Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

6 June 2013*

(Competition — Access to the file — Judicial proceedings relating to fines for infringement of Article 101 TFEU — Third-party undertakings wishing to bring an action for damages — National rules making access to the file subject to the consent of all parties to the proceedings — Principle of effectiveness)

In Case C-536/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Wien (Austria), made by decision of 12 October 2011, received at the Court on 20 October 2011, in the proceedings

Bundeswettbewerbsbehörde

v

Donau Chemie AG,

Donauchem GmbH,

DC Druck-Chemie Süd GmbH & Co KG,

Brenntag Austria Holding GmbH,

Brenntag CEE GmbH,

ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH,

ASK Chemicals Austria GmbH, formerly Ashland Südchemie Hantos GmbH,

intervening parties:

Bundeskartellamt,

Verband Druck und Medientechnik,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Ilešič, M. Berger, E. Levits and M. Safjan, Judges,

Advocate General: N. Jääskinen,

* Language of the case: German.

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 October 2012,

after considering the observations submitted on behalf of:

— the Bundeswettbewerbsbehörde, by T. Thanner and N. Harsdorf Enderndorf, acting as Agents,

— Donau Chemie AG and Donauchem GmbH, by S. Polster and C. Mayer, Rechtsanwälten,

— DC Druck-Chemie Süd GmbH & Co KG, by C. Hummer, Rechtsanwältin,

— Brenntag EEC GmbH, by A. Reidlinger, Rechtsanwalt,

— ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH, and ASK Chemicals AustriaGmbH, formerly Ashland Südchemie Hantos GmbH, by F. Urlesberger, Rechtsanwalt,

— Verband Druck & Medientechnik, by T. Richter, Rechtsanwalt,

— the Austrian Government, by A. Posch, acting as Agent,

— the Belgian Government, by T. Materne and J.-C. Halleux, acting as Agents,

— the German Government, by A. Wiedmann and T. Henze, acting as Agents,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

— the French Government, by J. Gstalter, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Santoro, avvocato dello Stato,

— the European Commission, by A. Antoniadis and P. Van Nuffel, acting as Agents,

— the EFTA Surveillance Authority, by M. Schneider and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2013

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the principles of effectiveness and equivalence in the light of the rules applicable in the Austrian legal system to actions for damages in respect of a breach of European Union competition law.

2 The request has been made in proceedings brought before the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as a Kartellgericht (Cartel Court), concerning an application lodged by the Verband Druck & Medientechnik ('the VDMT'), an association of undertakings, seeking access to the file relating to judicial proceedings brought by the Bundeswettbewerbsbehörde (Austrian Federal Competition Authority) ('the BWB') against Donau Chemie AG, Donauchem GmbH, DC Druck-Chemie Süd GmbH & Co KG, Brenntag Austria Holding GmbH, Brenntag CEE GmbH, ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH and ASK Chemicals AustriaGmbH,

formerly Ashland Südchemie Hantos GmbH ('Donau Chemie and Others'), which culminated in a final judgment from the Oberlandesgericht Wien ordering the latter to pay a fine owing to their participation in agreements and concerted practices contrary to Article 101 TFEU.

Legal context

3 Paragraph 39(2) of the 2005 Law on cartels (Kartellgesetz 2005) ('the KartG') states:

'Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties.'

4 Paragraph 219 of the Austrian Code of Civil Procedure (Zivilprozessordnung) ('the ZPO') provides:

'1. The parties may gain access and have made copies and obtain extracts of all of the files relating to their case in the court's possession (case file), except for draft judgments and orders, minutes of discussions and court votes and written documents concerning disciplinary measures.

2. With the consent of both parties, third parties can gain access in the same way, make copies thereof and obtain extracts therefrom, at their own expense, in so far as this is not precluded by the legitimate overriding interests of another individual or overriding public interests within the meaning of the first sentence of Paragraph 26(2) of the 2000 Law on data protection DSG 2000 [Datenschutzgesetz 2000]. In the absence of such consent, the third party is entitled to access and to obtain copies only in so far as it can adduce prima facie evidence to show that it has a legal interest in so doing.

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 By judgment of 26 March 2010, the Oberlandesgericht Wien imposed fines totalling EUR 1.5 million on Donau Chemie and Others for infringement, inter alia, of Article 101 TFEU on the market in the wholesale distribution of printing chemicals. By judgment on appeal of 4 October 2010, the Oberster Gerichtshof upheld that judgment of the Oberlandesgericht Wien, which thereby became *res judicata*.

6 The VDMT was established with a view to representing the interests of its members, which include in particular undertakings in the printing sector. On 3 July 2011, acting pursuant to Paragraph 219(2) of the ZPO, it applied to the Oberlandesgericht Wien for access to the file relating to the judicial proceedings between the BWB and Donau Chemie and Others. The purpose of that application was to gather evidence enabling an assessment to be made, in particular, of the nature and amount of the potential loss suffered by the VDMT's members due to the infringements committed by Donau Chemie and Others, and to determine whether it was appropriate to bring an action for damages against those undertakings.

7 Relying on Paragraph 39(2) of the KartG, all the parties to the judicial proceedings between the BWB and Donau Chemie and Others in essence refused to consent to the VDMT being granted access to the file.

8 In that regard, the Oberlandesgericht Wien states that, contrary to what is provided for in Paragraph 219(2) of the ZPO, Paragraph 39(2) of the KartG makes no allowance for the court to authorise access to the judicial case file in competition cases without the consent of the parties, even where the party seeking access can demonstrate a legitimate legal interest in having access. In other words, according to the referring court, under the Austrian system, it is the legislature itself which weighed up, on the one hand, the general interest of the federal competition authority in obtaining

information and identifying infringements of competition law and, on the other, the interest of third parties in having access to files in order to facilitate their bringing actions for damages. Thus, in that weighing-up, the former interest was given absolute priority, to the detriment of the latter. That court indicates that it follows that, even if only one of the parties to the proceedings has not given its consent, the court, which has no power to weigh up the interests present, is bound to not to allow third parties access to the file.

9 The referring court observes that, according to Case C-360/09 *Pfleiderer* [2011] ECR I-5161, the provisions of European Union law on cartels do not preclude a party from being granted access to documents relating to a leniency procedure involving the perpetrator of an infringement of European competition law. In the absence of binding European competition law rules, it is for the Member States to establish and apply the national rules governing access for persons who have been adversely affected by a cartel to documents relating to a leniency procedure.

10 The Oberlandesgericht Wien observes, however, that the Court, in paragraphs 30 and 31 of *Pfleiderer*, also stated that, in keeping with the principle of effectiveness, it is necessary to ensure that the applicable national rules do not operate in such a way as to make it practically impossible or excessively difficult to obtain such damages and to weigh the respective interests in favour of, on the one hand, disclosure of the information and, on the other, the protection of that information. That weighing-up exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.

11 The Oberlandesgericht Wien accordingly is in some doubt as to the compatibility of Paragraph 39(2) of the KartG with that interpretation of the applicable European Union law, given that that provision precludes the court from proceeding with any weighing-up of the interests present.

12 Moreover, in the light of the reference to the principle of equivalence in paragraph 30 of *Pfleiderer*, the referring court also wonders whether, although Paragraph 39(2) of the KartG applies in the same manner to any cartel proceedings, be they based on national law or European Union law, that provision is nevertheless contrary to the principle of equivalence, as it does not apply to actions for damages for harm suffered due to infringements committed in other areas of civil or criminal law, those actions being governed more favourably, in terms of access to documents, by Paragraph 219(2) of the ZPO.

13 In those circumstances, the Oberlandesgericht Wien decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Does European Union law, in particular in the light of the judgment [in *Pfleiderer*], preclude a provision of national antitrust law which, (inter alia) in proceedings involving the application of Article 101 or Article 102 [TFEU] in conjunction with [Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1)], makes the grant of access to documents before the cartel court to third persons who are not parties to the proceedings, so as to enable them to prepare actions for damages against cartel participants, subject, without exception, to the condition that all the parties to the proceedings must give their consent, and which does not allow the court to weigh on a case-by-case basis the interests protected by European Union law with a view to determining the conditions under which access to the file is to be permitted or refused?

If the answer to Question 1 is in the negative:

2. Does European Union law preclude such a national provision where, although the latter applies in the same way to purely national antitrust proceedings and, moreover, does not contain any special rules in respect of documents made available by applications for leniency, comparable national

provisions applicable to other types of proceedings, in particular contentious and non-contentious civil and criminal proceedings, allow access to documents before the court even without the consent of the parties, provided that the third person who is not party to the proceedings adduces prima facie evidence to show that he has a legal interest in obtaining access to the file and that such access is not precluded in the case in question by the overriding interest of another person or overriding public interest?'

Admissibility

14 The Commission expresses doubts as to the admissibility of the request for a preliminary ruling, considering that it is hypothetical in nature. There is nothing in the order for reference establishing that the conditions laid down in the second sentence of Paragraph 219(2) of the ZPO are fulfilled in the present case, particularly as regards the requirement of a legitimate interest for the VDMT in obtaining access to the file in question, despite the parties' refusal to give their consent to access. Consequently, even if the referring court were to find that Paragraph 39(2) of the KartG is incompatible with European Union law and not apply that provision, it is in any event not certain that the VDMT would obtain access to the file in question on the basis of Paragraph 219(2) of the ZPO.

15 In that regard it should be recalled that in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-561/11 *Fédération Cynologique Internationale* [2013] ECR, paragraph 26 and the case-law cited).

16 The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Fédération Cynologique Internationale*, paragraph 27 and the case-law cited).

17 That is not the case here.

18 It is apparent from the case file in the Court's possession that Paragraph 39(2) of the KartG is a specific provision governing requests for access to files relating to competition proceedings and that, as such, it precludes the rule laid down in Paragraph 219(2) of the ZPO from being applied to those proceedings. Consequently, it is only if the answer given by the Court of Justice should lead the referring court to find Paragraph 39(2) of the KartG to be incompatible with European Union law and, consequently, to disapply it, that the conditions of application of the second sentence of Paragraph 219(2) of the ZPO would need to be fulfilled in the present case, including the requirement that a legal interest be demonstrated in the absence of the parties' consent. However, if that answer should lead the referring court to consider that Paragraph 39(2) of the KartG is compatible with European Union law, a ruling could be made on VDMT's request for access to the file on the basis of that provision alone, which would make Paragraph 219(2) of the ZPO inapplicable to the present case.

19 In those circumstances, the answer to the questions referred is clearly relevant for the outcome of the dispute in the main proceedings and the reference for a preliminary ruling is therefore admissible.

Consideration of the questions referred

Preliminary observations

20 In order to answer the questions put by the referring court, it should be borne in mind at the outset that just as it imposes burdens on individuals, European Union law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaties but also by virtue of obligations which they impose in a clearly defined manner both on individuals and on the Member States and the EU institutions (see, to that effect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 31, and Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 19 and the case-law cited).

21 In that context, the Court has held previously that since Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for the individuals (Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 39 and the case-law cited), the practical effect of the prohibition laid down in that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (*Courage and Crehan*, paragraph 26).

22 Moreover, in accordance with settled case-law, the national courts whose task it is to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see, inter alia, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 16; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19; *Courage and Crehan*, paragraph 25; and *Manfredi and Others*, paragraph 89).

23 Thus, first of all, the right of any individual to claim damages for loss caused to him by conduct which is liable to restrict or distort competition contrary to, inter alia, Article 101(1) TFEU strengthens the working of the Community competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (see, to that effect, *Courage and Crehan*, paragraphs 26 and 27; *Manfredi and Others*, paragraph 91; and *Pfleiderer*, paragraph 28).

24 Secondly, that right constitutes effective protection against the adverse effects that any infringement of Article 101(1) TFEU is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest (see, to that effect, *Manfredi*, paragraph 95).

25 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.

26 Regarding, more specifically, the detailed procedural rules governing actions for damages arising from infringement of the competition rules, it is for the Member States to establish and apply national rules on the right of access, by persons believing themselves to be adversely affected by a cartel, to documents relating to national proceedings concerning that cartel (see, to that effect, *Pfleiderer*, paragraph 23).

27 However, while the establishment and application of those rules falls within the competence of the Member States, they must none the less exercise that competence in accordance with European Union law. In particular, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (see *Courage and Crehan*,

paragraph 29; *Manfredi*, paragraph 62; and Case C-397/11 *Jörös* [2013] ECR, paragraph 29). Specifically, in the area of competition law, those rules must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (see *Pfleiderer*, paragraph 24, and Case C-439/08 *VEBIC* [2010] ECR I-12471, paragraph 57).

28 It is in the light of those considerations that the questions asked by the referring court should be answered.

Consideration of the first question

29 By its first question, the referring court asks, in essence, whether European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made solely subject to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

30 In order to answer that question, it should be observed that, in exercising their powers for the purpose of applying national rules on the right of access, by persons believing themselves to be adversely affected by a cartel, to documents relating to national proceedings concerning that cartel, the national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information (see, to that effect, *Pfleiderer*, paragraph 30).

31 That weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals.

32 On the one hand, it is clear that a rule under which access to any document forming part of competition proceedings must be refused is liable to make it impossible or, at the very least, excessively difficult to protect the right to compensation conferred on parties adversely affected by an infringement of Article 101 TFEU. This is the case inter alia when only access to the documents relating to the proceedings before the competent national competition authorities enables those parties to obtain the evidence needed to establish their claim for damages. Where those parties have no other way of obtaining that evidence, a refusal to grant them access to the file renders nugatory the right to compensation which they derive directly from European Union law.

33 On the other hand, it should be observed that a rule of generalised access under which any document relating to competition proceedings must be disclosed to a party requesting it on the sole ground that that party is intending to bring an action for damages is not necessary in order to ensure effective protection of the right to compensation enjoyed by that party, as it is highly unlikely that the action for damages must be based on all of the evidence in the file relating to those proceedings. Furthermore, that rule could lead to infringement of other rights conferred by EU law, inter alia, on the undertakings concerned, such as the right to protection of professional secrecy or of business secrecy, or on the individuals concerned, such as the right to protection of personal data. Lastly, such generalised access is also liable to adversely affect public interests, such as the effectiveness of anti-infringement policies in the area of competition law, because it could deter parties involved in infringements of Articles 101 TFEU and 102 TFEU from cooperating with the competition authorities (see, to that effect, *Pfleiderer*, paragraph 27).

34 It follows that, as the Court has held previously, the weighing-up of interests justifying disclosure of information and the protection of that information can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case (*Pfleiderer*, paragraph 31).

35 Although it is true, as observed by the Austrian Government, that that weighing-up must be done in the national legal context, national law must not be developed in such a way as to preclude any possibility for the national courts to conduct that weighing-up on a case-by-case basis.

36 Yet it is apparent from the order for reference and from all of the observations submitted to the Court that, under Paragraph 39(2) of the KartG, access to the competition court file is granted only if none of the parties to the proceedings object.

37 In such a situation, national courts having to rule on a request for access to the file have no opportunity to weigh up the interests protected by European Union law. In particular, those courts, which are empowered only to take due note of the consent or refusal expressed by the parties to the proceedings concerning the disclosure of the evidence in the file, may not intervene in order to protect overriding public interests or the legitimate overriding interests of other parties, including that of allowing disclosure of the documents requested, if just one of those parties objects.

38 It is also apparent from the order for reference that the parties to the proceedings before the competition court may object to access to the file without having to give any reasons. In practice this allows for systematic objections to any request for access, inter alia when the requests pertains to documents the disclosure of which is contrary to the interests of the parties to the proceedings, including documents which may contain evidence on which a claim for compensation could be based and which the requesting party cannot obtain by other means.

39 It follows that, in so far as the national legal measure or rule at issue in the main proceedings allows the parties to the main proceedings having infringed Article 101 TFEU the possibility of preventing persons allegedly adversely affected by the infringement of that provision from having access to the documents in question, without taking account of the fact that that access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation, that rule is liable to make the exercise of the right to compensation which those persons derive from European Union law excessively difficult.

40 That interpretation is not called into question by the Austrian Government's argument to the effect that such a rule is especially necessary in respect of documents lodged by parties in a file relating to proceedings under a leniency programme, in order to ensure the effectiveness of such a programme and therefore also that of the application of Article 101 TFEU.

41 Admittedly, as observed in paragraph 33 above, Member States must not apply the rules on file access in such a manner as to undermine public interests such as the effectiveness of anti-infringement policies in the area of competition law.

42 The Court has recognised that leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes (*Pfleiderer*, paragraphs 25 to 27).

43 It is clear, however, that although those considerations may justify a refusal to grant access to certain documents contained in the file of national competition proceedings, they do not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case (see, to that effect, *Pfleiderer*, paragraph 31).

44 In the course of that assessment, it is for the national courts to appraise, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of other possibilities it may have.

45 Secondly, the national courts must take into consideration the actual harmful consequences which may result from such access having regard to public interests or the legitimate interests of other parties.

46 In particular, as regards the public interest of having effective leniency programmes referred to by the Austrian Government in the present case, it should be observed that, given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union (see *Courage and Crehan*, paragraph 27), the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence.

47 By contrast, the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused.

48 It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.

49 In the light of all the foregoing considerations the answer to the first question is that European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

Consideration of the second question referred for a preliminary ruling

50 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

[Signatures]