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I.

Michael Sánchez Rydelski, Brussels*

Antitrust Enforcement: Tensions between Leniency Programmes and Civil Damage Actions – How Immune is a Leniency Applicant?

(Pfleiderer AG v Bundeskartellamt, ECJ (Grand Chamber), Judgment of 14 June 2011, C-360/09)

The European Commission (Commission) and Member States operate leniency programmes whereby companies that provide inside information about a cartel in which they participated might receive full or partial immunity from fines. Leniency programmes are important tools in the public enforcement of antitrust law. With regard to private enforcement, the Commission vocally supports civil redress to sue cartel members for the damage the illegal activity has caused. However, where civil claimants seek access to the file of a leniency applicant, this request creates tensions between the effectiveness of leniency programmes, as disclosure might have a deterrent effect for future leniency applications, and an effective system for damage claims, as information is needed for the substantiation of claims. The judgment at hand was expected to shed some light on the question of where to strike a balance between these two potentially conflicting aims.

(1) Facts and Procedure

In 2008, the German Cartel Office (*Bundeskartellamt*) imposed fines on European manufactures of decor paper, pursuant to former Article 81 EC (now Article 101 TFEU), for price fixing and capacity closure agreements (decor paper cartel).

Pfleiderer AG (Pfleiderer) purchased decor paper and other goods from the decor paper cartel with a value in excess of EUR 60 million. With a view to **preparing civil damage actions**, assuming that it had been charged excessive prices as a result of the cartel, Pfleiderer submitted an application to the *Bundeskartellamt* seeking full **access to the file relating to the imposition of the fines**, including the documents relating to the leniency applications and the evidence seized.

The *Bundeskartellamt* rejected the application in part and restricted access to the file to a version from which confidential business information, internal documents and documents covered by point 22 of the *Bundeskartellamt's* notice on leniency were removed. According to point 22 of the *Bundeskartellamt's* notice on leniency, the

Bundeskartellamt has the power to refuse applications by third parties for file inspection, or the supply of information, involved in a leniency application.¹ The *Bundeskartellamt* refused access also to the evidence which was seized.

Pfleiderer challenged the **decision of partial rejection** before the Local Court of Bonn (*Amtsgericht Bonn*). The *Amtsgericht Bonn* concluded that Pfleiderer had «legitimate interest» in obtaining access to the documents, since those were to be used for the preparation of a civil damage action. The *Amtsgericht Bonn* ordered access to the **material which the leniency applicant had voluntarily made available** to the *Bundeskartellamt*. Conversely, it limited access to confidential business information and internal documents, i.e., notes on legal discussions of the *Bundeskartellamt* and correspondence within the framework of the European Competition Network (ECN).

However, the *Amtsgericht Bonn* stayed the enforcement of its decision and made a **reference for a preliminary ruling** to the Court of Justice, questioning whether EU competition law,² which obliges the Commission and the national competition authorities (NCAs) to cooperate closely and provide for a mutual exchange of information, would conflict with its decision. The *Amtsgericht Bonn* considered that it might prove necessary to deny third parties access to leniency applications to ensure the effectiveness and proper functioning of the EU competition rules.³

The reference for the preliminary ruling attracted the interest of some Member States. **Written observations** were submitted by the Belgium, Czech, German, Dutch, Cypriot, Spanish and Italian Governments. All **governments** submitted that parties adversely affected by a cartel should not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily provided by leniency applicants to the national competition authority pursuant to national leniency programmes.





The *Commission* submitted that a distinction had to be drawn between the voluntary presentations by leniency applicants of their knowledge of a cartel and their role therein prepared for the purpose of submission to the authorities under national leniency programme, known as «*corporate statements*», and other pre-existing documents submitted by the leniency applicant. The Commission argued that access should not be granted in respect of corporate statements to parties adversely affected by a cartel, for the purpose of bringing civil-law claims, as this would place the leniency applicant in a worse position in civil proceedings than other cartel members, thereby undermining the effectiveness of the leniency programme. The Commission claimed that access to the other documents submitted by the leniency applicant should be assessed on a case-by-case basis.

The *EFTA Surveillance Authority* observed that most leniency programmes provided for an oral procedure designed to protect corporate statements from discovery in civil damage procedures. Therefore, neither the effectiveness of EU competition law nor any of its provisions precluded a national law from granting access to leniency documents to civil claimants.

(2) Judgment

The Court started by recalling that the Member States' competition authorities and their courts are required to apply Articles 101 and 102 TFEU, where the facts come within the scope of EU law, and to ensure that those articles are *applied effectively* in the general interest (paragraph 19).⁴

The Court ascertained that there are neither provisions in the TFEU nor in Regulation 1/2003⁵ laying down common rules on leniency or common rules on the right of access to documents submitted voluntarily to a national competition authority pursuant to a national leniency programme (paragraph 20). Equally, the Court held that the Commission's leniency programme is not binding on Member States and within the ECN. The model leniency programme has no binding effect on the Member States' courts (paragraphs 21 and 22). Consequently, the Court noted that there is an *absence of binding regulation* under EU law on the question raised (paragraph 23).

Despite the absence of specific binding EU rules, the Court recalled that while the establishment and application of those rules falls within the competence of the Member States, the latter must none the less exercise that competence in accor-

dance with EU law.⁶ In particular, Member States may not render the implementation of EU law impossible or excessively difficult⁷ and, specifically, in the area of competition law, they must ensure that the rules which they establish or apply do *not jeopardise* the effective application of Articles 101 TFEU and 102 TFEU (paragraph 24).⁸

The Court then acknowledged that the *effectiveness of leniency programmes* could be compromised if leniency documents are disclosed to private litigants wishing to bring an action for damages (paragraphs 25 and 26). In this context, the Court found that a cartel member faced with the possibility of such disclosure would be deterred from taking the opportunity offered by such leniency programmes (paragraph 27).

But the Court referred also to its settled case-law according to which any individual has the *right to claim damages* for losses caused to him by conduct which is liable to restrict or distort competition (paragraph 28).⁹ On this point, the Court reiterated that the existence of such a right strengthens the working of the EU competition rules and discourages agreements or practices, which are liable to restrict or distort competition. Therefore, actions for damages before national courts can make a *significant contribution* to the maintenance of effective competition in the EU (paragraph 29).¹⁰

The Court observed that when assessing a request to access documents relating to leniency applications it is necessary to ensure 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 such compensation¹¹ and to *weigh the respective interests* in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency (paragraph 30).

Therefore, the Court concluded that this balancing exercise can be conducted by the national courts only on a *case-by-case basis*, according to national law, taking into account *all the relevant factors* in the case (paragraph 31).

Consequently, the Court replied to the question from the *Amtsgericht Bonn* as follows: «The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not





precluding 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. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law».

(3) Comment

The first impression when reading the judgment is that it is surprisingly short. The Court deals with this important and complex question in only fourteen paragraphs. The brevity of the judgment may be explained by the fact that the case was dealt with by a Grand Chamber and that it was probably the smallest common denominator for the judges to agree upon.

Despite its brevity, the judgment contains an important message, namely that documents submitted under the auspices of leniency programmes will **not be protected** from third party access **as a matter of EU law**. This result deviates from the solution proposed by Advocate General (AG) *Mazák* who had suggested that leniency documents should be accorded full protection from disclosure.¹²

In AG *Mazák's* opinion, access to leniency documents could substantially reduce the attractiveness and thus the effectiveness of leniency programmes and in turn undermine the effective enforcement of Article 101 TFEU. AG *Mazák* observed that the denial of such access could create obstacles to or hinder to some extent an allegedly injured party's **fundamental right** to an effective remedy and fair trial guaranteed by Article 47 in conjunction with Article 51(1) of the Charter of Fundamental Rights of the EU. However, AG *Mazák* concluded that the interference with that right would be justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and private interests in detecting and punishing cartels.

The Court decided not to follow this approach and instead **strengthen private enforcement** by allowing private claimants generally access to leniency applications. As pointed out by AG *Mazák* and the Commission, this may create disincentives for future leniency applications, because companies that voluntarily cooperate with the authorities in revealing cartels might now be

put in a worse position in respect of civil claims than other cartel members which refuse cooperation.

It is clear from the outset that immunity or a reduction of fines under a leniency programme will not protect an undertaking from the civil law consequences of its participation in the cartel.¹³ The «leniency immunity» **cannot** «automatically» **be extended** to civil damage actions. However, an important element of a successful leniency programme is the confidentiality guarantee for leniency applicants. It is the correlation of the undertaking's waiver of the fundamental right to **non-self-incrimination**, with the assurance that information so disclosed will be used for the specific context and purpose of the cartel investigation, which is key to a successful leniency programme.

The Commission has encouraged companies to self-report antitrust violations by promising that the contents of their leniency submissions will be protected from disclosure to civil damage claimants. As outlined in the Commission's White Paper,¹⁴ adequate protection against disclosure in private damage actions has to be ensured for **corporate statements** submitted under its leniency programme.¹⁵ Further, the Commission can refuse the transmission of information to national courts for overriding reasons relating to the need to safeguard the interests of the EU or to avoid any interference with its **functioning and independence**, in particular by jeopardising the accomplishment of the tasks entrusted to it.¹⁶ On that basis, the Commission announced in its notice on co-operation with national courts that it will only transmit to national courts information voluntarily submitted by a leniency applicant with the latter's **consent**.¹⁷ The Commission reacted quickly to the judgment with statements confirming its practice to protect leniency documents as it has done in the past.

Although the judgment concerns the interplay between national leniency programmes and the right of civil litigants, it is naive to believe that the judgment will have no effect on the Commission's leniency practice. The Court made it clear that there is **no overriding element** of an effective enforcement of Article 101 TFEU that prevents *per se* access to leniency applications. This conclusion applies equally to the Commission's practice. Consequently, the Commission may no longer provide standard replies refusing access to leniency applications by merely referring to the protection of the effectiveness of its leniency programme. Follow-





ing the Court's approach, the Commission would have to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information on a *case-by-case basis*, taking into account *all the relevant factors* in the case.

In the past, the Commission protected corporate statements against disclosure in civil damage actions, regardless of whether the leniency application was accepted, rejected or resulted to no decision by the competition authority.¹⁸ After the judgment, the Commission may be inclined to display a more refined approach towards disclosure, linked more to the success of a leniency application. The approach suggested by the Court seems also more in line with jurisprudence on *Regulation 1049/2001* concerning public access to files,¹⁹ whereby the Commission has to substantiate its refusals to documents on a case-by-case and sometimes even a document-by-document basis.²⁰ Under Regulation 1049/2001 refusal of access to documents is the exception to the rule, justified only under narrow conditions. In order to justify refusal of access to a document, it is not sufficient, in principle, for that document to fall within an exception. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception.²¹ It would therefore seem insufficient to rely merely on the hypothetical risk of detriment to any interests protected, such as the general public interest in the protection of a leniency programme.

In addition, with regard to requests from national courts,²² the Commission is under an obligation to give *active assistance* to such national proceedings.²³ Consequently, the Commission will have to substantiate on a case-by-case basis its reasons for turning a request down. This doesn't mean that civil litigants will have automatic access to leniency applications under the Commission's leniency programme, but it will require a more substantiated reasoning why access is refused. These decisions are ultimately subject to judicial review in Luxembourg.

The EFTA Surveillance Authority pointed out that in order to avoid the conflict, *oral corporate statements*, which are part of leniency programmes, may instead be accepted. However, transcripts of oral statements will be on the files of the competition authorities and civil claimants will also seek access to these transcripts. It is, therefore, not convincing that the form of a corporate statement (either written or oral) should prevail

over the right to access this information.

It is important for both public and private enforcement to ensure that leniency programmes remain attractive. It is foremost through public enforcement, to which leniency programmes are key, that cartels are revealed. Public enforcement provides the basis for civil *follow-on actions* (i.e. actions brought after a competition authority has found an infringement). Stand-alone actions (i.e. actions which do not follow on from a prior finding by a competition authority of an infringement of competition law) are much more difficult to initiate. Time will show whether the Court's ruling of 14 June 2011 will weaken leniency programmes.

Finally, the judgment will *not contribute to a uniform application* of antitrust law in the EU, as it is for the national courts to decide on the ultimate question of access to the files. National courts will have to strike the balance to ensure the most effective application of the EU antitrust law and to decide whether to allow or refuse access to the leniency applications. Whether access to a file will be granted or not will depend on the Member State in which the action is brought. Further, the proposed balancing exercise will be difficult to undertake. Further guidance will be required on how the balancing exercise should be conducted. It can be expected that new references for preliminary rulings will be submitted to the Court seeking further *clarification on the criteria* for the balancing test.

The Commission's recent public consultations on a «Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules»²⁴ and on «collective redress»,²⁵ which are intended to produce a Communication, will ultimately not solve this question. As the Court noted, there is an absence of binding regulation under EU law on the question raised. A Communication will be insufficient to create a binding EU rule on this issue. Hence, in order to improve legal certainty and create a uniform application throughout the EU, it might be necessary to amend Regulation 1/2003. As already touched upon by AG *Mazák*, whether such an *amendment of Regulation 1/2003* will be compatible with a civil claimant's fundamental right to an effective remedy and fair trial guaranteed by Article 47 in conjunction with Article 51(1) of the Charter of Fundamental Rights of the EU remains to be seen. As the judgment indicates, private enforcement may have «priority».





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- ¹ Point 22 of the Notice No 9/2006 of the *Bundeskartellamt* on leniency provides: «[w]here an application for immunity or reduction of a fine has been filed, the *Bundeskartellamt* shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, in so far as the leniency application and the evidence provided by the applicant are concerned».
- ² In particular, Articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now 101 and 102 TFEU) and the second paragraph of former Article 10 EC, in conjunction with former Article 3(1)(g) EC.
- ³ Namely, former Articles 81 and 82 EC (now Articles 101 and 102 TFEU).
- ⁴ With reference to ECJ of 7 December 2010, C-439/08 *VEBIC*, paragraph 56.
- ⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now 101 and 102 TFEU), OJ 2003 L 1, page 1.
- ⁶ ECJ [2009] ECR I-187 *Commission v. Spain*, paragraph 121.
- ⁷ ECJ [1998] ECR I-4767 *Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung*, paragraphs 23 and 24.
- ⁸ ECJ of 7 December 2010, C-439/08 *VEBIC*, paragraph 57.
- ⁹ ECJ [2001] ECR I-6297 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, paragraphs 24 and 26; and ECJ [2006] ECR I-6619 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, paragraphs 59 and 61.
- ¹⁰ ECJ [2001] ECR I-6297 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, paragraph 27.
- ¹¹ ECJ [2001] ECR I-6297 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, paragraph 29.
- ¹² Opinion of AG Mazák of 16 December 2010.
- ¹³ See for example, Commission notice on immunity from fines and reduction of fines in cartel cases («Leniency notice»), OJ 2002 C 45, page 3 (paragraph 31).
- ¹⁴ White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2 April 2008.
- ¹⁵ White Paper, Section 2.2 on page 5.
- ¹⁶ ECJ [2002] ECR I-10943 *European Community, represented by the Commission of the European Communities v. First NV and Franex NV*, paragraph 49.
- ¹⁷ Paragraph 26 of the Notice.
- ¹⁸ White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2 April 2008.
- ¹⁹ 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, OJ 2001 L 145, page 43.
- ²⁰ ECJ of 21 July 2011, C-506/08 P *Sweden v. Commission and MyTravel Group plc*.
- ²¹ ECJ [2008] ECR I-4723 *Sweden and Turco v. Council*, paragraph 49.
- ²² See for example Article 15(1) of Regulation 1/2003.
- ²³ ECJ [1990] ECR I-3365 *J. J. Zwartveld and others*.
- ²⁴ The deadline to submit comments is 30 September 2011. See: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>
- ²⁵ The deadline to submit comments ended on 30 April 2011. See: http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html

II.1

Carl Baudenbacher, Luxemburg/St.Gallen*

Liechtensteiners Can Buy Secondary Homes in Austria, Because Liechtenstein is No Third Country

(‘projektart’ Errichtungsges. mbH, Eva Pepic and Herbert Hilbe v. Grundverkehrs-Landeskommission Vorarlberg, ECJ (Eighth Chamber), Order of 24 June 2011, C-476/10)

(1) Facts and Procedure

Eva Maria Pepic and Herbert Hilbe, both Liechtenstein nationals residing in Liechtenstein, wanted to buy an apartment in neighbouring Vorarlberg, Austria. They planned to use the dwelling which is located near Lake Constance as a *secondary home* and later, after retirement, as their main residence. On 23 March 2010 the competent Vorarlberg authority refused to grant the permission which is necessary for such a purchase under Vorarlberg law. The two Liechtensteiners took their case to the *Unabhängiger Verwaltungssenat des Landes Vorarlberg* which referred the following

questions to the Court of Justice of the European Union:

«1. Is Article 6(4) of Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, according to which existing national legislation regulating purchases of secondary residences may be upheld, still applicable to the purchase of secondary residences situated in a Member State of the EU by a national of the Principality of Liechtenstein, which forms part of the EEA?

2. Does national legislation which, on the basis of Article 6(4) of Council Directive 88/361/EEC of



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