

The EU Court of Justice upholds the Commission's refusal to give damages claimants access to its cartel case files (EnBW)

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ECJ, EnBW, C-365/12 P, 27 February 2014

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The EU Transparency Regulation [1] has been afflicted by the law of unintended consequences. It aims to provide a legal framework for the granting of public access to the EU institutions' documents so that EU decisions "are taken as openly as possible and as closely as possible to the citizen" [2]. However, cartel damages claimants, ever eager to find evidence in support of their claims, have used the Transparency Regulation to try to obtain documents in the EU Commission's cartel case files, particularly leniency statements.

Unsurprisingly, the Commission, fearful that public disclosure of leniency statements and other documents in its case files would deter would-be leniency applicants from coming forward, has been circumspect about the use of the Transparency Regulation for this purpose. The latest word in the debate on confidentiality versus disclosure has come from the European Court of Justice ("ECJ") in its judgment on 27 February 2014 in *European Commission v EnBW Energie Baden-Württemberg AG* ("EnBW") [3]. The judgment will be welcomed by the Commission, as well as defendants in cartel damages claims because it relieves the tension between the Commission's disclosure obligations under the Transparency Regulation and its confidentiality obligations under Regulations 1/2003 and 773/2004. In so doing, the ECJ has made it harder for damages claimants to use the Transparency Regulation to obtain materials held in to the Commission cartel case files.

This article summarises the legal issues dealt with in the EnBW judgment and comments on its practical implications.

1. Legal issues at stake in EnBW

1.1 Relevant provisions of the Transparency Regulation

The Transparency Regulation establishes the legal framework for natural and legal persons to require public access to be given to documents held by the EU institutions. It applies to all activities

carried out by the EU institutions and is not specific to the enforcement of EU competition law. A successful application under the Transparency Regulation leads to the relevant EU institution having to make the subject documents publicly available (usually via its website).

Although the purpose of the Transparency Regulation is to promote public access to the EU institutions' documents, it recognises that the disclosure of certain documents could have undesirable consequences. Hence, Article 4 of the Transparency Regulation sets limits on the public access obligations. In particular:

- Article 4(2) requires the EU institutions to refuse access to a document when its disclosure would undermine the protection of:

(i) the commercial interests of a natural or legal person,

(ii) court proceedings and legal advice, or

(iii) the purpose of inspections, investigations and audits, unless the applicant for disclosure can prove an overriding public interest in the document being publicly disclosed.

- Article 4(3) sets out a similar limit on disclosure but aimed specifically at EU institutions' internally created documents. Article 4(3) requires the EU institutions not to disclose, *inter alia*, documents containing opinions for internal use as part of deliberations and preliminary internal consultations if public disclosure would seriously undermine the institution's decision-making process, unless the applicant can prove overriding public interest in their public disclosure.

These provisions establish general rules against the public disclosure of documents that fall within the specified categories unless the disclosure applicant demonstrates that the public interest in disclosure should override the interest that is intended to be protected by non-disclosure.

1.2 The interplay between the Transparency Regulation and Regulations 1/2003 and 773/2004

The Commission's legal position in relation to granting public access to its documents is more complex when the documents at issue reside in its case files for investigations for breach of EU competition law (Articles 101 and 102 TFEU). In that context, the Commission is under stringent legal obligations to maintain the confidentiality of confidential information it obtains in the course of enforcing Articles 101 and 102. [4] At first sight, there is a clear tension between those obligations and the Transparency Regulation. The EnBW judgment arose from a dispute between EnBW and the Commission on how the Commission's confidentiality obligations should be reconciled with its disclosure obligations under the Transparency Regulation, and its rights under Article 4(2) and Article 4(3) of the Regulation to resist public disclosure of its documents.

2. The EnBW Judgment

2.1 Background facts

EnBW was considering making a follow-on damages claim against members of the gas insulated switchgear cartel [5] and requested the Commission to grant public access to the documents held in

its file on this case. EnBW requested documents relating to all aspects of the Commission's investigation. [6] Following the Commission's refusal to grant access, EnBW appealed to the General Court ("GC"). EnBW argued that the Commission had breached its obligations under the Transparency Regulation by refusing EnBW's request on the basis of a general assumption that the requested documents should not be made public, and without carrying out an individual examination of each document to determine whether it met the conditions for non-disclosure under Articles 4(2) or Article 4(3) of the Transparency Regulation. The GC ruled in favour of EnBW, finding that the Commission was legally required to carry out such an individual assessment before it could refuse to grant disclosure.

2.2 The ECJ's findings

The ECJ found that the GC had erred in law in its interpretation and application of Articles 4(2) and 4(3) of the Transparency Regulation. Contrary to the GC's findings, the ECJ held that there is a general presumption in EU law that the public disclosure of documents held in the Commission's case files for the enforcement of Articles 101 and 102 TFEU would undermine the interests protected by Articles 4(2) and 4(3), namely, the commercial interests of persons mentioned in the case file, the purpose of EU competition law inspections and the Commission's decision-making process. The ECJ derived this presumption from the confidentiality provisions in Regulations 1/2003 and 773/2004 [7] and from its own previous judgments relating to third parties' use of the Transparency Regulation to obtain documents held in the Commission's mergers and state aid case files. Under that case law, the ECJ established that a presumption against non-disclosure applies when third parties make requests under the Transparency Regulation for documents in the Commission's mergers [8] and state aid [9] case files.

The ECJ found that, in light of this presumption, the Commission had acted lawfully by refusing to grant public disclosure of the documents requested by EnBW without carrying out an individual examination of each document. This general presumption against public disclosure is rebuttable. However, the ECJ held that the fact that EnBW was considering making a follow-on damages claim against the members of the gas insulated switchgear cartel was insufficient to rebut the presumption. The ECJ did not elaborate on what EnBW would need to prove in order to rebut the presumption. It seems probable that an applicant would need to discharge a heavy burden of proof, for example, by showing that the viability of its damages claim would be compromised without the information contained in the requested document(s) and that it is unable to obtain the critical information (or a reasonable substitute for it) from any other source.

The ECJ's findings clarify the boundary between the Commission's rights and obligations under the Transparency Regulation and its confidentiality obligations under the implementing Regulations for Articles 101 and 102 TFEU. In the regrettable absence of an EU legislative provision stating unequivocally how these provisions should co-exist, it has been left to the ECJ to balance the competing interests of public disclosure and due process in Commission investigations under Articles 101 and 102 TFEU.

2.3 Practical implications of the EnBW judgment

By discarding the GC's "document by document" assessment approach and shifting the burden of proof to the claimant, the ECJ has made it more difficult for follow-on damages claimants to use the

Transparency Regulation as a discovery tool. That is to be welcomed given that the Transparency Regulation was never intended to be sued for such a purpose. No doubt the Commission will be relieved. The judgment shores up its defences against having to disclose leniency statements and spares it from having to carry out a document by document assessment in response to requests under the Transparency Regulation for disclosure of its cartel case file documents. The ECJ's findings also ensure consistency in the rules and procedures on public disclosure of documents under the Transparency Regulation in all types of investigations carried out by DG Comp (mergers, state aid and Articles 101 and 102 TFEU).

The practical effects of the EnBW judgment may be superseded if the Commission's proposal on confidentiality of leniency statements is included in the forthcoming Directive on damages actions for competition law infringements. The Commission has proposed an absolute bar on the disclosure in damages actions of leniency statements and settlement submissions relating to proceedings under Article 101 TFEU. [10] It is not clear at this stage whether this rule will find its way into the Directive, either at all, or in the unqualified form proposed by the Commission.

[1] Regulation No. 1049/2001.

[2] Recital (1) to the Transparency Regulation.

[3] Case C-365/12P.

[4] Articles 27(2) and 28 of Regulation No. 1/2003 and Article 16 of Regulation No. 773/2004.

[5] Case COMP/F/38.899 – *Gas Insulated Switchgear*.

[6] EnBW requested the following: (1) leniency statements and all documents submitted in connection with the applications; (2) the Commission's requests for information and the responses thereto; (3) documents seized during the Commission's dawn raids; (4) the statement of objections and the parties' responses thereto; and (5) the following internal Commission documents: (a) background notes on the conclusions to be drawn from the evidence gathered, (b) correspondence with other competition authorities, (c) documents in connection with DG COMP's consultation of other Commission departments; (d) dawn raid warrants, inspection reports, lists of documents obtained during the dawn raids, (e) documents concerning the service of documents and (f) file notes.

[7] Articles 27(2) and 28 of Regulation No. 1/2003 and Article 16 of Regulation No. 773/2004.

[8] Case C-404/10 P, *European Commission v Éditions Odile Jacob SAS*, of 28 June 2012, Case C-477/10 P, *Commission v Agrofert Holding a. s.*, of 28 June 2012.

[9] C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, of 29 June 2010.

[10] Article 6(1) of the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union (2013/0185 (COD)).

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