



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA

EUROPOS SAJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

15 December 2011*

(Access to documents – Regulation (EC) No 1049/2001 – Statement of contents of the administrative file relating to a cartel proceeding – Refusal of access – Exception concerning the protection of the commercial interests of a third party – Exception relating to protection of the purpose of inspections, investigations and audits)

In Case T-437/08,

CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide), established in Brussels (Belgium), represented initially by R. Wirtz, subsequently by R. Wirtz and S. Echement and finally by T. Funke, A. Kirschstein and D. Stein, lawyers,

applicant,

supported by

Kingdom of Sweden, represented by A. Falk, K. Petkovska and S. Johannesson, acting as Agents,

intervener,

v

European Commission, represented initially by P. Costa de Oliveira, A. Antoniadis and O. Weber, and subsequently by A. Bouquet, P. Costa de Oliveira and A. Antoniadis, acting as Agents,

defendant,

supported by

* Language of the case: German.

ECR

EN

Evonik Degussa GmbH, established in Essen (Germany), represented initially by C. Steinle, and then by C. Steinle and M. Holm-Hadulla, lawyers,

intervener,

APPLICATION for annulment of Commission decision SG.E3/MM/psi D(2008) 6658 of 8 August 2008 refusing full access to the statement of contents of the case-file in Case COMP/F/38.620 – Hydrogen peroxide and perborate,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and M. van der Woude, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 14 June 2011,

gives the following

Judgment

Background

- 1 The applicant, CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide), is a limited company whose purpose is, inter alia, to defend the interests and the recovery by judicial and extrajudicial means of the claims of undertakings affected by the cartel sanctioned by Commission Decision C(2006) 1766 final of 3 May 2006 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/C.38.620 – Hydrogen peroxide and perborate) (the ‘hydrogen peroxide decision’).
- 2 In that decision, the Commission of the European Communities found that nine undertakings had taken part in a cartel in the hydrogen peroxide market in the context of which they exchanged information on prices and sales volumes, agreed on prices and reduction of production capacity and monitored the anti-competitive agreements made. Consequently, the Commission imposed fines amounting to EUR 338 million on the undertakings that had taken part in that cartel.
- 3 On 14 March 2008, the applicant sought from the Commission, on the basis of Article 2(1) and Article 11(1) and (2) of 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 2001 L 145, p. 43), full access to the statement of contents of the case-file in the hydrogen peroxide decision (the ‘statement of contents’).

- 4 On 11 April 2008, the Commission rejected the application for access to the statement of contents on the ground that it did not constitute a document within the meaning of Article 3(a) of Regulation No 1049/2001.
- 5 On 15 April 2008, in a letter to the Commission, the applicant set out the reasons why the statement of contents should be regarded as a document within the meaning of Article 3(a) of Regulation No 1049/2001. On 16 April 2008, the Commission stated that it considered that letter to be supplementing an initial application and not as a confirmatory application.
- 6 On 6 March 2008, the Commission rejected that application on the ground that disclosure of the statement of contents undermines protection of the purpose of the investigation activities referred to in the third indent of Article 4(2) of Regulation No 1049/2001, undermines protection of the commercial interests of the undertakings which took part in the cartel, provided for in the first indent of Article 4(2) of Regulation No 1049/2001, and undermines the institution's decision-making process, referred to in the second subparagraph of Article 4(3) of Regulation No 1049/2001.
- 7 On 20 May 2008, the applicant made a confirmatory application.
- 8 On 13 June 2008, the Commission extended by an additional fifteen working days the time-limit for replying to the applicant's confirmatory application. On 3 July 2008, the Commission informed the applicant that its application could not be dealt with within the extended time-limit.
- 9 On 8 August 2008, the Commission rejected the applicant's confirmatory application on the basis of the first and third indents of Article 4(2) of Regulation No 1049/2001 ('the contested decision'), but provided the applicant with a non-confidential version of the statement of contents.

Procedure and form of order sought

- 10 By application lodged at the Registry of the General Court on 6 October 2008, the applicant brought the present action.
- 11 On 15 January 2009, the Kingdom of Sweden sought leave to intervene in support of the form of order sought by the applicant. On 24 January 2009, Evonik Degussa GmbH sought leave to intervene in support of the form of order sought by the Commission.
- 12 By orders of 18 March 2009, the President of the Second Chamber of the General Court granted those applications.
- 13 On 27 May and 5 June 2009 respectively, the Kingdom of Sweden and Evonik Degussa lodged their statements in intervention.

- 14 By order of 15 April 2010, the President of the Second Chamber of the Court, after hearing the parties, stayed proceedings in the present case pending the General Court's decision disposing of Case T-399/07 *Basell Polyolefine v Commission*. Since that decision, in the form of an order removing the case from the register, was adopted on 25 January 2011, the procedure re-commenced at that date.
- 15 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber to which, in consequence, the present case was assigned.
- 16 The applicant, supported by the Kingdom of Sweden, claims that the Court should:
 - annul the contested decision;
 - order the Commission to pay the costs.
- 17 The Commission, supported by Evonik Degussa, contends that the Court should:
 - dismiss the action;
 - order the applicant to pay the costs.

Law

Admissibility

- 18 On 16 March 2009, the applicant brought an action before the Landgericht Dortmund (Regional Court, Dortmund, Germany) against several companies to which the hydrogen peroxide decision was addressed or their successors in law, among which was the intervener, Evonik Degussa.
- 19 In the autumn of 2009, following an agreement concluded with Evonik Degussa, the applicant discontinued its action before the Landgericht Dortmund in regard to that company. That action is still pending in regard to the other companies against which it was brought.
- 20 In a letter to the Court of 2 February 2011, the Commission raised the possibility that, as a result of the agreement concluded with Evonik Degussa and which led it to partly discontinue its action before the Landgericht Dortmund, the applicant might already have the information which it hoped to obtain from the statement of contents and, in particular, information permitting it to designate the specific documents in the case-file of the hydrogen peroxide decision of which it wishes to obtain discovery, whether from the Commission or from the national courts. The Commission therefore asked the Court to call upon the applicant to show that it had an interest in bringing the present proceedings.

- 21 The applicant stated in that regard that, following the agreement concluded with Evonik Degussa, it did not yet have all the documents necessary to pursue its action for damages before the national courts. In particular, it did not have access in the context of its action before the Landgericht Dortmund to the statement of contents nor to the complete version of the hydrogen peroxide decision. It therefore considers that it still has an interest in continuing the present proceedings.
- 22 Evonik Degussa confirms that the agreement was concluded but emphasises that it did not disclose either the statement of contents or the complete version of the hydrogen peroxide decision to the applicant.
- 23 Consequently, the applicant still has a legal interest in pursuing the present proceedings.

Substance

- 24 In support of its claim for annulment, the applicant puts forward four pleas alleging first, breach of the fundamental principles of Regulation No 1049/2001, secondly, breach of the right to compensation for an infringement of European Union competition law, thirdly, an infringement of the first indent of Article 4(2) of Regulation No 1049/2001, and fourthly, an infringement of the third indent of Article 4(2) of Regulation No 1049/2001.
- 25 As a preliminary point, it should be noted that, in its first two pleas, the applicant is complaining that the Commission has, in a general way, infringed principles of law, but without making a precise connection between those complaints and specific rules of law or specific grounds for the contested decision. However, it is obvious that the specific application of the legal rules referred to in the third and fourth pleas must take account of the more general principles set out in the first and second pleas. Therefore, the third and fourth pleas must be considered directly, taking account, where appropriate, of the complaints made in the first and second pleas.
- 26 Moreover, inasmuch as the Commission based the contested decision on both the first and third indents of Article 4(2) of Regulation No 1049/2001, its annulment presupposes that the third and fourth pleas are accepted.

The third plea alleging an infringement of the first indent of Article 4(2) of Regulation No 1049/2001

- 27 The applicant, supported by the Kingdom of Sweden, argues that the exception for the protection of the commercial interests of a given legal person does not apply to the present case inasmuch as the statement of contents does not reveal any business or professional secrets.

- 28 In addition, the applicant claims that the Commission erroneously balanced the interests of undertakings which took part in the cartel, on the one hand, against those of undertakings damaged by the cartel, on the other, since it gave preference to protection of the interests of the undertakings to which the hydrogen peroxide decision was addressed, notwithstanding the fact that, according to case-law, those interests do not deserve any special protection.
- 29 The Commission, supported by Evonik Degussa, contends that some information contained in the statement of contents, taken together with other information revealed in the non-confidential version of its hydrogen peroxide decision, could lead undertakings damaged by the cartel to consider that certain documents listed in the statement of contents might contain further incriminating evidence and therefore, to bring actions for damages.
- 30 The Commission adds that the statement of contents includes documents which were not incorporated into the non-confidential version of its hydrogen peroxide decision and which come within the exceptions referred to in Article 4 of Regulation No 1049/2001. The defence of the undertakings which took part in the cartel, in the procedure before the Commission, must be protected under the first indent of Article 4(2) of the same regulation.
- 31 With regard to the concept of professional secret, which is part of the broader concept of commercial interests, the Commission considers that the risk of an action for damages being brought is a serious disadvantage which could lead undertakings taking part in cartels, in the future, to cease to co-operate. According to the Commission, it cannot be accepted that the protection of professional secrecy or the commercial interests of undertakings should be affected by an application for access to documents based exclusively on private law interests.
- 32 It must be recalled that according to the fourth recital and Article 1 thereof, the purpose of Regulation No 1049/2001 is to give the public the fullest possible right of access to documents held by the institutions. The second recital of that regulation notes that that right of access is part of the democratic nature of the institutions.
- 33 However, that right is none the less subject to certain limitations based on grounds of public or private interest (Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62, Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 53, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and API v Commission* [2010] ECR I-0000, paragraph 70).
- 34 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision.

- 35 Thus, if the Commission decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception provided for in Article 4 of Regulation No 1049/2001 upon which it is relying (see, to that effect, Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 49; *Commission v Technische Glaswerke Ilmenau*, paragraph 33 above, paragraph 53; and *Sweden and API v Commission*, paragraph 33 above, paragraph 72).
- 36 Since they derogate from the principle of the widest possible public access to documents, the exceptions laid down in Article 4 of Regulation No 1049/2001 must be interpreted and applied strictly (*Sison v Council*, paragraph 33 above, paragraph 63; Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66; and *Sweden and Turco v Council*, paragraph 35 above, paragraph 36).
- 37 Furthermore, in an action for annulment brought on the basis of Article 230 EC, the lawfulness of the measure concerned falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Case T-251/97 *T. Port v Commission* [2000] ECR II-1775, paragraph 38, and Case T-70/99 *Alpharma v Council* [2002] ECR II-3495, paragraph 248, and the case-law cited). Thus, the fact that the applicant may have been able to reach agreement with one of the companies whose commercial interests the Commission was seeking to protect cannot be taken into account in the context of that assessment.
- 38 The Commission's application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 must now be considered in the light of those principles.
- 39 In accordance with that provision, the institutions are to refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person unless there is an overriding public interest in disclosure.
- 40 First of all, account must be taken of the nature of the document to which the applicant is seeking access. The parties agree that it is the statement of contents of the Commission's case-file, as it was made available to the addressees of the statement of objections in Case COMP/F/38.620 – Hydrogen peroxide and perborate. On the other hand, the applicant is not seeking access to the actual documents listed in the statement of contents, so that any consideration of the contents of the documents themselves, rather than merely the statement of contents, is irrelevant to the present case.
- 41 Secondly, in so far as the Commission considered in the contested decision that disclosure of the statement of contents would affect the commercial interests of

the undertakings mentioned therein, it must be considered whether the Commission erred in its assessment by finding that the statement of contents was covered by the concept of commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001.

- 42 In that regard, the applicant refers to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 [EC] and 82 [EC], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7, ‘the notice on access to the file’) to argue that the information contained in the statement of contents does not constitute business secrets. However, as the Commission correctly points out, the first indent of Article 4(2) of Regulation No 1049/2001 does not refer to the concept of ‘business secrets’. In addition, it should be noted that that point 2 of the notice on access to the file states that the right of access to the file, as defined in that notice, is distinct from the general right to access to documents established by Regulation (EC) No 1049/2001, which is subject to different criteria and exceptions and pursues a different purpose. Consequently, the concept of ‘commercial interests’ cannot be understood in the light of that regulation.
- 43 It follows that the applicant cannot refer to the notice on access to the file in order to challenge the Commission’s reliance on the protection of the commercial interests of the undertakings which took part in the cartel, under the first indent of Article 4(2) of Regulation No 1049/2001.
- 44 It must be pointed out that although the concept of commercial interests has not been defined in the case-law, the Court has specified that it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001 if application of the general principle of giving the public the widest possible access to documents held by the institutions is not to be frustrated (judgment of 30 January 2008 in Case T-380/04 *Terezakis v Commission*, not published in the ECR, paragraph 93).
- 45 However, it must be noted that the statement of contents, which merely contains references to the documents in the Commission’s case-file cannot be regarded as itself forming part of the commercial interests of the companies mentioned therein by name as authors of some of those documents. It is only if one of the columns in the statement of contents, which indicates, inter alia, according to the non-confidential version which the Commission supplied to the applicant, the origin, the addressee and the description of the documents listed, were to contain, in regard to one or more of those documents, information concerning the business relations of the companies concerned, the prices of their products, their cost structure, market share or similar information that disclosure of the statement of contents could be regarded as prejudicing the protection of the commercial interests of those companies. The Commission has not argued that such is the case.

- 46 On the other hand, the Commission considered, essentially, in the contested decision that the information contained in the statement of contents could expose to a greater extent to actions for damages the undertakings at which the Commission carried out on-the-spot verifications and those which co-operated with it in return for a reduction of their fine. According to the Commission, even if the fact that certain documents were obtained in accordance with the Leniency Notice is known to the public, the statement of contents contains further details in that regard as compared to the public version of the hydrogen peroxide decision.
- 47 However, it must be stated that those considerations concern solely the risk that, as a result of disclosure of the statement of contents, the intervener or other companies involved in the hydrogen peroxide cartel would face actions for damages. The Commission has thus based its argument solely on the use which might be made of the information contained in the statement of contents but has not argued that that information, by virtue of its contents, forms part of the commercial interests of the companies in question.
- 48 It should be noted in this respect that the statement of contents is a mere inventory of documents which, in itself, has only a very relative probative value in the context of an action for damages brought against the companies in question. Although it is true that that inventory could allow the applicant to identify the documents which could be useful to it for the purposes of such an action, it is none the less also true that the decision to order production of those documents, or not, is for the court having jurisdiction over that action. It cannot therefore be argued that disclosure of the statement of contents would, as such, affect the interests relied on by the Commission to justify its negative decision.
- 49 In addition, even if the fact that actions for damages were brought against a company could undoubtedly cause high costs to be incurred, even if only in terms of legal costs, and even if the actions were subsequently dismissed as unfounded, the fact remains that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61).
- 50 It follows from the above that the Commission has not established, to the requisite legal standard, that access to the statement of contents is likely specifically and effectively to undermine the commercial interests of undertakings which took part in the cartel and, in particular, of Evonik Degussa.
- 51 The applicant's third plea must therefore be upheld.

The fourth plea alleging an infringement of the third indent of Article 4(2) of Regulation No 1049/2001

- 52 The applicant, supported by the Kingdom of Sweden, argues that the Commission should have relied solely on the first indent of Article 4(2) of Regulation No 1049/2001 inasmuch as, in the non-confidential version made available to the applicant, it merely referred to the protection of professional and business secrecy in respect of each of the documents listed. As can be seen from the explanation of abbreviations preceding the non-confidential version of the statement of contents, the Commission did not base its refusal to grant access to the statement of contents on the protection of the purpose of the investigation activities, as referred to in the third indent of Article 4(2) of Regulation No 1049/2001.
- 53 In addition, the applicant argues that the conditions laid down by the latter provision are not fulfilled in the present case since the investigation activities undertaken in the context of Case COMP/F/38.620 have been completed. It states that re-opening the investigation cannot be envisaged inasmuch as the actions brought by the undertakings which took part in the cartel do not concern the existence of anti-competitive practices.
- 54 Finally, the applicant relies on the absence of a causal link between disclosure of the statement of contents, on the one hand, and the danger to the Commission's task of preventing anti-competitive practices, on the other. It emphasises that, notwithstanding the growing number of actions for damages, the number of requests for immunity is not decreasing.
- 55 The Commission, supported by Evonik Degussa, argues that the investigation in Case COMP/F/38.620 must be regarded as still open inasmuch as the hydrogen peroxide decision is not yet definitive.
- 56 In addition, the Commission observes that its task of preventing anti-competitive practices depends largely on the co-operation of undertakings, which would be jeopardised if the documents supplied by applicants for leniency were to be disclosed. It contends that such disclosure would place some undertakings at a disadvantage compared to others without that disadvantage being objectively justified.
- 57 The Commission considers that the interdependence of, on the one hand, the protection of the commercial interests of the undertakings in question and, on the other hand, of the public interest in preventing anti-competitive practices justifies the fact that it relied on the protection of the commercial interests of undertakings in the context of the assessment under the third indent of Article 4(2) of Regulation No 1049/2001.
- 58 As a preliminary point, the Court rejects the applicant's argument that the Commission did not base its refusal to grant access on the exception concerning protection of the objectives of the investigation activities. That argument is based

on the fact that none of the codes mentioned in the non-confidential version of the statement of contents in order to indicate the grounds for refusal of access concerns protection of the purpose of investigations. However, account must be taken, above all, of the text of the contested decision itself, point 3.2 of which refers to protection of the purpose of investigations and the subject matter of investigations in cartel matters as grounds for the refusal of access. In the light of those facts, the coded information in the non-confidential version of the statement of contents is merely of a subsidiary nature. Moreover, according to the reasoning employed by the Commission both in the contested decision and in its defence, the effect on the purpose of investigations of any disclosure of the statement of contents depends on the effect of such disclosure on the commercial interests of the undertakings concerned, with the result that the two factors are interdependent.

- 59 Furthermore, with regard to the merits of the Commission's reliance on the exception in regard to protection of the purpose of investigations, it must first of all be pointed out that the aim of the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, as is clear from its wording, is not to protect the investigations as such, but rather their purpose, which, in the case of competition proceedings, is to determine whether an infringement of Article 81 EC or Article 82 EC has taken place and to penalise the companies responsible if that be the case. It is for that reason that documents relating to the various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed (Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 133, and, by analogy, Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 110, and, as regards the application of the 1993 Code of Conduct, Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 48).
- 60 In the present case, however, on the date of the adoption of the contested decision, the Commission had already adopted – more than two years earlier – the hydrogen peroxide decision finding the infringements alleged by the Commission against the undertakings concerned and thereby closing the procedure in Case COMP/F/38.620. It cannot therefore be disputed that, on that date, there was no investigation in progress to prove the existence of the infringements in question which could have been jeopardised by the disclosure of the requested documents.
- 61 It is true that, at the date on which the contested decision was adopted, actions were pending before the Court against the hydrogen peroxide decision, with the effect that if that decision was annulled by the Court, the procedure could be re-opened.
- 62 However, the investigation in a given case must be regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently

be annulled by the courts, because it is at that moment that the institution in question itself considers that the procedure has been completed.

- 63 In that context, it must also be borne in mind that since all exceptions to the right of access must be interpreted and applied strictly, the fact that the documents requested concern a protected interest cannot, in itself, justify application of the exception invoked, since the Commission must establish that their disclosure was actually likely to undermine the protection of the purpose of its investigations concerning the infringements in question (see, to that effect, *API v Commission*, paragraph 59 above, paragraph 127).
- 64 In addition, to accept that the various documents relating to investigations are covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 until all possible legal procedures have been decided – even in the case where an action which may lead to a re-opening of the procedure before the Commission has been brought before the Court – would make access to those documents dependent on uncertain events, namely the outcome of that action and the conclusions which the Commission might draw from it. In any event they are uncertain and future events which depend on decisions of the addressees of the decision sanctioning a cartel and of the various authorities concerned.
- 65 Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (*API v Commission*, paragraph 59 above, paragraph 140; and, see, to that effect, *Franchet and Byk v Commission*, paragraph 59 above, paragraph 112).
- 66 It must be added in the present case that the pleas put forward in the actions brought against the hydrogen peroxide decision did not challenge the existence of the anti-competitive practices found by the Commission but, in essence, merely maintained that there were errors as regards the duration of those practices, the attribution to parent companies of the conduct of their subsidiaries and the calculation of the fines or the infringement of procedural rights. Thus, re-opening the procedure was not in any event likely to cause the Commission to adopt a different position in regard to the finding of the infringement and the participation of the various producers implicated in the hydrogen peroxide cartel but would at very most lead to a legal re-assessment of the facts, as found by the Commission, in regard to the duration of the participation of some undertakings in the infringement or the attribution of the unlawful conduct to some companies.
- 67 It follows that disclosure of the statement of contents was not likely to undermine the protection of the purpose of the investigations as regards the procedure before the Commission concerning the hydrogen peroxide cartel.

- 68 Secondly, that assessment cannot be called into question by the Commission's argument that the concept of the purpose of the investigation activities has a more general scope and includes all of the Commission's policy in regard to the punishment and prevention of cartels.
- 69 The Commission argues, in essence, that the exception based on that concept is independent of any specific procedure and may be relied on, in a general way, to refuse disclosure of any document likely to undermine the Commission's cartel policy and, in particular, its leniency programme. In particular, if applicants for leniency had to fear that, as a result of the disclosure of documents which they submitted in the context of their application, that they would be the prime target of actions for damages brought by companies damaged by the cartel, they might refrain, in the future, from co-operating with the Commission, which would affect the effectiveness of the leniency programme.
- 70 However, acceptance of the interpretation proposed by the Commission would amount to permitting the latter to avoid the application of Regulation No 1049/2001, without any limit in time, to any document in a competition case merely by reference to a possible future adverse impact on its leniency programme. Moreover, the present case is an illustration of the broad application which the Commission wishes to give to that interpretation, inasmuch as it refuses here to disclose a document which was not itself submitted by an applicant for leniency and contains no information likely in itself to damage the interests of the companies which applied for leniency. In fact, the Commission merely states that certain information contained in the non-confidential version of the hydrogen peroxide decision could be put together with other information, contained in the statement of contents, so as to permit victims of anti-competitive practices to know which documents in the file could contain further evidence of the infringement.
- 71 It must be held that such a broad interpretation of the concept of investigation activities is incompatible with the principle that, by reason of the purpose of Article 1049/2001, set out in recital 4, namely, 'to give the fullest possible effect to the right of public access to documents', the exceptions laid down in Article 4 of that regulation must be interpreted and applied strictly (see the case-law cited in paragraph 36 above).
- 72 It must be stressed, in that regard, that nothing in Regulation No 1049/2001 leads to the supposition that EU competition policy should enjoy, in the application of that regulation, treatment different from other EU policies. There is thus no reason to interpret the concept of the 'purpose of the investigation activities' differently in the context of competition policy than in other EU policies.
- 73 Moreover, it must be pointed out that the Commission's reasoning is based on a confusion between the exception regarding protection of the purpose of the investigation activities and that regarding protection of commercial interests.

74 As was pointed out in paragraph 58 above, according to the Commission’s reasoning in point 3.2 of the contested decision, the effects of any disclosure of the statement of contents on the purpose of its investigation activities depend on the effects of such disclosure on the commercial interests of the undertakings concerned inasmuch as, according to the Commission, undertakings would co-operate less with it in the future in order to protect their commercial interests. Therefore, the facts by which the Commission justifies the existence of an adverse impact on the purpose of the investigation activities are, in essence, identical to those relied on in support of the exception regarding the protection of commercial interests.

75 The passages of point 3.2 of the contested decision concerning the protection of the purpose of the investigation activities, in the broad sense, read as follows:

‘Moreover, the case at hand cannot be considered in isolation. Disclosing the full list of documents would create a precedent as it would signal to the business community that the Commission may disclose information on an antitrust case even if such disclosure would harm the commercial interests of the undertakings which were subject to the proceedings. This would lead to a situation where undertakings reduce their cooperation to an absolute minimum and become very reluctant to come forward with information which is essential for the Commission in combating cartels. Such an outcome would severely affect the Commission’s ability to carry out antitrust investigations and thus to fulfil the tasks entrusted upon it by the EC Treaty.

On the basis of the above-mentioned grounds the exception laid down in Article 4(2) third indent of Regulation 1049/2001 applies to the undisclosed data in the [non-confidential version of the statement of contents].’

76 However, it has been found in paragraphs 45 to 50 above that the Commission has not established, to the requisite legal standard, that access to the statement of contents is likely, specifically and effectively, to undermine the commercial interests of undertakings which took part in the cartel and, in particular, of Evonik Degussa.

77 In addition, it must be recalled that the leniency and co-operation programmes whose effectiveness the Commission is seeking to protect are not the only means of ensuring compliance with EU competition law. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU (*Courage and Crehan*, paragraph 49 above, paragraph 27).

78 Finally, with regard to the Commission’s argument that the fact that the statement of contents was drawn up solely to permit the undertakings concerned to exercise their right to defend themselves militates against it being disclosed ‘in the light of the purpose of [using] the documents and the confidentiality inherent in competition proceedings’, it must be stated that the purpose for which the

Commission drew up a document is a fact which is not, in itself, to be taken into account in a decision concerning access to that document under Regulation No 1049/2001. Article 4 of that regulation, which contains an exhaustive list of the situations which justify refusal of access to a document, sets out only circumstances relating to the consequences of disclosure of the documents requested and makes no reference to the purpose of the documents. Such a consideration is thus foreign to the system of access to documents established by Regulation No 1049/2001, at least as far as documents drawn up by the Commission itself are concerned.

- 79 It follows from the above that the Commission has not established, to the requisite legal standard, that disclosure of the statement of contents would specifically and effectively undermine protection of the purpose of investigations. The contested decision is thus vitiated by an error of law in that regard.
- 80 The applicant's fourth plea must therefore be upheld.
- 81 Since none of the exceptions laid down in Article 4(2) of Regulation No 1049/2001, relied on by the Commission, can justify the latter's refusal to grant access to the statement of contents, the application must be upheld and the contested decision must be annulled.

Costs

- 82 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant.
- 83 The Kingdom of Sweden and the Evonik Degussa are to bear their own costs, pursuant to the first and second paragraphs of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Decision SG.E3/MM/psi D(2008) 6658 of the Commission of 8 August 2008 refusing full access to the statement of contents of the case-file in Case COMP/F/38.620 – Hydrogen peroxide and perborate;**

- 2. Orders the European Commission to bear its own costs and pay those incurred by CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide);**
- 3. Orders the Kingdom of Sweden and Evonik Degussa to pay their own costs.**

Pelikánová

Jürimäe

van der Woude

Delivered in open court in Luxembourg on 15 December 2011.

[Signatures]