The Principle of Transparency and its Limits in the context of Competition Investigations

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I – Introduction

The European Commission has the power not only to find that certain companies have infringed EU competition rules but it can also impose heavy fines on such companies.[1] These considerable powers of the Commission require strict respect for the rights of the defence. Companies under investigation must therefore be able to state their case before the Commission adopts its final decision.[2] Since the Commission's position is never plucked out of thin air but is always based on the interpretation of documents in its file, companies under investigation must be given access to the Commission's file.[3] Regulation No 1/2003 guarantees such access to all relevant documents. However, access to the Commission's file is not absolute since it does not extend to "confidential information and internal documents of the Commission or the competition authorities of the Member States".[4]

Moreover, Regulation No 1/2003 in principle only grants access rights to the parties under investigation. Indeed, the provisions of that Regulation relating to access to the file are intrinsically linked to the exercise of the rights of defence.

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[*] All opinions expressed are personal.

[1] 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 [now Articles 101 and 102 TFEU] ([2003] O.J. L 1/1).

[2] ECJ, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, para. 66; ECJ, *Solvay v Commission*, C-110/10 P, EU:C:2011:687, para. 48.

[3] Article 27(2) of Regulation No 1/2003. ECJ, *Aalborg Portland and Others v Commission*, cited in n. 2, para. 68; ECJ, *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, para. 22.

[4] See Article 27(2) of Regulation No 1/2003. See also ECJ, *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, para. 315; ECJ, *Aalborg Portland and Others v Commission*, cited in n. 2, para. 68; ECJ, *Solvay v Commission*, cited in n. 2, para. 49.

Similar principles apply with respect to EU merger control investigations.[5] Access to the Commission's file is, in principle, open only to the parties directly involved in the merger.[6] And again, the right of access to the file does not extend to confidential information or to internal documents.[7]

The question that I will address today is the following. Can the restrictions on access to documents which can be found in the specific Regulations concerning competition investigations be circumvented by reliance on Regulation No 1049/2001,[8] the general Regulation on access to documents, whose purpose is to give the fullest possible effect to the principle of transparency?[9]

It should be recalled from the outset that even the general Regulation on access to documents contains several exceptions. The EU Institutions may refuse to disclose documents if such refusal of disclosure is necessary to protect the commercial interests of companies, or to protect an investigation or court-proceedings.[10] They may also refuse access to some internal documents.[11] However, the institution's refusal has, in principle, to be preceded by a concrete and individual examination of the documents requested in the light of the exception. The institution must, indeed, explain how disclosure of the documents requested could specifically and effectively undermine the interest protected

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5 Article 18(1) and (3) of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation) ([2004] O.J. L 24/1) and Article 17 of Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([2004] O.J. L133/1), as amended by Commission Regulation (EC) No 1033/2008 ([2008] O.J. L279/3).

6 Article 18(3) of Regulation (EC) No 139/2004.

7 Article 17(3) of Regulation (EC) No 802/2004.

8 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 ([2001] O.J. L145/43).

9 See *e.g.*, ECJ, *Sweden v MyTravel and Commission*, C-506/08 P, EU:C:2011:496, para. 73 and case-law cited.

10 See Regulation No 1049/2001, Article 4(2).

11 See Regulation No 1049/2001, Article 4(3).

by the exception.[12] And access to documents cannot be refused if there exists an overriding public interest in disclosure.[13]

It is therefore clear that, due to its general scope of application and to the limited scope of its exceptions, the general Regulation introduces a far more liberal regime of access to documents than the specific Regulations concerning competition investigations.

The Court of Justice of the European Union ("ECJ") has examined the interplay between the general Regulation on access to documents and the specific Regulations concerning competition investigations in several recent judgments. Let us now take a closer look at the lessons which can be drawn from these judgments with respect to the limits of the principle of transparency in the context of competition investigations.

In *Agrofert*[14] and *Odile Jacob*,[15] third parties sought access, on the basis of the general Regulation on access to documents, to the Commission's administrative file in two different merger control investigations. In both cases, the Commission had refused to disclose the documents requested. To justify its refusal, the Commission relied on the protection of commercial interests and on the necessity of protecting the merger investigation. As I already mentioned, these exceptions to the right of access are explicitly laid down in the general Regulation on access to documents.[16] Both companies brought actions before the General Court of the European Union ("EGC") against these refusal decisions. The EGC annulled the Commission's decisions. It held that the Commission had failed in its obligation to demonstrate, in a concrete and individual manner, that the disclosure of the requested documents would in fact undermine the interests protected by those exceptions.[17]

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12 ECJ, *Sweden and Others* v *API and Commission*, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, para. 72 and case-law cited.

13 See Regulation No 1049/2001, Article 4(2) and (3).

14 ECJ, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394.

15 ECJ, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393.

16 Regulation No 1049/2001, Article 4(2), first and third indents.

17 EGC, *Éditions Jacob v Commission*, T-237/05, EU:T:2010:224; EGC, *Agrofert Holding v Commission*, T-111/07, EU:T:2010:285.

On appeals brought by the Commission, the ECJ set aside the EGC's judgments. The ECJ ruled that when a third party requests access to the Commission's file in a merger case on the basis of the general Regulation on access to documents, the Commission does not need to undertake a concrete and individual examination of the requested documents in the light of the exceptions provided for by that Regulation. The ECJ indeed considers that there is a general presumption that disclosure of documents relating to merger control proceedings undermines not only the protection of the commercial interests of the companies involved in the merger but also the merger investigation as such.[18]

The reasoning of the ECJ is as follows. Under the Merger Regulation, the companies concerned must notify to the Commission sensitive commercial information in order to enable the Commission to assess the compatibility of the merger with the internal market. That obligation for the parties to a merger to disclose confidential information goes hand in hand with the guarantee of increased protection for the information these parties provide. If persons other than the companies involved in a merger were able to obtain access on the basis of the general Regulation to the Commission's file in a merger case, the scheme instituted by the Merger Regulation could collapse.

A request made by a third party to be granted access to a merger file on the basis of the general Regulation will thus be refused on the ground of the general presumption that disclosure of the documents would undermine both the protection of the commercial interests of the companies involved in the merger as well as the merger investigation as such.

But does this presumption still apply once the merger investigation is closed?

The answer is yes for the following reasons. Sensitive business information remains strictly confidential whether or not the Commission has already reached a final decision with respect to the merger concerned. Furthermore, if the protection of confidentiality were to lapse once the proceedings were closed, the parties would no longer be willing to

[18] ECJ, *Commission v Agrofert Holding*, cited in n. 14, paras 61-64; ECJ, *Commission v Éditions Odile Jacob*, cited in n. 15, para. 120-123. This general presumption does not exclude the possibility of demonstrating that a given document, of which disclosure is sought, is not covered by that presumption or that there is a higher public interest justifying the disclosure of that document under Article 4(2) of Regulation No 1049/2001: see ECJ, *Commission v Agrofert Holding*, cited in n. 14, para. 68; ECJ, *Commission v Éditions Odile Jacob*, cited in n. 15, para. 126.

communicate confidential information to the Commission, which would in turn undermine the Commission's investigation.[19]

In *Technische Glaswerke Ilmenau*[20] the ECJ applied these same principles to State aid proceedings and recently in the *EnBW Energie* case,[21] it also did so with respect to competition law infringement proceedings. Let us now examine more closely the latter case.

EnBW Energie sought, on the basis of the general Regulation, access to all documents in the Commission's file relating to an infringement of Article 101 TFEU. The purpose of its request was to substantiate its claim for compensation for the loss it had suffered as a result of that infringement.

The ECJ confirmed in this case that the Commission could apply a general presumption that disclosure of the requested documents would undermine both the protection of the commercial interests of the companies involved in the proceedings and the Commission's investigation as such.[22] Indeed, parties would not be inclined to communicate documents to the Commission if their confidentiality could not be guaranteed.

But does the general presumption also apply to documents which have been voluntarily communicated to the Commission within the framework of a leniency program? Or is the general presumption only applicable to documents which have been seized or requested by the Commission?

The *EnBW Energie* judgment answers this question very clearly. It is, according to the ECJ, irrelevant for the application of the general presumption whether the documents

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19 ECJ, *Commission v Agrofert Holding*, cited in n. 14, para. 66; ECJ, *Commission v Éditions Odile Jacob*, cited in n. 15, para. 124.

20 ECJ, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376.

21 ECJ, *Commission v EnBW Energie Baden-Württemberg*, C-365/12 P, EU:C:2014:112.

22 ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, paras 80, 90 and 93. The ECJ annulled the judgment of the EGC (*EnBW Energie Baden-Württemberg v Commission*, T-344/08, EU:T:2012:242) which had annulled the Commission decision refusing access to the documents concerned. In EGC, *MasterCard and Others/Commission* (T-516/11, EU:T:2014:759, para. 58), the EGC stated that the general presumption only applies when there is a specific link to an anti-trust investigation. According to the EGC, studies which could one day be useful in an anti-trust investigation do not benefit from the presumption.

were provided to the Commission under compulsion or on a voluntarily basis with a view to obtaining immunity or a reduction of the fines. Indeed, disclosure of such documents, regardless of whether they were provided to that institution on a voluntary basis or under compulsion, is strictly governed by the specific Regulations on competition investigations.[23] These specific Regulations may not be undermined by a generous application of the general Regulation on access to documents.

Is it possible in any circumstances, relying on the general Regulation, to obtain access to documents from the Commission's file – be it in a merger, a cartel or a State aid case – or does the general presumption block any attempt to do so?

First of all, it seems to follow from *EnBW Energie* that the general presumption only applies when access is requested to *a set* of documents. The ECJ indeed stressed that the case at hand as well as the other cases in which it had acknowledged a general presumption are characterised by the fact that the request for access covered not just one document but a set of documents.[24] So, when a *specific* document is requested, it cannot be ruled out that the Commission will be under an obligation to effect a concrete and individual examination of the requested document in the light of the exceptions of the general Regulation.

Secondly, the Court has also acknowledged that notwithstanding the general presumption, there may be an overriding public interest in disclosure of a document.[25] The fact that EnBW Energie sought access to the Commission's file in order to prepare an action for damages for the loss resulting from an infringement of Article 101 TFEU *can* constitute such an overriding interest. However, it does not, according to the ECJ, justify the need

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23 ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 97.

24 ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 67. The ECJ referred in this respect to ECJ, *LPN v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, para. 47.

25 By virtue of Article 4(2) or (3) of Regulation No 1049/2001. ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 100; ECJ, *Commission v Technische Glaswerke Ilmenau*, cited in n. 20, para. 62; ECJ, *Commission v Éditions Odile Jacob*, cited in n. 15, para. 126; ECJ, *Commission v Agrofert Holding*, cited in n. 14, para. 68; ECJ, *LPN v Commission*, cited in n. 24, para. 66. However, this does not mean that the Commission must examine individually all the documents requested in each individual case. Such a requirement would deprive the general presumption of its intended effect, which is to permit the Commission to reply to a global request for access in an equally global manner: ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 101; ECJ, *LPN v Commission*, cited in n. 24, para. 68.

for every document on the file to be disclosed. Indeed, it is highly unlikely that such an action for damages will need to be based on all the evidence in the file relating to that proceeding.[26] It follows that any person seeking compensation for the loss caused by a breach of Article 101 TFEU must establish that he or she needs to be granted access to specific documents in the Commission's file, in order to enable that institution to weigh up, on a case-by-case basis, the competing interests in favour of disclosure of such documents and in favour of the protection of those documents, respectively, taking into account all the relevant factors in the case.[27]

Recently in *Schenker*, the EGC confirmed this case law. The fact that a third party seeks access to the Commission's file under the general Regulation on access to documents in order to prepare an action for damages against a company that has violated the EU competition rules does not automatically mean that there exists an overriding public interest in disclosure of these documents.[28] However, the EGC did confirm that there is an overriding public interest for such party to have access to a non-confidential version of a decision finding an infringement on these Treaty rules. Indeed, there is an overriding public interest that the public should be informed of essential elements of the Commission's competition policy. Therefore, the EGC quashed the Commission's decision in so far as it refused access to the (not yet published) non-confidential version of the Commission's decision finding the infringement.[29]

It thus follows from the case law that, notwithstanding the general presumption that the documents in the Commission's file relating to competition investigations are covered by the exceptions of the general Regulation on access to documents, there remains scope for rebuttal of that presumption. Access should be given to specific documents requested when there is an overriding public interest in favour of disclosure.

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26 ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 106.

27 ECJ, *Commission v EnBW Energie Baden-Württemberg*, cited in n. 21, para. 107.

28 EGC, *Schenker/Commission*, T-534/11, EU:T:2014:854, paras 90-98.

29 *Ibid*., paras 110 to 117, and 142. In EGC, *Reagens/Commission* (T-181/10, EU:T:2014:139), the EGC ruled that the purpose of better preparing an action against a decision does not, as such, constitute an overriding public interest in disclosure capable of prevailing over the protection of confidentiality.

The ECJ embarked upon a similar balancing of the interests at stake in two cases which concerned the access to the file of national competition authorities. The rules of access to the file in such cases are not determined by EU law but by national law. However, these rules of national law may not impinge upon the effectiveness of the EU competition rules.

The first case, *Pfleiderer*,[30] concerned proceedings before the German Bundeskartellamt in which that competition authority had fined different wallpaper manufacturers for having infringed Article 101 TFEU. Pfleiderer, an industrial purchaser of such paper, unsuccessfully sought access to the leniency applications in the file of the Bundeskartellamt with a view to preparing civil actions for damages. The refusal decision of the Bundeskartellamt was challenged before the competent national court which, in turn, made a reference for a preliminary ruling to the ECJ. The national court wanted to know, in particular, whether EU competition law was to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil law claims, be given access to leniency applications.

According to the ECJ, the effectiveness of the EU competition rules does not as such require that a person, such as Pfleiderer, be granted access to leniency documents in the national authority's file.[31] But neither does the effectiveness of the EU competition rules preclude such a person from being granted access to those leniency documents. It is up to the national court and authorities to weigh up, on the basis of their national law, the respective interests at stake: those in favour of disclosure of the information and those in favour of the protection of that information, provided voluntarily by the applicant for leniency.[32] That assessment has to be made on a case-by-case basis, taking into account all the relevant factors of the case.[33]

The subsequent *Donau Chemie* judgment[34] concerned a rule of Austrian law under which access to the national competition file was granted only if none of the parties to the

30 ECJ, *Pfleiderer*, C-360/09, EU:C:2011:389.

31 ECJ, *Pfleiderer*, cited in n. 30, paras 25-29.

32 ECJ, *Pfleiderer*, cited in n. 30, paras 30-32.

33 ECJ, *Pfleiderer*, cited in n. 30, para. 31; ECJ, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, para. 34.

34 ECJ, *Donau Chemie and Others*, cited in n. 33, para. 48.

proceedings objected. In this case, the ECJ ruled that the principle of effectiveness precluded such a national rule. Indeed, under such rule "national courts having to [decide] on a request for access to the file have no opportunity to weigh up the interests protected by EU 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." [35]

Two lessons can be drawn from the above case-law with respect to the limits of the principle of transparency in the context of competition investigations. Firstly, as tempting as it may be for a party under investigation[36] or a third party to try to obtain a more comprehensive access to the Commission's file than that to which it is entitled under the specific Regulations in the field of competition law, such efforts will often be in vain. There indeed exists a *general presumption* that the documents in the Commission's file concerning a competition investigation fall within the exceptions provided for by the general Regulation on access to documents. Nonetheless, a party may – exceptionally – be able to demonstrate that with respect to *specific* documents in the Commission's file, there exists an overriding public interest in favour of disclosure.

So, exceptionally, by virtue of the principle of transparency, a party may obtain access to a document to which it would not have access under the specific Regulations with respect to competition investigations. The ECJ, however, sees to it that the specific regimes of these specific Regulations are safeguarded. The opening created in this particular context by virtue of the principle of transparency is therefore limited.

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35 ECJ, *Donau Chemie and Others*, cited in n. 33, para. 37.

36 See e.g. EGC, *Reagens/Commission*, T-181/10, EU:T:2014:139.