

## **“Cartel whistleblower submissions need block on dissemination via criminal cases, [Austrian construction company]<sup>1</sup> tells EU judges”**

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By Lewis Crofts (Mlex Ltd.) [Edited by petsche pollak]

*“An Austrian construction company today pleaded with the EU's highest court to establish that cartel confessions made to antitrust enforcers shouldn't be passed on into the files of criminal prosecutors, where they could then be disclosed more broadly and dissuade companies from blowing the whistle. The EU Court of Justice explored whether “leniency submissions” could be shared between law-enforcement agencies while remaining restricted from wider disclosure.*

*[The Austrian construction company] today pleaded with the EU's highest court to establish that cartel confessions made to antitrust enforcers shouldn't be passed on into the files of criminal prosecutors, where they could then be disclosed more broadly and dissuade companies from blowing the whistle.*

*The EU Court of Justice explored whether “leniency submissions” could be shared between law-enforcement agencies while remaining restricted from disclosure to companies that might sue the whistleblower.*

*The case — which sees [an Austrian construction company] and its unit [...]<sup>2</sup> take on Austria's public prosecutor — could determine the risk of cartel confessions being disseminated and therefore the attractiveness of whistleblower programs across Europe.*

*“You might as well publish the leniency statements in the newspaper and then ask how they are going to remain confidential,” Simone Petsche-Demmel said, for the construction company.*

*The Austrian government argued there were safeguards that meant the confessions could pass from the antitrust authority to the criminal prosecutor but not fall into the “wrong hands” afterwards.*

*The dispute hinges on an initial settlement that saw [the construction company] and a subsidiary enter voluntary talks with the Austrian Federal Competition Authority over involvement in a construction cartel in the country. That led in October 2021 to total fines of 45.37 million euros (\$49 million today) in a Vienna court judgment.*

*The following year, however, the regulator went back to court, saying judges should look again at the fine because new information on the company's behavior had come to light. The information cast doubt over whether [the construction company] had cooperated fully with the cartel investigation, the authority said at the time.*

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<sup>1</sup> The name of the construction company has been anonymized by petsche pollak for privacy reasons. This name has been anonymized multiple times in the text.

<sup>2</sup> The name of the subsidiary unit is anonymized by petsche pollak for privacy reasons. This name has been anonymized multiple times in the text.

*The competition authority stressed that companies cooperating with its officials had to do so fully to benefit from fine reductions. It pointed to parallel corruption proceedings run by a state prosecutor, without giving further details.*

*Austrian judges passed the case to the EU's Court of Justice, asking whether the protection for leniency submissions — enshrined in EU competition directives — should be absolute, and whether passing submissions to a criminal enforcer undermines the effectiveness of whistleblower regimes.*

*Further, they asked who could access such submissions once a public prosecutor has entered them into its investigative file. They may be requested by companies and individuals under prosecution to help defend themselves, or other companies to help substantiate a damages lawsuit.*

— [The Construction Company] —

*Andreas Traugott, for the construction company, said documents that were on a non-disclosure "blacklist" in antitrust cases — because they included cartel confessions — were regularly shared with other agencies "without consultation."*

*Petsche-Demmel noted that the parallel Austrian criminal case had "880 defendants and 160 injured parties" and therefore posed a high risk that the sensitive documents would leak.*

*Traugott waned that "there is no longer effective protection. It is not possible to stop proliferation." He argued that other authorities had no interest in protecting the documents and there was a risk of "uncontrolled distribution through the back door."*

*"It is critical for protection that these [leniency submissions] are not allowed to circulate outside the competition-law proceedings," Traugott said.*

— Austria —

*Andreas Bernat, representing Austria's public prosecutor, stressed that judges should take care not to put a "higher value" on competition law than criminal law. This would "harm the general public good," he said.*

*The EU competition-law directives that block the sharing of leniency submissions don't regulate national criminal procedures, he said: "Civil parties and the public are entitled to access the files [in the criminal proceedings] to the extent that their interests are affected."*

*He said the interests of victims needed to be balanced against the public importance of having a whistleblower program.*

*Julia Schmoll, for the Austrian government, said the EU's competition-law directives didn't stop transmission of the documents from the competition authority to the public prosecutor. "It must be ensured that leniency submissions in criminal proceedings only fall into the right and not the wrong hands," she said.*

*"The right hands are those individuals affected or injured by the leniency submissions. They may or must be given access to the leniency submissions for the purposes of exercising their rights of defense." The "wrong hands" were those of people "wanting to get hold of information for damages actions. It must be ensured there is no disclosure — no access to files — to these persons."*

*Austria's lawyer said the balance of interest "must fall on the side of the immunity recipient, [and] private parties must be denied access without exception."*

*— EU perspective —*

*Andreas Keidel, for the European Commission, drew a line between documents passing between agencies and documents placed on the file and subject to access requests.*

*He highlighted the risk of disclosure in such a large investigative file as that of the Austrian public prosecutor. "There is a major risk that certain defendants might get access and then transfer leniency statements in exchange for some benefit to the injured party," Keidel said.*

*"The restriction is essential in order to prevent that from happening ... Access to the file for leniency statements should be granted only to defendants and those who are using the information for their defense."*

*The judge who will draft the court's ruling, Irmantas Jarukaitis, asked questions that concentrated on how far the EU directives influenced the national civil procedures.*

*Advocate General Maciej Szpunar, who will draft a non-binding opinion for judges on the case, asked whether the law only foresaw leniency documents being shared among antitrust authorities.*

*Keidel, for the commission, explained that documents could be passed to other authorities — often at a national level — but the core restriction remained: They can only be accessed for mounting a defense.*

*Szpunar said he would publish his opinion on Oct. 24.*

*The case reference is C-2/23 [...]."*

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