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Discovery of Leniency Submissions in Europe: The *Pfleiderer* Judgment: Dawn of a New Era or Nothing New Under the Sun?

On 14 June 2011, the Court of Justice of the European Union handed down its judgment in the *Pfleiderer case*.[1] This judgment is likely to be much analyzed and quoted in civil damage actions in Europe, the United States, and around the world in connection with disclosure requests for documents and information submitted to the European Commission (EC or Commission) or National Competition Authorities (NCAs) in the European Union.

On a quick glance, one may be tempted to jump to the conclusion that the Court's *Pfleiderer* judgment creates formidable opportunities for damage claimants. In fact, even one day after its issuance, an English High Court judge pondered its meaning during a hearing on questions of discovery in an action for damages action brought by National Grid against the participants in the switchgear cartel that had been sanctioned by the EU in 2007.[2] But on closer review, the implications of the *Pfleiderer* judgment are not so clear.

This Advisory first will give an overview of the facts leading up to the *Pfleiderer* judgment and of the Court's reasoning in this judgment. We then discuss how the judgment might impact the EC's practice regarding disclosure of corporate statements and other material submitted to it by leniency applicants, including amnesty/immunity applicants, during the administrative antitrust procedure. As we discuss, the *Pfleiderer* case involved a leniency application under German law and a request for disclosure in a German proceeding. Given the differences between German and EC procedures for disclosure of leniency materials (and given the EC's position in its brief), we believe it is unlikely that the rule in *Pfleiderer* would apply to leniency materials provided to the EC (even if those materials are later shared with NCAs). Moreover, we do not believe that the *Pfleiderer* judgment is likely to change the EC's practice of opposing the discovery of leniency materials in US civil litigation.

1 Judgment of the Court in *Pfleiderer AG* v. *Commission*, C-360/09, 14 June 2011.

2 Citation of Mr. Justice Roth in the hearing of 15th of June 2011—*National Grid Electricity Transmissions Plc* v. *ABB Limited & Ors* [2011] reference IHC 876/09 (Ch).

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Facts Leading Up to the Judgment

The case arose out of a request for a so called preliminary ruling to the Court of Justice from the *Amtsgericht*—District Court—in Bonn, Germany. More specifically, the national court asked the Court of Justice to clarify whether EU law precludes parties adversely affected by a cartel from seeking access to corporate statements and supporting documents submitted by leniency applicants to a national antitrust agency, such as the German Federal Cartel Office (FCO), under a national leniency program.

The factual background was the following:

Under the German Code of Criminal Procedure, outside counsel acting on behalf of an aggrieved person has the right to inspect the file and even take the file to his office or residence, unless the purpose of the investigation appears to be compromised. It is uncontested that outside counsel also has this right of access in national administrative law procedures that give public authorities the power to impose fines. Pfleiderer's lawyers had invoked this right to ask the FCO to grant them *full* access to its file relating to a cartel in the decor paper sector. As a customer of the fined companies, Pfleiderer planned to make use of the file documents to prepare a private action for damages. Initially, the FCO only provided access to redacted versions of its final decisions imposing fines on the three manufacturers of decor paper as well as to a list of incriminating documents seized during an inspection it carried out. When Pfleiderer insisted on obtaining the entire file, including the leniency materials and the inspection documents (not just a list thereof), the FCO turned down its request, thereby relying on point 22 of its own Leniency Notice.

Pfleiderer successfully appealed to the Bonn District Court. The German court ordered access to the leniency materials and to the incriminating documents seized during the inspection. However, it stayed its order until the Court of Justice confirmed that EU law did not stand in the way of disclosure because it realized that disclosure might diminish the attractiveness of the FCO's own leniency system and, as a consequence, undermine its ability to effectively enforce EU competition law. The German court was also concerned that the disclosure might undermine cooperation between the EC and the NCAs within the European Competition Network, especially since Art. 11 and Art. 12 of Regulation 1/2003 contain safeguards against undue exchange of leniency material in the course of this cooperation.[3] However, this concern appeared to be merely hypothetical since the FCO had not shared any information with the EC or other NCAs.[4]

The Court's Judgment

The Court of Justice's reasoning is remarkably short, even for a preliminary ruling.

It first of all recalls that neither the Treaty on the Functioning of the EU (TFEU), nor any other binding EU legislation, specifically deals with access to documents voluntarily submitted to a national competition authority pursuant to a national leniency program.[5] As a consequence, it is, in principle, up to Member States "to establish and apply national rules on access, by persons affected by a cartel, to documents relating to leniency procedures."[6]

However, the Court of Justice reminds the Bonn Court of its settled case law according to which Member States "may not render the implementation of EU law impossible or excessively difficult"[7] and, "must ensure that the rules which they establish or apply do not jeopardize the effective application" of the Treaty's competition rules, i.e., Articles 101 and 102 of the TFEU.[8]

The Court of Justice then applies these two legal principles to the issue at hand.

On the one hand, it acknowledges that potential leniency applicants might be "deterred" from submitting evidence of the cartel under the existing leniency programs if they were faced with the possibility of disclosure of that evidence to persons wishing to bring an action for damages. From that perspective, the "effectiveness of those programs would […] be compromised."[9]

On the other hand, the Court points out that, in line with its *Courage* and *Manfredi* case law, the right to bring an action for damages "strengthens the working of the Community competition rules" and the legal principle according to which

3 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 EC [now Article 101 TFEU] and 82 EC [now Article 102 TFEU], OJ 2003 L 1, p. 1. The EC has further detailed these safeguards in § 40 of the Notice on cooperation within the European Competition Network (O.J. C 101/43 of 27 April 2004).

4 *Pfleiderer,* recital 29 of the Advocate General Opinion.

5 Recitals 20-22.

6 Recital 23.

7 Recital 24.

8 *Id.*

9 Recitals 25-27.

Member States may not render the implementation of EU law impossible or excessively difficult implies that they "must not make it practically impossible or excessively difficult to obtain […] compensation" for violations of competition law.[10, 11]

The reasoning of the Court of Justice then comes to an abrupt end. One would indeed have expected that it would have given guidance to the Bonn Court on how to weigh the conflicting interests of leniency applicants and damage claimants under the two legal principles of its settled case law. Not so. According to the Court, "that weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case".[12] The Court then concludes that EU law, and Regulation 1/2003 in particular, "must be interpreted as not precluding" a damage claimant "from being granted access to documents relating to a leniency procedure involving the perpetrator" of the cartel.[13]

Comments

In a wide variety of cases, the Court of Justice has systematically relied on the need to preserve the effectiveness of EU law. This legal concept therefore constitutes a cornerstone of its case law. However, in the present case, the Court of Justice faced a unique problem, i.e., how to weigh the effectiveness of *public* enforcement of competition law against the effectiveness of *private* enforcement of competition law.

There was no easy way to address that problem. In its landmark judgment in *Crehan*, the Court of Justice observed that private damage actions acted—just as much as administrative fines—as a deterrent for potential cartel participants. That judgment preceded the European Commission's 2002 Leniency Notice which—much more than its 1996 predecessor—led to the Commission stepping up its public enforcement policy against cartels.

The Court adopted a pragmatic approach. It recognized that there was a need for balancing. It also took the view that such balancing could not be operated in the abstract but has to take into account all relevant factors. However, the Court did not run the last mile: It did not identify which factors are potentially relevant. This is disappointing. It is also surprising because preliminary rulings are meant to guide national courts, not leave them in the dark on how to interpret European law.

This brings us to a few observations about the impact of the *Pfleiderer* judgment beyond the specific case at hand. First, will it have an impact on the current administrative practice of the Commission and Member States such as Germany of not disclosing leniency submissions to third parties who seek access to them in order to substantiate their damage claims in national courts? Second, will it have an impact on the Commission's policy to oppose discoverability of these submissions in the US Courts?

We will address each question in turn.

A. Discoverability in National Courts Within the European Union

Let us first summarize the EC's position regarding disclosure of leniency material in national courts within the European Union before we examine any impact the *Pfleiderer* judgment may have on that position.

The EC's Position Until *Pfleiderer*

The EC's position has been quite clear so far. While it has encouraged Member States to review their laws with a view to facilitating the bringing of private actions in cartel cases, it has been adamant about the need to protect from discovery not only corporate statements but also other leniency material, such as contemporaneous documents.

In its April 2004 Notice concerning its cooperation with national courts in the European Union,[14] the Commission states that "[it] will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant."[15] Such information covers oral corporate statements as well as pre-existing documents submitted by the leniency applicant.

In its December 2006 Notice on immunity from fines and reduction of fines in cartel cases (the Leniency Notice), the EC does not deal directly with disclosure of leniency

10 Recitals 28-30.

11 Judgment of the Court in *Courage* and *Crehan* v. *Commission*, case C-453/99, 20 September 2001 and in *Manfredi and Others* v. *Commission*, joined cases C-295/04 to C-298/04, 13 July 2006.

12 Recital 31.

13 Recital 32.

14 O.J. C 101/54 of 27 April 2004. The Notice does not deal with discovery per se but provides a national court with the ability to request the Commission's assistance, including by asking the Commission to disclose to it certain documents in the Commission's possession.

15 *Id. at* 26.

material in national courts, but sets out provisions dealing with incriminated parties' access to file and the rights of third parties to access the file. During the administrative proceedings, incriminated parties have access to that material in order to defend themselves, but only if they commit not to disclose or use the information contained therein outside the administrative investigation.[16] With regard to oral corporate statements, only outside counsel to incriminated parties have access and even then cannot copy these statements by mechanical or electronic means. Complainants have no access at all to these statements.[17] Early in the Notice, the EC stresses more generally that corporate statements "have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation."[18]

In §35 of the Leniency Notice, the EC also states that—where the conditions are met for sharing with NCAs the information voluntarily provided by a leniency applicant—it will share corporate statements with those authorities only if they guarantee the same level of protection against disclosure as that conferred by the EC.[19] The NCAs have taken their cue from the EC and regularly refuse to provide corporate statements to parties not involved in the administrative procedures in which the documents were obtained.

Finally, at § 40 of its Leniency Notice, the EC deals with public disclosure of leniency materials under Regulation (EC) No 1049/2001. This Regulation sets out the conditions under which European institutions, including the EC, have a duty to give public access to documents in their files.[20] The EC states in the Leniency Notice that, *as a rule*, public disclosure of leniency materials, including corporate statements, would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations.

16 *Id. at* 34.

17 *Id. at* 33.

18 *Id. at* 6.

19 This echoes what the EC has already set out in its April 2004 Notice on cooperation within the European Competition Network (cit. *supra* footnote 6). Building on this, the EC and the NCAs have designed an "ECN Model Leniency Program" which contains similar provisions.

20 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. L 145/43 of 31 April 2001.

Will *Pfleiderer* Require the EC to Change Its Position?

Although many complainants or damage claimants will argue that *Pfleiderer* is a landmark judgment that will require the EC to soften its position regarding disclosure of leniency material, we believe that they read too much into the judgment and that they will continue to face significant obstacles obtaining leniency materials.

In its *amicus brief* in *Pfleiderer*, the EC had noted that the German national law at issue provides for a special right of damage claimants to access leniency materials submitted to the FCO under the national leniency program. That right does not extend to information which the FCO has obtained from the EC or other NCAs and therefore, the EC argued, there was no conflict between the German rule and EU law provisions on cooperation between the EC and NCAs. However, the EC felt strongly about the need to preserve absolute confidentiality for oral corporate statements, even when submitted under a *national* leniency regime. In its pleadings, it therefore proposed to distinguish between pre-existing documents submitted by leniency applicants and their corporate statements. For the first category, disclosure could be envisaged, subject to a balancing of private and public enforcement objectives, as in fact provided for under German national law. For the second category, given their particularly sensitive nature, disclosure should be entirely precluded.[21]

The Court of Justice did not follow this distinction. It empowered the national court to weigh the private and public enforcement objectives with regard to *all* leniency material. It did agree with the EC that "it is, in the absence of binding regulation under European Union law on the subject, for Member States to establish and apply national rules on the right of access […] to documents relating to leniency procedures."[22]

One should therefore be careful to draw sweeping conclusions from the *Pfleiderer* judgment, given that it involved a request for access made to an NCA (rather than the EC) under a national law that provided damage claimants a right to access leniency materials submitted to the NCA. More specifically, one cannot assume that the EC will now also be required to carefully weigh private and public interest

21 *Pfleiderer*, recitals 17 and 44-47 of the Advocate General Opinion.

22 Recital 23.

grounds each time *it* receives a request to disclose leniency material, including corporate statements, that has been submitted to it in the course of its antitrust proceedings and to duly motivate any refusal to disclose such material in light of the specific facts at hand.

That being said, the Court's invitation to the Bonn court to carefully weigh the private and public enforcement objectives before deciding on whether or not to disclose the leniency material implies that it grants national courts in Germany, and possibly also in other jurisdictions which provide for special access rights, a margin of discretion whenever they are confronted with disclosure requests relating to leniency material. NCAs may therefore no longer be able to uphold broad confidentiality policies preventing third parties from obtaining access to leniency submissions, including corporate statements. In this regard, it is worth flagging that third parties have already tried to circumvent these policies, e.g. by asking co-defendants of a leniency applicant for copies of transcripts of corporate statements. Others have litigated access issues in national courts.[23] In light of *Pfleiderer*, damage claimants are now likely to argue that the broad policies of NCAs to refuse all requests for access to leniency materials must be replaced by the Court's balancing test. Companies considering to submit leniency applications to NCAs would therefore be well-advised first to determine the full extent of national discovery rules and assess the risk that their applications later may become subject to discovery.

It will also be interesting to see how the EC will take forward its regulatory project to put in place a legal framework for private damage actions in competition and other consumer welfare related matters. It put an earlier project—that had focused on competition matters—on hold last year, but whatever the scope of its revamped project will be, it will have to contain disclosure provisions.[24]

One final word about Regulation 1049/2001 (which provides rules for the public access to materials in the files of European institutions); the Commission has already made clear that Regulation 1049/2001 does not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions.[25] This Regulation indeed aims at achieving an objective that has nothing to with enhancing the capacity of aggrieved parties to claim damages for infringements of EU law in national courts. It merely seeks to enhance the transparency of the EU legislative and regulatory process. Disclosure of any documents under the procedure set forth in this Regulation is therefore disclosure *erga omnes* (it effectively enters into the public domain) and the exceptions set forth in Art. 4-2 of the Regulation seek to avoid misuse of the transparency regime set forth by the Regulation. We see no reason for the Commission to change its view based on the *Pfleiderer* judgment.

B. Discoverability in US Courts

Access to documents obtained in the course of the EC's cartel investigations has been sought not only in Europe but, time and again, in the United States, where private actions are much more frequent and discovery rules generally have a further reach than in Europe. Thus, the question of discovery of EC files has regularly come up and the EC has regularly tried to protect its files by submitting letters, filing *amicus curiae* briefs and actively seeking to intervene in the proceedings.[26] While it has used many different arguments, such as the act of state doctrine, privacy issues, and investigatory privilege, the main focus of the debate in US courts has been on the principle of comity.

By its very nature, the principle of comity requires balancing various private and public interests and the EC has regularly argued that its own interests in protecting its leniency program and thereby the effective public enforcement of its

23 In a case relating to the elevators and escalators cartel fined by the Austrian Cartel Court, the latter refused to provide access to its files intending to protect the confidentiality of leniency applications but was overturned by the Austrian Supreme Court in a procedure where access was sought by the public prosecutor who wanted to initiate criminal proceedings. *See* Judgment of the Oberster Gerichtshof Aufzugs und Fahrtreppenkartell, 16 Ok 5/08, 8 October 2008. In Italy, access to the files of the national authority in the cosmetics cartel, including to leniency applications, was also under review by an administrative court. *See* Judgment of the Tribunale Amministrativo Regionale per il Lazio *Conto Tv Srl contro Autorita' Garante della Concorrenza e del Mercato*, N. 10572/2010, 10 May 2010.

24 White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final of April 2, 2008.

25 Commission staff working paper accompanying the White paper cit. in footnote 11, § 113.

26 *Vitamins Antitrust Litigation, Re, Rep. of Special Master* (99-197) (TFH), 2002 U.S. Dist. LEXIS 26490 January 23, 2002 D.D.C. (hereinafter "*Vitamins*"), denying motion to reconsider at *Vitamins Antitrust Litigation*, Re (99-197) (TFH), 2002 U.S. Dist. LEXIS 25815 December 18, 2002 D.D.C. *See Methionine Antitrust Litigation, Re* (C99-3491), Rep. of Special Master June 17, 2002 N.D. Cal. *Rubber Chemicals Antitrust Litigation, Re*, 486 F. Supp. 2d 1078 2007 N.D. Cal. *See Flat Glass Antitrust Litigation, Re* (08-180) (Doc. 185) July 29, 2009 W.D. Pa. *See TFT-LCD (Flat Panel) Antitrust Litigation, Re* Case No. 3:07-md-01827-SI, 2011 N.D. Cal. Special Master's Order denying motion to compel production (hereinafter "*Flat Panels*").

competition rules should outweigh US plaintiffs' discovery needs. If anything, the EC consistently has balanced private and public enforcement objectives in these cases, which is precisely what the Court of Justice instructed the national court to do in *Pfleiderer*.

We do not believe that the *Pfleiderer* judgment will affect the EC's position in US Courts. As we described above, *Pfleiderer* likely has limited applicability to the disclosure of leniency materials provided to the EC (as opposed to leniency materials provided by firms to NCAs that operate under different disclosure regimes as a matter of national law). Perhaps, in light of *Pfleiderer*, the EC will articulate in even more detail its reasons for opposing disclosure of leniency material in US Courts. The EC might argue that litigation in US courts does not "make a significant contribution to the maintenance of effective competition in the European Union"[27] and therefore should not be capable of outweighing the interest that the EC has in maintaining confidentiality and encouraging companies to apply for leniency. The EC might also very well be led to explain the specific factual and legal background of the *Pfleiderer* judgment in order to place its judgment in its proper context and avoid undue extrapolations.

In any event, when assessing disclosure requests in light of the principle of comity, US Courts will continue to apply the US Supreme Court's detailed balancing test which requires them *inter alia* to consider the importance of the requested file documents and to compare the impact of nondisclosure on important interests of the US with the impact of disclosure on important interests of the state where the information is located.

27 *Pfleiderer,* recital 29.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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