Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

2 March 2016*

(Application for interim measures — Appeal — Administrative procedure — Publication of a decision finding the existence of an unlawful cartel on the European market for hydrogen peroxide and perborate — Commission Decision rejecting a request for confidential treatment of some information in the decision finding the existence of that cartel — Leniency Notice — Judgment of the General Court of the European Union dismissing the action for annulment of that decision — Application to suspend the operation of that decision — Prima facie case — Urgency — Weighing of interests)

In Case C-162/15 P-R,

APPLICATION for suspension of operation and interim measures under Articles 278 TFEU and 279 TFEU, brought on 6 October 2015,

Evonik Degussa GmbH, established in Essen (Germany), represented by C. Steinle, C. von Köckritz and A. Richter, Rechtsanwälte,

applicant,

the other party to the proceedings being:

European Commission, represented by G. Meessen, M. Kellerbauer, and F. van Schaik, acting as Agents,

defendant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the Advocate General, M. Szpunar,

makes the following

Order

1 By its appeal, lodged at the Registry of the Court of Justice on 8 April 2015, Evonik Degussa GmbH requested the Court of Justice to set aside the judgment of the General Court of the European Union of 28 January 2015 in *Evonik Degussa* v *Commission* (T-341/12, EU:T:2015:51; 'the judgment under appeal'), whereby the General Court dismissed its action for the annulment of Commission Decision C(2012) 3534 final of 24 May 2012 rejecting a request for confidential treatment made by the applicant pursuant to Article 8 of Decision 2011/695/EU of the President of the 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').

* Language of the case: German.

2 By a separate document lodged at the Registry of the Court on 6 October 2015, the applicant made this application for interim measures, under Articles 278 TFEU and 279 TFEU, requesting that the Court suspend the operation of the contested decision and order the European Commission to refrain, until delivery of the final judgment in the appeal in Case C-162/15 P, from publishing a non-confidential version of the Commission Decision C(2006) 1766 final of 3 May 2006 relating to proceedings pursuant to Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, Eka Chemicals AB, 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/38.620 — Hydrogen peroxide and perborate), a summary of which was published in the *Official Journal of the European Union* (OJ 2006 L 353, p. 54; 'the PHP decision'), that is more complete, in relation to the applicant, than the non-confidential version of that decision published in 2007.

3 The Commission lodged its observations on 29 October 2015.

Background to the dispute and the judgment under appeal

4 In the PHP Decision, the Commission found, in particular, that Degussa AG, now Evonik Degussa GmbH, had participated in an infringement of Article 81 EC on the territory of the European Economic Area (EEA), with 16 other companies active in the hydrogen peroxide and perborate sector. As the applicant had been the first company to contact the Commission, in December 2002, under the Commission's Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') and had, on that occasion, fully cooperated by providing the Commission with all the information in its possession concerning the infringement, it was granted complete immunity from fines.

5 In 2007 a first non-confidential version of the PHP Decision was published on the website of the Commission's Directorate-General for Competition.

6 In a letter to the applicant dated 28 November 2011, the Commission informed the applicant that it intended to publish a new, more complete, non-confidential version of the PHP Decision, setting out the entire content of that decision with the exception of confidential information. On that occasion, the Commission asked the applicant to identify the information in the PHP Decision in respect of which it proposed to request confidential treatment.

7 The applicant was of the view that the more complete non-confidential version contained confidential information or business secrets, and informed the Commission, in a letter of 23 December 2011, that it objected to the proposed publication. In support of its objection, the applicant claimed, more particularly, that that non-confidential version contained a significant amount of information which it had sent to the Commission under the 2002 Leniency Notice, and also the names of a number of its staff and information concerning its business relationships. According to the applicant, the proposed publication thus disregards, in particular, the principles of protection of legitimate expectations and equal treatment and is liable to have an adverse effect on the Commission's investigations.

8 By letter of 15 March 2012, the Commission informed the applicant that it was willing to delete from the new non-confidential version to be published all the information that would directly or indirectly allow the source of information communicated pursuant to the 2002 Leniency Notice to be identified, and also the names of the applicant's staff. On the other hand, the Commission considered that there was no reason to grant the benefit of confidentiality to the other information in respect of which the applicant had requested confidential treatment.

9 Taking advantage of the possibility provided for in Decision 2011/695/EU of the President of the 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; 'the decision on the function and terms of reference of the hearing officer'), the applicant referred the matter to the hearing officer, requesting him to exclude from the non-confidential version to be published all information supplied by the applicant pursuant to the 2002 Leniency Notice.

10 By the contested decision, the hearing officer, on behalf of the Commission, rejected the applicant's requests for confidential treatment.

11 The hearing officer first of all referred to the limits of his terms of reference, which enabled him only to consider whether information should be regarded as confidential and not to remedy an alleged breach of the applicant's legitimate expectations of the Commission.

12 The hearing officer further noted that the applicant's only reason for objecting to the publication of a new, more complete version of the PHP Decision was that it contained information supplied pursuant to the 2002 Leniency Notice and that the communication of such information to third parties was likely to be detrimental to it in the context of actions for damages brought before the national courts. In the hearing officer's view, the Commission has a wide discretion to decide to publish more than the main content of its decisions. In addition, references to documents in the administrative file are not, in themselves, business secrets or other confidential information.

13 The hearing officer took the view that the applicant had failed to show that the publication of information which it had communicated to the Commission with a view to benefiting from the leniency programme governed by the 2002 Leniency Notice was likely to cause it serious harm. The interest of an undertaking on which the Commission has imposed a fine for an infringement of competition law in non-disclosure of the details of the unlawful conduct of which it is accused to the public does not, in any event, merit special protection. The hearing officer observed, on that point, that actions for damages formed an integral part of European Union competition policy and that, accordingly, the applicant could not claim a legitimate interest in being protected against the risk of being subject to such actions as a result of its participation in the infringement to which the PHP Decision related.

14 The hearing officer also considered that he was not competent to answer the applicant's argument that disclosure to third parties of the information which it had communicated to the Commission in the context of the leniency programme would undermine that programme, as such an issue was outside the scope of his terms of reference. He observed, in that regard, that, in accordance with the case-law, it is for the Commission alone to assess the extent to which the factual and historical context of the impugned conduct must be brought to the knowledge of the public, provided that it does not contain confidential information.

15 Last, according to the hearing officer, since his terms of reference, under Article 8 of the decision on the function and terms of reference of the hearing officer, were limited to assessing the extent to which information might be covered by the obligation of professional secrecy or should be given confidential treatment for some other reason, he was not competent to give a ruling on the applicant's argument that publication of the information which it had communicated under the leniency programme would have constituted an unwarranted difference in treatment by comparison with the other participants in the infringement identified in the PHP Decision.

16 The applicant therefore brought an action seeking the annulment of the contested decision and an application for interim measures.

17 The President of the General Court granted the latter application by its order of 16 November 2012 in *Evonik Degussa* v *Commission* (T-341/12 R, EU:T:2012:604). However, the General Court dismissed the action for annulment in the judgment under appeal, against which judgment the applicant has brought the appeal referred to in paragraph 1 of this order.

18 Following that judgment, the Commission informed the applicant that it intended to publish a non-confidential version of the PHP decision that was more complete than the non-confidential version of that decision published in 2007. Consequently, the applicant also brought this application for interim measures.

Forms of order sought by the parties

19 The applicant claims that the Court should:

— suspend the operation of the contested decision until the Court has ruled on the substance of the appeal;

— order the Commission not to publish, until the Court has ruled on the substance of the appeal, on its website and/or any other location and/or not to make accessible to third parties a non-confidential version of the PHP decision containing, in relation to the applicant, information that is more complete as compared with the non-confidential version of that decision currently available which was published on the website of the Commissions' Directorate General for Competition;

— order any other relief as may seem just and appropriate in the circumstances; and

— reserve the costs.

20 The Commission asks the Court to dismiss the application in its entirety and to order the applicant to pay the costs.

The application for interim measures

21 In order to give a ruling on this application for interim measures, it must be borne in mind that Article 160(3) of the Rules of Procedure of the Court provides that applications for interim measures are to 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 measure applied for'. The judge hearing an application for interim relief 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. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. The judge hearing an application for interim relief is also to undertake, when necessary, a weighing of the competing interests (orders of the Vice-President of the Court in *Commission* v *ANKO*, C-78/14 P-R, EU:C:2014:93, paragraph 14, and in *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 21).

The establishment of a prima facie case

22 According to settled case-law, the condition relating to the establishment of 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, not unfounded. That is the case, inter alia, where one

of the pleas relied on 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 Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 67).

23 However, in the present context, the fact that the application for interim measures is for the grant of suspension of operation of the contested decision, and not of the judgment under appeal, nevertheless entails consequences for the assessment as to whether there is a prima facie case (orders of the President of the Court in *Technische Glaswerke Ilmenau* v *Commission*, C-404/04 P-R, EU:C:2005:267, paragraph 16, and of the Vice-President of the Court in *Greece* v *Commission*, C-431/14 P-R, EU:C:2014:2418, paragraph 21).

24 However solid the pleas and arguments put forward by the applicant against the judgment under appeal may be, they cannot suffice, in themselves, to justify in law suspension of operation of the contested decision. In order to establish that the condition relating to a prima facie case is satisfied, the applicant must succeed in showing, in addition, that the pleas and arguments relied on against the legality of that decision in the action for annulment are such as to justify, prima facie, the grant of the suspension of operation sought (order of the Vice-President of the Court in *Greece* v *Commission*, C-431/14 P-R, EU:C:2014:2418, paragraph 22).

25 Therefore, as regards the present application for interim measures, in assessing the condition relating to the existence of a prima facie case, account must be taken of the fact that the contested decision, the operation of which the applicant asks the Court to suspend, has already been considered by a court of the European Union, both as to the facts and the law, and that that court held that the action brought against that decision was unfounded (order of the President of the Court in *Technische Glaswerke Ilmenau* v *Commission*, EU:C:2005:267, paragraph 19). The need to put forward, in this application for interim measures, pleas in law which appear, prima facie, particularly solid follows therefore from, inter alia, the fact that those pleas must be capable of casting doubt on the findings made by the General Court in giving judgment on the substance of the arguments relied on by the applicant at first instance (see, to that effect, orders of the President of the Court in *Technische Glaswerke Ilmenau* v *Commission*, C-404/04 P-R, EU:C:2005:267, paragraph 20, and of the Vice-President of the Court in *Greece* v *Commission*, C-431/14 P-R, EU:C:2014:2418, paragraph 24).

26 In this case, the applicant relies on three pleas as grounds in support of its appeal. The first ground of appeal claims that an error was committed by the General Court in relation to the determination of the competence assigned to the hearing officer with respect to decisions on the publication of information under Article 8(2) and (3) of the decision on the function and terms of reference of the hearing officer. The second ground of appeal claims an infringement of Article 339 TFEU, Article 30 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), Article 4(2) 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), and of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR') and Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'). By its third ground of appeal, the applicant alleges an infringement of the obligation to state reasons and breach of the principles of protection of legitimate expectations and legal certainty.

27 In that regard, it must be observed that, irrespective of the outcome in the main proceedings with respect to the first ground, the Court will be called upon to give a ruling on the second ground of appeal, given that the competence of the hearing officer to determine the question of whether the

information which is to be published constitutes business secrets or must in any event be deemed to be confidential, the question that is the subject matter of the second ground, not only is not disputed by the applicant, but is manifestly not a matter on which there is any doubt.

28 Moreover, the arguments in support of the second ground overlap, at least in part, with those put forward in relation to the third ground, and consequently, in order to establish that those two grounds support a prima face case, those two grounds can conveniently be examined together.

29 To that end, it must be recalled that, as regards disputes concerning interim protection for information alleged to be confidential, 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 — may, as a rule, conclude that there is no prima facie case only where the information in question is obviously not confidential (order of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 68).

30 The second ground of appeal is directed against paragraphs 76 to 127 of the judgment under appeal, in which the General Court held, first, that the information at issue could not be considered to be business secrets, given that that information was historical, and, second, that, in any event, that information could not be considered to be confidential in relation to the obligation of professional secrecy for the sole reason that the information was voluntarily disclosed by an undertaking to the Commission with the aim of qualifying for the leniency programme.

31 Accordingly, the applicant claims, first, that, contrary to what was stated by the General Court in paragraphs 84 to 86 of the judgment under appeal, that information did not cease to be confidential by reason solely of the fact that it dated from more than five years earlier and that it ought therefore to have been treated as business secrets. In that regard, the applicant argues that the case-law cited by the General Court cannot be applied to this case and that, on the contrary, under Article 4(7) of Regulation No 1049/2001, commercial interests may preclude the publication of information for a period that may be as long as 30 years. According to the applicant, the information at issue continues to constitute 'essential elements of its commercial position', if only because it has been established that publication of that information would cause it serious harm, as the General Court itself recognised in paragraph 105 of the judgment under appeal.

32 Secondly, as regards the classification of the information at issue as being, in any event, confidential, the applicant asserts, first, that, contrary to the position taken by the General Court in paragraphs 92 and 93 of the judgment under appeal, the publication of extracts from the statements of applicants for leniency and the publication of those statements must be governed by the same criteria. Accordingly, the considerations which, in the judgment in *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112), led the Court to interpret Regulation No 1049/2001 as meaning that a reliance can be placed on a general presumption that the commercial interests of parties to proceedings relating to a cartel are placed in jeopardy where the statements of applicants for leniency are made public, should also apply to the publication of passages extracted from those statements and reproduced, whether directly or indirectly reported, in the non-confidential version of the Commission decision. That is even more the case when the publication of such passages is in breach of the assurances given by the Commission with respect to the statements of applicants for leniency in Point 32 of the 2002 Leniency Notice and in Point 40 of the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'). Accordingly, the distinction made by the Commission between, on the one hand, the publication of documents submitted by applicants for leniency and, on the other, the publication of information extracted from those documents, is formalistic and incompatible not only with the case-law of the General Court, but also with other relevant provisions of EU law.

33 Further, in this case, there should have been taken into consideration the fact that the Commission had previously published in 2007 a non-confidential version of the PHP decision and that the weighing, mentioned in paragraph 106 of the judgment under appeal, of interests for or against the publication of the information at issue had therefore already taken place. The Commission's administrative procedure was, at the latest, closed by that publication, as was recognised in paragraph 172 of the judgment under appeal. As from the date of that publication, Article 30 of Regulation No 1/2003 therefore no longer applied and nor did access given to the information fall any longer within the scope of Regulation No 1049/2001.

34 In addition, contrary to what is stated in paragraphs 107 to 111 of the judgment under appeal, the interests of the applicant are objectively worthy of protection. What is important to the applicant is not the avoidance of payment of damages or disclosure of the Commission's findings on the facts of the infringement. What is of more concern to the applicant is ensuring the protection, provided for by the 2002 and 2006 Leniency Notices, of the statements submitted by it which were made solely for the purposes of the leniency programme, in the expectation that they would remain confidential, and in which the applicant incriminated itself.

35 Last, in paragraphs 123 to 127 of the judgment under appeal, the General Court erred in rejecting the applicant's plea in law that there was an infringement of Article 8 ECHR and Article 7 of the Charter. In that regard, the applicant claims that the disclosure of the content of its statements, contrary to the 2002 Leniency Notice and the Commission's established practice, most certainly cannot be considered to be a foreseeable consequence of participation in the cartel.

36 In its arguments in support of its third ground of appeal, the applicant adds, in essence, that the General Court was in breach of its obligation to state reasons and of the principles of the protection of legitimate expectations and legal certainty by failing to take sufficient account of the fact that the Commission had previously, in 2007, published a non-confidential version of the PHP decision. According to the applicant, by that publication, the Commission had decided that the redacted information was not part of the main content of the reasons for the PHP decision, within the meaning of Article 30 of Regulation No 1/2003. Further, given that the publication of that first non-confidential version had not been described as provisional, the inference could be made that the Commission had taken a final view that the redacted passages did not merit publication. Such a favourable administrative act cannot, as a general rule, be withdrawn or revoked, at least to the extent that it was, as in this case, legally adopted.

37 Finally, the Commission, contrary to what was held by the General Court in paragraphs 155 to 157 of the judgment under appeal, was not entitled to alter its practice of maintaining the confidentiality of information such as that at issue, given that, after the closure of the procedure, the Commission was bound by its Leniency Notices and by Regulation No 1049/2001. At most, the Commission may be free to alter its leniency programme and, in future cases, grant less protection to the statements of applicants for leniency.

38 The Commission disputes the applicant's arguments.

39 In response to the second ground of appeal, the Commission contends, in the first place, that the General Court did no more than find that the applicant failed to establish, in accordance with the case-law of the General Court, the reasons why the information at issue, notwithstanding the substantial lapse of time, remained, exceptionally, essential elements of its commercial position or that of a third party and qualified, therefore, for the protection provided for in Article 30(2) of Regulation No 1/2003. In fact, according to the Commission, that information is no longer covered, on any view, by the obligation of professional secrecy or the protection of confidentiality, given that the facts of the infringement described date, exclusively, from more than 10 years ago.

40 Secondly, the Commission is of the opinion that, in the first place, the General Court was correct to hold that Regulation No 1049/2001 and the case-law relative thereto are of no relevance, in the light of their scope. What is at issue, in this case, is not access to documents, but the publication of the findings of fact made by the Commission as part of the reasons stated for the PHP decision. In any event, the judgment in *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112) recognised that an institution can rely on general presumptions that apply to certain categories of documents, though that option is not available to individuals. Moreover, the publication of those findings is not in breach of any assurance given by the Commission. If it is the case that the terms of Point 32 of the 2002 Leniency Notice created a legitimate expectation in the confidentiality of the documents received by the Commission pursuant to that notice, that provision created no legitimate expectation that the information contained in those documents would not be used by the Commission for the purposes of describing the facts of the infringement as part of the reasons stated in the PHP decision and, in that context, would not be made public. Accordingly, the distinction made between the documents and the Commission's findings of fact in relation to the facts of the infringement is not formalistic.

41 Next, the General Court should have taken account of the fact that the Commission had previously published a non-confidential version of the PHP decision in 2007. Contrary to what is stated by the applicant, the General Court did not hold in that regard, in paragraphs 155, 156 and 161 of the judgment under appeal, that a second publication was within the 'free' discretion of the Commission, since the General Court expressly emphasised the specific restriction on that discretion contained in the second sentence of Article 30(2) of Regulation No 1/2003. Further, nor can it be held that, as from the date of a first, provisional publication, Article 30 of that regulation 'no longer applies'. There is no basis for such a restriction in the wording of that provision and such a restriction is contrary to the objective pursued by the second paragraph of Article 1 TEU and Article 15(1) TFEU.

42 In addition, the applicant's assertion, at the current stage of proceedings, that what is important to it is not the avoidance of payment of damages or the disclosure of the Commission's findings as to the facts of the infringement, is contradictory of its arguments at first instance, as is apparent from paragraph 83 of the judgment under appeal.

43 Last, the General Court was correct to reject the plea in law claiming infringement of Article 8 ECHR and Article 7 of the Charter. While the right to protection of privacy enshrined in those provisions includes, in principle, the protection of a person's reputation and honour as well as the protection of private information, the European Court of Human Rights has made clear that Article 8 ECHR does not however offer protection against damage to reputation which is the foreseeable consequence of a person's own conduct, such as the commission of a criminal offence. That conclusion is applicable *mutatis mutandis* with respect to the foreseeable consequences of an infringement of European Union competition law. That being the case, the applicant ought to have expected, after committing the infringement found to exist by the PHP decision, that, in the event of that infringement being detected and investigated, details of its own actions would be made public in so far as they were relevant to the identification of that infringement.

44 As regards the third ground of appeal, the Commission contends that, by publishing a first non-confidential version of the PHP decision in 2007, it did not irrevocably exercise its discretion as to which parts of that decision were to be published. In fact, by that first publication, the Commission gave no indication, either explicitly or implicitly, that it was waiving the right subsequently to publish a more complete non-confidential version of the PHP decision. The reason why it is necessary to undertake a further publication is that the confidentiality of information is transitory, and that may necessitate further assessment after a certain period of time has elapsed. Accordingly, it is incorrect to claim, in particular, that the Commission had decided that the redacted information was not part of the main content of that decision and that its publication was therefore not required to satisfy the public interest in being informed. In fact, the Commission confined itself to deciding to publish initially the passages from the text of that decision which, essentially, indisputably did not contain business secrets, in order to be able, thereafter, to examine in detail the arguments of the parties

concerned that the other passages constituted such business secrets. A decision that the remaining passages were not part of the main content or did not merit publication was neither adopted nor expressed, implicitly or explicitly.

45 Finally, the General Court was correct to hold, in paragraph 161 of the judgment under appeal, that the mere fact that the Commission had published a first non-confidential version of the PHP decision in 2007 and had not described that publication as provisional could not have provided to the applicant any precise assurance that a further, more complete non-confidential version of that decision would not be published subsequently, for the purposes of the case-law cited in paragraph 135 of the judgment under appeal.

46 In the light of the foregoing, the view may be taken that the crux of the criticism that the applicant appears to direct against the judgment under appeal is that it failed to take into consideration the fact that, in essence, both access to the documents submitted by an undertaking as part of the leniency programme and the disclosure of the content of those documents by extracts, whether directly or indirectly reported, come to the same thing, that is, the same information is made available to third parties. That disclosure, like that access, should therefore be, as a general rule, prohibited, since it should be presumed that it is also likely to harm the commercial interests of the undertakings concerned. That applies *a fortiori* in this case, given that the Commission, following objections from the applicant, had previously not published the information at issue and that the applicant could therefore legitimately expect that the question of the confidentiality of that information was definitively resolved.

47 Without prejudice to the validity of the arguments put forward by the Commission, the merits of which will be examined by the court hearing the appeal, it is clear that there is a difficult legal issue the solution to which is not immediately obvious and that, consequently, it is not apparent that the information at issue is obviously not confidential.

48 It must first be stated that the Court has not yet given a ruling on either the question of which criteria are to be taken into consideration in order to establish whether particular information constitutes a business secret, or, as was also stated in the order of the President of the General Court in *Evonik Degussa* v *Commission* (T-341/12 R, EU:T:2012:604, paragraph 44), on the question of the alleged confidentiality of information such as that at issue in this case.

49 As regards the specific arguments put forward by the parties, the following observations can be made.

50 First, it is true that, as argued by the Commission, the disclosure of information, in accordance with Article 30 of Regulation No 1/2003, and the right of access to documents, under Regulation No 1049/2001, are legally distinct. However, to the extent that, as claimed by the applicant, the contested disclosure concerns extracts from documents, it appears that such disclosure leads to a situation that is comparable, in terms of practical effect, to that brought about by access to those documents. Irrespective of the legal basis on which the information is made public, that disclosure necessarily entails that third parties become aware of that information, the confidentiality of which is, consequently, no longer protected (see, by analogy, judgment in *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraph 89).

51 That applies *a fortiori* where, contrary to the Commission's contention, the applicant is not complaining that the Commission published its own findings of fact on which the PHP decision was based. In fact, the applicant expressly recognises the Commission's right to do so. However, the applicant disputes the Commission's ability to publish extracts from the documents concerned, whether directly or indirectly reported, thus reproducing verbatim the statements made by the applicant in its capacity as an applicant for leniency.

52 In such circumstances, it is true that the case-law concerning access to the file pursuant to Regulation No 1049/2001 is not directly applicable. Nonetheless, it is conceivable that the findings that led the Court, in that case-law, to hold that the Commission was entitled to presume that the disclosure of documents in a file relating to proceedings under Article 101 TFEU is, as general rule, detrimental to the protection of the commercial interests of undertakings involved in such proceedings, may, however, be relevant.

53 That is because the Court has held that generalised access to such documents, irrespective of the fact they are sent to the Commission voluntarily within the framework of the leniency programme, would be likely to jeopardise the balance which the legislature of the European Union sought to ensure, in Regulation No 1/2003 and in Commission Regulation No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81[EC] and 82 [EC] (OJ 2004 L 123, p.18), between, on the one hand, the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information in order to enable it to ascertain whether a concerted practice is in existence and to determine whether that practice is compatible with Article 101 TFEU, and, on the other, the guarantee of increased protection, by virtue of the obligation of professional secrecy and business secrets, for the information so provided to the Commission (judgment in *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 90 and 97).

54 It seems that it cannot immediately be ruled out that the disclosure of extracts from the documents concerned in the non-confidential version of the PHP decision is not liable to have the same effects, to the extent that such disclosure is the equivalent, in essence, of generalised access, albeit partial, to those documents.

55 If that were to be the case, that would involve, contrary to what is suggested by the Commission, not the Court permitting an individual to rely on a presumption that is accepted to be solely available to the Commission, but the Court recognising, by analogy, that the considerations on which the Court justified that presumption are applicable to a similar situation and, possibly, justifying, on those same considerations, a mirror image presumption that the undertakings concerned are as a general rule entitled to expect, other than in cases where that presumption can be rebutted, that the information provided within the framework of a leniency programme should be covered by the obligation of professional secrecy.

56 It may be added that, as mentioned by the applicant, recital 26 of the preamble of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1), which states that, in the interests of protecting the leniency programme, 'verbatim quotations from leniency statements', and those statements themselves, are expressly not to be disclosed, may be of relevance.

57 Second, as regards the arguments put forward by the applicant, in support of its second and third grounds of appeal, that the General Court was in breach of the principle of the protection of legitimate expectations when it held that the disclosure of the information at issue was not incompatible with the assurances that the Commission had given with respect to the statements of leniency applicants in Point 32 of the 2002 Leniency Notice and in Point 40 of the 2006 Leniency Notice, it must be observed that the distinction that the Commission appears to make between the documents concerned and the information contained in those documents, and not between those documents and the findings of fact by the Commission that are based on the content of those documents, is not self-evidently justified, particularly where the information concerned is presented in the form of extracts from those documents.

58 The subject matter of the protection accorded by the obligation of professional secrecy is the information that merits such protection and is given effect by a prohibition on making available to third parties the support on which that information is stored, such as a document. In other words, the

confidentiality of a document does not appear to depend on the characteristics and nature of the information that it contains. As stated by the applicant, that appears to be capable of inference from, inter alia, Article 16(1) of Regulation No 773/2004, which refers to 'information, including documents' that the Commission may not communicate or make accessible.

59 If the distinction that the Commission appears to make between the documents in question and the information that those documents contain is to be held to be unfounded, it is conceivable that, as claimed by the applicant, extracts from confidential documents must be treated in the same way that those documents are treated, notably by the 2002 and 2006 Leniency Notices, in Points 32 and 40 respectively of those notices.

60 In that regard, it must be recalled that, where the Commission publishes rules of conduct that are intended to produce external effects for economic operators, such as those contained in the 2002 and 2006 Leniency Notices, it cannot depart from those rules, in a particular case, unless it gives reasons that are compatible with the principle of equal treatment. By adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, by analogy, judgments in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 209 to 211, and *Quinn Barlo and Others* v *Commission*, C-70/12 P, EU:C:2013:351, paragraph 53).

61 Yet, in Points 32 and 33 of the 2002 Leniency Notice, the Commission had held that, normally, 'disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of [Regulation No 1049/2001]' and that '[a]ny written statement made vis-à-vis the Commission in relation to this notice forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 [EC]'. Likewise, in Point 40 of the 2006 Leniency Notice, the Commission stated that 'public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations within the meaning of Article 4 of [Regulation No 1049/2001], even after the decision has been taken', thus expressly extending the reasons for maintaining the confidentiality of documents also to other interests protected by Article 4 of that regulation, to include, consequently, the commercial interests referred to in the first indent of Article 4(2) thereof.

62 The fact that those notices, in Points 31 and 39 respectively, contain an identically worded statement that '[t]he fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 [EC]', does not seem to be sufficient, in itself, to preclude the undertakings concerned from being able to rely on the confidentiality of the documents in question. Taking into consideration, in particular, the generality of that statement, it appears to do no more than indicate that qualification for the benefits provided for by those notices, with respect to, inter alia, the consequences as to the administrative liability of the undertakings concerned because of the infringement of competition law, cannot diminish the civil law liability of those same undertakings, and does not appear to mean that the Commission will make public their business secrets that may constitute evidence in the establishment of the latter liability by the national courts.

63 It may be added that that would appear to contradict Point 35a of the 2006 Leniency Notice, as amended by the Commission communication entitled 'Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases' (OJ 2015 C 256, p. 1), according to which 'the Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of [Articles 101 TFEU or 102 TFEU]'.

64 In the light of the foregoing, it cannot be immediately ruled out that an undertaking could expect the Commission not to make public the documents concerned, either wholly or in part, by sending them to third parties or by disclosing them in the form of extracts in the non-confidential version of the decision finding an infringement of Article 101 TFEU.

65 In any event, if the Commission were in fact to be able to publish, in accordance with Article 30 of Regulation No 1/2003, the information at issue, it is also not inconceivable that the Commission should be required, even notwithstanding the absence of assurances that could justify legitimate expectations being held by undertakings, to provide clear and detailed guidance on its decision-making practice and that, if that were not the case, any clarification of unclear rules should be undertaken not in such a way as to disadvantage parties to proceedings and sound administration, but rather by adopting new rules that apply to future cases and that have the requisite degree of clarity.

66 That is all the more necessary in this case, given that the Commission had previously published a non-confidential version of the PHP decision. Yet, at the time of that publication, the Commission had taken account of the objections made by the applicant and had not disclosed the greater part of the information for which the applicant had requested confidential treatment.

67 Admittedly, as contended by the Commission, the Commission had expressed no view on the applicant's objections. However, the non-confidential version of the PHP decision was not published in provisional form, as is apparent from paragraph 160 of the judgment under appeal, and that decision had closed the administrative procedure.

68 That being the case, the question that might arise is whether Article 30 of Regulation No 1/2003 is applicable to a subsequent publication, at least as regards whether it is open to the Commission to publish a version that is more complete than that non-confidential version without explaining why such a publication is necessary so long after the first publication.

69 In the light of the foregoing considerations, it is not obvious that the information at issue is not confidential.

70 Further, since those considerations are equally relevant with respect to the findings of the hearing officer contained in the contested decision and therefore with respect to the assessment of the action for annulment, they suffice to establish the existence of a prima facie case, in accordance with the case-law cited in paragraphs 23 to 25 of this order.

Urgency

71 In order to establish that the interim measures requested are urgent, the applicant claims, initially, that, to that end, it can rely on the premise that the information at issue is confidential for the purposes of Article 339 TFEU, Article 4(2) of Regulation No 1049/2001, Article 8 ECHR and Article 7 of the Charter. Since the applicant's appeal is expressly directed against the part of the judgment under appeal in which the General Court held that that information does not fall within the scope of the protection provided for by those provisions, only in the proceedings on the substance of the appeal will the Court be called upon to resolve that matter.

72 Consequently, with that premise as its starting point, the applicant argues that the disclosure of the information at issue would cause it serious and irreparable harm.

73 As regards, more particularly, the seriousness of that harm, the applicant states that the publication of that information would mean that the information would irretrievably lose the value inherent in its being confidential, would mean that it could be used in actions for damages brought against the

applicant and would damage the applicant's reputation in its business dealing with its customers. In addition, since publication is intended to be on the internet, the consequence would be that, from the instant of publication, the information at issue would be available to the applicant's customers, competitors and suppliers, as well as to financial analysts and a broader public, who would be able to access that information and make free use of it.

74 As regards the alleged harm being irreparable, the applicant observes at the outset that, even if its appeal is upheld, that will not cure the harm that the applicant will suffer because of the publication of the information at issue, whether that is non-material damage linked to its reputation or financial damage. First, the knowledge acquired of that information by the persons who have access to it cannot be erased. Further, the non-material harm is not, by its very nature, capable of being repaired by financial compensation. Last, the financial damage cannot be adequately defined and quantified, given that it will be variable, both in nature and in scale.

75 The Commission observes that the premise on which the applicant bases its arguments, that the information at issue is, by reason of its content, confidential, is unfounded. The General Court has already ruled on that matter, holding that that information must be regarded as historical and, therefore, since the applicant failed to demonstrate why it would, even so, be justified to grant that information, exceptionally, the protection offered by Article 30(2) of Regulation No 1/2003, the information does not merit protection. Accordingly, the applicant cannot rely on the order of the Vice-President of the Court in *Commission* v *Pilkington Group* (C-278/13 P(R), EU:C:2013:558), given that the information at issue in the case which gave rise to that order was specific commercial information which, by reason of its content, could be covered by the obligation of professional secrecy, whereas, in this case, the alleged harm does not stem from the content of the information at issue, but has external causes, such as the legitimate expectation that the applicant claims it can derive from the Commission's practice and from its notices.

76 More specifically, the Commission identifies two harms that the applicant claims that it would suffer if the information at issue were published and expresses the view that in neither case is the seriousness of the harm proved to the requisite legal standard.

77 As regards the financial burdens linked to any findings of liability in civil proceedings, the Commission contends, first, that the immediate cause of that alleged harm is not the publication, but the participation of the applicant in the infringement identified by the Commission in the PHP decision. Second, the interests of an undertaking whose participation in a cartel has been established to avoid actions for damages do not merit protection.

78 As regards the negative effects on the applicant's image, the Commission states that the immediate cause of such effects is again the publication of the first non-confidential version of the PHP decision in 2007 and that, in any event, the effects are not sufficiently serious to justify the grant of interim measures. The Commission adds that the applicant cannot claim any interest worthy of particular protection where it seeks to avoid the publication of additional detail of the facts of the infringement, the more so when the passages concerned in the envisaged publication contain no value judgment likely to disparage the applicant and cause serious damage to its reputation.

79 As regards whether the harm alleged by the applicant would be irreversible, the Commission acknowledges that, once read, the information at issue would continue to be remembered or stored in IT memories by the recipient even if its publication was, subsequently, revoked. However, that is not determinative in this case, given that the appeal does not challenge the finding of the General Court, in paragraphs 84 to 86 of the judgment under appeal, that that information contains no material that is commercially sensitive which would, if disclosed, confer advantages on its business partners and its competitors.

80 As regards the increased risk of being found liable in actions for damages, the Commission states, first, that financial damage can only exceptionally be deemed to be irreparable, given that it can be remedied by monetary compensation. In particular, that would be the case if, were the interim measure requested not granted, the applicant was placed in a position which might jeopardise its very existence or irremediably alter its market share. Yet, in its application, the applicant has not even claimed that the envisaged publication would jeopardise its very existence or cause it to irretrievably lose its share of the market. Second, the Commission considers that, contrary to what is claimed by the applicant, the order of the Vice-President of the Court in *Commission* v *Pilkington Group* (C-278/13 P(R), EU:C:2013:558) is not relevant to the establishment of the alleged impossibility of adequately defining and quantifying the financial damage that the applicant would suffer due to actions for damages. In that order it was held that it was impossible to identify the number and status of all the persons who acquired knowledge of the information published and thus assess the actual impact which publication of that information might have on the commercial and financial interests of the undertaking concerned, taking into consideration, inter alia, the fact that the information at issue in the case which gave rise to that order constituted commercially sensitive information and therefore business secrets *stricto sensu*. In contrast, according to the Commission, the financial damage alleged by the applicant in this case is linked solely to actions for damages or cross claims subsequent to an infringement of the competition rules. Consequently, given that it is not impossible to determine the circle of persons who could, as victims of the cartel, bring actions for damages against the applicant, the damage suffered by the applicant is capable of being adequately defined and quantified. In any event, the alleged financial damage is no more than largely hypothetical, since it is impossible to predict the impact that any use of the information at issue would have in civil actions, pending or potential, against the applicant.

81 The Commission considers, last, that, since the alleged harm resulting from the alleged damage to the applicant's image is not serious, there is no need to examine whether the additional damage to its reputation which might be caused by the disclosure of the information at issue might be deemed to be irreparable.

82 In order to determine whether the interim measures sought are urgent, it should be noted that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to avoid a lacuna in the legal protection afforded by the Court. For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interim order in order to avoid serious and irreparable damage to the party seeking the interim protection (order of the Vice-President of the Court in *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro* v *Commission*, C-506/13 P-R, EU:C:2013:882, paragraph 18 and the case-law cited).

83 In this case, the applicant, relying on the order of the Vice-President of the Court in *Commission* v *Pilkington Group* (C-278/13 P(R), EU:C:2013:558), claims that the publication of the information at issue would be liable to affect it adversely by reason of the very nature of that information.

84 It must be observed that, contrary to the Commission's contention, not only has the applicant challenged, in its appeal, the findings of the General Court, in paragraphs 84 to 127 of the judgment under appeal, that the information at issue did not constitute business secrets and was not covered by the obligation of professional secrecy, but also, as is apparent from paragraphs 46 to 69 of this order, a prima facie examination of the arguments advanced in support of the relevant grounds of appeal does not permit the conclusion that that information is obviously not confidential.

85 Consequently, in order to assess urgency in this case, the starting point must be the same premise as that which served, for analogous reasons, the judge hearing the application for interim measures in the case which gave rise to the order of the Vice-President of the Court in *Commission* v *Pilkington Group* (C-278/13 P(R), EU:C:2013:558, paragraphs 38 and 47), that the information at issue is covered by the obligation of professional secrecy (see, *a contrario*, the order in *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraphs 29 to 33).

86 Starting from that premise, the disclosure of the information at issue would necessarily cause significant harm to the applicant.

87 Like the information at issue in the case which gave rise to the order in *Commission* v *Pilkington Group* (C-278/13 P(R) EU:C:2013:558), the information which the applicant claims to be confidential, as is apparent from paragraph 104 of the judgment under appeal, essentially relates to its role in the origin and continuation of the infringement found to exist by the PHP decision and reveals, in detail, the collusive contacts or anti-competitive agreements in which the applicant participated, referring to, inter alia, the names of certain products affected by those contacts or agreements, figures concerning prices charged, and the objectives pursued by the participants in terms of pricing and allocations of market share (see, by analogy, the order of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 47).

88 Moreover, the General Court itself recognised, in paragraph 105 of the judgment under appeal, that the disclosure of the information in respect of which the applicant sought confidential treatment was such as to cause it serious harm.

89 It may be added that the Commission's argument that such harm does not jeopardise interests of the applicant that merit protection is unconvincing, given that that argument assumes that the information at issue does not, by its very nature, merit protection by the obligation of professional secrecy.

90 As regards the question whether such harm from the contested disclosure is irreparable, it is in fact obvious that annulment of the contested decision cannot reverse the effects of publication of the information at issue, since once a person has acquired knowledge of that information by reading it, that knowledge cannot be erased (see, by analogy, orders of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 48, and in *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 35).

91 The applicant considers that the irreversibility of disclosure of that information entails that the harm it will suffer as a result of that disclosure will be irreparable. In that regard, the applicant identifies in essence two heads of damage which would flow from publication of the information at issue. Thus, the applicant would suffer, on the one hand, damage of a financial nature, in so far as that information could be used in actions for damages against it and, in any event, would be available to a broader public that could make free use of it, and, on the other, non-material damage, linked to the negative effects on its reputation.

92 There is no need to determine whether that alleged non-material damage is irreparable, since it is sufficient to state, as regards the first head of alleged damage, that, admittedly, damage of a financial nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage. That is however not the case, and such damage can then be deemed to be irreparable, if it cannot be quantified (order of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraphs 50 to 52 and the case-law cited).

93 To the extent that the applicant claims that the disclosure of the information at issue would expose it to an increased risk in actions for damages brought against it, it must be recalled that the uncertainty linked to reparation for harm of a pecuniary nature in a possible action for damages cannot be regarded, in itself, as a circumstance capable of establishing that such a harm is irreparable, for the purposes of the case-law of the Court. At the stage of seeking interim relief, the possibility of subsequently obtaining compensation for pecuniary damage, if an action for damages is brought following annulment of the contested measure, is necessarily uncertain. Interlocutory proceedings are not intended to act as a substitute for an action for damages in order to remove that uncertainty,

since their purpose is only to guarantee the full effectiveness of the final future decision that will be made in the main action, in this case an action requesting the Court to set aside a judgment, to which the interlocutory proceedings are an adjunct (orders of the Vice-President of the Court in *Commission* v *Pilkington Group*,C-278/13 P(R), EU:C:2013:558, paragraph 53, and *AGC Glass Europe and Others* v *Commission*, C-517/15 P-R, EU:C:2016:21, paragraph 56).

94 On the other hand, the situation is different where it is already clear, when the assessment is carried out by the judge hearing the application for interim measures, that, in view of its nature and the manner in which it will foreseeably occur, the harm alleged, should it occur, may not be adequately identified or quantified and that, in practice, it will not therefore be possible to make good that harm by bringing an action for damages. That may be the case, inter alia, in a situation involving the publication of specific commercial information that is purportedly confidential and relates to matters such as those at issue in the present case, in particular the names of products affected by the infringement, the figures in relation to prices charged and the objectives pursued by the participants in terms of prices (see, to that effect, order of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 54).

95 In that regard, it is clear that the harm that is liable to be suffered by the applicant due to the publication of its purported business secrets or information concerning the applicant covered, in any event, by the obligation of professional secrecy would differ, both in nature and in scale, according to whether the persons who acquire knowledge of that information are its customers, its competitors, its suppliers, or indeed financial analysts or members of the general public. It would be impossible to identify the number and status of all those who in fact had knowledge of the published information and thereby assess the actual impact that the publication of that information might have on the applicant's commercial and financial interests (see, to that effect, order of the Vice-President of the Court in *Commission* v *Pilkington Group*, C-278/13 P(R), EU:C:2013:558, paragraph 55).

96 Since that damage at least is relied on by the applicant and can be considered to be serious and irreparable, it must be concluded that the condition relating to urgency is satisfied in this case.

The weighing of interests

97 As regard the weighing of interests, the applicant argues, first, that the harm that it would suffer due to the disclosure of the information at issue would be irreversible and would prejudge the decision on the substance. If the publication of that information is not suspended, the applicant, even if its appeal on the substance were to be upheld, would suffer the same harm as if its appeal were dismissed. That is even more true if the information at issue is published on the internet, there being nothing to stop that information being accessed even after it is removed from the Commission's website. The applicant adds, in that regard, that the right to an effective legal remedy, enshrined in Article 47(1) of the Charter, requires the granting of the interim measures sought.

98 Further, an order to suspend publication of the information at issue would not, in contrast, have any adverse effect on the interests of the Commission. Since the Commission has already published a non-confidential version of the PHP decision, the public interest in being informed has already been satisfied. Moreover, since the Commission has itself recognised for five years that the information at issue is confidential, it is reasonable that the Commission wait a few months more and maintain the longstanding status quo until a final ruling is given on the substance of the appeal.

99 Last, as regards the interests of third parties and, in particular, those who have brought actions for damages, the applicant states that, on the one hand, having regard to the length of time between the end of the infringement and the adoption of the Commission's initial decision, the interested third parties have no interest in a rapid publication of a more complete non-confidential version of the PHP decision and, on the other, those parties have in any event the possibility of either applying to

the Commission to permit access to the information at issue in accordance with Regulation No 1049/2001, or requesting the national courts before which actions for damages are brought to ask the Commission to transmit that information under Article 15(1) of Regulation No 1/2003.

100 Taking the opposite view, the Commission states, first, that the arguments and grounds relied on in support of the appeal are not sufficiently solid to establish that there is a particularly strong prima facie case, a factor which should be taken into consideration when weighing interests.

101 Further, account should be taken of the public interest in knowing as quickly as possible the reasons for any action of the Commission, the interest of economic operators in knowing what conduct is likely to expose them to penalties, and the interest of persons harmed by the infringement in learning the details of it in order to be able to assert, if necessary, their rights against the undertakings that participated in the infringement.

102 Last, with due regard to Article 15 TFEU, the reasons for the Commission's action should be accessible to the public not only comprehensively, but also as soon as possible. That would however not happen if, in this case, the Commission had further to wait, almost 10 years after the adoption of the PHP decision, to disclose the details of the infringement in which the applicant participated, whereas sufficiently expeditious information helps to ensure that the right to compensation that case-law has accorded to victims of infringements of competition law is effectively protected. The effect of any delay in the disclosure of information on the essential facts of the infringement would be that actions for damages could not be brought and, consequently, the effectiveness of the prohibition on cartels laid down in Article 101 TFEU would be compromised, taking into consideration, inter alia, the options open to the applicants in actions for compensation to establish the existence of the necessary conditions for obtaining compensation and the rules on limitation laid down by the applicable law.

103 To respond to those arguments, it must be recalled that, in accordance with settled case-law, the risks associated with each of the possible disposals of the case must be weighed in the proceedings for interim measures. In practical terms, that means examining whether or not the interest of the applicant in obtaining suspension of the operation of the contested act outweighs the interest in its immediate implementation. In that examination, it must be determined whether the possible annulment of that act by the judgment on the substance would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of its operation would be such as to impede the objectives pursued by the contested act in the event of the main action being dismissed (orders of the President of the Court in *Commission* v *Atlantic Container Line and Others*, C-149/95 P(R), EU:C:1995:257, paragraph 50 and *Belgium and Forum 187* v *Commission*, C-182/03 R and C-217/03 R, EU:C:2003:385, paragraph 142, and order in *United Kingdom* v *Commission*, C-180/96 R, EU:C:1996:308, paragraph 89).

104 In this case, the Court will be called upon to give a ruling, in the main proceedings, on whether the judgment under appeal is to be set aside and whether, if appropriate, the contested decision is to be annulled, notably for an infringement of the obligation of professional secrecy due to the applicant protected by Article 339 TFEU, Article 30 of Regulation No 1/2003, Article 4 of Regulation No 1049/2001, Article 8 ECHR and Article 7 of the Charter and for disregard of the confidentiality of the information to be published.

105 That being the case, a judgment upholding the applicant's appeal would plainly be deprived of effectiveness if this application for interim measures was dismissed and if the Commission could therefore publish immediately the information at issue without waiting for that judgment. By the very fact of that publication, that information would lose irretrievably the protection granted by the obligation of professional secrecy, and consequently the dismissal of the application for interim measures would *de facto* prejudge the future decision on the substance of the appeal, concerning the application that the judgment under appeal should be set aside and the contested decision annulled.

106 It cannot be concluded from the arguments submitted by the Commission that its interest in the application for interim measures being dismissed prevails over the interest of the applicant in obtaining the suspension that it seeks.

107 Contrary to what the Commission appears to maintain, the findings made in paragraphs 46 to 70 of this order lead to the conclusion that, in this case, where there is a sufficient prima facie case to justify the granting of the interim measures requested, that finding cannot be called into question as part of the weighing of interests, particularly where other aspects of that weighing tip the balance in favour of the applicant.

108 That is so in the present case. As regards the interests defended by the Commission, it is clear that the public interest in knowing as quickly as possible the reasons for any action of the Commission has to a great extent already been satisfied by the publication of a non-confidential version of the PHP decision in 2007. Since it is not disputed that that version met the requirements of Article 30 of Regulation No 1/2003, it must be presumed that it contained at least all the main content of the reasons stated for that decision. Admittedly, that interest would be even more fully satisfied in the event of the appeal being dismissed by the Court, since that would permit the publication of the more complete non-confidential version of the PHP decision envisaged by the Commission. However, the view cannot be taken that it is possible to satisfy that interest before the judgment dismissing the appeal is even delivered without invalidating the opposing interest of the applicant.

109 As regards the interest of economic operators in knowing what conduct is likely to expose them to penalties, it must be observed that, while the Commission's practice is certainly useful in that regard, it is the Commission itself which, in this case, appears to hold that economic operators can rely only to a very limited extent on past decisions of the Commission in order to regulate their conduct. Consequently, the solicitude shown by the Commission in wishing to make known to other traders the reasons for a decision on which they can in any event rely only to a limited extent cannot suffice to justify the sacrifice of the applicant's opposing interest in this case. *A fortiori*, when the delay in the publication of the information at issue is largely due to the Commission, which seems even to confirm that it has spent the time that has elapsed since the first publication of a non-confidential version of the PHP decision in 2007 in examining in detail the arguments of the parties concerned that certain passages in the reasons stated for that decision constituted business secrets.

110 Last, as regards the interest of the persons harmed by the infringement in learning the details of it in order to be able, if necessary, to assert their rights against the undertakings that participated in the infringement, it is clear that, while the reasons for a decision finding an infringement may be useful to those persons in their actions for damages, the fact remains that it cannot be presumed that the only possible basis for those actions is the evidence that emerges from those reasons.

111 Further, in such cases, the Court has previously held that the fact that a refusal of access to documents, including those submitted to a competition authority as part of a national leniency programme, may prevent the bringing of such actions requires that refusal to be based on overriding reasons that relate to the protection of the interest relied on and that are applicable to each document to which access is refused. It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified (see, to that effect, judgment in *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraphs 47 and 48).

112 Consequently, the interest of victims who can found their legal claims only on the documents submitted to the Commission is likely to be more expeditiously satisfied by an application for access to documents than by waiting for the publication of the reasons for the decision finding the infringement to exist.

113 It may be added that if the Commission is criticising the applicant for failing to state whether and to what extent the limitation period was interrupted for any cross claims by other participants in the cartel, it must be stated that the Commission itself provides no information to allow an assessment of the extent to which the possibility of persons who claim to be harmed by the infringement asserting their rights in actions seeking compensation depends on a publication of the information at issue before the actual delivery of the judgment on the substance of the appeal and, in particular, the Commission specifically offers no guidance as to the limitation period of those actions.

114 Finally, the effect of granting the interim measures requested would be no more than to maintain, for a limited period, the status quo which has existed for many years (see, by analogy, order of the President of the Court in *Radio Telefis Eireann and Others* v *Commission*, 76/89 R, 77/89 R and 91/89 R, EU:C:1989:192, paragraph 15).

115 In the light of the foregoing, it must be concluded that the balance of competing interests falls in favour of granting the interim measures requested.

116 That being the case, the operation of the contested decision must be suspended and the Commission must be ordered to refrain, until the delivery of the final judgment in the appeal proceedings in Case C-162/15 P, from publishing a non-confidential version of the PHP decision that is more complete, in relation to the applicant, than the non-confidential version of that decision published in 2007.

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

1. **Operation of the Commission Decision C(2012) 3534 final of 24 May 2012 rejecting a request for confidential treatment made by Evonik Degussa GmbH pursuant to Article 8 of Decision 2011/695/EU of the President of the 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 until the delivery of the final judgment in the appeal proceedings in Case C-162/15 P.**

2. **The European Commission is ordered to refrain, until delivery of the final judgment in the appeal proceedings in Case C-162/15 P, from publishing a non-confidential version of Commission Decision C(2006) 1766 final of 3 May 2006 relating to proceedings pursuant to Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, Eka Chemicals AB, 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/38.620 — Hydrogen peroxide and perborate) that is more complete, in relation to Evonik Degussa GmbH, than the non-confidential version of that decision published in 2007.**

3. **The costs are reserved.**

[Signatures]