Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 March 2017 * [i]

(Appeal — Competition — Articles 101 TFEU and 102 TFEU — Regulation (EC) No 1/2003 — Article 30 — Commission decision finding an illegal cartel on the European hydrogen peroxide and perborate market — Publication of an extended non-confidential version of that decision — Rejection of a request for confidential treatment of certain information — Terms of reference of the hearing officer — Decision 2011/695/EU — Article 8 — Confidentiality — Protection of professional secrecy — Article 339 TFEU — Concept of 'business secrets or other confidential information' — Information from a request for leniency — Rejection of the request for confidential treatment — Legitimate expectations)

In Case C-162/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 8 April 2015,

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

appellant,

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 COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and E. Regan (Rapporteur), Presidents of Chambers, E. Levits, J.-C. Bonichot, A. Arabadjiev, C. Toader, M. Safjan, C.G. Fernlund, C. Vajda, S. Rodin and F. Biltgen, Judges,

Advocate General: M. Szpunar,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 4 April 2016,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2016,

gives the following

* Language of the case: German.

Judgment

1 By its appeal, Evonik Degussa GmbH asks the Court 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, 'the judgment under appeal', EU:T:2015:51), by which that court dismissed its action for the annulment of Commission Decision C(2012) 3534 final of 24 May 2012 rejecting a request for confidential treatment submitted by the appellant (Case COMP/F/38.620 — Hydrogen peroxide and Perborate) ('the decision at issue') under 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 (OJ 2011 L 275, p. 29).

Legal context

Regulation (EC) No 1/2003

2 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), entitled 'Professional secrecy', provides:

'1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.'

3 Article 30 of that regulation, entitled 'Publication of decisions', provides:

'1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 23 and 24.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

Decision 2011/695

4 Recital 8 of Decision 2011/695 states:

'The hearing officer should operate as an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of the parties concerned, … where such issues could not be resolved through prior contacts with the Commission services responsible for the conduct of competition proceedings, which must respect these procedural rights.'

5 Recital 9 of that decision states that 'the terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the effective exercise of procedural rights throughout proceedings before the Commission pursuant to Articles 101 [TFEU] and 102 [TFEU], in particular the right to be heard.'

6 Under Article 1(1) of Decision 2011/695, the powers and functions of hearing officers for competition proceedings are to be laid down in that decision.

7 Article 1(2) of that decision defines the role of hearing officer as safeguarding 'the effective exercise of procedural rights throughout competition proceedings before the Commission for the implementation of Articles 101 [TFEU] and 102 [TFEU]'.

8 Article 8 of Decision 2011/695, which is in Chapter 4 of that decision entitled 'Access to file, confidentiality and business secrets', provides:

'1. Where the Commission intends to disclose information which may constitute a business secret or other confidential information of any undertaking or person, the latter shall be informed in writing of this intention and the reasons thereof by the Directorate-General for Competition. A time limit shall be fixed within which the undertaking or person concerned may submit any written comments.

2. Where the undertaking or person concerned objects to the disclosure of the information it may refer the matter to the hearing officer. If the hearing officer finds that the information may be disclosed because it does not constitute a business secret or other confidential information or because there is an overriding interest in its disclosure that finding shall be stated in a reasoned decision which shall be notified to the undertaking or person concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than 1 week from the date of notification.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Union*.

…'

Regulation (EC) No 1049/2001

9 Article 4(2), (3) and (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) provides:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

…

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

2002 Commission notice on immunity from fines and reduction of fines in cartel cases

10 Point 4 of the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the 2002 Leniency Notice') provides:

'The Commission considered that it is in the [European Union's] interest to grant favourable treatment to undertakings which cooperate with it. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices.'

11 Point 6 of that notice states:

'The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.'

12 According to point 21 of the 2002 Leniency Notice:

'In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.'

13 Point 29 of that notice is worded as follows:

'The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.'

14 Points 31 to 33 of the 2002 notice state:

'31. In line with the Commission's practice, the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article [101 TFEU].

32. The Commission considers 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].

33. Any 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 [101 TFEU].'

The 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases

15 Point 40 of Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17, 'the 2006 Leniency Notice') provides:

'The Commission considers that normally 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.'

Background to the dispute

16 The background to the dispute, as described in paragraphs 1 to 13 of the judgment under appeal, may be summarised as follows.

17 On 3 May 2006, the European Commission adopted Decision C(2006) 1766 final relating to a proceeding under 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/F/38.620 — Hydrogen Peroxide and Perborate) ('the PHP Decision'), a summary of which was published in the *Official Journal of the European Union* (OJ 2006 L 353, p. 54).

18 In the PHP Decision, the Commission found, in particular, that Degussa AG, which became 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 appellant had been the first company to contact the Commission, in December 2002, pursuant to the 2002 Leniency Notice, and had on that occasion fully cooperated and provided the Commission with all the information in its possession concerning the infringement, it was granted complete immunity from fines.

19 In the course of 2007, a first non-confidential version of the PHP Decision was published on the website of the Commission's Directorate-General (DG) 'Competition'.

20 In a letter to the appellant dated 28 November 2011, the Commission informed it that it intended to publish a new, more complete, non-confidential version of the PHP Decision ('the extended version of the PHP Decision'), setting out the entire content of that decision apart from the confidential information. On that occasion, the Commission asked the appellant to identify the information in the PHP Decision in respect of which it proposed requesting confidential treatment.

21 Being of the view that that extended version of the PHP Decision contained confidential information or business secrets, the appellant informed the Commission, in a letter of 23 December 2011, that it objected to the proposed publication. In support of that objection, the appellant claimed, more particularly, that that 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 collaborators and information concerning its business relations. In the appellant's contention, the proposed

publication would thus fail to have regard, in particular, to the principles of the protection of legitimate expectations and equal treatment and would be liable to have an adverse effect on the Commission's investigations.

22 By letter of 15 March 2012, the Commission informed the appellant that it agreed to delete from the extended version of the PHP Decision to be published all the information that would directly or indirectly allow the source of the information communicated pursuant to the 2002 Leniency Notice, and likewise the names of the appellant's collaborators, to be identified. On the other hand, the Commission considered that there was no reason to grant the benefit of confidentiality to the other information for which the appellant had requested such confidential treatment ('the contested information').

23 Taking advantage of the possibility provided for in Decision 2011/695, the appellant referred the matter to the hearing officer, requesting him to exclude from the extended version of the PHP Decision all information supplied by the appellant pursuant to the 2002 Leniency Notice.

24 By the decision at issue, the hearing officer, acting on behalf of the Commission, rejected the appellant's requests for confidential treatment.

25 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 appellant's legitimate expectations by the Commission.

26 The hearing officer further noted that the appellant's only reason for objecting to the publication of the new, extended version of the PHP Decision was that it contained information supplied pursuant to the 2002 Leniency Notice and that the disclosure 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 essential part of its decisions. In addition, references to documents in the administrative file are not in themselves business secrets or other confidential information.

27 The hearing officer took the view that the appellant had not shown 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 fined by Commission for an infringement of competition law in the details of the unlawful conduct of which it is accused not being disclosed 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 EU competition policy and that, accordingly, the appellant 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 cartel to which the PHP Decision related.

28 The hearing officer also considered that he was not competent to answer the appellant'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 harm that programme, as such a question 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.

29 Lastly, the hearing officer stated that since his terms of reference under Article 8 of Decision 2011/695 are limited to assessing the extent to which information might constitute a business secret or must be given confidential treatment for some other reason, he was not competent to give a ruling on the

appellant's argument that publication of the information it had communicated under the leniency programme would constitute an unwarranted difference in treatment by comparison with the other participants in the infringement found in the PHP Decision.

The judgment under appeal

30 By application lodged at the General Court Registry on 2 August 2012, the appellant brought an action for the annulment of the decision at issue.

31 In support of its action, the appellant put forward five pleas in law, alleging (i) infringement of Article 8(2) and (3) of Decision 2011/695, (ii) failure to state sufficient reasons in the decision at issue, (iii) a breach of professional secrecy and also of the confidentiality of the information which the Commission proposes to publish, (iv) breach of the principles of the protection of legitimate expectations, legal certainty and equal treatment and (v) breach of the 'specific purpose' principle in Article 28(1) of Council Regulation No 1/2003 and breach of point 48 of the Commission's Notice on the rules for access to the Commission file in cases pursuant to Articles [101 TFEU] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7).

32 By the judgment under appeal, the General Court dismissed the action as unfounded.

Forms of order sought by the parties to the appeal

33 By its appeal, the appellant claims that the Court should:

— set aside the judgment under appeal;

— annul the decision at issue;

— order the Commission to pay the costs.

34 The Commission contends that the Court should dismiss the appeal in its entirety and order the appellant to pay the costs.

The appeal

35 The appellant relies on three grounds in support of its appeal. The first ground of appeal alleges an infringement of Article 8(2) and (3) of Decision 2011/695, the second an infringement of Article 339 TFEU, Article 30 of Regulation No 1/2003, Article 4(2) of Regulation No 1049/2001, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), and the third an infringement of the principles of the protection of legitimate expectations and legal certainty.

The first ground of appeal, alleging an infringement of Article 8(2) and (3) of Decision 2011/695

36 The first ground of appeal is divided, in essence, into two parts, alleging, first, that the General Court misconstrued the competence assigned to the hearing officer to decide on the publication of information under Article 8(2) and (3) of Decision 2011/695 and, secondly, that the General Court rejected the appellant's complaint alleging a distortion of the facts and of the decision at issue.

First part of the first ground of appeal

– Arguments of the parties

37 By the first part of its first ground of appeal, the appellant complains that the General Court erred in law in paragraphs 42 to 44 of the judgment under appeal, in holding that the hearing officer was not competent to examine its arguments that the publication of the extended version of the PHP Decision would infringe the principle of the protection of legitimate expectations and equal treatment.

38 The Commission contends that the first part of the first ground of appeal should be rejected, arguing that the hearing officer was not competent to examine such arguments since those principles do not pursue specifically the objective of protecting the confidentiality of information or documents.

– Findings of the Court

39 The powers and functions of the hearing officer for competition proceedings are, in accordance with Article 1(1) of Decision 2011/695, laid down in that decision.

40 Article 1(2) of Decision 2011/695, as clarified by recital 9 of that decision, provides that the terms of reference of the hearing officer must be framed in such a way as to safeguard the effective exercise of procedural rights throughout proceedings before the Commission pursuant to Articles 101 TFEU and 102 TFEU, in particular the right to be heard.

41 In that regard, it is apparent from Article 8(1) of Decision 2011/695 that where the Commission intends to disclose information which may constitute a business secret or other confidential information of any undertaking or person, the latter must be informed in writing of that intention and a time limit must be fixed within which the undertaking or person concerned may submit any written comments.

42 In accordance with Article 8(2) of that decision, the interested person may then, in the case of information which may, in its view, constitute a business secret or other confidential information, object to its disclosure, referring the matter to the hearing officer. Where the hearing officer finds that the contested information may be disclosed, either because it does not constitute a business secret or other confidential information or because there is an overriding interest in its disclosure, he must take a reasoned decision specifying the date after which the information will be disclosed, which may not be less than one week from the date of notification.

43 Lastly, Article 8(3) of Decision 2011/695 provides that those provisions are to apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Union*.

44 The aim of Article 8 of that decision is, therefore, as the General Court held in paragraph 41 of the judgment under appeal, to provide, on a procedural level, for the protection required by EU law of information which has come to the Commission's knowledge in the context of proceedings applying the competition rules, now provided for in Article 28(2) of Regulation No 1/2003.

45 In particular, the aim of Article 8(2) of Decision 2011/695 is to specify the reasons allowing the hearing officer to find that the information for which the interested person seeks confidential treatment may be disclosed. It is apparent from that provision that the hearing officer may find that the information may be disclosed when it does not, in fact, constitute a business secret or other confidential information or when there is an overriding interest in its disclosure.

46 However, although that provision sets out the reasons which allow the hearing officer to find that a piece of information may be disclosed, it does not limit, by contrast, the grounds arising from rules or principles of EU law on which the interested person may rely in order to object to the proposed publication.

47 In the present case, the appellant submitted before the General Court, in essence, that the observance of the principles of the protection of legitimate expectations and equal treatment constitutes a legitimate ground which could justify the contested information benefiting from the protection of EU law against disclosure and that, in refraining from ruling on the objections based on those principles, the hearing officer erred in law.

48 In that regard, the General Court noted, first of all, in paragraph 33 of the judgment under appeal, that where the hearing officer takes a decision pursuant to Article 8 of Decision 2011/695, he is required not merely to examine whether the version of a decision penalising an infringement of Article 101 TFEU submitted to him contains business secrets or other confidential information enjoying similar protection. He is also required to check whether that version contains other information which may not be disclosed to the public either on the basis of rules of EU law affording such information specific protection or because it is information of the kind covered by the obligation of professional secrecy.

49 The General Court then found, in essence, in paragraphs 42 and 43 of the judgment under appeal, that the principles of the protection of legitimate expectations and equal treatment, on which the appellant relied before the hearing officer, are not rules intended to afford specific protection against disclosure to the public of information such as that communicated to the Commission by the appellant in order to obtain leniency from it. Those principles did not, therefore, come, in and of themselves, within the protection which EU law confers on information which has come to the knowledge of the Commission in the context of proceedings under Article 101 TFEU.

50 The General Court concluded, therefore, in paragraph 43 of the judgment under appeal, that those principles fall outside the framework of the mission entrusted to the hearing officer under Article 8 of Decision 2011/695.

51 However, as pointed out in paragraph 44 above, the aim of Article 8 of Decision 2011/695 is to provide, on a procedural level, for the protection of information required by EU law which has come to the Commission's knowledge in the context of proceedings applying the competition rules. That protection must be understood as relating to any ground which could justify protecting the confidentiality of the contested information.

52 That interpretation is borne out, first, by the first sentence of Article 8(2) of Decision 2011/695, which provides, without further restriction, that where the undertaking or person concerned objects to the disclosure of the information it may refer the matter to the hearing officer.

53 Secondly, it would run counter to the aim of the hearing officer's terms of reference, as defined in Article 1(2) of Decision 2011/695 and recital 9 of that decision, of safeguarding the effective exercise of procedural rights, if the hearing officer could rule only on some of the grounds which may preclude the disclosure of a given piece of information.

54 The scope of Article 8(2) of Decision 2011/695 would be considerably reduced if that provision had to be interpreted as allowing, as the General Court held in paragraph 42 of the judgment under appeal, the hearing officer to take into account only those rules intended to afford specific protection against disclosure of the information to the public, such as the rules in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1) or in Regulation No 1049/2001.

55 It follows that the grounds which may restrict the disclosure of information, such as that communicated by the appellant to the Commission with a view to obtaining leniency from it, are not restricted to those arising solely from the rules intended to afford specific protection against disclosure to the public of that information and that the hearing officer must, therefore, examine any objection based on a ground, arising from rules or principles of EU law, relied on by the interested person in order to claim protection of the confidentiality of the contested information.

56 Consequently, in holding, in paragraph 44 of the judgment under appeal, that the hearing officer had, in the present case, been correct to decline competence to answer the appellant's objections to the proposed publication raised on the basis of the observance of the principles of the protection of legitimate expectations and equal treatment, the General Court erred in law.

57 Consequently, the first part of the first ground of appeal must be upheld and there is no need to examine the second part of that ground.

The second ground of appeal, alleging an infringement of Article 339 TFEU, Article 30 of Regulation No 1/2003, Article 4(2) of Regulation No 1049/2001, Article 8 of the ECHR and Article 7 of the Charter.

58 By the four parts of the second ground of appeal, the appellant complains that the General Court erred in law in holding that the contested information is neither confidential nor protected against possible publication for reasons other than its confidential nature.

First part of the second ground of appeal

– Arguments of the parties

59 By the first part of its second ground of appeal, the appellant submits that the General Court wrongly held, in paragraphs 84 to 86 and 162 of the judgment under appeal, that the contested information had lost its confidential nature merely because it was more than five years old. According to the appellant, such information still constitutes essential elements of its commercial position, since, as the General Court indeed found, its publication could cause it serious harm.

60 The case-law cited by the General Court in paragraph 84 of the judgment under appeal on which it relied in support of that finding may not be transposed to the present case, since that case-law relates not to the publication on the Internet of information communicated by the applicants for leniency, but to the disclosure of secret or confidential information relating to other parties in the context of proceedings pending before the EU courts.

61 Moreover, it is apparent from Article 4(7) of Regulation No 1049/2001 that financial interests may preclude the publication of information even beyond a 30-year period.

62 Lastly, to accept a presumption that the information provided by applicants for leniency loses its confidential nature at the end of five years would have the effect of eliminating the protection of the statements made by those applicants, since generally the Commission's cartel proceedings last more than five years.

63 The Commission contends that the first part of the second ground of appeal should be rejected.

– Findings of the Court

64 As regards, first, the argument by which the appellant complains that the General Court applied to the publication of information communicated for the purposes of obtaining leniency a rule which may not be transposed to that context, it must be pointed out that information which was secret or confidential, but which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties. Those considerations, which give rise to a rebuttable presumption, are valid both in the context of requests for confidential treatment in respect of parties intervening in actions before the EU Courts and in the context of requests for confidentiality with a view to the publication by the Commission of a decision finding an infringement of competition law.

65 In the present case, after setting out that rule in paragraph 84 of the judgment under appeal, the General Court found, in paragraph 85 of that judgment, that although the contested information all dated from more than five years previously and that most of it even dated from more than 10 years previously, the appellant had put forward no specific argument to show that, in spite of its age, that information still constituted essential elements of its commercial position or that of a third party. The appellant merely asserted that a large number of the passages in the extended version of the PHP Decision, while describing the facts constituting the infringement, contained information relating to the appellant's business relations and its pricing policy.

66 Lastly, the General Court concluded, in paragraph 86 of the judgment under appeal, that, even assuming that some of the contested information may have constituted business secrets at a certain time, it had in any event to be considered historical. Moreover, the appellant has not shown how there would still be any reason to confer on it, exceptionally, the protection afforded on that basis by Article 30(2) of Regulation No 1/2003.

67 It follows that the General Court's reasoning in paragraphs 84 to 86 of the judgment under appeal is not vitiated by an error of law.

68 Secondly, it is to be noted that the appellant relies, in the context of the first part of the second ground of appeal, on a contradiction between the assessment, in paragraph 85 of the judgment under appeal, that the information concerned was not confidential on the ground of its historical nature and the assessment, in paragraph 105 of that judgment, that the publication of that information could cause it serious harm.

69 In that regard, it must, however, be pointed out that that argument is based on a misreading of the judgment under appeal. In paragraph 85 of that judgment, the General Court merely noted the historical nature of the contested information for the purposes of rejecting the appellant's request for the protection of that information as business secrets or confidential business information, whereas the General Court's statement, in paragraph 105 of that judgment, that the disclosure of the contested information would be of such a kind as to cause the appellant serious harm, forms part of the examination of the second of the three conditions governing the protection of the confidentiality of the information communicated, in the present case, to the Commission under the leniency programme.

70 Thirdly, the appellant's argument that the General Court accepted a general presumption of the loss of confidentiality of the information provided by leniency applicants at the end of five years, the effect of which being to eliminate the protection of the statements made in the context of the leniency programme, is again based on a misreading of the judgment under appeal. As the Advocate General observed in points 136 to 139 of his Opinion, such an argument misconstrues the fact that, in paragraphs 84 to 86 of the judgment under appeal, the General Court simply applied that

presumption in order to reject the appellant's assertion that the proposed publication contained sensitive commercial information, and that the application of that presumption was, therefore, without prejudice to the General Court's examination, in paragraphs 88 to 122 of the judgment under appeal, of the appellant's separate complaint relating to the fact that the contested information came from a leniency statement. That argument must, therefore, also be rejected as unfounded.

71 In the light of the foregoing, the first part of the second ground of appeal must be rejected.

Second part of the second ground of appeal

– Arguments of the parties

72 By the second part of the second ground of appeal, the appellant submits, first, that the General Court misconstrued, in paragraphs 92 and 93 of the judgment under appeal, the scope of Regulation No 1049/2001 and the related case-law. A general presumption of endangering the aim of the Commission's investigations and the financial interests of the parties to cartel proceedings, such as that established by the Court in the judgment of 27 February 2014, *Commission* v *EnBW* (C-365/12 P, EU:C:2014:112), should also apply to the publication of passages from the statements of applicants for leniency in the non-confidential versions of the Commission's decisions.

73 Secondly, the appellant submits that the findings in paragraphs 93 and 117 of the judgment under appeal are vitiated by an error of law, since the General Court drew a distinction there between the publication of documents communicated by applicants for leniency, which would generally be unlawful, and the publication of information from those documents, such as extracts from the statements made by those applicants, which would be lawful.

74 Thirdly, the appellant submits that the publication of the contested information would be contrary to the assurances given by the Commission in point 32 of the 2002 Leniency Notice and point 40 of the 2006 Leniency Notice, respectively.

75 Fourthly, the appellant submits that, contrary to the General Court's findings in paragraph 119 of the judgment under appeal, as an applicant for leniency it has its own particular interest in the protection of the leniency programme's effectiveness.

76 The Commission contends that the second part of the second ground of appeal should be rejected.

– Findings of the Court

77 In the first place, as regards the appellant's argument concerning the rules derived from case-law restricting the conditions in which the Commission may, under Regulation No 1049/2001, disclose to third parties documents in the administrative file relating to a proceeding under Articles 101 TFEU and 102 TFEU, it must be stated, at the outset, that Regulation 1049/2001 does not apply in the context of the present case, which relates to the publication of information in a Commission decision finding an infringement of Article 101 TFEU. The question arises, therefore, of whether, despite the fact that that regulation does not apply to the present case, the case-law formulated on the basis of that regulation, under which the Court acknowledged that there was a general presumption capable of justifying the refusal to disclose the documents in a file relating to a proceeding under Article 101 TFEU, must, nonetheless, be transposed to the publication of decisions on infringements of Article 101 TFEU (see, to that effect, judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 92 and 93).

78 In that regard, it must be pointed out that the publication of a non-confidential version of a decision finding an infringement of Article 101 TFEU is provided for in Article 30 of Regulation No 1/2003. That provision reflects considerations concerning the effectiveness of the application of EU competition law in so far as, in particular, such publication enables victims of infringements of Article 101 TFEU to be provided with support during their actions for damages against those who have committed those infringements. Those different interests must, however, be weighed against the protection of rights conferred by EU law, in particular, on the undertakings concerned, such as the right to protection of professional secrecy or business secrecy, or on the individuals concerned, such as the right to the protection of personal data.

79 In the light of the differences between the system of third-party access to the Commission's file and the system relating to the publication of infringement decisions, the case-law deriving from the interpretation of Regulation No 1049/2001 relied on by the appellant cannot be transposed to the context of the publication of infringement decisions.

80 In the second place, the appellant submits that the publication of the contested information includes that of information from the statements made by a leniency applicant. In its view, such publication amounts to publishing 'verbatim quotations' and 'extracts' from those statements, which cannot be permitted.

81 In that regard, it is not disputed, as the General Court stated in paragraphs 5 and 6 of the judgment under appeal, that the appellant submitted to the Commission, under the leniency programme, numerous pieces of information in order to be granted the benefit of full immunity from a fine. The Commission agreed, by letter of 15 March 2012, to delete from the more complete non-confidential version of the PHP Decision, which it proposes publishing, the information that would directly or indirectly enable the source of the information communicated under the 2002 Leniency Notice, and likewise the names of the appellant's collaborators, to be identified.

82 As is apparent from paragraph 88 of the judgment under appeal, the appellant argued before the General Court that the contested information had be protected by confidential treatment solely because it had been communicated by it voluntarily to the Commission with the aim of benefiting from the leniency programme.

83 In response to that argument, the General Court held, in particular, in paragraph 93 of the judgment under appeal, that if it were to take place, the publication of the information relating to the facts constituting the infringement which did not appear in the non-confidential version of the PHP Decision published in 2007 would not result in the communication to third parties of requests for leniency submitted by the appellant to the Commission, of minutes recording oral statements made by the appellant under the leniency programme or of documents which the appellant voluntarily submitted to the Commission during the investigation.

84 Lastly, in paragraph 139 of the judgment under appeal, the General Court noted that the Commission had decided to delete, in the extended version of the PHP Decision, all information that might permit, directly or indirectly, identification of the source of the information communicated to it by the appellant with a view to benefiting from the leniency programme.

85 It is apparent from those different passages of the judgment under appeal that the arguments developed by the appellant before the General Court as to the confidentiality of the contested information were generally directed at all that information on that the ground that it had been voluntarily communicated to the Commission in the context of the leniency programme. It is clear from the same passages that the General Court at no time held that the Commission was entitled, by the publication of the extended version of the PHP Decision, to publish verbatim quotations from the statements made by the appellant with a view to obtaining leniency.

86 In those circumstances, the argument advanced by the appellant in the second part of the second ground of appeal, that the General Court accepted that the Commission could publish an extended version of the PHP Decision containing verbatim quotations from its statement made for the purposes of obtaining leniency from the Commission, is based on a misreading of the judgment under appeal and must be rejected.

87 In that regard, it must be pointed out that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances.

88 In the third place, the appellant submits that the Commission is not entitled to publish the contested information, which comes from statements it made with a view to obtaining leniency, since such publication would be contrary to the assurances given by the Commission in the 2002 and 2006 Leniency Notices, and would jeopardise the leniency programme's effectiveness.

89 In that regard, it is apparent from points 3 to 7 of the 2002 Leniency Notice, in force when the appellant submitted its request for leniency, that the sole aim of that notice is to lay down the conditions under which an undertaking may obtain either immunity from fine or a reduction of fine.

90 Consequently, point 4 of that notice states that it is in the European Union's interest to grant favourable treatment to undertakings which cooperate with it. In addition, point 6 of that notice specifies that a decisive contribution to the opening of an investigation may justify the granting of immunity from fines to the undertaking applying for immunity.

91 In addition, the rules laid down in points 8 to 27 of the 2002 Leniency Notice relate exclusively to the imposition of fines and the setting of their amount.

92 Such an interpretation is expressly confirmed by the title of that notice and also by point 31 which states that the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 101 TFEU.

93 As regards the Commission's treatment of the information submitted by an undertaking participating in the leniency programme, it is true that, in point 29 of that notice, the Commission accepts that it is aware that that notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to it.

94 In that regard, the 2002 Leniency Notices provides, first, in point 32, that normally disclosure, at any time, of documents received in the context of that 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, secondly, in point 33, that any written statement made vis-à-vis the Commission in relation to that notice, forms part of its file and may not be disclosed or used for any other purpose than the enforcement of Article 101 TFEU.

95 It is, therefore, with the aim of protecting statements made with a view to obtaining leniency that the Commission, in adopting the 2002 Leniency Notice, imposed on itself rules as regards the written statements received by it, in accordance with that notice, the publication of which is normally viewed by the Commission as undermining the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation No 1049/2001, as stated in points 32 and 33 of that notice.

96 However, those rules have neither the object nor the effect of prohibiting the Commission from publishing the information relating to the elements constituting the infringement of Article 101 TFEU which was submitted to it in the context of the leniency programme and which does not enjoy protection against publication on another ground.

97 Consequently, the only protection available to an undertaking which has cooperated with the Commission in the context of a proceeding under Article 101 TFEU is the protection concerning (i) the immunity from or reduction in the fine in return for providing the Commission with evidence of the suspected infringement which represents significant added value with respect to the information already in its possession and (ii) the non-disclosure by the Commission of the documents and written statements received by it in accordance with the 2002 Leniency Notice.

98 Therefore, contrary to the appellant's claims, publication, such as that envisaged, under Article 30 of Regulation No 1/2003 in compliance with the protection of professional secrecy does not undermine the protection which the appellant may claim under the 2002 Leniency Notice, since, as has been found in the preceding paragraph of this judgment, that protection can relate only to the determination of the fine and the treatment of the documents and statements specifically targeted by that notice.

99 It follows from this that, in paragraphs 93 and 117 of the judgment under appeal, the General Court did not err in law in the course of its analysis of the treatment to be given to information communicated by the appellant to the Commission in the context of the leniency programme. The appellant's arguments in this respect must, therefore, be rejected.

100 Lastly, in the fourth place, the appellant's argument that it has its own particular interest in the protection of the leniency programme's effectiveness does not cast doubt on the foregoing considerations.

101 In that regard, it is sufficient to note that, as the General Court correctly held in paragraph 119 of the judgment under appeal, the protection of the effectiveness of the leniency programme does not constitute a particular interest specific to the appellant.

102 In the light of the foregoing considerations, the second part of the second ground of appeal must be rejected.

Third part of the second ground of appeal

– *Arguments of the parties*

103 By the third part of the second ground of appeal, the appellant submits, in the alternative, that, contrary to the General Court's statements in paragraphs 107 to 111 of the judgment under appeal, the contested information should be protected against the proposed publication, since the conditions laid down in the General Court's judgment of 30 May 2006, *Bank Austria Creditanstalt* v *Commission* (T-198/03, EU:T:2006:136), are met. Accordingly, the General Court ought to have found that the appellant's interests were worthy of protection.

104 In the appellant's view, its interest is not in avoiding an order for damages or the disclosure of the Commission's findings on the course of the infringement at issue, but rather dissuading the Commission from eliminating the protection, provided for by the 2002 and 2006 Leniency Notices, afforded to the statements made for the sole purposes of the leniency programme, in the expectation that their confidentiality would be preserved.

105 In addition, contrary to the General Court's finding in paragraph 149 of the judgment under appeal, the proposed publication would clearly place the appellant at a disadvantage by comparison with other participants in the cartel which have not cooperated with the Commission under the leniency programme. In so far as the relevant passages of the PHP Decision do not constitute the Commission's own findings, but only the verbatim reproduction of the leniency candidates' statements, the disclosure of those passages would have a considerably greater effect on leniency applicants than the cartel participants which have not cooperated with the Commission. The General Court infringed, therefore, in paragraph 164 of the judgment under appeal, the principle of equal treatment.

106 The Commission contends that the third part of the second ground of appeal should be rejected.

– *Findings of the Court*

107 It must be noted, first of all, that the appellant does not call into question the consideration set out by the General Court in paragraph 94 of the judgment under appeal, according to which three cumulative conditions must be fulfilled in order for information, such as that at issue, to fall within the protection of professional secrecy and thus to benefit from protection on that ground.

108 On the other hand, the appellant disputes, in the context of the third part of the present ground of appeal, the application to the present case of the last of those conditions by the General Court and, therefore, the finding, in paragraph 110 of the judgment under appeal, that its interests are not worthy of protection.

109 In that regard, as has been found in paragraphs 82 and 85 above, the argument developed by the appellant before the General Court in contending that its interest in the non-disclosure of the contested information was worthy of protection was directed at all the information on the ground that the latter had been communicated to the Commission in the context of an application for leniency. That argument was not aimed at any verbatim quotations taken directly from its statement made for the purposes of obtaining such leniency.

110 In those circumstances, the General Court's assessment in paragraphs 107 to 111 of the judgment under appeal and, in particular, in paragraph 110 thereof, regarding the appellant's having no interest worthy of protection concerning the information it had communicated to the Commission, must necessarily be understood as not concerning such verbatim quotations and as being directed solely at the information, taken from documents produced by the appellant in support of its application for leniency, providing details of the elements constituting the infringement and the appellant's participation in that infringement.

111 That reading of the General Court's assessment is borne out by paragraph 107 of the judgment under appeal, in which the General Court stated that the interest of an undertaking which has been fined, in the non-disclosure to the public of 'the details of the offending conduct of which it is accused' does not warrant any particular protection, and also by paragraph 108 of that judgment, in which the General Court stated that the appellant cannot legitimately object to the publication by the Commission 'of information revealing in detail its participation in the infringement penalised in the PHP Decision'.

112 It follows that the appellant's argument, referred to in paragraph 108 above, is based on a misreading of paragraphs 107 to 111 of the judgment under appeal. That argument must, therefore, be rejected.

113 As regards the appellant's argument alleging an infringement of the principle of equal treatment, the examination of that argument would lead the Court of Justice to prejudge the examination — which must be carried out by the hearing officer — of the similar argument developed by the appellant during the administrative procedure which the hearing officer incorrectly refrained from adjudicating

on, as is apparent from the examination of the first part of the first ground of appeal. In those circumstances, there are no grounds for the Court of Justice to rule on that argument in the context of the present appeal.

114 Having regard to the foregoing considerations, the third part of the second ground of appeal must be rejected.

The fourth part of the second ground of appeal

– Arguments of the parties

115 By the fourth part of the second ground of appeal, the appellant submits that the passages taken from the leniency applicants' statements are protected by Article 8 of the ECHR and Article 7 of the Charter and it infers from this that the General Court erred in rejecting, in paragraphs 121 to 126 of the judgment under appeal, its argument alleging an infringement of those provisions. In that regard, the appellant submits that the statements from which the contested information has been taken which the Commission plans to disclose were made under the leniency programme and would not exist without its participation in that programme. The disclosure of such statements, in breach of the 2002 and 2006 Leniency Notices, and the practice established by the Commission, could not, contrary to what the General Court held in paragraphs 125 et seq. of the judgment under appeal, be regarded as a foreseeable consequence of participating in the cartel.

116 The Commission contends that the fourth part of the second ground of appeal should be rejected.

– Findings of the Court

117 The Court points out that the General Court held, in paragraphs 125 and 126 of the judgment under appeal, that the right to protection of private life guaranteed in Article 8 of the ECHR and Article 7 of the Charter cannot prevent the disclosure of information which, like that whose publication is envisaged in the present case, concerns an undertaking's participation in an infringement of EU law relating to cartels, established in a Commission decision adopted on the basis of Article 23 of Regulation No 1/2003 and intended to be published in accordance with Article 30 of that regulation, since a person cannot, according to the well-established case-law of the European Court of Human Rights, rely on Article 8 of the ECHR in order to complain of a loss of reputation which is the foreseeable consequence of his own actions.

118 However, although the appellant submits, in the context of the present appeal, that the disclosure of the contested information could not be considered a foreseeable consequence of its participation in the cartel at issue, it adduces no evidence capable of supporting such an assertion. As the Commission has argued, while the contested information is of direct relevance to the elements constituting the infringement and the appellant's participation in it, the appellant had to expect, in a case such as the present, that that information might be the subject of a public decision, unless such information is protected on another ground.

119 In addition, the appellant fails to indicate, as the Advocate General observed in point 172 of his Opinion, how the disclosure of the contested information would have consequences for its right to respect for its private life.

120 Since the fourth part of the second ground of appeal is unfounded, it must be rejected.

121 Accordingly, the second ground of appeal must be rejected in its entirety.

The third ground of appeal, alleging an infringement of the principles of the protection of legitimate expectations and legal certainty.

122 The examination of the third ground of appeal would lead the Court to prejudge the examination — which must be carried out by the hearing officer — of the argument alleging the infringement of the principles of the protection of legitimate expectations and legal certainty, developed by the appellant during the administrative procedure, which the hearing officer incorrectly declined competence to adjudicate on, as is apparent from the examination of the first part of the first ground of appeal. In those circumstances, there are no grounds for the Court to rule on that argument in the course of the present appeal.

123 It is apparent from all the foregoing considerations that since the first part of the first ground of appeal is well founded, the judgment under appeal must be set aside in so far as the General Court held that the hearing officer was correct to decline competence to answer the appellant's objections to the proposed publication raised on the basis of the observance of the principles of the protection of legitimate expectations and equal treatment.

124 The appeal must be dismissed as to the remainder.

The action before the General Court

125 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

126 In the present case, the state of the proceedings permits the Court of Justice to give final judgment.

127 In the light of the considerations set out in paragraphs 39 to 57 above, the decision at issue must be annulled in so far as in that decision the hearing officer declined competence to answer the appellant's objections to the proposed publication by the Commission of the extended version of the PHP Decision, which were based on the observance of the principles of the protection of legitimate expectations and equal treatment.

Costs

128 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to the costs.

129 Under Article 138(3) of those rules of procedure, applicable to the procedure on appeal by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

130 Since that is the situation in the present case, Evonik Degussa and the Commission must bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 28 January 2015, *Evonik Degussa* v *Commission* (T-341/12, EU:T:2015:51) in so far as by that judgment the General Court held that the hearing officer was correct to decline competence to answer the**

objections, raised by Evonik Degussa GmbH on the basis of the observance of the principles of the protection of legitimate expectations and equal treatment, to the proposed publication of a detailed, non-confidential version of Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under 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/F/38.620 — Hydrogen Peroxide and Perborate);

2. **Dismisses the appeal as to the remainder;**

3. **Annuls Commission Decision C(2012) 3534 final of 24 May 2012, rejecting a request for confidential treatment submitted by Evonik Degussa GmbH in so far as, by that decision, the hearing officer declined competence to answer the objections referred to in point 1 of the operative part of this judgment;**

4. **Orders Evonik Degussa GmbH and the European Commission to bear their own costs.**

[Signatures]

i — The wording of paragraph 64 of this document has been modified after it was first put online.