Reports of Cases

ORDER OF THE VICE-PRESIDENT OF THE COURT

10 September 2013*

(Appeal — Administrative procedure — Publication of a Commission decision concerning a cartel on the European market for glass for use in motor vehicles — Suspension of operation of a Commission decision rejecting in part the applicant's request that certain information in the decision concerning the cartel be treated as confidential)

In Case C-278/13 P(R),

APPEAL under the second paragraph of Article 57 of the Statute of the Court of Justice of the European Union, brought on 21 May 2013,

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

appellant,

the other party to the proceedings being:

Pilkington Group Ltd, established in Lathom (United Kingdom), represented by J. Scott, S. Wisking et K. Fountoukakos-Kyriakakos, Solicitors,

applicant at first instance,

THE VICE-PRESIDENT OF THE COURT,

after hearing the First Advocate General, N. Jääskinen,

makes the following

Order

1 By its appeal, the European Commission seeks to have set aside the order of the President of the General Court of the European Union of 11 March 2013 in Case T-462/12 R *Pilkington Group* v *Commission* ('the order under appeal'), by which the President granted an application for interim measures relating to Commission Decision C(2012) 5718 final of 6 August 2012 on the rejection of a request for confidential treatment submitted by Pilkington Group Ltd pursuant to Article 8 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (Case COMP/39.125 – Car glass) ('the contested decision').

* Language of the case: English.

The facts of the dispute and the proceedings before the judge hearing the application for interim measures

2 The facts of the dispute are summarised at paragraphs 2 to 8 of the order under appeal as follows:

'2 By the contested decision the … Commission rejected the request for the continuation of the non-confidential version of its Decision C (2008) 6815 final of 12 November 2008 relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.125 – Car glass) ('the 2008 Decision'), as published in February 2010 on the website of the "Competition" Directorate General.

3 In the 2008 Decision, the Commission found that an infringement of Article 81 EC had been committed between 1998 and 2003 within the European Economic Area (EEA) by [Pilkington Group Ltd ('Pilkington')], and other companies belonging to its group, by a number of companies belonging to the French Saint-Gobain group and the Japanese Asahi group – to which AGC Glass Europe, among others, belongs – and by the Belgian company Soliver with regard to sales of glass for new vehicles and replacement parts for motor vehicles ("the car glass cartel"). As a consequence, the Commission imposed fines totalling more than EUR 1.3 billion on the members of that cartel, the [Pilkington] group being fined EUR 370 million.

4 After taking into account requests for confidential treatment submitted by the addressees of the 2008 Decision, the Commission published, in February 2010, a full-text provisional non-confidential version of that decision on its website. That publication was not challenged by [Pilkington].

5 By letter of 28 April 2011, the Commission informed [Pilkington] of its intention to publish, for reasons of transparency, a fuller non-confidential version of the 2008 Decision and to reject, to that end, several requests for confidential treatment that it had received concerning (i) customer names, product names or descriptions of products, as well as any other information which might identify individual customers ("category I information"), (ii) the number of parts supplied by [Pilkington], the share of the business of a particular car manufacturer, pricing calculations or price changes etc. ("category II information"), and (iii) information which, according to [Pilkington], might identify certain members of its staff who were allegedly involved in implementing the cartel ("category III information"). The Commission invited [Pilkington], should it not agree, to refer the matter to the Hearing Officer pursuant to Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29).

6 Noting that the proposed more complete version contained a considerable amount of information which had not been published in February 2010 for reasons of confidentiality, [Pilkington], by letter of 30 June 2011, informed the Hearing Officer that it objected to publication of a version of the 2008 Decision which would be more complete than the version published in February 2010, maintaining that category I and II information had to be protected since it constituted business secrets, whilst disclosure of category III information would make it possible to identify the natural persons, namely employees of [Pilkington] who had allegedly been involved in implementing the cartel. [Pilkington] thus requested confidential treatment for all that information.

7 In the contested decision, signed '[f]or the Commission', the Hearing Officer, whilst accepting the confidential nature of certain information referred to by [Pilkington], none the less rejected the majority of its requests.

8 [Pilkington] was notified of the contested decision on 9 August 2012.'

3 By application lodged at the Registry of the General Court on 19 October 2012, Pilkington brought an action for annulment of the contested decision, which is still pending before that court. In support of that action, it argues, in essence, that the publication at issue is, on the one hand, an infringement of the Commission's duty of confidentiality under Article 339 TFEU and Article 28 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1) and, on the other, an infringement of that institution's duty to protect personal data under Article 8 of the Charter of Fundamental Rights of the European Union ('the Charter'), inasmuch as the more complete version of the 2008 Decision contains business secrets, covered by the obligation of professional secrecy, and information enabling its employees to be identified.

4 By separate document, lodged at the Registry of the General Court the same day, Pilkington brought an application for interim measures, requesting the President of the General Court to:

— suspend the operation of the contested decision until the General Court has ruled on the substantive action;

— order the Commission to refrain from publishing a version of the 2008 Decision which is more complete, in relation to Pilkington, than the version published in February 2010 on the Commission's website; and

— order the Commission to pay the costs.

5 In its observations on the application for interim measures, lodged at the Registry of the General Court on 11 January 2013, the Commission contended that the Court should:

— reject the application for interim measures, and

— order Pilkington to pay the costs.

The order under appeal

6 Having rejected a number of applications for leave to intervene at paragraphs 14 to 22 of the order under appeal, the President of the General Court went on to examine the application for interim measures, starting at paragraph 23 of the order.

7 The President of the General Court pointed out, at paragraphs 24 to 27 of the order under appeal, that the two conditions relating, respectively, to urgency and to the establishment of a prima facie case are cumulative and that the judge hearing an application for interim measures must also weigh up the interests involved. He observed that the judge hearing such an application enjoys a broad discretion in determining the manner in which those various conditions are to be examined and decided to examine first of all, together, those issues relating to the weighing up of the interests involved and urgency.

8 At paragraphs 28 and 29 of the order under appeal, referring to the orders of the President of the Court of Justice in Joined Cases 76/89 R, 77/89 R and 91/89 R *Radio Telefis Eireann and Others* v *Commission* [1989] ECR 1141, paragraph 15, and Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187* v *Commission* [2003] ECR I-6887, paragraph 142, the President of the General Court observed that the weighing up of the various interests involved requires the judge hearing the application for interim measures to determine whether or not the applicant's interest in obtaining the interim measures sought outweighs the interest in immediate application of the contested measure by examining, more specifically, whether annulment of that measure by the Court when ruling on the main application would allow the situation which would have been brought about by its immediate operation to be reversed, and, conversely, whether suspension of its operation would prevent it from

being fully effective in the event of the main application being dismissed. Referring to the order of the President of the Court of Justice in Case C-313/90 R *CIRFS and Others* v *Commission* [1991] ECR I-2557, paragraph 24, the President of the General Court added that the decision made by the judge hearing an application for interim measures is by its nature interim in the sense that it must not either prejudge the future decision on the substance or render it illusory by depriving it of effectiveness.

9 The President of the General Court went on to point out, at paragraphs 31 and 32 of the order under appeal, that in order to preserve the effectiveness of a judgment annulling the contested decision, Pilkington must be able to ensure that the Commission cannot unlawfully publish the disputed information, as such a judgment would be rendered illusory and deprived of effectiveness if the application for interim measures were to be dismissed, since the consequence of that dismissal would be that the Commission would be free immediately to publish that information, notwithstanding the fact that, even if the disputed information were actually published, that would probably not have the effect of depriving Pilkington of an interest in bringing proceedings for annulment of the contested decision. Consequently, the President of the General Court stated, at paragraph 33 of the order under appeal, that the interest defended by Pilkington must prevail over the Commission's interest in the dismissal of the application for interim measures, *a fortiori* since the grant of the interim measures requested amounted to no more than maintaining, for a limited period, the status quo which had existed since February 2010.

10 In so far as the Commission invoked the interest of the potential victims of the car glass cartel who will need the category I and II information in order to establish the requirements of any claim in damages, the President of the General Court stated, at paragraphs 35 and 36 of the order under appeal, that the Commission's arguments did not prevail over Pilkington's interest in the present case because, inter alia, as regards the national limitation rules alluded to, the Commission failed to indicate what would prevent those victims from bringing their actions for damages in due time, whilst obtaining a stay of national proceedings until judgment is given in the main action.

11 At paragraph 38 of the order under appeal, the President of the General Court stated that in view of the fact that, following the weighing up of interests, the balance was thus in Pilkington's favour, there was clearly an urgent need to protect the interest defended by that company, provided that it was likely to suffer serious and irreparable harm in the event of its application for interim measures being dismissed. The President pointed out that, according to Pilkington, the situation which would result from publication of the more complete version of the 2008 decision could not be undone.

12 The President of the General Court concluded, at paragraphs 39 to 42 of the order under appeal, that the condition relating to urgency was not met so far as the category III information was concerned, essentially because Pilkington had failed, in his view, to establish that the measures sought were necessary to protect an interest of its own.

13 On the other hand, with regard to the category I and II information, the President of the General Court found, at paragraphs 43 to 45 of the order under appeal, that that condition was, in principle, satisfied. He stated that if it transpired that publication of the information at issue was incompatible with the right to the protection of professional secrecy, enshrined in Article 339 TFEU and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ('the ECHR'), Pilkington's fundamental right to such protection could be irreversibly deprived of any meaning. Moreover, Pilkington's fundamental right to an effective remedy, enshrined in Article 6 of the ECHR and Article 47 of the Charter, might be jeopardised if the Commission were allowed to publish that information before the General Court had adjudicated on the main action.

14 At paragraphs 46 et seq. of the order under appeal, the President of the General Court rejected the arguments to the contrary put forward by the Commission. He stated, at paragraph 47 of the order, that there was no factual basis for the Commission's assertion that Pilkington had not alleged infringement of a fundamental right. He also found, at paragraphs 48 to 50 of the order, that the Commission's argument that the publication of the information at issue was the foreseeable consequence of acts which Pilkington had itself committed – namely that company's unlawful conduct – such that this consequence could not be attributed to an infringement of its fundamental rights, as held by the European Court of Human Rights in *Gillberg* v *Sweden* [GC], (no 41723/06, §§ 67 and 72, of 3 April 2012), could not succeed because the present case concerns the confidential nature of certain information, unlike the case which gave rise to that judgment.

15 Moreover, the President of the General Court stated, at paragraphs 52 and 53 of the order under appeal, that it was not possible to follow the earlier case-law (orders of the President in Case T-198/03 R *Bank Austria Creditanstalt* v *Commission* [2003] ECR II-4879, and Case T-201/04 R *Microsoft* v *Commission* [2004] ECR II-4463) in which the President of the General Court, in response to arguments relating to the irreversible nature of the publication of sensitive information that might be used in actions for damages against the undertaking concerned, had treated as purely financial – and not normally therefore regarded as irreparable – the damage which might be caused to that undertaking by the information being used in such a way. He added that, at least since the entry into force – on 1 December 2009 – of the Treaty of Lisbon, which has raised the Charter to the level of primary European Union law and provides that it is to have the same legal value as the Treaties (first subparagraph of Article 6(1) TEU), an imminent risk of a serious and irreparable breach of the fundamental rights conferred by Articles 7 and 47 of the Charter in that field was to be regarded, in itself, as harm justifying the grant of the interim protection requested.

16 The President of the General Court went on, at paragraphs 54 to 56 of the order under appeal, to dismiss as irrelevant to the present case other orders relied on by the Commission, namely the order of the President in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, and the order of the President of 18 March 2011 in Case T-457/09 R *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, not published in the ECR, on the ground that those cases concerned mere restrictions of the exercise of the fundamental rights in issue, and the order of the President in Case C-7/04 P(R) *Commission* v *Akzo and Akcros* [2004] ECR I-8739, on the ground that in the case which gave rise to that order, which concerned whether or not documents seized by the Commission in the course of an inspection were confidential, the issue was not the public's access to those documents, but the very different question of whether the Commission was entitled to read them, bearing in mind that the Commission itself is required to respect professional secrecy.

17 At paragraphs 58 et seq. of the order under appeal, the President of the General Court examined the condition relating to the establishment of a prima facie case. After observing, at paragraph 58, that that condition is satisfied where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, prima facie, to be relevant and in any event not unfounded, he went on to state, at paragraph 59 of the order, that in the specific context of 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 and the imminent risk of negation of the fundamental rights relied on by the party seeking interim protection of those rights – may, as a rule, conclude that there is no prima facie case only where the information in question is obviously not confidential.

18 At paragraph 60 of the order under appeal, the President of the General Court examined the second plea raised by Pilkington in support of its action in the main proceedings, by which it complains that the Commission has, inter alia, infringed Article 339 TFEU and Articles 28(1) and 30(2) of Regulation No 1/2003 in deciding to publish information which should be regarded as business secrets and whose

confidentiality should thus be protected. The President also pointed out that, according to Pilkington, the Commission erred in its assessment of whether there were overriding interests permitting disclosure of that information.

19 The President concluded, at paragraphs 61 to 65 of the order under appeal, that the category I and II information, as a whole, was commercially sensitive, notwithstanding the fact that it is more than five years old, essentially because it discloses Pilkington's commercial practices regarding car manufacturers which remain its customers.

20 The President also stated, at paragraphs 67 to 73 of the order under appeal, that, without prejudice to the merits of the arguments put forward by the Commission, there was nothing to support the conclusion that there was clearly no prima facie case. The President pointed out that the assessment of the merits of the main action called for a very detailed examination of the information for which confidential treatment was sought, as well as a weighing up of Pilkington's interest and the public interest in transparency, which could not be carried out in proceedings for interim measures. He also stated that the fact that the Hearing Officer recognised that certain items of both the category I and the category II information were secret was in itself an indication that the information at issue cannot, on the face of it, be classified en bloc – because of its very nature – as clearly neither secret nor confidential. Moreover, with regard to the fact that the information at issue had been in existence for a long time, the President found that Pilkington's arguments that that information was nevertheless confidential in the circumstances of the case were not wholly irrelevant.

21 For all those reasons, the President of the General Court decided to grant Pilkington's application for interim measures, in so far as it sought to prevent publication by the Commission of the category I and II information, and to dismiss the application as to the remainder. Points 2 and 3 of the operative part of the order under appeal are worded as follows:

'(2) Operation of [the contested decision] is suspended in relation to two categories of information, as referred to in point 6 of Decision C(2012) 5718 final, concerning, first, customer names, product names or descriptions of products, as well as any other information which might identify individual customers and, second, the number of parts supplied by [Pilkington], the share of the business of a particular car manufacturer, pricing calculations, price changes etc.

(3) The Commission is ordered to refrain from publishing a version of [the 2008 decision] which is more complete, in relation to the information in the two categories referred to in point 2 above, than that published in February 2010 on the Commission's website.'

The appeal

22 The Commission relies on two grounds of appeal, alleging, respectively:

— an error of law in the assessment of the condition relating to urgency, and

— in the alternative, an error of law in the assessment of condition relating to the establishment of a prima facie case in conjunction with the condition relating to urgency.

23 The final section of the appeal is devoted to the potential consequences, in the Commission's view, of the decision adopted by the President of the General Court in the order under appeal. The Commission maintains, in essence, that if European Union courts hearing applications for interim relief adopt the approach set out in the order under appeal, it will become impossible in practice for it to publish information on competition law infringements under Article 30 of Regulation No 1/2003 in a timely manner, since it will in future be sufficient for an undertaking to claim that information is confidential in order to prevent its publication until the court hearing the substantive application has

ruled on confidentiality. According to the Commission, the case-law thus established by the President of the General Court will also have a negative effect on the conduct of administrative proceedings for the enforcement of the competition rules, since it may also be applied at the stage at which access is granted to the statement of objections.

24 Pilkington submits that the Commission's argument is inadmissible because it does not raise any pleas in law and, in any event, the Commission's fears are unfounded. With regard to the possible application, by analogy, of the approach adopted by the President of the General Court as regards access to the statement of objections, Pilkington claims that there is a significant difference between disclosure of information to a limited number of companies and disclosure on the internet to the public at large.

The first ground of appeal, alleging an error of law in the assessment of the condition relating to urgency

Arguments of the parties

25 The Commission submits that the President's assessment of the condition relating to urgency at paragraphs 44 to 56 of the order under appeal is based on an erroneous interpretation of Article 104(2) of the Rules of Procedure of the General Court, in so far as the President took the view that the alleged breach of European Union law constitutes harm justifying the suspension of operation of a decision without there being any need to assess whether that breach entails serious and irreparable harm in the individual circumstances of the case. In fact, the damage to be established by Pilkington in order to show that the condition relating to urgency is satisfied must be serious and irreparable, that is, it could not be remedied either by a decision on the main application or a separate action for damages. At paragraphs 45 and 53 of the order under appeal, the President of the General Court assumed the existence of 'harm justifying the grant of the interim protection requested' merely on the basis of an alleged breach of European Union law, without assessing whether Pilkington had made out a plausible case that, in the specific circumstances of the case, it was likely to sustain serious and irreparable harm if the protection requested was not granted.

26 According to the Commission, the requirement to determine whether urgent measures are necessary by assessing the risk of serious and irreparable harm applies, without distinction, in all fields of law, including situations in which an applicant seeks interim relief to secure suspension of the operation of a decision to publish information which it claims is confidential. The Commission states that the fact that the acquisition of knowledge of such information cannot be reversed once it has occurred does not mean that the disclosure of such information previously kept secret would, in the context of an application for interim relief, necessarily lead to a risk of serious and irreparable harm in all cases. That is what the President of the General Court concluded, correctly, in the orders cited above in *Bank Austria Creditanstalt* v *Commission* (paragraphs 50 to 62) and *Microsoft* v *Commission* (paragraphs 253 to 256).

27 The Commission claims that undertakings involved in competition law proceedings usually have predominantly economic interests in protecting the secrecy of their information. The extent to which disclosure of that information would cause irreparable harm depends on a combination of factors, such as the commercial usefulness of the information for the those who provide it and other market participants. Thus, the likelihood that disclosure of that information would cause serious and irreparable harm which cannot be the subject of subsequent financial compensation can be determined only through an assessment of the consequences of such disclosure in the specific circumstances of the case under examination.

28 Moreover, the Commission maintains that the requirement to determine whether the condition relating to urgency is satisfied by assessing the risk of serious and irreparable harm in the light of the specific circumstances of the case is also applicable where interim relief is sought against a decision

that allegedly infringes fundamental rights. It points out, in particular, that in the order in *Camar* v *Commission and Council* (paragraphs 46 and 47), the President of the Court of Justice rejected the argument that the damage pleaded would, by definition, be irreparable since it was 'connected with the field of fundamental freedoms', and held that it is not enough to allege infringement of fundamental rights in the abstract for the purpose of establishing that the harm which could result would necessarily be irreparable.

29 According to the Commission, the President of the General Court erred, at paragraph 54 of the order under appeal, in dismissing as irrelevant the order in *Camar* v *Commission and Council* on the ground that, in the case which gave rise to that order, the applicant was able to allege only a 'restriction' of his fundamental rights, whereas in the present case, if the application for interim relief were dismissed, Pilkington would be 'utterly deprived of the fundamental rights it has pleaded'. The order in *Camar* v *Commission and Council* did not make any such distinction as regards the question whether an applicant invoking a breach of fundamental rights must demonstrate the likelihood of 'irreparable' harm.

30 As regards the relevance in that regard of the entry into force of the Treaty of Lisbon and the resulting enhanced protection of the rights enshrined in the Charter – factors alluded to at paragraph 53 of the order under appeal – the Commission states that the President of the General Court does not explain how those factors may have affected the conditions for interim relief laid down in Article 104(2) of the Rules of Procedure of the General Court, particularly in view of the fact that both the right to respect for private life, embodied in Article 8 of the ECHR and Article 7 of the Charter, and the right to an effective judicial remedy, enshrined in Article 6 of the ECHR and Article 47 of the Charter, have been protected as general principles of European Union law at least since the early 1980s. The approach adopted by the President of the General Court goes against long-standing case-law according to which the alleged breach of a higher-ranking rule of law cannot be sufficient on its own to establish that any damage caused is serious and irreparable (order of the President in Case C-159/98 P(R) *Antilles néerlandaises* v *Council* [1998] ECR I-4147, paragraph 62, and Case C-377/98 R *Netherlands* v *Council* [2000] ECR I-6229, paragraph 45).

31 According to the Commission, while the high intrinsic value of fundamental rights may imply that certain violations of such rights cannot be made good by financial compensation, Article 278 TFEU, which provides that actions brought before the Court do not have a suspensory effect, would be deprived of its practical effect if invoking a breach of fundamental rights automatically sufficed for the purpose of establishing the urgency of interim relief. The Commission criticises the President of the General Court for dismissing, without first examining it, the possibility that financial compensation might be sufficient to make good the harm to Pilkington's economic interest in the confidentiality protection sought, in spite of the fact that that company essentially argued that disclosure of the purportedly confidential information could put it at a disadvantage in competition terms vis-à-vis its competitors or customers. Therefore, the President's approach fails to take account of the fact that the economic damage which might result from the alleged breach of Pilkington's right to confidentiality could be purely financial.

32 While acknowledging that the disclosure of confidential information may, because of its irreversible nature, lead to serious and irreparable harm in an individual case, the Commission submits that the conditions set out in Article 104(2) of the Rules of Procedure of the General Court, together with the non-suspensory effect of actions against European Union acts established in Article 278 TFEU, require the judge hearing an application for interim measures to assess, by reference to the specific circumstances of the case, the likelihood of serious and irreparable harm occurring in the absence of the interim relief requested, it not being possible to assume such harm will occur simply because a breach of fundamental rights is alleged.

33 Pilkington submits that the Commission's approach has no basis in case-law. It is manifestly incorrect that serious and irreparable harm affecting a fundamental right should be perceived as a special type of harm which may be disregarded.

34 Pilkington concurs with the Commission's view that, under settled case-law, the condition relating to urgency is met only where serious and irreparable harm is likely to occur if the interim relief sought is not granted. However, that company shares the view of the President of the General Court that such harm may be found in the harm caused to fundamental rights that stems from their serious and irreparable breach. Contrary to the Commission's submissions, the President of the General Court examined the specific harm Pilkington was likely to suffer if the information at issue was published and concluded that there was a risk that its fundamental rights would be seriously and irreparably harmed, thus constituting serious and irreparable harm for that company.

The Court's assessment

35 Article 104(2) of the Rules of Procedure of the General Court provides that applications for interim measures must state 'the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for'. Thus, the judge hearing an application for interim relief may order suspension of operation of an act, or other interim measures, if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, so that an application for interim measures must be dismissed if either of them is absent (order of the President in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the interests involved (see the order of the President in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

36 It should be noted in that regard that the purpose of interlocutory proceedings is to guarantee the full effectiveness of the final future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice. It is for the purpose of attaining that objective that urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable harm to the party seeking the interim relief (see the order of the President in Case C-404/01 P(R) *Commission* v *Euroalliages and Others* [2001] ECR I-10367, paragraphs 61 and 62). It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering harm of that nature (see the order of the President in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14).

37 Although, in order to establish the existence of serious and irreparable damage, it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage is foreseeable with a sufficient degree of probability, the party seeking interim measures is nevertheless required to prove the facts forming the basis of his claim that serious and irreparable damage is likely (order of the President in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67).

38 It should be noted that, in the present case, the alleged harm would result from the publication of information claimed to be confidential. For the purpose of assessing the existence of serious and irreparable harm, and without prejudice to the examination relating to the establishment of a prima facie case that is connected with – but separate from – that assessment, the President of the General Court was necessarily required to start from the premiss that the information alleged to be confidential was in fact confidential, as claimed by Pilkington in its action in the main proceedings and in its application for interim relief.

39 It should be noted in that regard that at paragraphs 44 and 45 of the order under appeal, the President of the General Court concluded that there was a risk of serious and irreparable harm on the basis that Pilkington's fundamental rights would be seriously and irreversibly infringed by the publication of its alleged business secrets in circumstances in which no effective remedy would be available to it. It is apparent from paragraphs 52 and 53 of the order that the President of the General Court decided not to follow that court's earlier case-law according to which disclosure of confidential information of a commercial nature, in breach of the fundamental rights of the party seeking interim relief, does not necessarily give rise to serious and irreparable harm. In support of that line of reasoning, the President referred, inter alia, to the entry into force of the Treaty of Lisbon and the enhanced protection of the rights enshrined in the Charter resulting from it.

40 However, according to the settled case-law of the Court of Justice, the argument that harm is, by definition, irreparable because it falls within the scope of fundamental freedoms cannot be accepted since it is not sufficient to allege infringement of fundamental rights in the abstract for the purpose of establishing that the harm which could result would necessarily be irreparable (see, to that effect, *Camar* v *Commission and Council*, paragraphs 46 and 47). That case-law is not called into question by the enhanced protection of fundamental rights brought about by the Treaty of Lisbon, since those rights, in particular the rights invoked in the present case, already enjoyed protection under European Union law before the entry into force of that treaty.

41 It is true that breach of certain fundamental rights, such as the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter, may, on account of the very nature of the right violated, in itself give rise to serious and irreparable harm. However, the fact remains that, in accordance with the case-law cited at paragraphs 36 and 37 above, it remains for the party seeking interim measures to set out and establish the likelihood of such harm occurring in his particular case.

42 That is the case, inter alia, where a party seeks interim measures in order to prevent the publication of commercial data which that party claims are covered by the obligation of professional secrecy. Indeed, as the Commission correctly observed, the extent to which disclosure of such information will cause serious and irreparable harm depends on a combination of factors, such as, inter alia, how significant the information is in commercial terms for the undertaking providing the information and its usefulness for other market participants.

43 In so far as the President of the General Court stated, at paragraph 54 of the order under appeal, that Pilkington would be utterly deprived of its rights, since the fundamental rights at issue in the present case would be violated, whereas the case which gave rise to the order in *Camar* v *Commission and Council* concerned a mere restriction of the rights in question, it is sufficient to note that the difference between those two cases does not render that order irrelevant. Indeed, that difference does not in any way alter the requirement referred to above for the party seeking interim measures to set out and establish the likelihood of serious and irreparable harm occurring in his particular case.

44 It is apparent from all the foregoing considerations that the President of the General Court erred in law in considering, in particular at paragraphs 44 and 45 of the order under appeal, that the alleged breach of Pilkington's fundamental right to protection of professional secrecy, enshrined in Article 339 TFEU and Article 8 of the Charter, and of that company's right to an effective judicial remedy, enshrined in Article 6 of the ECHR and Article 47 of the Charter, were in themselves sufficient for the purpose of establishing the likelihood of serious and irreparable harm in the particular circumstances of the case.

45 It should be noted, however, that if the grounds of a decision of the General Court disclose an infringement of European Union law but its operative part is shown to be well founded on other legal grounds, such infringement is not one which should bring about the annulment of that decision and it

is appropriate to carry out a substitution of grounds (see, to that effect, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 187 and case-law cited).

46 It is apparent from the order under appeal, in particular paragraph 43, that the harm pleaded by Pilkington in relation to the category I and II information consists in the fact that, once the confidential information has been published, any subsequent annulment of the contested decision, on grounds of breach of Article 339 TFEU and of the fundamental right to the protection of professional secrecy, would not reverse the effects of the publication of that information. Pilkington's customers, competitors and suppliers, financial analysts and the general public could have access to the information in question and use it as they pleased, which would cause serious and irreparable harm to that company. As a consequence, Pilkington would be denied effective judicial protection if the information at issue was disclosed before the resolution of the main action.

47 It should be noted that the harm thus alleged is sufficiently serious. If, as a starting point, it is assumed that the category I and II information was covered by business secrecy, publication of that information would necessarily cause Pilkington significant harm, since it is specific commercial information relating to matters such as the identity of customers, the number of parts supplied, price calculations and price changes.

48 As regards the question whether such harm is irreparable, it is obvious that annulment of the contested decision by the General Court could not reverse the effects of publication of a version of the 2008 decision containing the information at issue, since once a person has acquired knowledge of that information by reading the decision, that knowledge cannot not be deleted.

49 However, according to the Commission, the harm alleged by Pilkington in the present case is purely financial, since, by objecting to publication of the information at issue, that company is seeking to protect its commercial and financial interests.

50 Damage of a pecuniary 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 (see, inter alia, the order of the President in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24). Any such damage could be recouped by the applicant's bringing an action for compensation on the basis of Articles 268 TFEU and 340 TFEU (orders of the President in Case 229/88 R *Cargill and Others* v *Commission* [1988] ECR 5183, paragraph 18, and *Commission* v *Euroalliages* and Others, paragraph 70).

51 In the present case, as the President of the General Court correctly observed at paragraph 43 of the order under appeal, in order to establish serious and irreparable harm, Pilkington refers to the effects that would arise from publication of the information at issue if various categories of third parties were free to use it as they pleased. Accordingly, were it to occur, the harm alleged by Pilkington would consist in the adverse effects on its commercial and economic interests resulting from such use. If Pilkington's commercial and economic interests were harmed as a result of publication of the information at issue, the payment of commensurate compensation should, at least in theory, be sufficient to make good the damage alleged. Such harm may, therefore, actually be classified as financial harm within the meaning of the case-law cited in the preceding paragraph and may be made good, in principle, by means of an action for damages.

52 However, it should be noted that harm of a financial nature may, inter alia, be considered to be irreparable if the harm, even when it occurs, cannot be quantified (order of the Vice-President of the Court of Justice in Case C-551/12 P(R) *EDF* v *Commission* [2013] ECR, paragraph 60 and the case-law cited).

53 The uncertainty of obtaining compensation for pecuniary damage if an action for damages is brought cannot in itself be regarded as a factor capable of establishing that such damage is irreparable within the meaning of the case-law of the Court of Justice. At the interlocutory stage, 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 for annulment), to which the interlocutory proceedings are an adjunct (order of the President of 14 December 2011 in Case C-446/10 P(R) *Alcoa Trasformazion*i v *Commission*, paragraphs 55 to 57; see also paragraph 36 above).

54 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 identity of customers, the number of parts supplied, price calculations and price changes.

55 It is clear that the harm which Pilkington might suffer as a result of the publication of its alleged business secrets would be different, in both nature and extent, depending on whether the persons who acquired knowledge of that information fell within each of the categories of persons identified at paragraph 43 of the order under appeal, namely its customers, competitors and suppliers, or indeed financial analysts and the general public. It would be impossible to identify the number and status of all the persons who in fact acquired knowledge of the information published and thus assess the actual impact which publication of that information might have on Pilkington's commercial and financial interests.

56 Lastly, with regard the argument put forward by the Commission in the third part of its appeal that the order under appeal would also have a negative effect on the conduct of administrative proceedings designed to bring to an end infringement of the competition rules, since it may also be applied, by analogy, at the stage at which access is granted to the statement of objections, it should be added that that situation is very different from that in which a definitive decision is published establishing the existence of such an infringement.

57 Where a party to administrative proceedings is given access to a version of the statement of objections which contains business secrets, such access is, in principle, granted to that party for the sole purpose of enabling him to participate effectively in those proceedings, so that he is not entitled to use the information contained in that document for other purposes. Moreover, the harm which may occur if a limited number of easily identifiable persons were granted access to the statement of objections cannot be compared – in particular as regards the possibility of assessing and, ultimately, quantifying the harm – with the harm which would arise as a result of the publication on the internet of a definitive decision which could be accessed by any person.

58 It cannot therefore be inferred from the findings at paragraphs 51 to 55 above that, where the Commission grants access to a statement of objections, that will necessarily cause serious and irreparable harm in the same way as the publication of a definitive decision finding an infringement.

59 In the light of the foregoing considerations, the President of the General Court was correct to find that the condition relating to urgency was satisfied in the present case, since it had been established to the requisite legal standard that Pilkington was likely to suffer serious and irreparable harm.

60 The first ground of appeal must therefore be rejected.

The second ground of appeal, alleging an error of law in the assessment of the condition relating to the establishment of a prima facie case, in conjunction with the condition relating to urgency

Arguments of the parties

61 By its second ground of appeal, put forward as an alternative argument, the Commission maintains that the President of the General Court imposed on it, in particular at paragraph 59 of the order under appeal, the burden of proving that no prima facie case could be made out by requiring it to demonstrate that the information at issue is clearly not confidential.

62 The Commission refers to established case-law to the effect that the particular strengths or weaknesses of the pleas relied on to show a prima facie case are to be taken into consideration by the judge in his assessment of urgency and, if appropriate, of the balance of interests. As the President of the General Court based his assessment of urgency solely on the assumption that any disclosure of confidential information would infringe fundamental rights, he was not entitled simply to carry out an abstract assessment of the condition relating to the establishment of a prima facie case. According to the Commission, the onus was not on it to demonstrate that that information was clearly not confidential but on Pilkington to establish that the information in question was confidential, an especially difficult task because the information is over five years old.

63 The Commission also claims that, at paragraphs 69 and 70 of the order under appeal, the President of the General Court disregarded the fact that the Hearing Officer's task was not to demonstrate that certain information was not confidential but merely to examine whether Pilkington had sufficiently substantiated its confidentiality claims. Moreover, the Commission's arguments were misrepresented, since it referred to the fact that the information in question was more than five years old and had been exchanged among the cartel members not in order generally to rule out any possibility that the information may be regarded as confidential but simply in order to point out that it was for Pilkington to explain, with regard to each individual item of information, why information more than five years old and known to other cartel members remained confidential. Far from showing him to be inconsistent, the fact that the Hearing Officer accepted some of Pilkington's confidentiality claims demonstrates that the officer was willing to accept those claims, provided that Pilkington put forward sufficient reasons to justify the confidential treatment of the information in question.

64 According to Pilkington, the President of the General Court correctly applied established case-law which calls for a concrete assessment of the arguments put forward by the party seeking interim relief, in order to determine whether the prima facie test is met. It claims that a higher standard than the prima facie test would be contrary to interim measures case-law and completely alien to the provisional assessment which the judge hearing an application for such measures is required to carry out. In any event, Pilkington submits that the Commission's observations in that regard are not only incorrect but also irrelevant in the present case because Pilkington succeeded in establishing a strong prima facie case, as acknowledged by the President of the General Court at paragraphs 67 to 72 of the order under appeal.

The Court's assessment

65 By its second ground of appeal, alleging an error of law in the assessment of the condition relating to the establishment of a prima facie case, in conjunction with the condition relating to urgency, the Commission claims, in essence, that the President of the General Court reversed the burden of proof as regards the examination of the condition relating to the establishment of a prima facie case, such a reversal being especially open to criticism, in its view, because the President of the General Court gave too broad an interpretation of the condition relating to urgency.

66 In the light of the substitution of grounds made in paragraphs 46 et seq. above, the Commission's arguments concerning the effect of the President of the General Court's approach to the condition relating to urgency on the analysis of whether a prima facie case had been made out should be dismissed at the outset. As it is now established that that condition has been met, not simply on the basis of a breach of fundamental rights as such but essentially because it is impossible to quantify adequately the harm pleaded in the present case, those arguments cannot succeed.

67 According to the established case-law cited at paragraph 58 of the order under appeal, 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 (see, to that effect, the orders of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 26, and Case C-39/03 P-R *Commission* v *Artegodan and Others* [2003] ECR I-4485, paragraph 40 and the case-law cited). That is the case, inter alia, as the President of the General Court correctly observed at paragraph 58 of the order under appeal, 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 (see, to that effect, the order in *Commission* v *Atlantic Liner Container and Others*, paragraph 30).

68 That being so, it should be noted that, by stating, at paragraph 59 of the order under appeal, 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, the President of the General Court did not intend to depart from the principles set out at paragraph 58 of the order under appeal. Similarly, by stating, at paragraph 67 of that order, that – without prejudice to the merits of the arguments put forward by the Commission, which would be considered by the Court when it adjudicates upon the substance – the case-file does not support the conclusion that there is clearly no prima facie case, the President of the General Court was simply emphasising the need, in a case concerning the possible publication of confidential information, not to prejudge the outcome of the substantive proceedings at the stage where an application for interim measures is examined.

69 In any event, the President of the General Court based his concrete analysis on whether there was a prima facie case on specific criteria which in fact reflect the rules governing evidence and the burden of proof referred to in the considerations set out at paragraph 58 of the order under appeal and confirmed at paragraph 67 above.

70 Indeed, at paragraph 68 of the order under appeal, the President of the General Court held that, in the light of the volume of the information covered by the requests for confidentiality, consideration of whether the Commission made errors in rejecting the majority of those confidentiality requests raised complex questions the resolution of which called for a very detailed examination, which could not be carried out in proceedings for interim measures.

71 Moreover, the President of the General Court did not reverse the burden of proof at paragraph 69 of the order under appeal by taking the view that the fact that the Hearing Officer recognised that certain items of both the category I and the category II information were secret undermined the officer's argument that, as it had been exchanged between members of the car glass cartel, that information had been transformed into information that was generally known, or by reaching the conclusion that it was not manifestly apparent from the fact that Pilkington had made that information known to the other members of the cartel that that information was available, if not to

the general public, at the very least to certain specialist circles. Prima facie, those inferences, by which the President of the General Court addressed specific arguments put forward by the Commission, appear to be logical and do not, in principle, disclose any error of law.

72 In so far as the President of the General Court also inferred from the same set of circumstances, at paragraph 69 of the order under appeal, that the information at issue could not be classified en bloc as clearly neither secret not confidential, it should nevertheless be noted that the Hearing Officer is required to examine each item of information individually and his conclusion concerning an individual item of information should therefore, in principle, have no effect on his assessment of the other items. However, for the purposes of the present appeal, it is sufficient to note that that statement does not form an essential part of the reasoning adopted by the President of the General Court and does not, in any event, support the Commission's argument that the President erred in law by departing from the standard of proof referred to at paragraph 58 of the order under appeal and confirmed at paragraph 67 above or by reversing the burden of proof.

73 Nor did the President of the General Court reverse the burden of proof by considering, at paragraph 70 of the order under appeal, that the specific, detailed arguments put forward by Pilkington (set out at paragraphs 63 to 65 of the order) were not wholly irrelevant for the purpose of establishing that the category I and II information had remained secret because of its very nature, notwithstanding the fact that it was more than five years old, or in finding that it could not 'clearly be ruled out' that the exceptional rule laid down in Article 4(7) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) may be relevant. By those observations, the President was simply pointing out that, prima facie, those arguments did not appear to be unfounded, in accordance with the case-law cited at paragraph 67 above.

74 It follows from the foregoing that the President of the General Court did not err in law in his application of the condition relating to the establishment of a prima facie case and, accordingly, the second ground of appeal must be rejected.

75 It follows that the appeal must be dismissed in its entirety, since the arguments put forward in the third part of the appeal in no way constitute autonomous grounds of appeal.

Costs

76 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Pilkington has applied for an order that the Commission pay the costs and the Commission has been unsuccessful in all its pleas, it must be ordered to pay the costs.

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

1. The appeal is dismissed.

2. The European Commission is ordered to pay the costs.

[Signatures]