

Case C-2/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 January 2023

Referring court:

Oberlandesgericht Wien (Austria)

Date of the decision to refer:

20 December 2022

Appellants:

FL und KM Baugesellschaft m.b.H. & Co. KG

S AG

Subject matter of the main proceedings

Competition law – Protection of leniency statements and settlement submissions – Effect vis-à-vis prosecution authorities

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

Question 1:

Are the provisions of EU competition law – in particular Directive 2014/104 of 26 November 2014 and Article 6(6) and (7) and Article 7(1) thereof, as well as Directive 2019/1 of 11 December 2018 and Article 31(3) thereof – to be interpreted as meaning that the protection laid down therein of leniency statements and settlement submissions and information obtained from them has absolute effect, applying also to prosecution authorities (public prosecutors and criminal

courts), so that leniency statements and settlement submissions may not be added to the file in criminal proceedings and used as the basis for further enquiries?

Question 2:

Are the provisions of EU competition law – in particular Directive 2014/104 of 26 November 2014 and Article 6(6) and (7) and Article 7(1) thereof, as well as Directive 2019/1 of 11 December 2018 and Article 31(3) thereof – to be interpreted as meaning that the absolute protection of leniency statements and settlement submissions (within the meaning of Question 1) also covers documents and information obtained therefrom which the person lodging a leniency statement or settlement submission has presented in order to explain, specify in detail and prove the content of the leniency statement or settlement submission?

Question 3:

Are the provisions of EU competition law – in particular Directive 2014/104 of 26 November 2014 and Article 6(6) and (7) and Article 7(1) thereof, as well as Directive 2019/1 of 11 December 2018 and Article 31(3) thereof – to be interpreted as meaning that the protection laid down therein of leniency statements, settlement submissions (and documents within the meaning of Question 2) and information obtained therefrom has absolute effect, applying in criminal proceedings, on the one hand, also against accused persons who are not the authors of the respective leniency statement or settlement submission and, on the other hand, against other participants in the criminal proceedings (in particular injured parties asserting claims under civil law), so that accused persons and injured parties are not to be permitted to inspect leniency statements, settlement submissions and the documents presented in that connection and information obtained therefrom?

Community legislation cited

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Provisions of national law cited

Bundes-Verfassungsgesetz (Federal Constitution Law) (B-VG), Article 22

Strafprozessordnung (Code of Criminal Procedure) 1975 (StPO) Paragraph 2(1), Paragraph 49(1)(3) and (2), Paragraph 51(1) and (2), first sentence, Paragraph 65(2), Paragraph 66(1)(2), Paragraph 68 (1) and (2), Paragraph 76(1) and (2), Paragraph 87(1), Paragraph 106(1), Paragraph 162

Brief summary of the facts and procedure

- 1 The Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption (Central Public Prosecutor's Office for the Prosecution of Economic Crimes and Corruption; 'the Public Prosecutor's Office') is conducting an investigation into numerous construction companies and their managers regarding offences relating to the conclusion of agreements restricting competition in procurement procedures under Paragraph 168b(1) of the Austrian Strafgesetzbuch (Criminal Code) and other criminal offences. The proceedings cover more than 350 suspicious procurement procedures in the period 2006 to 2017 and currently relate to around 860 accused persons.
- 2 In parallel with these criminal proceedings, the Bundeswettbewerbsbehörde (Federal Competition Authority) was conducting a competition case for the imposition of fines before the Oberlandesgericht Wien (Higher Regional Court, Vienna), acting as the Austrian Cartel Court. In this case, both appellants applied for leniency under competition law. Their participation in the leniency programme was approved and the Cartel Court imposed a reduced fine in accordance with a corresponding application by the Federal Competition Authority.
- 3 The investigations of the Public Prosecutor's Office were conducted in coordination with the Federal Competition Authority. The Public Prosecutor's Office also applied for a copy of the file from the Cartel Court in the context of mutual assistance. In providing this copy, the Cartel Court expressly referred to Article 22 of the Federal Constitution Law as well as to a decision of the Oberster Gerichtshof (Supreme Court) according to which the provision in the Kartellgesetz (Law on Cartels) at that time, which restricted the inspection of the Cartel Court's files by third parties, was not applicable vis-à-vis the Public Prosecutor's Office and this provision did not lay down a statutory duty of secrecy which also applied vis-à-vis the prosecution authorities. At the request of the Public Prosecutor's Office, the Federal Competition Authority also sent documents in the context of mutual assistance, referring, in so doing, to the protection provided for by Directive 2019/1 for the documents transmitted. The Public Prosecutor's Office added to the file the parts of the file of the Cartel Court that were found to be relevant as well as the documents submitted by the Federal Competition Authority, including (parts of) leniency statements and settlement submissions together with annexes, and prepared a new request for investigation to the police based on these documents.
- 4 The appellants then applied to the Public Prosecutor's Office, requesting it not to add the leniency statements and settlement submissions together with documents

to the file, not to exploit them, and in any case permanently to exclude them from inspection, vis-à-vis all co-accused and injured parties. The Public Prosecutor's Office did not comply with this request, but only provisionally excluded some of the documents (including the leniency statements and settlement submissions) from inspection (pending final clarification of this issue by the court).

- 5 The appellants lodged an objection against this decision of the Public Prosecutor's Office. The Public Prosecutor's Office submitted the objection to the Landesgericht für Strafsachen Wien (Regional Court for Criminal Matters, Vienna). The latter rejected the objection, a decision against which the appellants appealed to the referring court.

Principal arguments of the parties in the main proceedings

- 6 The protection of leniency statements, settlement submissions and information obtained therefrom from disclosure serves to privilege leniency applicants in actions for damages and criminal proceedings, which is considered by both the national legislature and the EU legislature to be a necessary incentive for a functioning leniency programme.
- 7 Article 31(3) of Directive 2019/1 provides, for example, that any form of disclosure of leniency statements and settlement submissions is impermissible and lays down an explicit obligation of confidentiality, compliance with which must be ensured vis-à-vis everyone, i.e. also vis-à-vis prosecution authorities and third parties.
- 8 This would also be supported by Article 13(4) of Directive 2019/1, which, in order to ensure the effectiveness of competition law leniency programmes, establishes the primacy of competition law over domestic criminal law, and by recital 72 of that directive.
- 9 Evidence prepared by leniency applicants only in or for the competition authority proceedings (for example, reports on internal investigations or lists and minutes drawn up for the competition authority) form part of the leniency statements and are also protected. This protection also applies in relation to the prosecution authorities. The gaining of information by potential injured parties indirectly via criminal proceedings would undermine absolute protection.
- 10 Should the absolute protection of settlement submissions and the information obtained therefrom not be guaranteed on the basis of the applicable Austrian law, the corresponding provisions of EU law would be directly applicable due to the primacy of EU law.
- 11 It is to be feared that third parties (accused persons and injured parties), who are not allowed to have access to the leniency statements and settlement submissions under the provisions of cartel and competition law as well as under Article 6(6) of Directive 2014/104 and Article 31(3) of Directive 2019/1, will gain knowledge of

the content of these documents indirectly through the criminal proceedings. This would put the appellants, which enjoy leniency status, in a worse position under criminal law, and also under civil law, than other accused persons.

Brief summary of the basis for the reference

Presentation of the Austrian legal situation

- 12 In Austria, the principle of investigation by an authority of its own motion applies, which, in conjunction with the power of the public prosecutor's office to direct the investigation proceedings, means that the public prosecutor's office must pursue every initial suspicion and clarify it by taking appropriate investigative steps. All significant information thereby ascertained is to be added to the file. Such information can also be obtained through requests for administrative and legal assistance to other authorities. Public authorities are required to provide mutual assistance. This can be restricted or refused vis-à-vis prosecution authorities only by explicit statutory order.
- 13 In Austrian law, there is no explicit restriction on administrative and legal assistance between the Cartel Court and competition authorities on the one hand and the prosecution authorities on the other. Criminal law also knows no prohibition of evidence with regard to leniency statements and settlement submissions under cartel or competition law.
- 14 Under the Austrian Code of Criminal Procedure, different parties to the proceedings have a right to inspect files to varying extents, with the accused person generally having a right to comprehensive access to files. In that case, the principle of completeness of the file must be applied. A restriction of access by accused persons to files is possible only in exceptional cases and only temporarily. In the case at hand, no exceptional circumstances apply.
- 15 In addition to the accused person, victims and private involved parties also have the right to inspect the file, and inspection is in principle to be granted if it is necessary to protect their interests (related to the claim asserted).
- 16 The Public Prosecutor's Office thus permissibly added the documents of the cartel proceedings (including leniency statements, settlement submissions and other documents) obtained in the course of official and legal assistance to the file, on the basis of the Austrian provisions, and lawfully generated investigation requests from them. Consequently, in principle, the parties to the proceedings were given the possibility of inspecting these parts of the file as well. For this reason, the appellants requested that the relevant documents and information not be added to the file, that they not be used for further investigative steps or that they be permanently excluded from inspection for all parties to the proceedings.

Presentation of the European law issue

- 17 On the basis of Article 6(6) and (7) of Directive 2014/104 as well as Article 31(3) of Directive 2019/1, it can be argued that the protection of leniency statements and settlement submissions from disclosure laid down in these directives is intended to be a comprehensive protection, which is thus effective vis-à-vis any third party and thus also vis-à-vis courts or authorities and the parties to proceedings there. This interpretation is also supported by Article 13(4) of Directive 2019/1.
- 18 Domestically, the problem arises that the Cartel Court and the Federal Competition Authority are obliged to provide administrative and legal assistance and thus to transmit their files, including leniency statements, settlement submissions and information obtained therefrom. In so far as these transmitted documents contain information material to the criminal proceedings, they are to be added to the criminal file and are then accessible to the parties to the proceedings by way of file inspection. The latter can then also use the information thus obtained, for example, to assert claims for damages.
- 19 Restrictions on the inspection of files are only possible in a few cases, while a permanent and general restriction is not provided for as a matter of principle. According to the referring court, this has negative consequences in criminal and civil law for leniency applicants under competition law, and the objective of protecting leniency statements and settlement submissions from disclosure is thus undermined.
- 20 The above-mentioned directives clearly provide for broader protection of leniency statements and settlement submissions from disclosure than merely protection in competition proceedings. However, this protection would be counteracted by the possibility of access to the file by the parties to the criminal proceedings. In the present proceedings, the question therefore arises as to whether and, if so, which parts of the cartel files may be added to the criminal file, and who, if anyone, is to be granted access to these parts of the file.
- 21 The referring court therefore wishes to know whether the protection of leniency statements and settlement submissions (as well as the information obtained therefrom) laid down in the aforementioned directives is absolute and thus also applies vis-à-vis the prosecution authorities (Question 1). If this is the case, the prosecution authorities would already be prevented from adding the documents to the file and generating further investigative steps from them.
- 22 Should the absolute protection be affirmed, the question arises as to its scope, i.e. whether in this case, in addition to leniency statements and settlement submissions, it also covers documents submitted by the leniency applicant to explain, specify in detail and prove the content of the leniency statement (Question 2).
- 23 If Question 1 is answered in the negative and the documents in question can be added to the criminal file and used for further investigations, it must be clarified

whether the protection laid down in the directives at least means that co-accused of the leniency applicants and/or other participants in the criminal proceedings are to be permanently denied access to these parts of the file (Question 3), which would directly interfere with Austrian criminal law and an accused person's rights protected by the European Convention on Human Rights.

WORKING DOCUMENT