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Access to information as a procedural right of a cartel victim as recognized by EU law

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The judgement in Commission v EnBW (C-365/12, 27 February 2014) has already awakened a lot of interest. The facts are very simple. EnBW, an energy-distribution company requires access to the cartel file documents related to the prosecution of a number of GIS producers in 2007 and the Commission rejects this application. Following the action for judicial review, the GC annuls the contested decision in its entirety. EnBW mentioned its intention to bring an action for damages against the GIS cartelists.

The Commission affirms first its entitlement to presume that certain documents were covered by the exceptions in article 4(2) and argues that the applicant has not showed any evidence that his request was protected by an overriding public interest. The intention to bring an action for damages was considered by the Commission as being insufficient in order to prove that the exclusion from the applicability of the named exceptions in article 4 of the Regulation no 1049/2001 may be pertinent.

The jurisprudence under Article 267 TFEU dealing with the access to the file prepared by a National Competition Authority and case law on the access to a Commission file contain a lot of cross-references, though some of these references can only be used by analogy. The complex architecture of the Union legal order may induce some fuzzy conclusions, if the procedural context is not fully taken into consideration.

The principles of equivalence and effectiveness – Unity in Diversity – Access to evidence in the hands of a national enforcing agency

The Article 101 TFEU and the Council Regulation no 1/2003 do not prescribe the consequences of infringing the cartel prohibition followed by harm caused to others. Therefore according to Courage (C-453/99, 20 September 2001, paragraphs 26-27) it is for the national court to apply, in principle national law, while taking care to ensure the full effectiveness of EU law, a task, which may lead it to refrain from applying, if need be, a national rule preventing that or to interpret a national rule, which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross-border situation at issue.

In Ministero delle Finanze v Spac SpA (C-260/96, 15 September 1998, paragraph 18)

the CJEU made an interesting statement according to which the discrepancy between various national systems resulted mainly from the lack of Union rules governing the action for safeguarding rights, which individuals derive from EU law. In this context the national legal system of each member state has to make use of its own procedural law and if necessary lay down detailed procedural rules that enable the exercise of the individual EU rights. The preliminary ruling mechanism does not aim to eliminate the discrepancy, but just cares to set aside a discrepant national rule, if it constitutes a hinder to full effectiveness of EU law.

The main interpretative tool used by the CJEU under the procedure provided by Article 267 TFEU is the proportionality principle. All presumptions on which a refusal is based are therefore suspect of breaching the proportionality principle, unless there is another sufficiently effective way to access the evidence. The principle of effectiveness is a general principle of EU law developed by the CJEU (REWE, Case 33/76) and applicable only to the national law practices or provisions used for the enforcement of EU law before a national court.

EnBW – Access to evidence via access to EU public documents

The CJEU affirms that since there is no primacy of the Regulation on access to public documents over the Enforcement Regulation, the first must be interpreted in a manner that is compatible with the public interests pursued by the other. In paragraph 89 the CJEU underlines the distinct legal character of the two regulations, but sustains that they fulfil the same function and a generalised access as provided by Regulation no 1049/2001 would run contrary to the limited access provided under the Regulation no 1/200313. However even the opposite affirmation is true, that a restricted access following the spirit of the Regulation no 1/2003 impedes on the effectiveness of the right of access as provided by Regulation no 1049/2001.

The actual result of the appeal is in favour of the Commission and the GIS cartelists, since the CJEU sets aside the judgement of the GC and annuls the Commission Decision only for failing to consider one category of internal documents in its refusal to grant access. The main conclusion was that the judgement under appeal did not disclose anything capable of rebutting the presumption that the cartel documents were covered by the exceptions in article 4 of the Regulation no 1049/2001 and therefore the Commission Decision to refuse the access was valid.

Final commentary

The key paragraph of the judgement in EnBW is the following, I cite:

“132. However, EnBW has failed to show in what way access to all the documents relating to the proceeding in question is necessary for that purpose on the basis that there is an overriding public interest in disclosure of the documents under Article 4(2) and (3) of Regulation No 1049/2001. In particular, EnBW simply stated that it was ‘utterly dependent’ on disclosure of the documents in the file in question, without showing that such disclosure would have enabled it to obtain the evidence needed to establish its claim for damages as it had no other way of obtaining that evidence.”

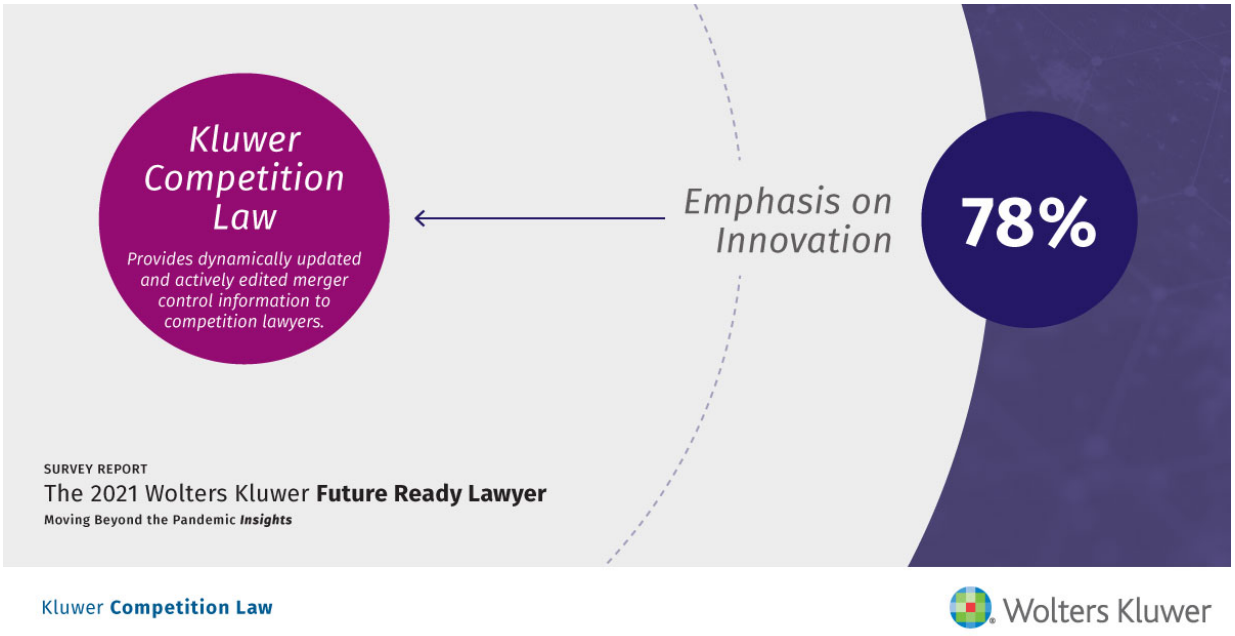
The ruling in Donau Chemie used as reference in ENBW, paragraph 132 does not say

that if the parties adversely affected by an infringement of Article 101 TFEU may make appeal to other means of access to evidence, the refusal to grant it is generally compatible with EU law, but it only clarifies that in this case the principle of effectiveness does not preclude a refusal. The conclusion in paragraph 132 of EnBW must be read as an extrapolation of Donau Chemie.

The ruling in EnBW imposes on the plaintiff a test of reverse proportionality requiring him to demonstrate that his request for access to documents is appropriate and necessary for the exercise of his right to bring an action for damages instead of applying this test on the restriction narrowing this right derived from EU law. This oddness comes as a result of the manner in which the EU citizen is asked to prove that the condition of overriding public interest in disclosure stipulated by article 4 of the Regulation is fulfilled.

However before reaching the point of invoking the exception of an overriding public interest a proportionality test must be applied to the use of an automatic exclusion from the large scope of disclosure required by the Regulation no 1049/2001, where the same question must be asked. Is there any alternative way of providing protection to the information contained by a Competition file than the use of general presumption in conjuncture with a narrow possibility to rebut it?

More case law would be necessary in order to clarify the issue of proportionality of such general presumption taking into consideration the actual availability of the facts necessary in order to rebut it.



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