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European Court of Justice Holds That Disclosure of Leniency Documents to Cartel Victims Seeking Civil Damages Is Subject to National Law

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The European Commission (EC) and many other competition authorities around the world have long promoted confidentiality as an essential feature of their highly successful cartel leniency programs. The authorities seek to encourage companies to self-report antitrust violations by promising that the contents of their leniency submissions will be protected from disclosure to civil damages claimants. Absent such guarantees of confidentiality, the authorities have cautioned, at least some companies will not seek leniency or will "hedge" their leniency applications to the detriment of antitrust enforcement efforts.

The Court of Justice of the European Union (ECJ) recently had an opportunity to confront the policy issues surrounding the confidentiality of cartel leniency submissions in Case C-360/09, *Pfleiderer v. Bundeskartellamt*. The ECJ there held that EU competition law does not preclude Member State competition authorities from disclosing documents received though a leniency program to cartel victims pursuing damages claims if such disclosure would otherwise be required under national law. The ECJ recognized that the potential for such disclosures to undermine the effectiveness of leniency programs was a legitimate concern that must be taken into account when deciding whether to order the disclosure of such documents. However, it held that national courts must, on a case-by-case basis, balance this concern against the need to ensure that national rules do not make it unduly difficult for private parties to recover damages for breaches of EU competition law. The ECJ noted that disclosing documents received from leniency applicants could "make a significant contribution to the maintenance of effective competition in the European Union" by promoting civil damages litigation in Europe.

The decision creates uncertainty for companies considering a leniency application to the EC and/or Member State competition authorities. Presented with an opportunity to issue a definitive decision prohibiting discovery of leniency materials, the ECJ instead opted for a more complicated and context-specific balancing test. Although it remains to be seen how the courts of the Member States (and the ECJ itself) will apply this test, companies considering making a leniency submission in Europe need to consider the risk that their submission will ultimately be made available to civil damages claimants.

The essential facts of the case are as follows: The German Bundeskartellamt (Federal Cartel Office) issued a decision fining three companies and five individuals for participating in a cartel. The Bundeskartellamt received voluntary submissions from some of the defendants under its leniency program. Pfleiderer AG, a customer of the cartel, sought to compel the Bundeskartellamt to disclose its complete case file, including leniency materials, relying on Paragraph 406e of the German Code of

Criminal Procedure, which allows the lawyer of "an aggrieved person" (i.e., the victim of a crime or administrative offense) to inspect "documents which may have been submitted to a court or, if a public prosecution were commenced, would have to be submitted," unless "overriding interests worthy of protection . . . constitute an obstacle thereto." The Bonn Amtsgericht (District Court) ordered the Bundeskartellamt to disclose documents made available to the Bundeskartellamt under its leniency program and other incriminating materials and evidence in the Bundeskartellamt's case file, but not confidential business information or internal documents, such as notes on legal discussions or communications within the European Competition Network framework.[1]

However, the Bonn Amtsgericht was concerned that the order could conflict with EU competition rules, and stayed the order pending a request to the ECJ for a preliminary ruling under Art. 267 TFEU (ex 234 EC) on whether EU law would preclude the disclosure order. Under this procedure, national courts may request the ECJ to issue an opinion on the construction of EU law in national court proceedings. Preliminary rulings do not, however, reach the merits of the case.

The ECJ found that nothing in either the EU Treaties or Regulation 1/2003, which sets out the framework for the enforcement of Arts. 101 and 102 TFEU, sets out rules governing the right of access of third parties to documents that were voluntarily submitted to a national competition authority under a national leniency program.

National law governs in the absence of binding EU regulation on a subject, but the Member States must ensure that national laws do not jeopardize the effective application of the EU competition rules. The ECJ acknowledged the important role played by leniency programs in ensuring effective enforcement of EU competition rules and the potential for disclosure of materials provided under such programs to undermine their effectiveness. However, the ECJ found that this concern must be balanced against the need to ensure that individuals harmed by breaches of EU law can obtain effective redress through national legal systems, which could also make a significant contribution to EU competition law enforcement. The ECJ therefore held that national rules affecting the disclosure of leniency materials be no less favorable than those governing similar domestic claims, and that national courts must balance the "respective interests in favor of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency" on a case-by-case basis.

The impact of this decision on the effectiveness of government enforcement and the claims of civil litigants will be watched closely over the coming months as the respective courts, competition authorities, and impacted companies seek either to apply the balancing test adopted by the ECJ or to predict how that balancing test will be applied in practice by courts of the Member States. For now, the importance of the court's ruling is already evident with respect to the following issues:

- Although the ECJ recognized the interest in preserving the confidentiality of leniency materials, it refused to give that interest preclusive force.

- The ECJ's ruling raises as many questions as it answers because it fails to give specific guidance on what factors national courts should take into account. For example, is it relevant whether

1. Article 12 of Regulation 1/2003 establishes a framework within which the EC and Member State competition authorities may exchange case-related information (including confidential information).

national law treats competition authority decisions as binding proof of an infringement?

- While the ability to require national competition authorities to provide third parties with access to their case files varies tremendously from one Member State to another, the ECJ's decision strengthens the legal position of those individuals and companies asking for access to leniency applications and other sensitive documents.

- There is a risk that the ruling is going to affect access to documents in the EC's case files. The EC relies on its interest in encouraging leniency applications through the promise of confidentiality as the main argument to block access to the EC's case file under the EU transparency rules (see, for instance, Case T-437/08 *CDC v. Commission*). The ECJ's ruling makes clear that this interest is by itself not sufficient to justify denying access to documents sought in civil damages actions. It will be interesting to see, therefore, how the ECJ deals with a similar request for access to the EC's files in the *CDC* case currently pending before the General Court.

- The EC so far has issued no binding EU legislation in this area, even though the legal community has expressed a need to safeguard leniency applications. Will this decision spur a legislative response?

- This decision could also impact civil litigation outside the EU. In the United States, courts have evaluated civil plaintiffs' demands for access to EC leniency applications in much the same way suggested by the ECJ—by balancing the competing interests of the civil plaintiffs and the specific facts of the case in the U.S. against the interests that competition authorities have in maintaining confidentiality and encouraging companies to self-report misconduct. U.S. decisions on this issue to date have been mixed, but more often than not U.S. courts have not required production of foreign leniency statements to civil litigants in the United States. The ECJ's decision may shift the direction of this trend in the United States, as it could be read to suggest that the confidentiality interests of competition authorities in the EU are not as strong as some of the EC regulations may lead one to believe.

- The ECJ's decision could also lead to pressure to change the manner in which leniency applications are filed with the EC and the various Member States so as not to require written leniency applications that could be at risk for disclosure to the plaintiffs in follow-on civil damages litigation.

- Private damages actions for anticompetitive conduct in the EU are gaining more significance. The EC has recently started a consultation process as the first step in preparing a guidance notice for courts in the EU Member States for quantifying harm in actions for monetary damages for violations of the EU's competition laws.

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