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# THE FUTURE OF LENIENCY

**SHOCK ECJ RULING MAY ALLOW THIRD  
PARTY ACCESS TO CONFIDENTIAL  
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# Plaintiffs in pursuit

In a decision with far-reaching consequences for both cartel enforcement and civil antitrust damages actions in Europe, the European Court of Justice has ruled that national courts should decide whether private plaintiffs may be granted access to confidential leniency applications

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ON 14 June, in *Pfleiderer AG v Bundeskartellamt*, the ECJ determined that national courts in the 27 EU member states should determine whether private plaintiffs may obtain confidential leniency applications. In ruling that European Union law presents no bar to private plaintiffs obtaining leniency applications, the ECJ rejected both the views of the ECJ's advocate general (an independent magistrate who renders a preliminary opinion for the ECJ) and opinions submitted by several member states. Those opinions argued that the promise of confidentiality to applicants was a hallmark of leniency programmes. They also expressed concern that any undermining of that guarantee would weaken cartel enforcement.

It remains to be seen whether any national court in Europe will permit a private plaintiff to obtain documents submitted by a leniency applicant in a damages action, but the potential prospect should give some pause to any company considering the leniency route. If a leniency application could potentially be made available to third-party litigants, then it would provide a roadmap to the private plaintiff in follow-up civil actions and undoubtedly provide a boost to the growing move toward private antitrust damages actions in European courts. The consequences could extend beyond the specific jurisdiction at issue, as information obtained from the leniency application in one jurisdiction might be used in pursuit of damages actions elsewhere, including a US class action litigation.

The implications of *Pfleiderer* may also extend in time to the confidential cartel investigations conducted by the European Commission. Although *Pfleiderer* arose in the context of a case from Germany implicating the national competition authority and German procedural rules, the reasoning employed by the ECJ logically extends more broadly and could implicate cartel investigations conducted by the European Commission. This could leave the commission in the delicate position of reconciling the new principle of EU antitrust law articulated in *Pfleiderer*, recognising the rights of private plaintiffs in cartel cases, with its long-standing leniency programme, which has been highly successful in detecting and punishing cartel activity.

## The background

The *Pfleiderer* decision had its origins in a 2008 German antitrust enforcement action against three of Europe's largest decor paper [laminates] producers. The paper producers filed leniency applications with the Bundeskartellamt, Germany's Federal Cartel Office, and subsequently received fines of approximately €62 million in connection with price-fixing activity. *Pfleiderer* was a customer of three of the producers, having purchased over €60 million worth of decor

European Court of Justice



paper between 2005 and 2008. The Bundeskartellamt fines prompted Pfeleiderer to initiate a case for civil damages.

After the announcement of the fines, Pfeleiderer filed a request with the Bundeskartellamt to obtain the leniency applications of the three companies implicated in the decor paper cartel. The request was grounded in a German law permitting a lawyer representing an aggrieved party, or civil plaintiff, to obtain access to evidence held by public authorities in which the plaintiff has a legitimate interest.

The Bundeskartellamt denied Pfeleiderer's request for full access to the paper producers' files, specifically declining to permit Pfeleiderer access to statements and documents submitted as part of the leniency applications. Pfeleiderer then initiated an action before the Amtsgericht Bonn, the local German court, challenging the denial. The court ruled in Pfeleiderer's favour, granting the company access to information in the leniency files. It reasoned that while the leniency applicants and the Bundeskartellamt have an interest in maintaining confidentiality over the files, Pfeleiderer had an interest in obtaining information supporting its damages action.

The Amtsgericht Bonn stayed implementation of its order and referred the case to the ECJ for a preliminary ruling under European law seeking clarification on the issue of whether disclosure of the leniency application or related information to third parties would violate provisions of European competition law.

#### **The views of the European Commission and the EU member states**

In December 2010, Advocate General Mazak, as the independent legal advisor to the ECJ, issued a non-binding preliminary opinion that advised against giving plaintiffs full access to leniency applications. He warned that granting private plaintiffs access to the materials would dissuade other enforcement authorities from sharing information with the Bundeskartellamt because most leniency programmes protect leniency applicants' information from discovery. Advocate General Mazak also argued that disclosing the materials would deter companies from cooperating with enforcement authorities in the future. A company might decide that any benefit of a reduced penalty available under the leniency programme would be outweighed by potential exposure to private damages actions.

The advocate general's opinion distinguished between incriminating statements provided to enforcement agencies and pre-existing documents provided to the agencies as part of a cartel investigation. Advocate General Mazak proposed that courts and enforcement agencies faced with requests such as Pfeleiderer's protect any self-incriminating statements that companies produce after entering the leniency programme. However, they should disclose pre-existing documents provided to the enforcement agency because denying access to pre-existing documents would conflict with the fundamental right to a fair trial and effective remedy.

Competition authorities from seven European national governments, including Spain, Italy and the Netherlands, also weighed in before the ECJ. The member states stressed the importance of leniency programmes in investigating cartels and enforcing European law. They objected to

actions will only be determined through future litigation. But it must be noted that the German court in *Pfleiderer* had decided in the first instance that the private plaintiff was entitled to obtain access to the files of the leniency applicant. However, the *Pfleiderer* decision is likely to have an impact on cartel enforcement and private damages actions as national courts wrestle with these issues. But, of potentially greater long-term significance, the decision arguably has implications on cartel investigations conducted by the European Commission and raises issues that the commission will need to acknowledge and address:

## The promise of confidentiality to applicants was a hallmark of leniency programmes

releasing documents obtained through leniency programmes because the disclosure could deter companies from participating in the programmes, thereby undermining their effectiveness.

### The ECJ's decision

In its 14 June decision, the ECJ acknowledged the concerns set out by the European Commission and the individual member states that disclosure of documents obtained through leniency programmes might undermine these programmes if it deterred companies from cooperating. Nonetheless, the ECJ decided that the right of a private plaintiff to claim damages for losses resulting from restricted or distorted competition was equally important. The ECJ reasoned that the existence of private damages actions buttresses the commission's efforts in deterring companies from colluding and voiced concern about laws that would make it practically impossible for private plaintiffs to obtain redress in civil antitrust actions.

The ECJ held that, as a matter of European law, there is no preclusion preventing third parties that have been adversely affected by anti-competitive activity from accessing the company's leniency application file held by national enforcement authorities. Instead, the ECJ ruled that national courts should address the issue on a case-by-case basis. It is the responsibility of national courts to balance the interest in promoting enforcement through leniency programmes with a private plaintiff's interest in obtaining information to support a civil damages lawsuit.

### The implications of *Pfleiderer*

How national courts conduct the balancing test that the ECJ invited them to engage in between the demands of national leniency programmes versus those of private plaintiffs in civil damages

### The impact on ongoing cartel investigations and damages actions

First, *Pfleiderer* will affect international cartel enforcement, both from the perspective of the enforcement authorities and companies that are weighing a possible leniency application. Confidentiality is one of the hallmarks of leniency programmes across jurisdictions. Competition authorities offer a company entering into a leniency programme the promise of confidential treatment and either no or reduced financial penalties for cartel activity in exchange for full cooperation regarding wrongdoing supported by facts and evidence. If an enforcement authority in a specific jurisdiction cannot guarantee the confidentiality of the information, then a company may be more reluctant to commit to the leniency programme knowing that the information it provides may be accessed and used by private plaintiffs, thus providing an invaluable roadmap in follow-on civil damages actions.

This issue is particularly acute given the increasing cooperation and sharing of information among different competition authorities. If, for example, German courts decide to permit private plaintiffs access to the files, then a potential leniency applicant might refrain from pursuing leniency from the German authorities or seek to limit the sharing of any information it provides to competition authorities in other jurisdictions pursuant to a leniency application. This would undermine the cross-jurisdictional efforts at global enforcement long touted by competition authorities, a concern articulated by Advocate General Mazak and one undoubtedly weighing on competition authorities from the different member states that submitted papers to the ECJ.

*Pfleiderer* may also provide an impetus to civil antitrust actions in Europe and elsewhere.

There have been increasing efforts in recent years by private plaintiffs, often driven by US class action lawyers, to bring civil damages actions in European courts for cartel activity. For example, in connection with the five-year-old air cargo investigation, over 200 European companies sued Air France-KLM and Martinair in Amsterdam last year, seeking in excess of €400 million in damages. Disclosure of leniency application materials would assist these plaintiffs in pursuing their litigation and enable them to present a factually appealing case in the litigation. In addition, even if courts in only one or two European countries permit access to leniency materials in the files of the authorities, it is not clear that the information would be limited to a damages action in that country alone. It is certainly possible that private plaintiffs, including those involved in US class action litigation, might seek to obtain the leniency application materials once they have been made available in a specific jurisdiction. For example, a company might be a private plaintiff in damages actions in multiple jurisdictions. Once it has information submitted by a leniency applicant in one jurisdiction, then it will surely seek to use it in damages actions in other jurisdictions.

It remains to be seen how the courts in individual European countries choose to conduct the balancing test outlined by the ECJ in *Pfleiderer*. But the possibility that confidential leniency applications may be available to private plaintiffs is likely to worry enforcement authorities that have relied upon it and alter the calculus for companies considering going down the leniency road.

#### The impact on the European Commission

Finally, the impact of *Pfleiderer* may extend to cartel investigations and leniency applications before the European Commission. *Pfleiderer* arose in the context of a case involving procedural rules in a legal system where the German courts have jurisdiction to order the national competition authority to grant an aggrieved party access to the leniency file. The situation is different where the leniency procedure has taken place before the European Commission. The national judicial procedures referred to in *Pfleiderer* are irrelevant in such a case, since jurisdiction over litigation between a company and the European Commission is reserved exclusively to the EU courts in Luxembourg. This forecloses an aggrieved

company from applying to a national court in an attempt to obtain a judicial order compelling the commission to transmit the file of a leniency applicant. In addition, under current EU case law, it would be feckless to apply to the court having jurisdiction over a matter brought by a company against the European Commission – the General Court of the EU – with the hope of obtaining an order against the European Commission. EU courts consistently have declared as inadmissible those petitions of companies seeking injunctive measures against the European Commission (or any other EU institution), because it is well established that EU courts do not have jurisdiction to deliver injunctive measures against another EU institution.

But the commission nonetheless finds itself in a delicate position. In the past, it has steadfastly fought against the production of any documents from EU leniency files sought in any court proceeding (including intervention in US court proceedings) and it defended this position in *Pfleiderer*. But while no court has jurisdiction over the commission to issue an injunctive order against it, the commission nonetheless must comply with EU law. In this regard, it should be emphasised that the scope of the ECJ's *Pfleiderer* ruling is not limited to national authorities and national courts alone. Instead, the principles set out logically encompass the commission as well. According to the ECJ in *Pfleiderer*, EU competition rules do not preclude “a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.” While the commission cannot be ordered by a court to produce documents to an aggrieved third party, it must nonetheless comply with EU law. Precisely how the commission will reconcile this

The scope of the ECJ's *Pfleiderer* ruling is not limited to national authorities and courts

new principle of EU antitrust law articulated by the ECJ with its stated goal of protecting the highly successful leniency programme currently enforceable in the European Union is an interesting question that the commission will have to address in due course.