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Back to black? AG Szpunar on the Protection of Leniency Documents (C-2/23)

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The scope of the protection of leniency documents appears to be the central issue when it comes to the discussion about whether there is a conflict between private and public enforcement. AG Szpunar's statements in the recently published Opinion (C-2/23) have now shed light on the CJEU's possible direction for how to deal with this ongoing hot topic.

For a brief overview and before a more in-depth analysis, the following takeaways in a nutshell:

- The AG gives its blessing to the Austrian provision that allows sending blacklisted documents to the criminal investigation authority.
- He first addresses the scope of applicability of Directive 2014/104/EU (Damages Directive) and Directive 2019/1 (ECN+ Directive):

Both Directives do not apply to matters of intranational administrative exchange between the National Competition Authority and the Prosecuting Authority. Therefore, the scope of 'blacklist-protection' has to be measured against EU primary law.

Regarding access to the file of the parties in criminal proceedings, he considers the ECN+ Directive applicable. However, the Damages Directive does not have reach, as the proceedings in question lack a competition law enforcement component.

- He distinguishes between the different parties. For accused parties, complete access is necessary for safeguarding their fundamental procedural rights and therefore cannot be restricted. However, this is not the case for civil parties (who do not enjoy the same level of need for protection) where consequently – according to AG Szpunar – a restriction of access to file can be justified.
- With regard to the protected documents, he clearly rejects an extensive interpretation of the term blacklisted documents. According to him, leniency statements' annexes constitute 'grey-list' documents.

Background

A Never-Ending Story: The Austrian Construction Cartel

The Austrian construction cartel is one of the biggest cartels that has been revealed by the Austrian

Federal Competition Authority (FCA). The involved companies were held liable for having the objective of minimising/eliminating competition by fixing prices, dividing up markets, and exchanging competition-sensitive information – for example about how future bids would be approached (for more, see the FCA's FAQ). Considerable fines (see another post on this blog for an overview of fines as of December 2023) have been imposed and preparations for follow-on damages actions are underway. This mainly concerns injured parties from the public sectors (such as municipalities) across Austria.

However, the involvement of a leniency applicant often leads to walking on eggshells in private enforcement due to the perceived need to protect leniency applicants. One problem area where this conflict becomes particularly evident is the disclosure of evidence. The leniency applicant and the leniency programme as an important prosecution tool for the competition authorities is worth protecting. However, it is also clear that the effectiveness of private enforcement of EU (competition) law should not be undermined either.

This conflict is once again evident in the present request for a preliminary ruling.

Legal situation in Austria: Adding blacklisted documents to the Criminal File

The construction cartel is not only keeping the FCA and the Cartel Court busy but also the criminal investigation authority. The Public Prosecutor's Office (PPO) is conducting parallel investigations relating to unlawful agreements in procurement procedures (under Section 168b(1) of the Austrian Criminal Code). As the file of the competition authority contains valuable information for the related criminal proceedings, the PPO requested a copy of the file. This request was based on the duty of mutual assistance between authorities which is laid down in Article 22 of the Federal Constitution Act together with Section 76 of the Austrian Criminal Procedure Code as well as to supreme court's case-law. The requested documents were thus – lawfully – added to the investigation file of the PPO.

Backdoor-Access to Protected Documents?

From this point onwards, these documents were principally accessible to parties involved in the criminal proceedings. The accused party has to be granted unrestricted access to the file. The principle of completeness of the file also stipulates that (in principle) no parts of the file may be excluded from inspection, which can be derived from ECtHR case-law.

In criminal proceedings in Austria, there is the possibility for injured parties to join the proceedings as private parties to assert their claims. The criminal court then has the option of co-deciding on these claims in the course of an adhesion procedure. As a rule, this group must also be granted a relatively extensive right of access to the file.

In casu, the accused parties requested the PPO to exclude the leniency documents from the file. To this end, they have invoked the absolute protection of so-called 'black-list' documents under Article 6(6) of the Damages Directive (2014/104) and Article 31(3) of the ECN+ Directive (2019/1). In their view, this would be undermined if these documents, as part of the criminal file, were exposed to access rights of parties in criminal proceedings. They also argued in this respect,

that this situation would put the leniency applicant in a worse position under both, civil and criminal law than other (non-cooperating) accused parties. The PPO did not follow this request and neither did the court of first instance (which was in this case the Regional Court for Criminal Matters, Vienna). This then led the requesting parties to the referring court – the Austrian Supreme Court.

Preliminary Questions of the Austrian Supreme Court

The Austrian Supreme Court assumes that the EU directives 'clearly provide for broader protection of leniency statements and settlement submissions' (Request for preliminary ruling C-2/23, para 20) rather than just being limited to competition proceedings. Accordingly, the scope of protection would extend to any third party – thus also vis-à-vis other courts and authorities and the involved parties in other proceedings. This is based in particular on Article 13(4) ECN+ Directive, which stipulates that national provisions can only go as far as the effective application of competition law is not at risk (para 25). Therefore, they turned to the CJEU to clarify how far this premise goes. In particular, the question was posed of whether the protection of 'black-list' documents can be considered absolute, meaning that it would also extend to mutual administrative assistance.

In case such further-reaching protection is denied, the referring court asks whether parties – either persons under investigation or civil parties to the proceedings – can be excluded permanently from access to (at least parts of) the investigative file.

Another question aimed to clarify where the scope of protected documents has its limits. As the leniency application usually includes documents that should explain, substantiate and prove the correctness or conclusiveness of its content, the referring court wants to know if these documents (the annexes of the leniency statement) are also covered by the protection regime.

The opinion

Scope of Application of the Directives in the Context of Criminal Proceedings

To answer these questions, it must first be assessed whether the two Directives are applicable at all.

As to the scope of application of the Damages Directive, due to its Article 1 para 2, it is applicable in 'damages actions'. The CJEU has specified in Repsol (where it ruled in the context of the binding effect of cartel decisions) that this only covers claims where the damage results from competition law infringements (cf para 41).

In the referred case, the civil parties joined the criminal proceedings to claim their damages. The fact that these claims are not brought to civil courts but criminal courts does not change the civil law nature of this action because it has – from the civil parties' point of view – the characteristics of proceedings for damages (cf para 79). The present situation could therefore – theoretically – fall under the scope of the Damages Directive. However, according to Article 2(4), there must be a link to competition law rules. As the criminal proceedings in Austria do not aim to ensure the enforcement of competition law, this prerequisite is not fulfilled (cf para 84). Applicability must also be denied for the 'issue in question' – namely the inclusion of blacklisted documents to the

PPO's case file. The PPO can neither be considered as a claimant requesting disclosure for damages actions nor as a competent court that orders disclosure by an NCA (cf para 45). Therefore, the procedure in question does in no way affect the 'sphere of private enforcement' (cf para 46) and consequently does also not fall within the scope of the Damages Directive.

In this context, he also clarifies the relationship between the Damages Directive and the ECN+ Directive: the former is regarded as *lex specialis* to the more general latter (cf para 85). Therefore, even if the Damages Directive is not applicable, it has to be assessed whether the *lex generalis* has legal grounds regarding the matters in question.

The ECN+ Directive complements the protection regime of the Damages Directive as it is not limited to the context of actions for damages. The protection of the blacklisted documents substantially corresponds with the one laid down in the Damages Directive (cf para 51). In order to assess the applicability, one has to distinguish between the Directive in general and the provision aiming to harmonize the protection of the leniency applicant (namely Art 31(3) and (4)). While the former applies only when EU competition law is involved, the latter (in order to be effective) does also cover matters that only affect domestic competition law (cf para 53). For matters of access to evidence by third parties, the protection regime of the ECN+ Directive does apply as it does not pose a prerequisite on the nature of the proceedings. When it comes to purely domestic mutual assistance between authorities, however, the ECN+ Directive does not have reach as it was designed to govern the exchange of information between the Member State's NCAs to strengthen and facilitate their cooperation (cf para 61). Thus, both Directives do not apply to matters of intranational mutual assistance . However, restricting access to blacklist documents could undermine the effectiveness of competition law, namely Article 101 TFEU. Consequently, the AG applies the standard of EU primary law when assessing the legality of access to blacklist documents. Therefore, it depends on whether the national regulation in question would undermine the protection of blacklisted documents or not. The requirements for the EU primary law conformity with regard to blacklist protection can in turn be read from the Directive's protection regime (para 69).

Black, grey, white: Where to draw the line?

The referring court also wanted to know if annexes to the leniency application also fall within the scope of the 'blacklist-protection'. Due to AG Szpunar, the answer is: no. In his view, annexes are qualified as documents that have been 'specifically prepared for the purposes of proceedings brought by an NCA […] which do not fall within the definitions of "leniency statements" and "settlement submission"' and thus must be treated as 'grey list' documents. The latter are not granted the same level of protection as blacklisted documents do (cf para 109; for more details on the delimitation of the protected documents, see the analysis of the EC's Judgment RegioJet in another blogpost). To explain his argument, he refers to the CJEU's reasoning in Evonik Degussa, in which the protection relates solely to blacklisted documents. He states that the term 'leniency declaration' (as well as 'settlement submissions') must be interpreted narrowly because otherwise, it would undermine the individual's right to compensation (cf para 112).

Favoured Parties of Access to File and the Question of Permanent Exclusion

Art 31(3) ECN+ permits the disclosure of blacklisted documents *only* if their content is necessary for the parties subject to the relevant proceedings to exercise their rights of defence. In this regard, the AG clarifies that the term 'relevant proceedings' is not necessarily limited to competition law procedures only. This is where he brings the fundamental rights of persons under investigation enshrined in the ECHR into play, which grants a comprehensive – and only in very few instances limitable – right to access to all evidence that the law enforcement authority possesses. The nature of the documents (in this case the 'blacklist-characteristic') cannot, according to the ECtHR (in Mirilachvili vs Russia, 11th December 2008, para 206), constitute a reason for non-disclosure per se. The latter can only be justified in case the disclosure of the requested documents would harm the fundamental rights of another individual or an important public interest (cf para 91).

As the risk for disclosure could act as a deterrent to applying for leniency and therefore reduce the effectiveness of public enforcement, safeguarding blacklisted documents can serve public interests. Furthermore, the protection is intended to protect the leniency applicant individually from disclosure. The refusal of disclosure therefore can be justified with public interests, but still has to be assessed case-by-case (cf para 97).

This allows a differentiated approach when it comes to the favoured parties of access to file. A provision granting access to blacklisted documents for accused parties of a criminal proceeding is in accordance with EU law due to the described procedural fundamental rights and the overriding public interest in public enforcement of competition law. However, this is different for civil parties involved in criminal proceedings. Article 31(3) ECN+ Directive provides for access to blacklisted documents only if it is necessary for involved parties for their right of defence. This is, according to the AG, clearly not the case for civil parties, who are not under investigation (cf para 87).

Conclusion

The struggle is (and remains) real when it comes to weighing up the rights of the accused against the interests of (effective) public enforcement and the associated protection of the leniency applicant. A distinction between private parties and accused persons is quite comprehensible, as the latter are simply more worthy of protection – not least due to established ECtHR case law.

The gripping question is now of course: how will the Court decide? While the demarcation of the blacklisted documents can already look back on existing case-law and thus – corresponding to the AG's opinion – a narrow interpretation of blacklisted documents will probably be upheld, the scope of protection is new territory for the interpretation of EU law. It therefore remains to be seen whether the CJEU will follow the Advocate General's opinion, particularly whether it will adopt his differentiated approach in distinguishing between civil and accused parties.

Nevertheless, it strikes a sour note that – at least in cases with criminal relevance – there is a great deal of uncertainty concerning the disclosure of leniency documents which potential leniency applicants will have to take into account.

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