INTERIM RELIEF AND PROTECTION OF CONFIDENTIAL INFORMATION IN EU CARTEL DECISIONS: A NEW LOVE STORY?

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I. INTRODUCTION

Imagine the following scenario.

You are the lawyer advising a multinational company that was sanctioned by the European Commission for participating in a cartel. The Commission has prepared a 300-page decision with detailed information about the cartel, including information that your client sees as business secrets (e.g. information about pricing, products affected by the cartel, customer names, employee names and even some secret know-how concerning specific products). You identify the information as confidential and the Commission accepts your claims, albeit provisionally, and publishes a provisional non-confidential version of the decision on its website, with the information redacted. Some years later, potential private damages claimants put pressure on the Commission to disclose documents relating to the cartel including the full, confidential version of the decision. Following a debate with the Commission services and an "appeal" to the Commission's Hearing Officer, the Commission rejects your confidentiality claims and decides to publish an "extended", allegedly non-confidential, version of the decision that discloses the information that your client considers to be confidential.

Your client wants to fight to prevent publication. Surely, there is something you can do? You can appeal to the EU General Court ("GC") and ask the President of the GC to grant interim relief to prevent publication pending adjudication of the action. What are the chances the President of the GC will order interim relief by finding that your client would otherwise

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suffer "serious" and "irreparable" harm? What about the balance of interests? Will the President of the GC prefer to protect your client's interests in preserving the confidentiality of potentially valuable information? Or should the interest of the public in transparency and the interest of private damages claimants in getting access to the full decision prevail? Surely, if publication is allowed, this negates the trial in the main case as the information will already be out there for the world to see? Or is damage beyond this required?

This is the scenario that played out before the EU Courts in the last four years in a string of cases that have now created established case law in the area of disclosure of alleged/potential business secrets and other confidential information in cartel decisions.

Has interim relief been granted? Yes, in the vast majority of these cases. It seems that, after years of the EU Courts being very strict in granting interim relief in general (to the extent that lawyers were advising clients to not even try), applicants and the EU Courts are now learning to love interim relief again.

In this paper, we will look at the test recently established by the EU Courts that companies have to meet to secure interim relief in such situations.

II. OVERVIEW OF THE CONDITIONS FOR AN APPLICATION FOR INTERIM RELIEF

What are the main, traditional conditions for obtaining interim relief?

The EU Courts have consistently held that the purpose of interim proceedings is "to guarantee the full effectiveness of the judgment on the substance" (Case C-65/99P(R) *Willeme v. Commission*, §62). Interim relief is a necessary element of effective judicial protection which is a fundamental right enshrined in Article 6(1) of the European Convention on Human Rights (the "ECHR") and an established principle of EU law, which the EU Courts are mandated to uphold.

Admissibility. Pursuant to Article 156(1) of the Rules of Procedure of the GC and Article 160(1) of the Rules of Procedure of the European Court of Justice (the "ECJ"), an application to suspend the operation of a measure is admissible only if the applicant has challenged that measure before the GC/ECJ in a separate application.

Conditions. Pursuant to Article 156(3) of the Rules of Procedure of the GC and Article 160(3) of the Rules of Procedure of the ECJ, an application for interim measures must state (i) the pleas of fact and law establishing a *prima facie* case (*fumus boni juris*); and (ii) the circumstances giving rise to urgency. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent. Where appropriate, the judge hearing such an application must also weigh up the interests involved (Case C-445/00R *Austria v. Council*, §73).

A *prima facie* case is established where either (i) at least one of the pleas in law appears, *prima facie*, to be relevant and not unfounded in that it reveals the existence of difficult legal issues without an immediately obvious solution calling for a detailed assessment which cannot be carried out in the context of the interim measures action, or (ii) there is a major legal disagreement between the parties whose resolution is not immediately obvious (Case T-52/12R *Greece v. Commission*, §13).

As regards the condition of urgency, it has been consistently held that the urgency of an application for interim relief 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 relief (Case C-329/99P(R) *Pfizer Animal Health v. Council*, §94). Particularly where harm depends on the occurrence of a number of factors, it is enough for that harm to be foreseeable with a sufficient degree of probability (Case C-335/99P(R) *HFB and Others v. Commission*, §67). The test is difficult to meet as proof is required that the harm is both serious and, more importantly, irreparable. Harm which is purely pecuniary in nature will only in exceptional circumstances be regarded as irreparable or as being reparable only with difficulty (Case T-198/03R *Bank Austria Creditanstalt AG v. Commission*, §53). It will be regarded as irreparable if it cannot be quantified (Case C-551/12P(R) *EDF v. Commission*, §60).

The measure requested must, further, be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (Case C-149/95P(R) *Commission v. Atlantic Container Line AB and Others*, §22).

III. THE DEVELOPMENT OF INTERIM RELIEF CASE LAW REGARDING THE PROTECTION OF CONFIDENTIAL INFORMATION IN EU CARTEL DECISIONS

A. Early days: the Akzo Nobel and Evonik Degussa interim relief cases – the test relaxed: automatic interim relief where information is provided as part of the leniency procedure

In November 2012, the *Akzo Nobel* and *Evonik Degussa* interim relief cases (Cases T-345/12R and T-341/12R) paved the way to the possibility for an undertaking seeking the protection of information covered by professional secrecy contained in a cartel decision to successfully obtain the suspension of publication of that information pending adjudication of the case in the main proceedings.

In those cases, both applicants had requested that the President of the GC order the Commission to refrain from publishing a more detailed version of the *Hydrogen Peroxide and Perborate* cartel decision than the one that had been available on its website for five years, pending adjudication in the main proceedings as to whether information contained in that extended decision deserves protection.

In support of their arguments, Akzo Nobel and Evonik Degussa had put forward the fact that they had provided the information in question to the Commission as part of the leniency procedure and it should thus be protected as confidential.

Weighing up of interests. The President of the GC started with the balancing of interests. He recalled that the purpose of the interim relief procedure is to guarantee the full effectiveness of the future judgment in the main proceedings. Therefore, the interim order must neither prejudge the future judgment on the substance of the case nor render it illusory by depriving it of its effectiveness. If the application for interim measures were to be dismissed, a judgment that would annul the contested decision in the main proceedings would be illusory: the Commission would have been able to publish the more detailed version of the cartel decision in the meantime and a win in the main case would be meaningless. The President of the GC concluded that the applicants' interests prevailed over the Commission's

interests, especially since granting interim relief would only maintain, for a limited period of time, the *status quo* that had existed for several years.

Urgency. As noted above, to show urgency, a party seeking interim relief must show that it will suffer "serious" and "irreparable" harm if interim relief was not granted.

The President of the GC found that this test was met. The serious and irreparable harm consisted of damage to the company's "fundamental right to privacy". The President found that, if he dismissed the application for interim measures, the immediate publication of the more detailed version of the cartel decision would lead to a risk that the applicants' fundamental rights to the protection of professional secrecy, enshrined in Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights, would irreversibly lose its meaning in relation to the information at stake and that the applicants' right to an effective remedy would be jeopardised. He concluded therefore that, provided there was a *prima facie* case that the information was indeed confidential, the applicants' fundamental rights may be seriously and irreparably harmed and that, consequently, the condition of urgency was satisfied.

***Prima facie* case.** The President of the GC stated that the question to be resolved, i.e. whether the contested decision infringes the applicants' right to professional secrecy because the more detailed version of the cartel decision contains information provided as part of the leniency procedure, could not be easily answered and required a detailed examination in the main proceedings.

Further, the President of the GC held that, *prima facie*, the applicants could rely on the fact that the information provided in the context of the leniency procedure would enjoy enduring protection from publication, notably on the basis of the Commission's jurisdictional practice in respect of applications from third parties for access to documents pursuant to the Public Access Regulation.[2]

The President of the GC therefore concluded that there was a *prima facie* case and, consequently, since all the conditions were satisfied, granted the suspension of the operation of the contested decision and ordered the Commission to refrain from publishing the extended version of the *Hydrogen Peroxide and Perborate* cartel decision.

B. The Pilkington interim relief case[3]

Following the *Akzo Nobel* and *Evonik Degussa* interim relief cases, it was clear that, where the information at stake had been provided to the Commission as part of the leniency procedure, *prima facie*, such information could not be published pending adjudication in the main proceedings as to whether it indeed deserved protection. It was unclear, however, whether such a ruling would also apply where the information at stake was not provided to the Commission as part of the leniency procedure.

A few months after the orders in the *Akzo Nobel* and *Evonik Degussa* cases had been handed down, the order of the President of the GC in Pilkington's interim relief case in March 2013 (Case T-462/12R) clarified that interim relief is also available to protect any

[2] 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 L145, 31.5.2001, p. 43-48.

[3] The authors represented Pilkington in the interim measures case before the President of the GC, and then before the Vice-President of the ECJ.

information claimed to be confidential, even if such information has not been provided to the Commission as part of the leniency procedure.

In October 2012, Pilkington requested that the President of the GC order the Commission to refrain from publishing a more detailed version of the *Car glass* cartel decision than the one that had been available on its website since February 2010, pending adjudication in the main proceedings as to whether information contained in that extended decision was covered by professional secrecy. Pilkington was not a leniency applicant during the administrative procedure before the Commission.

1. Order of the President of the GC - the test relaxed further: automatic interim relief in cases of publication of any information that is *prima facie* confidential

Weighing up of interests. In addition to recalling the principles set out in settled case law and reproduced above, the President of the GC noted that the delay in the publication of a more detailed version of the cartel decision was due to the Commission since it waited until April 2011 to engage in the process of re-publishing a decision it adopted in 2008. Further, he held that the interests of damages claimants in having access to the information in question did not prevail over Pilkington's interests in the protection of professional secrecy because, while the right of the first would simply be delayed if interim relief was granted and the information at stake was ultimately considered not to be confidential, Pilkington's right would be "reduced to nothing" if its application for interim relief was dismissed.

Urgency. Similarly to his ruling in the *Akzo Nobel* and *Evonik Degussa* cases, the President of the GC held that, if the Commission were allowed to publish the information at stake pending adjudication in the main proceedings, there would be a risk that Pilkington's fundamental rights to the protection of professional secrecy would irreversibly lose its meaning in relation to that information. He also held that Pilkington's right to an effective remedy would be jeopardised and, therefore, concluded that the condition of urgency was satisfied.

***Prima facie* case.** The President of the GC held that it is only where the information at stake is "obviously not confidential" that there is no *prima facie* case. He found that this was not the case here on the basis that (i) Pilkington's confidentiality claims related to a large number of pieces of information; (ii) the Hearing Officer had accepted the confidential nature of some pieces of information, which showed that the information at stake could not be classified *en bloc* as non-confidential; and (iii) Pilkington's arguments to justify the confidential nature of information that is more than five years old were *prima facie* not irrelevant. Consequently, he concluded that a detailed examination of the information in question was required, which could not be done at the interim measures stage.

As all the conditions were satisfied, the President of the GC granted the suspension of the operation of the contested decision and ordered the Commission to refrain from publishing the extended version of the *Car glass* cartel decision.

2. The Commission decides to appeal to the ECJ

Following this order, it became clear that the test for obtaining interim relief in cases concerning publication had been relaxed dramatically. The urgency criterion would be met almost automatically given publication immediately harms the fundamental right to privacy and renders the main action illusory. This was subject to the *prima facie* criterion being met,

i.e. that the information was at least *prima facie* confidential. But this was always a very low threshold and the orders had confirmed that, in situations of confidentiality, all that the applicant had to show was that the information was not obviously non-confidential.

The Commission, which had refrained from appealing in *Akzo Nobel* and *Evonik Degussa*, saw that this approach had potentially very wide-ranging implications and appealed the order to the Vice-President of the ECJ (Case C-278/13P(R)).

3. Order of the Vice-President of the ECJ – threshold for urgency raised somewhat: information must be shown to be of confidential nature for the harm to be serious and irreparable

The Commission relied on the following two grounds of appeal: (i) an error of law in the assessment of the condition relating to urgency; and (ii) 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 lost the case but, importantly, achieved a narrowing of the legal test.

In relation to the first ground of appeal (urgency), the Vice-President of the ECJ disagreed with the reasoning of the President of the GC. He rejected the view that harm caused to fundamental rights would automatically be irreparable. He demanded that something beyond harm to privacy be shown as damage.

The Vice-President of the ECJ therefore held that the President of the GC erred in law by considering that violations of Pilkington's fundamental rights "were in themselves sufficient for the purpose of establishing the likelihood of serious and irreparable harm in the particular circumstances of the case." However, as the Vice-President of the ECJ found that the operative part of the order was well founded on other legal grounds, he did not annul the order, but performed a substitution of grounds as regards the condition of urgency, as follows:

- He found that the alleged harm was sufficiently "serious" because, if the information at stake was indeed covered by professional secrecy, as it is specific commercial information, its publication would necessarily cause Pilkington significant harm. Therefore, the information must, at least *prima facie*, be of a confidential/business secrets nature to show that its disclosure can lead to serious harm.

- As regards the "irreparable" nature of the alleged harm, although he acknowledged that the alleged harm was purely financial and could in principle be made good by means of an action for damages, he recalled settled case law pursuant to which harm of a financial nature can be considered irreparable if it cannot be quantified (Case C-551/12P(R) *EDF v. Commission*, §60). In the present case, he found that the harm could not be quantified because "[i]t 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."

In relation to the second ground of appeal, the Vice-President of the ECJ held that the President of the GC did not depart from the principles established in settled case law with regard to the existence of a *prima facie* case. It was correct to find that the majority of Pilkington's confidentiality claims raised complex issues necessitating a very detailed

examination, which could not be performed at the interim proceedings stage in light of the volume of the information concerned.

It follows that he dismissed the Commission's appeal in its entirety, thus confirming that, even where the information at stake has not been provided to the Commission as part of the leniency procedure, it may nonetheless benefit from interim protection.

C. Latest developments: the AGC and Evonik Degussa interim relief cases – the test confirmed: importance of showing that the information is indeed, at least prima facie, confidential

The interim relief wins were of course not the end of the story. The main trials continued with the Commission being prevented from publishing the information in question pending adjudication.

The GC handed down its judgments in the *Evonik Degussa*, *Pilkington* and *AGC* cases on 28 January and 15 July 2015 (Cases T-341/12, T-462/12 and T-465/12). In the *Evonik Degussa* and *AGC* cases, the applicants had relied both on the fact that the information had been provided as part of the leniency procedure and that it constituted business secrets. The *Pilkington* case was focussed only on the confidential/business secrets nature of the information (leniency was not an issue as Pilkington was not a leniency applicant). On that point, the GC held that the applicants had failed to put forward arguments that would demonstrate that the information in question, despite its age, still constituted essential elements of their commercial position. Therefore, it found that the information at stake was not covered by professional secrecy and dismissed the appeals.

Evonik Degussa and AGC appealed to the ECJ.[4] Both appeals are pending at the time of writing this article. Once more, in order to prevent the Commission from publishing the revised version of the cartel decisions before final adjudication by the ECJ of the main case, the companies also applied for interim relief before the Vice-President of the ECJ seeking the suspension of such publication.

On January 14, 2016, the Vice-President of the ECJ rejected the interim relief sought by AGC (Case C-517/15P(R)). A few weeks later, on March 2, 2016, he allowed the interim relief sought by Evonik Degussa (Case C-162/15P(R)).

Although, at first sight, these orders may appear contradictory, it is clear that they are both in line with the previous case law. Let's recall the test established by the Vice-President of the ECJ. The urgency test will not be met by simply claiming breach of the fundamental right to privacy. The applicant must also show that the information is at least *prima facie* "confidential"/"business secrets" such that its disclosure results in serious harm to its commercial or pecuniary position and that any harm is irreparable (and, if pecuniary, it is unquantifiable and therefore irreparable).

The difference in the two cases was that AGC had not challenged in its application the GC's finding that the information at stake did not constitute business secrets hence that finding had become definitive (AGC had only challenged the leniency point, i.e. whether the information should be protected because it was provided via the leniency procedure; a different point to actually demonstrating that the information is indeed of a

[4] Pilkington did not appeal to the ECJ.

confidential/business secrets nature). Therefore, the Vice-President considered that the analysis of urgency had to be based on the premise that the information was not *prima facie* confidential (§33). Hence serious harm could not be shown (§40-43). On the contrary, in the *Evonik Degussa* case, the appeal was expressly also directed at the part of the judgment finding that the information was not of a confidential nature/business secrets. Therefore, following the approach in *Pilkington, prima facie*, at interim relief stage, the Vice-President considered that the urgency criterion had to be based on the premise that the information was confidential (§83-86) and hence its disclosure would result in serious and irreparable harm given that pecuniary harm was unquantifiable (§92-96).[5]

This approach almost conflates the *prima facie* and urgency criterion in cases of confidentiality. In case there is no *prima facie* case on the confidential nature of the information, it automatically follows that the urgency criterion cannot be met because the information is not confidential and hence its disclosure cannot result in serious harm.

The order in Evonik Degussa's case is also interesting in that it contains a number of notable statements in relation to the balance of interests showing that, when weighing up the interests at stake, the interest of undertakings in the protection of their confidential information would most likely always prevail over any other consideration. Indeed, the Vice-President of the ECJ stated that it prevails over (i) the public interest in knowing as quickly as possible the reasons for any action of the Commission because the public has already been informed by the initial publication of the cartel decision; (ii) the interest of economic operators in knowing what conduct is likely to expose them to penalties because, as the Commission itself acknowledges, previous Commission decisions cannot be relied on by economic operators; and (iii) the interest of damages claimants because there are other ways for claimants to seek the information they need in support of their claims.

IV. CONCLUDING REMARKS

So, four years and six interim relief orders later, where do we stand? Going back to our original scenario, is it still worth applying for interim relief and how can you maximise chances of success? The answer is yes and there are clear points that an applicant must focus on.

First, the balance of interests would almost always be in favour of the undertakings challenging the publication of information in cartel decisions claimed to be confidential. This is particularly the case where a relatively long period of time has elapsed since the first publication of the cartel decision, so that delaying the publication of a more detailed version of that decision simply amounts to maintaining the *status quo* for a little longer.

Second, on the *prima facie case*, the threshold is low but must still be met on the basis of cogent arguments. As it is not for the judge hearing the application for interim measures to rule on the confidential nature of the information at stake (this is the role of the GC/ECJ in the main proceedings), all that is required in order to establish a *prima facie* case is that the information at stake is not, *prima facie*, not confidential. In this regard, the fact

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[5] In both *Evonik Degussa* and *AGC* the Vice-President held that pecuniary damage arising from private damages actions would not be sufficient to meet the criterion of urgency (see §93 and §56 respectively). On the contrary, pecuniary damage arising from disclosure of the information as such to competitors, customers, suppliers, financial analysts and the public, is unquantifiable and therefore meets the criterion of urgency (see *Evonik Degussa*, §95).

that the information in question is more than five years old is not, *per se*, an obstacle to the establishment of a *prima facie* case; however, it is for the undertakings claiming that the information still constitutes business secrets to demonstrate why this is the case.

Third, the condition of urgency has been relaxed but not as much as in the original *Akzo Nobel*, *Evonik Degussa* and *Pilkington* orders. It is not enough to show that publication will breach the fundamental right to privacy. The applicant must also show that it will suffer "serious" harm beyond the breach of privacy. This will be shown, in conjunction with the *prima facie* test, if the applicant can show that the information is *prima facie* of a confidential/business secrets nature. The "irreparable" criterion has also been relaxed. Despite harm being of a financial nature, which traditionally was not accepted as irreparable, the orders show that it can be irreparable if it cannot be quantified which will almost always be the case in cases of publication given the diverse nature of the public that will have access to the information. Indeed, it suffices to prove that it is impossible to identify the number and status of all the persons who acquired knowledge of the information published, and thus to assess the actual impact which publication of that information might have on the undertaking's commercial and financial interests.

While the test has been relaxed, the requirement to show damage beyond breach of privacy will not always be easy to meet. In essence, the applicant must show that *prima facie* the information is of a confidential nature such that its disclosure will lead to some serious and irreparable harm. As case law develops, the EU Courts, in the main actions, will clarify what type of information cannot be regarded as confidential and undertakings may therefore find it more and more difficult to establish a *prima facie* case. This is clear from paragraph 48 of the order of the Vice-President of the ECJ in Evonik Degussa's case where he stated, in support of his findings that there was a *prima facie* case, that "the Court has not yet given a ruling on either the question of which criteria are to be taken into consideration in order to establish whether particular information constitutes a business secret, or [...] on the question of the alleged confidentiality of information such as that at issue in this case."

Interim measures and the protection of confidential information may therefore well be in love at the moment but it remains to be seen whether it is of the enduring kind.