Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2013*

(Access to documents — Regulation (EC) No 1049/2001 — Request seeking to obtain access to certain confidential passages of the final decision of the Commission relating to a cartel — Refusal of access — Obligation to state reasons — Obligation to carry out a specific, individual examination — Exception concerning the protection of privacy and the integrity of the individual — Exception concerning the protection of the commercial interests of a third party — Exception relating to the protection of the purpose of investigations — Overriding public interest — Sincere cooperation)

In Case T-380/08,

Kingdom of the Netherlands, represented by C. Wissels, M. de Mol and M. de Ree, acting as Agents,

applicant,

v

European Commission, represented by A. Bouquet and P. Costa de Oliveira, acting as Agents,

defendant,

APPLICATION for annulment of the Commission decision of 30 June 2008 refusing access to certain confidential passages of Decision C(2006) 4090 final (Case COMP/F/38.456 – Bitumen (Netherlands)),

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen, President, S. Soldevila Fragoso (Rapporteur) and G. Berardis, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2012,

gives the following

Judgment

Facts

1 On 13 September, the Commission of the European Communities adopted Decision C(2006) 4090 final (Case COMP/F/38.456 – Bitumen (Netherlands)), ('the Bitumen decision') relating to a proceeding under Article 81 [EC]. A version of that decision, not containing certain passages which the

* Language of the case: Dutch.

Commission considered confidential ('public version of the Bitumen decision') was published in the *Official Journal of the European Union* of 28 July 2007 (OJ 2007 L 196, p. 40). In the Bitumen decision the Commission found that a number of undertakings had breached Article 81(1) EC by participating in a cartel for the supply of road pavement bitumen in the Netherlands and imposed on those undertakings fines totalling EUR 266.717 million.

2 On 7 March 2008, the Kingdom of the Netherlands sent to the Commission an application for access to the complete version of the Bitumen decision ('the confidential version of the Bitumen decision') under 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).

3 By letter of 27 March 2008, the Commission rejected the initial application for access to the confidential version of the Bitumen decision.

4 On 17 April 2008, the Kingdom of the Netherlands made, under Article 7(2) of Regulation No 1049/2001, a confirmatory application asking the Commission to reconsider its position ('the confirmatory application'). It stated that, since it has been harmed by the actions of the undertakings concerned by the Bitumen decision, it intended to seek compensation from those undertakings in the national courts. The Kingdom of the Netherlands observed that it would be useful, in that regard, to examine the information contained in the confidential version of the Bitumen decision, but which was removed in the public version of that decision. To that end, the Kingdom of the Netherlands identified certain specific passages of the Bitumen decision relating to:

— the nature and scale of the infringements (recitals 4 to 6 of the Bitumen decision);

— the organisation and operation of the cartel (recitals 48 to 86 and 350 to 354 of the Bitumen decision);

— the role of certain undertakings as instigators or leaders of the cartel (recitals 342 to 347 of the Bitumen decision);

— the price-fixing agreements within the cartel (recitals 87 to 126 of the Bitumen decision);

— the difference in the price levels of bitumen between the Netherlands and in neighbouring countries (recitals 150, 174, 314 of the Bitumen decision);

— the interest of the road builders in seeing the price of bitumen increase (recitals 149 and 151 of the Bitumen decision);

— the bitumen market shares and the bitumen sales turnover in the Netherlands of the participants in the cartel (recitals 7 to 29 and 321 of the Bitumen decision);

— finally, the names of the people representing the participants at the cartel meetings (recitals 187, 205, 236, 252, 265, 268, 273, 279, 286, 291, 293 and 298 of the Bitumen decision).

5 By letter of 30 June 2008 ('the contested decision'), the Commission rejected the confirmatory application.

6 As regards the information mentioned in the first indent of paragraph 4 above, the Commission indicated that the public and confidential versions of the Bitumen decision were identical.

7 As regards the information mentioned in the second to eighth indents of paragraph 4 above, the Commission indicated, first, that it was covered by the exceptions to the right of access to documents set out in the first and third indents of Article 4(2) of Regulation No 1049/2001 relating to the protection of natural or legal persons' commercial interests and the purpose of inspections, investigations and audits of the institutions of the European Union respectively. Second, it indicated that, in accordance with the end of Article 4(2) of that regulation, those exceptions must be disregarded where there is an overriding public interest in the disclosure of the information requested. However, the Commission considered that the confirmatory application did not contain any arguments capable of demonstrating the existence of such an interest, to the extent that the argument put forward by the Kingdom of the Netherlands, alleging the usefulness of the confidential version of the Bitumen decision in order to prepare a possible action for damages against the undertakings concerned by that decision, related to an interest that was private and not public in nature.

8 As regards the information mentioned in the eighth indent of paragraph 4 above, the Commission considered that it was covered by both the first and third indents of Article 4(2) of Regulation No 1049/2001 and the exception laid down in Article 4(1)(b) thereof, relating to the protection of privacy and integrity of the individual.

9 Lastly, the Commission considered that, since the information mentioned in the second to eighth indents of paragraph 4 above was covered entirely by the aforementioned exceptions, partial disclosure of that information, under Article 4(6) of Regulation No 1049/2001, was not possible.

10 In August 2009, the Commission published a new public version of the Bitumen decision, which had fewer non-disclosed passages ('the new public version of the Bitumen decision').

Procedure and forms of order sought by the parties

11 The Kingdom of the Netherlands brought this action by application lodged at the Court Registry on 9 September 2008.

12 By order of the President of the Second Chamber of the Court of 2 June 2010, the procedure in this case was suspended pending the final decision of the Court of Justice in the case which gave rise to the judgment in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, and pending the final decision of the General Court in the case which gave rise to the order of 25 January 2011 in Case T-399/07 *Basell Polyolefine* v *Commission*, not published in the ECR. Proceedings recommenced on 25 January 2011.

13 Owing to a change in the composition of the chambers of the Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was, consequently, assigned.

14 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure. The parties presented oral arguments and replied to questions put by the Court at the hearing on 14 December 2012.

15 At the end of the hearing, the Court asked the parties a question seeking to clarify the precise subject matter of the dispute in the light of the new public version of the Bitumen decision.

16 In their written submissions lodged at the Court Registry on 24 January and 8 February 2013 respectively, the Kingdom of the Netherlands and the Commission responded to the Court's question.

17 In its submissions, the Kingdom of the Netherlands indicated that the subject of its application for access was henceforth all the passages which remained confidential in the new public version of the Bitumen decision. In that respect, it identified certain passages of that decision relating to:

— the nature and scale of the infringements (footnotes 7 to 12 of the Bitumen decision);

— the organisation and operation of the cartel (recitals 50, 53 to 57, 59, 62, 64 to 66, 69 to 74, 77, 78, 80, 82 to 86 and footnotes 130, 132 to 134, 137 to 140, 143 to 148, 150 to 157, 160 to 187, 189 to 192, 194 to 198, 200 to 204, 206 to 212, 215 to 229, 231 to 239, 519 to 521 of the Bitumen decision);

— the role of certain undertakings as instigators or leaders of the cartel (recitals 342 to 345 and footnotes 505, 507 to 513, 515 to 518 of the Bitumen decision);

— the price-fixing agreements within the cartel (recitals 88 to 98, 102 to 118, 120 to 125 and footnotes 240 to 251, 253, 254, 256 to 268, 270, 272 to 322 of the Bitumen decision);

— the difference in the price levels of bitumen between the Netherlands and in neighbouring countries (footnotes 372 to 376 of the Bitumen decision);

— the interest of the road builders in seeing the price of bitumen increase (footnotes 341 to 346 of the Bitumen decision);

— the bitumen market shares and the bitumen sales turnover in the Netherlands of the participants in the cartel (recitals 8 to 16, 18 to 23, 29 and footnotes 16, 18, 21, 29 to 32, 35 to 37, 41, 43 to 45, 47, 49, 52, 53, 56, 59, 60, 70, 73, 77 to 81 of the Bitumen decision);

— the names of the people representing the participants at the cartel meetings (recitals 187, 236, 252, 265, 268, 273, 279, 286, 291, 293, 298 of the Bitumen decision);

— and finally, 'other information requested' (recitals 30, 34, 35, 37, 42, 45, 154, 175 to 177, 179, 187, 236, 252, 265, 268, 273, 279, 286, 291, 293, 298, 302, 317, 319, 321, 342 to 347, 372, 378, 380, 382 to 386, 389 to 391, 394, 397 and footnotes 82, 84 to 87, 89 to 100, 102 to 119, 121, 122, 124, 126, 341, 350 to 352, 379 to 381, 385, 386, 390 to 393, 395, 419, 420, 422, 423, 430, 433, 435 to 437, 441, 447, 450, 453 to 458, 465 to 469, 472 to 474, 480 to 483, 522, 528, 541, 547, 549 and Annex I to the Bitumen decision).

18 The Kingdom of the Netherlands stated that 'other information requested' also formed part of its application for access even though it was not specifically indicated in the confirmatory application. The confirmatory application concerned the Bitumen decision as a whole. Finally, the Kingdom of the Netherlands clarified that the subject-matter of the dispute did not concern the confidential information obtained by the Commission under its Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the Leniency Notice').

19 For its part, the Commission drew attention, in its submissions, to the fact that the position of the Kingdom of the Netherlands is incoherent and imprecise when it comes to determining the information sought in the application for disclosure, which is the subject-matter of the dispute. In that respect, the Commission claimed that it does not appear clearly in the initial and confirmatory applications that the Kingdom of the Netherlands was requesting access to information other than that specified in those applications.

20 Subsequently, the parties were invited to participate in another hearing on 29 April 2013, which they however waived. The oral procedure was therefore closed on 17 April 2013.

21 The Kingdom of the Netherlands claims that the Court should:

— annul the contested decision in so far as it concerns all the passages of the Bitumen decision which are still confidential, with the exception of the passages containing information obtained under the Leniency Notice;

— order the Commission to pay the costs.

22 The Commission claims that the Court should:

— dismiss the action;

— order the Kingdom of the Netherlands to pay the costs.

Law

The subject-matter of the dispute

23 After the contested decision was adopted and the rejoinder was lodged, the Commission published the new public version of the Bitumen decision. That decision contains less undisclosed information than the public version which was the subject of the initial disagreement between the parties, before the Commission first of all and before the Court subsequently, in the parties' written pleadings. At the hearing, the General Court found it necessary to ask the parties to clarify the subject-matter of the dispute following the publication of that new public version of the Bitumen decision. The Kingdom of the Netherlands responded to that request in its submissions of 24 January 2013 in which it identified the passages whose disclosure it henceforth requested by withdrawing from its application the passages which now appear in the new public version of the Bitumen decision. In addition, the Kingdom of the Netherlands indicated that the information obtained under the Leniency Notice was excluded from its application for access (see paragraph 18 above).

24 The application for annulment of the contested decision must, therefore, be examined in the light of the clarifications made by the Kingdom of the Netherlands in its submissions of 24 January 2013.

Substance

25 The arguments presented by the Kingdom of the Netherlands in support of its application may be rearranged into seven pleas. The first and second pleas allege breach of the first and third indents of Article 4(2) of Regulation No 1049/2001 and the obligation to state reasons respectively, in so far as the Commission considered that the information referred to in the second to eighth indents of paragraph 17 above ('the contested information') was covered by the exceptions to the right of access to documents set out in those provisions and did not explain the reason for which footnotes 7 to 12 of the Bitumen decision (first indent, paragraph 17 above) had not been disclosed. The third plea alleges breach of the last subparagraph of Article 4(2) of Regulation No 1049/2001, in that there is an overriding public interest in the disclosure of the contested information. The fourth plea alleges breach of Article 4(1)(b) of Regulation No 1049/2001 in so far as the Commission considered that the information referred to in the eighth indent of paragraph 17 above was covered by the exception based on the protection of the integrity of the individual. The fifth plea alleges breach of Article 4(6) of Regulation No 1049/2001 and infringement of the principle of proportionality in that the Commission did not grant partial access to the contested information. The sixth plea alleges breach of Article 4(7) of Regulation No 1049/2001, in that the application of the exceptions referred to in the first and third indents of Article 4(2) of Regulation No 1049/2001 was no longer justified in the light

of the period to which the contested information related. Finally, the seventh plea alleges breach of Article 10 EC, in the light of the principle of proportionality, in so far as the Commission did not exchange that information with the Kingdom of the Netherlands.

Preliminary observations

26 It must be noted that a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it (see, to that effect, Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR, paragraphs 113 and 114).

27 As was stated in paragraph 7 above, the Commission considered that the contested information was covered by both the exception set out in the first indent of Article 4(2) of Regulation No 1049/2001, relating to the protection of commercial interests, and the exception set out in the third indent of Article 4(2) thereof, relating to the protection of the purpose of inspections, investigations and audits of the institutions of the European Union. Therefore, in order to succeed in showing that the contested decision is vitiated by an error capable of justifying its annulment in respect of that information, the Kingdom of the Netherlands must establish either, in its first and second pleas, that the Commission committed an error in considering that it could refuse access to that information under each one of those exceptions, or, in its third, fifth, sixth and seventh pleas, that an overriding public interest, the passage of time or the obligation of the Commission to respect either Article 10 EC or the principle of proportionality justified in any event at the very least partial disclosure of that information or the exchange of that information with the Kingdom of the Netherlands.

28 Finally, as stated in paragraph 8 above, the Commission considered that the information referred to in both the eighth indent of paragraph 4 and in the eighth indent of paragraph 17 above was also covered by the exception set out in Article 4(1)(b) of Regulation No 1049/2001, relating to the protection of privacy and the integrity of the individual. Therefore, in order to succeed in showing that the contested decision is vitiated by an error capable of justifying its annulment as regards the information at issue, the Kingdom of the Netherlands must either show cumulatively that the first, second and fourth pleas are well founded, or that one of the third, fifth, sixth or seventh pleas is well founded.

29 It is appropriate to consider, first of all, the first and second pleas together.

The first and second pleas, alleging breach of the first and third indents of Article 4(2) of Regulation No 1049/2001 and the obligation to state reasons, respectively, in so far as the Commission considered that the contested information was covered by the exceptions to the right of access to documents set out in those provisions and did not explain the reason for which footnotes 7 to 12 of the Bitumen decision had not been disclosed.

30 The present case concerns the relationship between Regulation No 1049/2001 and another regulation, namely Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), which governs a specific area of European Union law. Those two regulations have different objectives. The first is designed to ensure the greatest possible transparency of the decision-making process of the public authorities and the information on which they base their decisions. It is thus designed to facilitate as far as possible the exercise of the right of access to documents of the institutions, and to promote good administrative practices. The second is designed to ensure compliance with the duty of professional secrecy in proceedings which punish infringements of European Union competition law (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 109).

31 Contrary to the argument of the Kingdom of the Netherlands that it follows from Article 18(3) of Regulation No 1049/2001 that, if there is a contradiction between that regulation and another rule of European Union law, the provisions of that regulation would prevail, it must be stated that Regulation No 1049/2001 and Regulation No 1/2003 do not contain a provision expressly giving one regulation primacy over the other. Accordingly, it is appropriate to ensure that each of those regulations is applied in a manner compatible with the other and which enables a coherent application of them. Moreover, in accordance with the case-law of the Court of Justice, although Regulation No 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions, that right of access is nevertheless subject, in the light of the regime of exceptions laid down in Article 4 thereof, to certain limits based on reasons of public or private interest (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraphs 110 and 111).

32 While it is true that the right to consult the administrative file in the context of a proceeding under Article 81 EC and the right of access to documents of the institutions, pursuant to Regulation No 1049/2001, are legally distinct, the fact remains that they lead to a comparable situation from a functional point of view. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 120).

33 In the present case, it must be held that the contested information relates to an inspection, investigation and audit of the institutions of the European Union within in the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. That information has been collected by the Commission in the context of an investigation under Article 81 EC, the purpose of which was to assemble sufficient information and evidence to punish specific practices contrary to that provision.

34 Furthermore, having regard to the objective of a proceeding under Article 81 EC, which consists of ascertaining whether one or more undertakings have engaged in collusive behaviour which may significantly affect competition, the Commission gathers, in the context of such a procedure, sensitive information about the commercial strategies of the undertakings concerned, their sales figures, their market shares or their business relations, so that access to documents in such a proceeding can undermine the protection of the commercial interests of those undertakings. Accordingly, the exceptions relating to the protection of commercial interests and that of the purpose of inspections, investigations and audits of the institutions of the European Union are, in the present case, closely connected (see, to that effect and by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 115).

35 It is true that, in order to justify refusal of access to a document, it is not sufficient, in principle, for that document to fall within an activity or an interest mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article. However, it is open to the institution to base its decisions in that regard on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature (see *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 116 and the case-law cited).

36 As regards procedures for reviewing State aid and procedures on the control of concentrations between undertakings, the Court of Justice has held that such general presumptions might arise from Council Regulation (EC) No 659/1999 of 22 March 1999 laying down rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) and from Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Corrected version OJ 1990 L 257, p. 13) respectively, which specifically regulate the fields of State aid and concentrations between undertakings and which contain provisions concerning access to information and to documents obtained in the context of investigation and review proceedings relating to aid and concentrations between

undertakings (see, to that effect, *Commission* v *Technische Glaswerke Ilmenau*, cited in paragraph 12 above, paragraphs 55 to 57 and *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraphs 117 and 118).

37 It must be held that such general presumptions are also applicable in respect of proceedings under Article 81 EC because the legislation governing those proceedings also lays down strict rules as regards the treatment of information obtained or established in those proceedings (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 118).

38 Articles 27(2) and 28(1) of Regulation No 1/2003, as well as Articles 8 and 15 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18), restrict the use of information under proceedings relating to the implementation of the rules on competition laid down in Articles 81 EC and 82 EC, by limiting access to the file to the parties to whom the Commission has addressed a statement of objections and, possibly, to complainants, subject to the legitimate interest of the undertakings concerned in the non-disclosure of their business secrets, and by requiring that the information concerned is used only for the purposes for which it was gathered, and that the information, which, by its nature, is covered by the obligation of professional secrecy, is not disclosed.

39 In those circumstances, first, generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged in a proceeding under Article 81 EC between the Commission and the parties involved in that proceeding or third parties would jeopardise the balance which the European Union legislature sought to ensure, in Regulation No 1049/2001, between (i) the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information and (ii) the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 121).

40 Second, if persons other than those entitled to have access to the file by the rules relating to a proceeding under Article 81 EC were able to obtain access to the documents relating to such a procedure on the basis of Regulation No 1049/2001, the system introduced by that legislation would be undermined (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 122).

41 Moreover, it must be held, as regards information gathered by the Commission pursuant to the Leniency Notice in proceedings under Article 81 EC, that the disclosure of that information could dissuade potential leniency applicants from making statements under that notice. Indeed they could find themselves in a less favourable position than that of other undertakings which participated in the cartel and which did not cooperate with the investigation or which cooperated to a lesser extent.

42 Consequently, for the purposes of interpretation of the exceptions set out in the first and third indents of Article 4(2) of Regulation No 1049/2001, it is necessary to acknowledge the existence of a general presumption that the disclosure of documents gathered by the Commission in the context of a proceeding under Article 81 EC undermines, in principle, both the protection of the purpose of inspections, investigations and audits of the institutions of the European Union and the protection of the commercial interests of the undertakings involved in such a procedure (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 123).

43 Having regard to the nature of the interests protected in the context of a proceeding under Article 81 EC, the conclusion reached in the preceding paragraph of this judgment applies regardless of whether the application for access concerns a proceeding which has already been closed or a proceeding which is pending. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a proceeding under Article 81 EC is pending. Furthermore, the prospect of such publication after that proceeding is

closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending (see, by analogy, *Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 124).

44 It must, in addition, be pointed out that, under Article 4(7) of Regulation No 1049/2001, the exceptions relating to commercial interests or to sensitive documents may apply for a period of 30 years and may, if necessary, continue to apply after this period (*Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 125).

45 Finally, the general presumption referred to above does not exclude the possibility of demonstrating that a given document the disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (*Commission* v *Éditions Odile Jacob*, cited in paragraph 26 above, paragraph 126).

46 It is in the light of the foregoing that the complaints raised essentially by the Kingdom of the Netherlands under the present pleas must be examined.

47 In the first place, the Kingdom of the Netherlands claims that the notion of commercial interests within the meaning of the first indent of Article 4(2) of Regulation No 1049/2001 covers only lawful and legitimate commercial interests, which would exclude the commercial interests of the participants in a cartel as well as the interest of not being the subject-matter of a claim for damages for breach of European Union law. The Kingdom of the Netherlands adds that, in any event, in those circumstances, on the one hand, the interests concerning the organisation of the cartel would not fall within the protection of commercial interests and, on the other hand, no real risk of undermining the commercial interests exists in the present case, since all the suppliers of bitumen participated in the cartel and, as regards that market, there was no genuine competition during the period of the infringement at issue.

48 On this point, it must first be noted that, as the Commission correctly claims, neither Regulation No 1049/2001 nor Regulation No 1/2003 provides that the participation of an undertaking in an infringement of the competition rules prevents the Commission from invoking the protection of the commercial interests of that undertaking to refuse access to information and documents relating to the infringement concerned.

49 On the contrary, the fact that Article 28(1) and (2) of Regulation No 1/2003 provides that information collected pursuant to Articles 17 to 22 thereof can be used only for the purpose for which it was acquired and that the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States are obliged not to disclose information acquired or exchanged by them pursuant to that regulation and of the kind covered by the obligation of professional secrecy shows that, in principle, the information concerning the infringement at issue can, or even must, be considered confidential.

50 That conclusion is moreover confirmed by the fact that the right of access to the Commission's file of the undertakings to which a statement of objections has been addressed is, under Article 27(2) of Regulation No 1/2003, limited by the legitimate interest of undertakings in the protection of their business secrets and does not extend to confidential information. That means that the European Union legislature decided to provide some protection to the commercial interests of undertakings subject to a proceeding applying Article 81 EC, as well as Article 82 EC, even in the situation where that interest could be partly in conflict with the rights of defence of those undertakings.

51 Next, it is true, as the Kingdom of the Netherlands claims, that the Court has found that the interest of an undertaking which the Commission has fined for breach of competition law in the non-disclosure to the public of details of the offending conduct of which it is accused does not merit any particular protection, given, first, the public interest in knowing as fully as possible the reasons for any Commission action, the interest of economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and, second, the fined undertaking's ability to seek judicial review of such a decision (Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 72).

52 However, the Court has also emphasised the need to respect the reputation and dignity of the undertakings concerned so long as they have not been found finally guilty of an infringement and therefore it has held that, in certain situations, the Commission's findings relating to an infringement committed by an undertaking must be regarded as confidential as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy (*Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, cited in paragraph 51 above, paragraph 78). It should be pointed out that, when the application for access to the contested information was lodged, a number of judicial proceedings concerning actions for annulment against the Bitumen decision were pending before the Court (the case which gave rise to the order of 4 July 2008 in Case T-358/06 *Wegenbouwmaatschappij J. Heijmans* v *Commission*, not published in the ECR; and the cases which gave rise to the judgments in Case T-343/06 *Shell Petroleum and Others* v *Commission* [2012] ECR; Case T-344/06 *Total* v *Commission*, not published in the ECR; Case T-347/06 *Nynäs Petroleum and Nynas Belgium* v *Commission* [2012] ECR; Case T-348/06 *Total Nederland* v *Commission*, not published in the ECR; Case T-351/06 *Dura Vermeer Groep* v *Commission*, not published in the ECR; Case T-352/06 *Dura Vermeer Infra* v *Commission*, not published in the ECR; Case T-353/06 *Vermeer Infrastructuur* v *Commission*, not published in the ECR; Case T-354/06 *BAM NBM Wegenbouw and HBG Civiel* v *Commission*, not published in the ECR; Case T-355/06 *Koninklijke BAM Groep* v *Commission*, not published in the ECR; Case T-356/06 *Koninklijke Volker Wessels Stevin* v *Commission*, not published in the ECR; Case T-357/06 *Koninklijke Wegenbouw Stevin* v *Commission* [2012] ECR; Case T-359/06 *Heijmans Infrastructuur* v *Commission*, not published in the ECR; Case T-360/06 *Heijmans* v *Commission*, not published in the ECR; Case T-361/06 *Ballast Nedam* v *Commission* [2012] ECR; Case T-362/06 *Ballast Nedam Infra* v *Commission* [2012] ECR; and Case T-370/06 *Kuwait Petroleum and Others* v *Commission* [2012] ECR), meaning that the undertakings to which that decision was addressed could not be considered to have been found finally guilty.

53 Moreover, in the light of the case-law cited in paragraph 51 above, there are no grounds for considering that all the information relating to the details of the offending conduct must be regarded as not being confidential as regards the public. That case-law must be interpreted in the light of the legitimate objectives of the Commission in disclosing and using information necessary to prove an infringement, in accordance with the final sentence of Article 27(2) of Regulation No 1/2003, as well as the interests of the public in understanding the grounds which led the Commission to adopt its decision. Those interests include those of the economic operators and the potential victims of the infringement in being informed of the conduct which the Commission considered prohibited and of the details necessary in order to seek compensation from the undertakings responsible in the national courts respectively.

54 In the present case the Kingdom of the Netherlands does not claim that the public version of the Bitumen decision does not make it possible to understand the reasons why the Commission adopted that decision. Nor does the Kingdom of the Netherlands claim that the economic operators would not be in a position, from reading that version, to ascertain the conduct that the undertakings concerned by the Bitumen decision engaged in which was in violation of European Union competition rules and which resulted in penalties being imposed.

55 As regards the interests of the potential victims of the infringement which is covered by the Bitumen decision, the public version of that decision makes it possible to identify the undertakings responsible, the nature and duration of the infringement and a large number of elements which allows the essence of how it functioned to be understood. A reading of that version therefore allows those who considered they had been harmed by the cartel to bring an action before the relevant national court.

56 In that regard it must be pointed out that a rule under which any document relating to competition proceedings must be disclosed to a party requesting it on the sole ground that that party is intending to bring an action for damages is not necessary in order to ensure effective protection of the right to compensation enjoyed by that party, as it is highly unlikely that the action for damages must be based on all of the evidence in the file relating to those proceedings. Furthermore, that rule could lead to infringement of other rights conferred by European Union law, inter alia, on the undertakings concerned, such as the right to protection of professional secrecy or of business secrecy, or on the individuals concerned, such as the right to protection of personal data. Lastly, such generalised access is also liable to adversely affect public interests, such as the effectiveness of anti-infringement policies in the area of competition law, because it could deter parties involved in infringements of Articles 81 EC and 82 EC from cooperating with the competition authorities (see, to that effect, Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 27).

57 Lastly, it must be noted that the Bitumen decision was not final at the time of the adoption of the contested decision, whereas the complaint of the Kingdom of the Netherlands is based, in essence, on the existence of an infringement which is final and which would justify, for the undertakings concerned, the loss of all commercial interest deserving of protection in respect of that infringement.

58 It follows from the foregoing that the present complaint must be rejected.

59 In the second place, the Kingdom of Netherlands claims that its application for access to the confidential version of the Bitumen decision does not concern documents on which that decision was based, but only the confidential passages drafted by the Commission itself on the basis of those documents. According to the Kingdom of the Netherlands, the passages which cannot be regarded as coming from information provided by a specific party or the information relating to the operation of the cartel should not benefit from the exception relating to the protection of investigations.

60 In that regard, it should be observed at the outset that, as the Commission claims in essence, the fact that the application for access of the Kingdom of the Netherlands does not concern documents collected by the Commission during its investigation but only certain passages of the Bitumen decision drafted on the basis of those documents does not exclude the application of the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of the purpose of investigations. That provision would be deprived of all its practical effectiveness if its scope were limited to documents collected in the context of an investigation carried out by an institution of the European Union and could not be used to refuse the parties access to documents drafted subsequently by that institution containing information from protected documents.

61 Next, the argument of the Kingdom of the Netherlands that the information relating to the operation of the cartel should not benefit from the exception relating to the protection of investigations must be rejected given, on the one hand, that that argument is not supported in any way, and, on the other hand, the explanations set out in paragraphs 48 to 56 above.

62 The present complaint must therefore be rejected.

63 In the third place, the Kingdom of the Netherlands claims that the exception relating to the protection of investigations applies only during the period when the investigation is being carried out, while the application for access was lodged after the adoption of the Bitumen decision.

64 That complaint cannot be accepted, given the observations made in paragraph 43 above. Moreover, as the Commission rightly points out, the investigation that culminated in the adoption of the Bitumen decision could not be considered definitively terminated when the contested decision was adopted, since, as indicated in paragraph 52 above, a number of judicial proceedings were pending before the General Court when the application for access to the contested information was lodged. Therefore, depending on the outcome of those legal proceedings, the Commission could have been called upon to recommence its activities with a view to possibly adopting a new decision relating to the infringements of Article 81 EC referred to in the Bitumen decision.

65 This complaint must, therefore, also be rejected.

66 In the fourth place, the Kingdom of the Netherlands claims, in essence, that by applying to the contested information both the exception set out in the first indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of commercial interests and the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of the purpose of inspections, investigations and audits of the institutions of the European Union, the Commission did not provide specific reasons justifying the confidential nature of each one of the pieces of information at issue, even though they were distinct. According to the Kingdom of Netherlands, the Commission should, in accordance with the case-law, have stated precisely, after an individual analysis, the nature of each piece of information for which disclosure was refused and the reasons for refusal.

67 In that regard it should be pointed out that the contested information was collected in the context of the Commission's investigation that culminated in the adoption of the Bitumen decision, which, as stated in paragraph 64 above, could not be considered as definitively terminated when the contested decision was adopted. That information relates to the details of the organisation and the operation of the cartel which was the subject of the Bitumen decision, to the specific involvement of the undertakings which participated in that infringement of Article 81 EC as well as the personal involvement of their employees and, finally, to the conditions of the markets concerned. It is apparent from reading the public version of the Bitumen decision that the Commission's decision to keep that information confidential resulted from an individual analysis of that information. The information considered as confidential in that version has been concealed in a selective manner in the text of that version. The public version of the Bitumen decision makes it possible to understand with a sufficient degree of precision the reasons which led the Commission to refuse the disclosure of the concealed information.

68 Against that background, in the light of what is set out in paragraphs 30 to 45 above, the Commission was entitled to consider that the contested information was covered by the general presumption that disclosure of documents gathered by the Commission in the context of a proceeding under Article 81 EC undermines, in principle, both the protection of the purpose of investigation activities and the protection of the commercial interests of the undertakings involved in such a proceeding.

69 The statement of reasons for the contested decision, which is based, in essence, on such a presumption, as the parties recognise, must therefore be considered sufficient.

70 This complaint must therefore be rejected.

71 Finally, in the fifth place, the Kingdom of the Netherlands claims that the Commission has failed to state the reasons for refusing access to footnotes 7 to 12, attached to recitals 4 to 6 of the Bitumen decision, and therefore to the information referred to in the first indent of paragraph 17 above.

72 In that regard, it must be noted that, in the contested decision, the Commission did not indicate the reasons for which those footnotes were not disclosed. However, as the Commission rightly claims, even if the confirmatory application refers to recitals 4 to 6 of the confidential version of the Bitumen decision, to which those footnotes were attached, it did not refer to those footnotes. Yet, where, in the

confirmatory application, the Kingdom of the Netherlands has considered that footnotes relating to a passage in the Bitumen decision should have been disclosed, it referred to them explicitly. Accordingly, it specifically requested to be granted access to footnotes 340, 341, 343, 344, 345 to 349, 371 to 376, 489 and 519 to 521 of the Bitumen decision. Therefore, it must be held that the Commission could conclude, from reading the confirmatory application, that it did not include footnotes 7 to 12 of the Bitumen decision, so that the contested decision did not have to include a statement of reasons as to why it chose not to disclose those footnotes.

73 This complaint must therefore also be rejected.

74 It follows from all the foregoing considerations that the first and second pleas in law must be rejected.

The third plea, alleging breach of the last subparagraph of Article 4(2) of Regulation No 1049/2001, in that there is an overriding public interest in the disclosure of the contested information

75 It is apparent from the last subparagraph of Article 4(2) of Regulation No 1049/2001 that European Union institutions must not refuse access to a document where its disclosure is justified by an overriding public interest, even if it could undermine, as in the present case, the protection of natural or legal persons' commercial interests or the purpose of inspections, investigations and audits of the institutions of the European Union.

76 As was indicated in paragraph 7 above, the Commission considered, in the contested decision, that the confirmatory application did not contain any arguments capable of demonstrating the existence of such an overriding public interest, to the extent that was claimed by the Kingdom of the Netherlands in that respect, on the basis of that the interest pursued in using the confidential version of the Bitumen decision in order to prepare a possible action against the undertakings concerned by that decision was private in nature.

77 The Kingdom of the Netherlands claims that that conclusion is incorrect. It contends that civil actions play an important role in the application of Articles 81 EC and 82 EC and observes that it is not a private party but is a Member State which, being responsible for the management of the Netherlands public funds and for serving the financial interests of the State, must make every effort to obtain compensation for the harm suffered. Finally, recourse to a private action for damages is the only possible way that the Kingdom of the Netherlands can ensure that European Union law is enforced in its own legal order under its duty of cooperation pursuant to Article 10 EC.

78 The Commission rejects those arguments.

79 It must be noted 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; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61; and *Pfleiderer*, cited in paragraph 56 above, paragraph 28). The existence of such a right strengthens the working of the European Union competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union (*Courage and Crehan*, cited above, paragraph 27, and *Pfleiderer*, cited in paragraph 56 above, paragraph 29).

80 However, it is apparent from the case-law, first, that the question whether a person needs a document to prepare an action for annulment is a question to be considered when that action is assessed and, second, even if that need is established, that is not taken into consideration for the purposes of

assessing the balance of interests referred to in Article 4(2) of Regulation No 1049/2001 in relation to a request for access to the document (see, to that effect and by analogy, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 55).

81 It must be held that the case-law cited in the previous paragraph is also applicable to requests for access to documents and information under Regulation No 1049/2001, documents and information which could prove useful in an action for damages.

82 First, it is for the relevant national court before which an action for damages is brought to decide on the way in which evidence and appropriate documents are produced in accordance with the applicable law to resolve the dispute.

83 In that context, the national court may request the Commission to cooperate with it to the extent that the court considers it necessary, including as regards the production of information and documents. Accordingly, under Article 15(1) of Regulation No 1/2003, in proceedings under Article 81 EC or Article 82 EC, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the European Union competition rules.

84 Second, the interest based on the possibility of obtaining compensation for the damage resulting from an infringement of European Union competition law must be considered a private interest, as the Commission indicated in the contested decision, despite the importance of actions for damages in potentially contributing to the maintenance of effective competition in the European Union. In that regard, it must be observed that the public interest in enforcing competition law against the cartel concerning the supply of road pavement bitumen in the Netherlands was already pursued by the Commission when it adopted the Bitumen decision to that end.

85 That finding cannot be invalidated by the fact that the Kingdom of the Netherlands is a Member State.

86 The Kingdom of the Netherlands itself chose to request access to the contested information under Regulation No 1049/2001. That regulation grants, as set out in Article 2(1) thereof, a right of access to the documents of the institutions to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State without establishing rules on access which discriminate on the basis of who is making the request.

87 This plea must therefore be rejected.

88 There is no need to examine the fourth plea, alleging breach of Article 4(1)(b) of Regulation No 1049/2001 in so far as the Commission considered that the information referred to in the eighth indent of paragraph 17 above was covered by the exception based on the protection of the integrity of the individual, because, first, the Commission found, in the contested decision, that the information referred to in the eighth indent of paragraph 17 above was covered by the exceptions to the right of access to documents set out in the first and third indents of Article 4(2) of Regulation No 1049/2001, relating to the protection of commercial interests of undertakings and the protection of investigations respectively and because, second, the three previous pleas, in which the applicant claims in essence that the application of those exceptions in the present case is vitiated by errors, have been rejected.

The fifth plea, alleging breach of Article 4(6) of Regulation No 1049/2001 and infringement of the principle of proportionality in that the Commission did not grant partial access to the contested information

89 The Kingdom of the Netherlands contends that, even if certain parts of the Bitumen decision do in fact come under the exceptions to the right of access, the other parts of that decision must nevertheless be disclosed under Article 4(6) of Regulation No 1049/2001. Moreover, in accordance with the principle of proportionality, the Commission should have examined whether there existed measures which were less burdensome than refusing the application for access. Indicating the value of sales and the market shares through the use of ranges, for example, would have allowed the disclosure of part of the information requested.

90 The Commission disputes the arguments of the Kingdom of the Netherlands.

91 In accordance with Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions referred to in that article, the remaining parts of the document are to be released. According to the case-law of the Court of Justice, examination of partial access to a document of the European Union institutions must be carried out in the light of the principle of proportionality (see, to that effect, Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraphs 27 and 28).

92 It is clear from the very wording of Article 4(6) of Regulation No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access to requested documents and to limit any refusal to information covered by the relevant exceptions referred to in that provision. The institution must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved by merely blanking out the passages which might harm the public interest to be protected (Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 50; see also, to that effect, *Council* v *Hautala*, cited in paragraph 91 above, paragraph 29).

93 First, it must be stated that, in the present case, by publishing the public version of the Bitumen decision, the Commission did indeed provide partial access to that decision, refusing at a later stage the access requested by the Kingdom of the Netherlands only to the parts of the Bitumen decision that, as is apparent from all the observations made above, the Commission was entitled to regard as being covered by the exceptions set out in the first and third indents of Article 4(2) of Regulation No 1049/2001 relating to the protection of natural or legal persons' commercial interests and the purpose of inspections, investigations and audits of the institutions of the European Union respectively.

94 Second, it must be held that Article 4(6) of Regulation No 1049/2001 does not require, contrary to what the Kingdom of the Netherlands claims in essence, institutions of the European Union, to which an application for access to documents is addressed to replace the parts of those documents for which disclosure is legitimately refused in accordance with the exceptions set out in that regulation by ranges where the data concerned are in figures.

95 This plea must therefore be rejected.

The sixth plea, alleging breach of Article 4(7) of Regulation No 1049/2001, in that the application of the exceptions referred to in the first and third indents of Article 4(2) of Regulation No 1049/2001 was no longer justified in the light of the period to which the contested information related

96 Article 4(7) of Regulation No 1049/2001 provides as follows:

'The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

97 The Kingdom of the Netherlands claims that the Commission did not examine whether the application of the exceptions referred to in the first and third indents of Article 4(2) of Regulation No 1049/2001 was still justified in the light of how old the contested information was, dating as it did from 6 to 14 years before and relating to prohibited activities which, on the face of it, no longer take place today.

98 The Commission disputes the argument of the Kingdom of the Netherlands.

99 In that regard it must be noted that, as is clear from the very wording of Article 4(7) of Regulation No 1049/2001 and is emphasised in the case-law (see paragraph 44 above), the exceptions set out in that provision may apply for a period of 30 years, or even longer if necessary, in the case, inter alia, of the exception relating to the protection of commercial interests.

100 In the present case, part of the contested information came from documents which can be dated back to the beginning of the 1990s. However, all that information was less than 30 years old and forms part of a Commission decision adopted less than two years before the present action was brought. Moreover, as stated in paragraph 64 above, the investigation that culminated in the adoption of the Bitumen decision could not be considered definitively terminated when the contested decision was adopted. Finally, the Kingdom of the Netherlands does not provide any reasons challenging the Commission's argument that the markets concerned by the Bitumen decision in the Netherlands were very stable. Therefore, information, even that which is relatively old, could retain commercial importance.

101 In the light of all of the foregoing considerations, this plea must be rejected.

The seventh plea, alleging breach of Article 10 EC, in the light of the principle of proportionality

102 According to the Kingdom of the Netherlands, the application of Regulation No 1049/2001 must not be contrary either to primary law, or to the general principles of European Union law. Under Article 10 EC, the Member States and the institutions have a duty to sincerely cooperate with one another. The principle of proportionality comes into play in this case, since Article 10 EC leaves open the possibility to exchange information, and proceeding in such a manner would not go as far as disclosure but could nevertheless concern information which was not made public.

103 According to the Commission, the Kingdom of the Netherlands has based its application for access to the Bitumen decision expressly and exclusively on Regulation No 1049/2001 and has not presented a request for information under Article 10 EC. As regards the merits of the contested decision, the only issue to be determined is whether the Commission has correctly applied the provisions of Regulation No 1049/2001. This plea is thus inadmissible.

104 Even if the plea were admissible, in the present case, according to the Commission, none of the information which the Kingdom of the Netherlands needs to fulfil its obligations under European Union law is at issue; only information which that State wishes to obtain in order to prepare a private action for damages before a civil court is concerned. Authorisation for access to that information should not be provided on the basis of Article 10 EC. If the action for damages at national level is considered to contribute to the implementation of Articles 81 EC and 82 EC, in that event the Commission considers that the confidentiality of the information requested could not be guaranteed and that therefore that application for access be dismissed.

105 Article 10 EC states:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the [Union] They shall facilitate the achievement of the [Union]'s tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

106 That article lays down a duty of sincere cooperation which applies both to the Member States and the European Union institutions. They must seek to establish a constructive dialogue to facilitate in particular the implementation of European Union law under the division of powers set out in the Treaties.

107 However, it must be held, without there being any need to rule on the admissibility of this plea, that, as stated in paragraph 86 above, the Kingdom of the Netherlands chose to submit an application for access to the confidential passages of the Bitumen decision under Regulation No 1049/2001. The choice of that procedure binds both the Kingdom of the Netherlands and the Commission, since both parties are obliged to submit to the constraints imposed by that regulation. The Commission could not therefore avoid that procedure or the possibilities of exceptions to the right to access provided for by that regulation simply because the application was made by a Member State. Regulation No 1049/2001 does not bestow on a Member State requesting any particular access status, and it therefore is constrained by the same limits provided for by the regulation as any other applicant. The automatic application of the duty of sincere cooperation in that context would result in Member States being granted a particular status which was not envisaged by the European Union legislature when drafting the various pieces of legislation at issue.

108 The plea alleging breach of Article 10 EC must therefore be rejected and, accordingly, the application in its entirety must be dismissed.

Costs

109 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Kingdom of the Netherlands has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Kingdom of the Netherlands to bear its own costs and to pay those incurred by the European Commission.

Kanninen Soldevila Fragoso Berardis

Delivered in open court in Luxembourg on 13 September 2013.

[Signatures]

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