

## German Court Protects the Confidentiality of Leniency Submissions

February 14, 2012

In the wake of the seminal European Court of Justice (ECJ) ruling in case C-360/09 - *Pfleiderer AG v Bundeskartellamt*, Amtsgericht Bonn (Bonn local court), in a decision rendered on 18 January 2012 (case 51 Gs 53/09), has refused to give a damages claimant access to leniency submissions held by the German Federal Cartel Office (FCO). Although strongly welcomed by the FCO, the decision is a blow to potential damages claimants in Germany, especially as it is not open to appeal.

Despite the fact that damages claimants can rely on a competition authority's decision as evidence of an antitrust infringement, they also need to prove causation and level of pecuniary damage in a damages claim. It is precisely to prove these latter two limbs of a damages claim that access to leniency documents is sought.

This is the first time that the relevant test laid down by the ECJ in *Pfleiderer* for deciding whether to divulge leniency submissions to damages claimants in a cartel case has been applied by a national court. The test propounded by the ECJ is that a national court must exercise its discretion to determine—on a case-by-case basis—whether leniency documents should be disclosed to damages claimants on the basis of their own national law, balanced with the interests protected by EU law.

### Decision to Refuse Access

The decision of Amtsgericht Bonn related to documents that had been submitted under the German leniency programme. The Court held that, on the basis of Article 406(2)(2) of the German Criminal Code, access to leniency documents could be refused if the purpose of inspections would be compromised.

According to the Court, the purpose of inspections by the FCO is the discovery and pursuit of anticompetitive practices. The Court decided that the purpose of inspections could be undermined if a damages claimant was given access to leniency submissions. This is because it may cause a future leniency applicant to shy away from taking part in the leniency programme for fear of information given in confidence being handed to damages claimants. Indeed, the

Court ruled that the refusal to grant access may be based on future events i.e. the fact that only *future, hypothetical* applications for leniency may be avoided did not change the German Court's appraisal of the case at hand.

## Comment

Access to leniency submissions has been a topic of considerable practical and academic interest in recent times. In addition to the *Pfleiderer* judgment, there was the recent *amicus curiae* observation made to the UK High Court in the context of a damages action brought by National Grid, a UK utility company, against a number of companies found to have participated in the Gas Insulated Switchgear cartel. Here, the European Commission argued vehemently that giving damages claimants access to leniency submissions—especially oral statements—could have a detrimental impact on leniency programmes.

Despite the fact that the ruling of the Bonn Court only defines the legal situation in Germany, it is possible that it may have some influence on the UK High Court's decision on whether to disclose leniency documents or not. It may also influence the development of the law in other EU Member States. This issue is of some practical importance given the undesirable prospect of conflicting judgments in the European Union.

The decision of the Bonn Court does not bar all access to potentially useful incriminating documents; the Court ruled that access can be provided to documents that have not been provided voluntarily to the antitrust authority, *i.e.*, documents that were already in the possession of cartelists and therefore ran the danger of being confiscated. On a practical level, it should also be remembered that leniency documents are not the only source of evidence in a damages claim. Witness evidence and pre-existing documents are also extremely valuable.

The decision has been welcomed by the FCO and may provide some comfort for other antitrust authorities that operate leniency programmes. Competition authorities have frequently voiced their fears that potential leniency applicants would not apply for leniency programmes if confidential documents can later be handed to damages claimants.

## Conclusion

The decision can be seen as a setback for potential damages claimants and a victory for the German competition authority. Given the risk of inconsistency of results at the national level in

other countries, however, companies doing business in the European Union are urged strongly to follow developments in this area. At EU level, the European Commission is planning to legislate this year to ensure that sensitive leniency documents do not fall into the hands of damages claimants; the legislative proposal on antitrust damages actions is scheduled for June 2012.

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