

Current Intelligence

Netherlands v Commission: General Court confirms refusal to access to the full version of the bitumen cartel decision

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Case T-380/08, *Netherlands v Commission*, 13 September 2013

The General Court recognises a general presumption under which the disclosure of documents gathered in the context of an Article 101 TFEU procedure undermines, in principle, both the purpose of inspections, investigations and audits, and the protection of the commercial interests of the undertakings involved in such proceedings.

Legal context

On 13 September 2013, the General Court rejected an appeal by the Dutch Government against a European Commission (the ‘Commission’) decision refusing a request to access documents under Regulation No 1049/2001 which confers to the public a right of access to documents of the institutions (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 L 145, 31.5.2001, p. 43–48).

Facts

In this case, the Dutch Government requested access to the full version of the Commission’s decision in the *Dutch road bitumen* cartel (Decision of 13 September 2006 in Case COMP/F/38.456 — Bitumen (the Netherlands)), which it considered necessary in order to bring a damages action. The Commission refused to grant such access on the basis—amongst others—of Article 4(2) of Regulation No 1049/2001, which provides that access to a document can be refused where its disclosure would undermine, *inter alia*, the protection of commercial interests of a natural or legal person and the purpose of inspections, investigations, and audits.

Analysis

In assessing requests for access to documents under Regulation No 1049/2001, the Courts of the European Union (EU) have to carry out a delicate balancing exercise in order ‘to maintain the balance sought by the EU legislature in enacting Regulation No 1049/2001 and all other regulations which specifically govern access to documents contained in administrative files’ (Case C 477/10 P, *Commission v Agrofert Holding a. s.* [2012], not yet reported, Opinion of AG Cruz Villalón, para 20). Indeed, Regulation No 1049/2001 ‘does not exist in a vacuum’ (Case C-365/12 P, *EnBW Energie Baden-Württemberg AG ‘EnBW’ v Commission* [2013], not yet reported, Opinion of AG Cruz Villalón, para 38), nor does it expressly state its primacy over other pieces of EU legislation governing access to documents (Para 31; see also Case C 477/10 P, *Agrofert*, para 52). Accordingly, Regulation No 1049/2001 must be interpreted in a way which preserves their *effet utile*.

The current case concerned the interaction between Regulation No 1049/2001 and Regulation No 1/2003 (Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1). It is not the first time that the EU Courts have had to rule on requests for access to documents generated or exchanged in the context of cartel proceedings. On the contrary, since *Pfleiderer* (Case C-360/09, *Pfleiderer*, [2011] ECR I-5161), this particular topic has been brought several times before the EU Courts (see for example Case T-437/08, *CDC Hydrogene Peroxide Cartel Damage Claims (‘CDC’) v Commission* [2011] ECR II-08251; Case T-344/08 *EnBW v Commission*; Case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG* [2013], not yet reported; and Case C-365/12 P, *Commission v EnBW*, Opinion of AG’s Cruz Villalón). However, the question of the interplay between Regulation No 1049/2001 and requests for access to documents in the context of cartel proceedings is far from settled, and the judgment in *Netherlands v Commission* presents an important development in this respect. Indeed, in this case the General Court brings its interpretation in line with the Court of Justice’s case law on access to documents in the context of competition proceedings, in particular regarding the use of general presumptions.

Under Regulation No 1049/2001, institutions wishing to refuse access to a document have to demonstrate in what way such access would affect the interests protected by Article 4 of that regulation. By exception to this rule, the

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Court of Justice has recognised that, for certain categories of documents, the institutions can use general presumptions. In particular, the Court of Justice has recognised the existence of such a presumption in the context of state aid (Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH 'TGI'* [2010] ECR I-05885) and merger proceedings (Case C 477/10 P, *Agrofert*), essentially because the procedures to which the documents related were governed by special rules on accessibility.

The existence of these rules supports the presumption that the disclosure of such documents could, in principle, adversely affect the purpose served by those procedures (Case C 477/10 P, *Agrofert*, Opinion of AG's Cruz Villalón, para 57). Nonetheless, until the judgment in *Netherlands v Commission*, the fourth chamber of the General Court had refused to identify a presumption covering documents produced or exchanged in the context of Regulation No 1/2003 (Case T-437/08, *CDC*, para 50 and Case T-344/08, *EnBW*, para 61). Such a conclusion might appear surprising in view of the existence of strict rules regarding accessibility under Articles 27(2) and 28 of Regulation No 1/2003 governing access to documents.

In *Netherlands v Commission*, the sixth chamber of the General Court recognises that the Commission may, for the interpretation of the exceptions contained at the first and third indent of Article 4(2), use a general presumption under which disclosure of documents exchanged between the Commission and undertakings during Article 81 EC (now Article 101 TFEU) proceedings undermines, in principle, the protection of both the objectives of investigation activities and the commercial interests of the undertakings involved in such a procedure (para 42). It is interesting to note that the General Court had stayed proceedings until the Court of Justice rendered its ruling in the *TGI* case. More recently, Advocate General Cruz Villalón in the *EnBW* appeal (Case C-365/12 P) also drew very similar conclusions, stating that 'the case-law of the Court of Justice allowing general presumptions in relation to documents covered by specific accessibility rules because of the type of proceedings in which they are generated is readily applicable to documents generated or used in cartel proceedings' (Ibid, para 50).

Ratione temporis, the General Court considers that the presumption applies irrespective of whether the request for access concerns a closed or a pending procedure (para 43). In the General Court's opinion, this is justified by the fact that the publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether an Article 101 TFEU procedure is pending (see, by analogy Case C-551/10 P, *Éditions Odile Jacob v Commission* [2012], not yet reported, para 124).

In addition, the prospect of publication after such procedure is closed could adversely affect the willingness of undertakings to cooperate while the procedure is pending. Although, as the General Court notes, an undertaking's interest in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, those findings must, in principle, be regarded as confidential to the public in order to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement (Case T-474/04, *Pergan GmbH v Commission* [2007] ECR II – 4231 para 78). In the present case, several proceedings were pending when the Dutch Government made its request for access to confidential parts of the Commission's decision (para 52). In addition, the public version of the Commission's decision was sufficient to enable victims to identify the undertakings involved and the nature and duration of the infringement, for the purposes of bringing damages actions before national courts.

Access to documents will nevertheless be granted under Regulation No 1049/2001 when an overriding public interest in disclosure exists. The Dutch Government argued that, as a Member State, its interest in disclosure was necessarily public (para 77). The General Court, confirming the Commission's analysis, rejects this argument finding that the interest in obtaining damages as a result of an infringement of competition law, which was the interest pursued by the Dutch Government in this case, is a matter of private interest. The public interest in the application of EU competition law to the Dutch road bitumen cartel was already satisfied by the adoption of the Commission's decision (para 84).

Practical significance

The recognition of the existence of a general presumption by the General Court means that obtaining disclosure of documents in cartel proceedings under Regulation No 1049/2001 will become more difficult for claimants. Indeed, it allows the institutions to refuse access for reasons of principle which follow from the existence of special arrangements applicable to the type of document concerned. It also increases the degree of justification required for a request for access, which must be based on a higher public interest and not merely on a private interest (Case C 477/10 P, *Agrofert*, Opinion of AG Cruz Villalón, para 64). It remains to be seen whether the Court of Justice will follow the opinion of AG Cruz Villalón in *EnBW*, and thus confirm the General Court's finding in *Netherlands v Commission*.

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