McDermott Will & Emery

EU's Top Competition Court Rules that Companies Seeking Damages May Have Access to Leniency Statements

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Introduction

The European Commission has consistently taken the position that applications for leniency from suspected cartel participants should not be disclosed to prospective claimants wishing to bring follow-on damages claims. A recent decision by the Court of Justice of the European Union (CJEU) may, however, make it easier for prospective claimants to obtain leniency statements and related materials that are submitted to the national competition authorities of the EU Member States. (*Pfleiderer AG v Bundeskartellamt* C-360/09 14 June 2011).

The CJEU decision increases the risk of private damages litigants having access to incriminating documents, which could undermine the efficacy of leniency programmes.

Equally troubling, the *Pfleiderer* judgment could result in the development of a patchwork of disparate national rules because national judges in EU Member States have discretion to decide whether disclosure should take place. On this basis, the *Pfleiderer* ruling adds additional layers of complexity and uncertainty to the deciaion by a potential leniency applicant to apply to EU national competition authorities for leniency. Because *Pfleiderer* may deter companies from applying for leniency, the ruling threatens to undermine national leniency programmes.

The decision could also lead to a situation in which the European Commission may find it more difficult to prevent the disclosure of documents provided by leniency applicants from being disclosed to private litigants in US federal class actions, where defendants may be exposed to treble damages claims. In light of *Pfleiderer's* likely consequences, companies that do business in the European Union are strongly advised to factor this risk into their assessment on whether to apply for leniency, and to follow developments in this area carefully.

Background and Ruling

Pfleiderer AG v Bundeskartellamt originated in Germany. Pfleiderer, a firm active in the wood industry, was considering bringing a damages claim against members of a paper cartel. It sought access to the cartel files held by the German competition authority (the FCO) in order to substantiate its claim. A

dispute arose subsequently in a German court over whether disclosure of the documents submitted by companies that had cooperated with the FCO would undermine the national leniency programme, as potential leniency applicants would fear eventual disclosure. The German court referred this question to the CJEU, requesting a preliminary ruling as to whether the provisions of EU competition law are to be interpreted as meaning that cartel victims can be granted access to leniency applications received by an EU Member State.

The CJEU held that the national courts and tribunals of each Member State have the discretion to determine—on a case by case basis—whether leniency documents may be disclosed to claimants on the basis of their own national law, balanced with the interests protected by EU law. In reaching this ruling, the CJEU took the unusual step of distancing itself from Advocate General Mazák, who had advised that leniency documents that existed before the cartel was uncovered could be disclosed in follow-on civil proceedings, but that submissions drafted for the purpose of revealing the infringement should be protected from disclosure.

Implications of the Ruling

Discoverability in National Courts Within the European Union

The upshot of the ruling is that each judge in each EU Member State has a considerable margin of discretion as to what type of leniency document can be disclosed to a cartel victim. Although this provides parties with room to maneuver in national courts, it also threatens to generate considerable legal uncertainty and unpredictability. This is because the CJEU did not provide concrete guidance on what factors judges should take into account in assessing whether and which documents should be disclosed to a damages claimant.

Post-*Pfleiderer*, defendants also face significant additional complexity in deciding whether to apply for leniency. They will now have to take into consideration not only the remaining risk of a fine and criminal sanctions, but also the fact that private damages claimants might get easier access to incriminating evidence. Indeed, if leniency statements are disclosed, leniency applicants may paradoxically be in a worse position than those companies that refrained from applying for leniency and instead contested their participation in the alleged cartel.

Moreover, the CJEU's ruling may lead to different results across Member States, potentially creating an inconsistent and unpredictable legal patchwork in the European Union. This may lead to forum shopping by damages claimants, particularly given different legal traditions and national rules in different Member

States.

Discoverability in US Courts

Apart from the increased risk of disclosure in litigation in the European Union, the *Pfleiderer* ruling may well have consequences for litigants outside the European Union, most notably in US federal antitrust litigation.

To date, there have been several cases in which the European Commission has intervened in US civil proceedings to stop the discovery of EU documents submitted by leniency applicants. The Commission has asserted that, in order to safeguard the effectiveness of the EU leniency programme, such documents should not be disclosed.

In support of its arguments against the disclosure of leniency documents, the European Commission has relied mainly on the principle of comity. Under this principle, a country voluntarily takes into account other countries' interests when deciding a legal issue, provided that doing so would not infringe the first country's public policy. By arguing for the application of comity, the European Commission essentially asks US courts to prevent the disclosure of leniency documents submitted to the European Commission, because such disclosure would not be permitted in the European Union and would undermine the enforcement of EU law (*via* the European Commission's leniency programme). The European Commission's arguments based on comity have invariably succeeded in US courts.

The *Pfleiderer* judgment may have the unfortunate consequence of making it more difficult for the Commission to argue persuasively that documents disclosed to it by companies subject to an EU cartel investigation should not be disclosed to private litigants in US litigation. The CJEU's stance in *Pfleiderer* could be interpreted by US courts to mean that the confidentiality of leniency statements in the European Union is itself not absolute.

Despite the fact that *Pfleiderer* applies only to the disclosure of leniency materials submitted to national competition regulators, it appears that there is now a greater risk that documents submitted under the European Commission's leniency programme could be disclosed in US federal courts. The judgment may therefore give impetus to the Commission's current discussions about new and stronger EU laws aimed at preventing the disclosure of documents submitted to the Commission by companies under the Commission's leniency programme.

Conclusion

For the moment, the European Commission maintains that the *Pfleiderer* judgment has no impact on the leniency applications submitted to it under the EU Leniency Programme.

Neverthless, companies thinking about applying for leniency anywhere in the European Union need to consider the risk that sensitive and incriminating leniency documents may fall into the hands of civil damages claimants. Companies doing business in the European Union are therefore urged strongly to follow developments in this area and factor the risk of disclosure into the decision of whether or not to apply for leniency.

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