



Legal Update
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Leniency Applications Protected: German Court denies Private Plaintiffs Access to File

Yesterday, a decision of the Local Court of Bonn, Germany, became public denying a company seeking redress from cartelists access to a leniency application and documentary evidence submitted in the context of a cartel proceeding.¹ Following a period of uncertainty, this is the first time – as far as we can see – that a national court in the EU has taken a clear stand on this sensitive issue.

Background

In 2008, the German Federal Cartel Office imposed fines on three manufacturers of decor paper for price fixing and agreements on capacity shutdowns. The company Pfeleiderer, a customer of these companies, had requested full access to the cartel file to enable it to prepare an action for damages. In line with its national Leniency Notice, the Federal Cartel Office refused the request as far as the leniency applications were concerned. Pfeleiderer brought an action against the refusal before the Local Court of Bonn.

The Court seemed in favour of granting full access to the file, but nevertheless stayed the proceedings and referred the question whether EU law requires that access to file in cartel proceedings includes access to leniency documents to the Court of Justice (“CoJ”).

CoJ: it is a matter of national law

In June 2011, the CoJ ruled that, in the absence of a binding EU regulation, the question has to be decided on the basis of national law.² National courts would have to balance the interests at stake on a case-by-case basis, ensuring that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain compensation.

The CoJ stated that the right to claim damages for infringements of competition law discourages illegal conduct and therefore makes a significant contribution to safeguarding effective competition in the internal market. However, the CoJ also made it clear that leniency applications can be very helpful in detecting, investigating and putting an end to competition infringements. The effectiveness of leniency schemes could be jeopardised if leniency applicants were at risk of becoming subject to a claim for damages on the basis of information voluntarily submitted to the competition authorities, even if those applicants were granted immunity or at least a reduction from fine.

Local Court of Bonn: denies access to leniency documents

Following the European ruling, the Local Court of Bonn has now denied Pfeleiderer access to the leniency application and evidentiary documents, essentially on two grounds:

First, the Court relied on a statute in the national code of criminal procedure, pursuant to which access to file can be denied if the objective of the investigation may be compromised. The Court states that leniency applicants usually reveal more information to the competition authorities than other participants in a cartel. Cartelists could be deterred from filing leniency applications containing self-incriminating information if private plaintiffs seeking damages had a right of access to leniency documents. The risk of private damage claims could not be compensated by the prospect of a reduction in, or immunity from, fines. This would impede the detection of competition infringements because uncovering cartels in the absence of leniency applications is difficult, especially in the case of hard core cartels. For the Court, the statute in the national code of criminal procedure also protects other, even future, investigations which are

¹ Local Court of Bonn, Case No. 51 Gs 53/09, decision of 18 January 2012.

² CoJ, Case No. C-360/09, judgment of 14 June 2011.

unrelated to the proceeding at stake. In addition, in the Court's view, the so-called right to informational self-determination of the leniency applicant, who voluntarily reveals information trusting that it will be kept secret, was more worthy of protection than the interest of Pfleiderer to be granted access to the documents.

Second, the Court took into consideration the European Union's interest in the effective enforcement of anti-trust law (Articles 101 and 102 TFEU). As cartels are hard to detect, the Court stated that leniency programs are the most effective means to counter anticompetitive agreements and would be jeopardised if access to leniency documents was granted. This would not make it excessively difficult for Pfleiderer to obtain compensation. As the cartel decision of the German antitrust authority has become definitive, Pfleiderer would not have to prove a competition infringement in an action for damages, but could use the decision as evidence. Moreover, if competition infringements were not detected by competition authorities in the first place, this would also obstruct private actions for damages.

Conclusion

Technically, the effect of the decision of the Local Court of Bonn is limited to the present case. However since the Court's reasoning could be applied to other cases in which plaintiffs request access to cartel files, including leniency documents, the decision is expected to have an impact far beyond this case. The question of access to

leniency documents by private plaintiffs is not only being considered in Germany. There is a similar case pending before the English High Court, in which a private plaintiff has requested access to leniency documents in relation to a cartel proceeding before the European Commission.³ In November 2011, the European Commission made a formal submission to the Court, which has just been published, setting out its objections to disclosure of the leniency documents.

The decision of the Local Court of Bonn cannot be appealed before the civil law courts (although theoretically, Pfleiderer could file a constitutional complaint). We note that the decision is in line with legislative amendments to the German Act Against Restraints of Competition that are currently on the table; the draft law indeed contains a provision stating that access to leniency documents will not be granted. The decision also reflects the position of the German Federal Cartel Office, the President of which, Andreas Mundt, has already welcomed the decision.

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³ See Mayer Brown News Alert from 6 July 2011.

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