 of the Convention, to the Commission's imposition of a fine for an infringement of Article 101 TFEU, to its own public designation as a member of the car glass cartel or to other 'foreseeable' negative consequences for its business arising from such a sanction. In this case the European Union judicature must rather determine whether the category I and II information must be afforded confidential treatment, pursuant to Article 8 of the Convention, or whether that information can, on the contrary, be used by the Commission for the purpose of providing a very detailed public description of the applicant's unlawful conduct. Since a question of that kind relating to whether or not certain specific pieces of information were confidential did not form the subject-matter of the judgment in *Gillberg v. Sweden*, the argument which the Commission bases on that decision of the ECHR cannot succeed.
- 51 Referring to a number of orders of the Presidents of the Court of Justice and the General Court, the Commission adds that, in any event, it is not sufficient for the applicant to allege infringement of a fundamental right to the protection of professional secrecy or business secrets but that it must also establish that that infringement is likely to cause it serious and irreparable material or non-material damage. It has not been shown in the present case that any damage of that nature would occur.
- 52 In that connection, the Commission refers first to the orders in Case T-198/03 R *Bank Austria Creditanstalt v Commission* [2003] ECR II-4879 and Case T-201/04 R *Microsoft v Commission* [2004] ECR II-4463, in which the President of the General Court, in response to arguments relating to the irreversible nature of publication of sensitive information that might be used in actions for damages against the undertaking concerned, regarded as purely financial the damage which might be caused to that undertaking by the information being used in that way, pecuniary damage not normally being regarded as irreparable (see the order in *Bank Austria Creditanstalt v Commission*, paragraphs 45, 47, 52 and 53), pointing out that the disclosure of information previously kept secret – whether because it is the subject of an intellectual property right or because it constitutes a trade secret – does not necessarily mean that serious damage will occur, even though knowledge of such information cannot be deleted from memories (see order in *Microsoft v Commission*, paragraphs 253 and 254).
- 53 In that regard, it must, however, be stated that the approach taken in the interim orders in *Bank Austria Creditanstalt v Commission* and *Microsoft v Commission* with regard to the protection of allegedly confidential information cannot be followed in so far as it disregards the fundamental rights relied upon by the person seeking interim protection for that information. At least since the entry into force – on 1 December 2009 – of the Treaty of Lisbon, which raised the Charter to the level of primary European Union law and provides that it is to have the same legal value as the Treaties (first subparagraph of Article 6(1) TEU), an imminent risk of a serious and irreparable breach of the fundamental rights conferred by Articles 7 and 47 of the Charter (and by the corresponding provisions of the Convention) in that field has had to be regarded, in itself, as harm justifying the grant of the interim protection requested.

- 54 The Commission then mentions the order of the President in Case C-43/98 P(R) *Camar v Commission and Council* [1998] ECR I-1815, paragraphs 46 and 47, which rejected an argument concerning the irreparable nature of the harm alleged on the ground that ‘it [was] not sufficient to allege the infringement of fundamental rights, in this case the right to property and the right to pursue a professional or trade activity, in the abstract, for the purposes of establishing that the harm which could result would necessarily be irreparable’. It must, however, be borne in mind that the case giving rise to that order concerned an importer who considered that he had been awarded an insufficient number of import licences and was trying to obtain additional licences. Although the importer thus relied on his right to property and the right to pursue a professional or trade activity, the fact that an allegedly inadequate number of import licences had been awarded merely restricted the exercise of the fundamental rights at issue. As the importer was still able to exercise those rights, the judge hearing the application required it to be shown that the restriction of the rights was serious and irreparable. In the present case, however, if its application for interim relief were dismissed, the applicant would be utterly deprived of the fundamental rights it has pleaded, which would entail the total loss of those rights and thus the most serious and irreparable harm possible. Accordingly, the order in *Camar v Commission and Council* is irrelevant for the examination in these proceedings of the conditions for urgency.
- 55 The same is true – for the same reasons – of the order of the President of 18 March 2011 in Case T-457/09 R *Westfälisch-Lippischer Sparkassen- und Giroverband v Commission*, not published in the ECR, paragraph 48, according to which the assertion that a fundamental right has been flagrantly infringed is not sufficient to establish that any damage that might result is serious and irreparable. In the case which gave rise to that order, a minority shareholder of a bank objected to the economic consequences of executing a condition which the Commission had attached to its authorisation of State aid for that bank, a condition which that shareholder had himself accepted in principle (order in *Westfälisch-Lippischer Sparkassen- und Giroverband v Commission*, paragraph 47). Unlike the present case, what was at issue was thus a simple restriction of the exercise of the right to property and of the right to equal treatment, which the applicant in that case had invoked.
- 56 With regard to the order of the President in Case C-7/04 P(R) *Commission v Akzo and Akcros* [2004] ECR I-8739, which concerned whether or not documents seized by the Commission in the course of an inspection were confidential, the issue was not the public’s access to those documents, but whether the Commission was entitled to read them. It was thus in a quite specific context, which is not comparable to that of the present case, that it was held that, while the mere reading by the Commission of the documents at issue, without them being used in proceedings for the infringement of the competition rules, might possibly be capable of affecting professional privilege, that circumstance was not in itself sufficient to establish that the condition of urgency was satisfied (order in *Commission v Akzo and Akcros*, paragraph 41). If a Commission decision ordering an inspection is annulled, the Commission will, on that account, be prevented from using, for the purpose of proceeding in respect of an infringement of the competition rules, any documents or evidence which it might have obtained in the course of that inspection, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Courts of the European Union (order in *Commission v Akzo and Akcros*, paragraph 37). In such a situation, the mere fact of disclosing confidential information to the Commission, a public authority which is itself required to respect professional secrecy, could obviously not amount to a serious and irreparable breach of the fundamental right relied on.
- 57 Consequently, since the condition relating to urgency is met so far as the category I and II information is concerned, the Court will consider whether or not there is a *prima facie* case in that regard.

Whether there is a *prima facie* case

- 58 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 the President of 19 September 2012 in Case T-52/12 R *Greece v Commission* [2012] ECR, paragraph 13 and the case-law cited; see also, to that effect, order of the President in Case C-39/03 P-R *Commission v Artegoda and Others* [2003] ECR I-4485, paragraph 40).
- 59 With regard more particularly to disputes concerning interim protection for information alleged to be confidential, it should be added that the judge hearing the application for interim measures – if he is not to disregard the intrinsically ancillary and provisional nature of proceedings for interim measures (see paragraphs 29 to 31 above) and the imminent risk of negation of the fundamental rights relied on by the party seeking interim protection of those rights (see paragraphs 44 and 45 above) – may, as a rule, conclude that there is no *prima facie* case only where the information in question is obviously not confidential. That would be the case, for example, if the information for which protection is sought were published in the applicant's annual report or in a measure published in the *Official Journal of the European Union*.
- 60 In this case, the applicant, in the framework of the second plea raised in support of its main action, complains that the Commission has, *inter alia*, infringed Article 339 TFEU and Articles 28(1) and 30(2) of Regulation No 1/2003 in deciding to publish information which should be regarded as business secrets and whose confidentiality should thus be protected. Furthermore, the Commission erred in its assessment of whether there were overriding interests permitting disclosure of the information in question.
- 61 The applicant submits that the category I and II information is commercially sensitive, secret and not known to the public, inasmuch as the publication at issue would disclose to customers, competitors, suppliers and the general public details in consolidated form of its principal customers, including details concerning its relations with those customers, such as the make and model of the cars for which it supplies parts. That type of information is clearly sensitive, as is information relating to the number of parts supplied, the share of business of a particular car manufacturer, prices, pricing calculations, specific discounts, percentages, etc. That information shows the applicant's commercial practices with regard to manufacturers which remain its customers and could also be used by other manufacturers in their business dealings with it.
- 62 In so far as the Commission denies that the information at issue is confidential on the ground that it is more than five years old, the applicant contends that there is no pre-determined threshold when data become historic, since, whether data are genuinely historic depends on the specific characteristics of the relevant market. Furthermore, in its judgment of 28 June 2012 in Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 67, the Court drew attention to the fact that, under Article 4(7) 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), the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond that period if necessary.
- 63 The applicant explains that [*confidential*]. Consequently, consolidated category I information has not ceased to be inherently confidential because of the passage of time, as disclosure of that information would permit competitors and customers to obtain an extremely detailed list relating to the applicant and specific aspects of its relations with its customers.

- 64 So far as category II information is concerned, the applicant submits that it continues to be confidential and commercially sensitive because of the specific characteristics of the car glass market, in which contracts are often negotiated several years before production. Contracts are long term and are frequently renewed as car glass suppliers continue to supply manufacturers for several generations of a model. In view of that market structure, the proposed disclosure would result in significant transparency, which would be likely to alter the characteristics of the market and be detrimental to the applicant's interests. The applicant [*confidential*]. That information contains targeted specific details pertaining to prices of products, which are of continued relevance to the applicant's commercial dealings. Publication of that information would permit customers and competitors to extrapolate prices to current levels, would result in transparency in the market about prices generally and would thus adversely affect the applicant's position as that information could be used by its customers in negotiations and by other operators to create a competitive disadvantage for it.
- 65 In brief, the applicant complains that the Commission failed to assess whether the category I and II information as a whole, when read not just by individual passages but together, published in a consolidated version accessible on the internet, remains confidential. It submits that publication of that information together makes it extremely sensitive as it would give the general public a comprehensive insight, with a very high level of detail, into the applicant's sensitive dealings with the majority of its important customers. That could also increase exponentially and artificially transparency in the car glass market by facilitating access by each of the applicant's customers to sensitive information pertaining to its dealings with its other customers. That information would also be made available to potential customers and the general public, resulting in potentially significant harm to the applicant's interests.
- 66 The Commission's response, in essence, is that the requests for confidentiality which the applicant made to the Hearing Officer were too vague and general to justify the confidential treatment sought, except in a very limited number of cases and that, even in the proceedings for interim relief, the applicant has failed to establish, with regard to each specific piece of information referred to, that that information should be protected as a business secret. Furthermore, the information at issue was exchanged in the car glass cartel and was thus made known to other undertakings participating in the cartel. For that reason, it can no longer be regarded as secret. In any event, the information at issue is five years old or older and, on that ground, has to be regarded as historic, as the applicant has not shown that the information, despite its age, still constitutes essential elements of its commercial position.
- 67 In that regard, it must be stated – without prejudice to the merits of the arguments put forward by the Commission, which will be considered by the Court when it adjudicates upon the substance – that the documents in the case do not support the conclusion that there is clearly no *prima facie* case.
- 68 First, the 2008 Decision whose publication in a non-confidential version is at issue has 731 recitals and 882 footnotes. As is apparent from point 6 of the contested decision, the applicant's requests for confidentiality in respect of category I information concern 270 recitals and 46 footnotes, whilst the requests relating to category II information concern 64 recitals and 19 footnotes. It is thus apparent, *prima facie*, that consideration of whether the Commission made errors in rejecting the majority of those confidentiality requests raises complex questions the resolution of which calls for a very detailed examination, which cannot be carried out in proceedings for interim measures but must be dealt with in the main proceedings.
- 69 Second, the fact that the Hearing Officer recognised that certain pieces of both the category I and the category II information were secret is in itself an indication that the information at issue cannot, on the face of it, be classified *en bloc* – because of its very nature – as clearly neither secret nor confidential. The recognition that some information was secret also seems to undermine the argument that the information, merely because it was exchanged between members of the car glass cartel, was transformed into information that was generally known outside the applicant. In any event, in so far

as the Commission refers, in this context, to the order of the President of the First Chamber of the General Court of 5 August 2003 in Case T-168/01 *Glaxo Wellcome v Commission*, not published in the ECR, paragraph 43, and to the order of the President of the Eighth Chamber of the General Court of 8 May 2012 in Case T-108/07 *Spira v Commission*, not published in the ECR, paragraph 52, it is not apparent that the fact that the applicant made the information at issue known to the other members of the car glass cartel, but not to its suppliers, customers and competitors other than the cartel members, must clearly be interpreted as meaning that that information is available, if not to the general public, at least to certain specialist circles as referred to in those two orders.

- 70 Furthermore, inasmuch as the Commission maintains that all the information at issue is more than five years old and has thus ceased to be secret, it is true that data concerning an undertaking which are five years old or older must, as a general rule, be regarded as historic. However, an interested party may demonstrate that, despite their age, those data still constitute essential elements of its commercial position (see, to that effect, order of the President of the Fourth Chamber of the General Court in Case T-383/03 *Hynix Semiconductor v Council* [2005] ECR II-621, paragraph 60 and the case-law cited). It is not apparent that the applicant's arguments set out in paragraphs 63 to 65 above are, *prima facie*, wholly irrelevant for establishing that the category I and II information has remained secret because of its very nature. Nor can it clearly be ruled out that Article 4(7) of Regulation No 1049/2001 – pursuant to which the confidentiality of commercial interests or sensitive documents may exceptionally be protected for a period of 30 years, possibly beyond that period if necessary – may have a bearing on the assessment to be carried out in the present case.
- 71 The President of the General Court cannot therefore exclude, *prima facie*, the possibility that the information at issue is known only to a limited number of persons and that its disclosure would be liable to cause serious harm to the applicant, as stated in the judgment in Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429, paragraph 71.
- 72 Finally, assuming that the information at issue may be regarded as constituting business secrets of the applicant, the question whether that information is, objectively, worthy of protection will require the applicant's interest in the information not being disclosed to be weighed against the public interest that the activities of the European Union institutions take place as openly as possible (judgment in *Bank Austria Creditanstalt v Commission*, paragraph 71). An exercise of that kind entailing the weighing up of the various interests involved – regardless of whether it deals generally with the very nature of the category I and II information or with each of the more than 300 recitals and 60 footnotes cited – will call for delicate assessments which must be a matter for the Court adjudicating on the substance of the case. In any event, it is not obvious from the documents in the file that, following that weighing up of interests, the balance will clearly be in favour of the interest defended by the Commission.
- 73 In view of the foregoing considerations, it is clear that the present case raises complex and delicate questions which cannot, *prima facie*, be considered to be clearly of no relevance, while their resolution calls for thorough examination within the main proceedings. Accordingly, it must be held that there is a *prima facie* case.
- 74 It follows that, since all the requisite conditions are satisfied, the application for interim measures must be upheld in so far as it seeks to prevent publication by the Commission of the category I and II information and must be dismissed as to the remainder.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

1. **The applications of HUK-Coburg, LVM, VHV and Württembergische Gemeinde-Versicherung for leave to intervene are dismissed.**
2. **Operation of Commission Decision C(2012) 5718 final of 6 August 2012 on the rejection of a request for confidential treatment submitted by Pilkington Group Ltd 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/39.125 – Car glass) is suspended in relation to two categories of information, as referred to in point 6 of Decision C(2012) 5718 final, concerning, first, customer names, product names or descriptions of products, as well as any other information which might identify individual customers and, second, the number of parts supplied by Pilkington Group, the share of the business of a particular car manufacturer, pricing calculations, price changes etc.**
3. **The Commission is ordered to refrain from publishing a version of its Decision C(2008) 6815 final of 12 November 2008 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 – Car glass) which is more complete, in relation to the information in the two categories referred to in point 2 above, than that published in February 2010 on the Commission's website.**
4. **The application for interim relief is dismissed as to the remainder.**
5. **The costs are reserved.**

Luxembourg, 11 March 2013.

E. Coulon
Registrar

M. Jaeger
President