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No access to file to leniency applications for third parties in Germany – national follow-on judgment in Pfleiderer

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On January 18, 2012, the district court of Bonn ruled on the scope of access to file for third parties in a cartel case under German law. The court rejected the claim insofar as it concerned access to leniency applications. This is a landmark decision. The court upheld the FCO's practice to refuse access to file to leniency applications and evidence provided by the applicants.

In 2008, the FCO had fined decorative paper manufacturers for cartel activities. The manufacturers had cooperated under the FCO's leniency program, and the case was ultimately settled. Pfleiderer, a decorative paper customer, requested full access to the FCO's file in order to examine and prepare possible damage claims. The FCO decided to grant partial access only: to a non-confidential version of the file, but without any internal records and without the evidence seized during the dawn raids. Most importantly, the FCO refused to grant access to the leniency applications and the evidence provided by the leniency applicants. The latter was in line with para. 22 of the FCO's leniency program, stipulating that the FCO does not grant third parties access to file to this type of records.

Pfleiderer appealed the decision with the district court of Bonn. The court initially decided that Pfleiderer should get full access to a non-confidential version of the file, with the exception of internal FCO records. After the decorative paper manufacturers intervened and challenged the full access to file *inter alia* based on EU competition law, the court requested a referral to the Court of Justice of the European Union. (Due to the editorial requirements of this blog, I should mention that I was involved in the case.)

The Court decided on June 14, 2011 (C-360/09) that the interpretation of EU competition law would 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*”. The Court ruled that it is up to the national courts to decide under which conditions to grant or refuse access under national law, by balancing the interests protected by EU law in a case-by-case analysis.

The Court found that these interests include on the one hand the right to claim damages for breach of EU competition law (*Courage* and *Manfredi*) and the principle that the national procedures should not render obtaining such compensation excessively difficult or practically impossible. On the other hand, the Court pointed out that the effectiveness of leniency programs as a successful tool to detect cartels is also protected by EU law, as is the interest to protect the information

voluntarily provided by leniency applicants. It was the first time that the Court acknowledged the functioning of leniency programs as an interest protected by EU law. The Court played the ball back to the referring court to decide upon the case in question.

The district court of Bonn now balanced the different interests in the actual case. It decided to grant access to a non-confidential version of the file, with the exception of internal FCO records and the exception of the statements and evidence provided by the leniency applicants. The court stressed the significance of the FCO's leniency program. Granting access to the leniency applications in this case would compromise the functioning of the leniency program in the future, and thereby the effectiveness of public cartel enforcement. This would also harm the possibility of civil damage actions that mostly occur as follow-on cases after successful public cartel enforcement. Further, the court found that para. 22 of the leniency program created legitimate bona fide expectations that the FCO would not disclose leniency applications and evidence provided by the applicants. In contrast, the court held that the partial access to file would not render it practically impossible for Pfleiderer to prepare and bring civil actions.

The decision is a good step for the leniency program and cartel enforcement in Germany, and it provides legal certainty. The case had triggered many questions. The ministry of economics has therefore proposed an amendment (as part of a larger antitrust law reform) to prevent access to file by third parties to leniency applications and evidence provided by the leniency applicants. The amendment would enshrine the principle as set out in para. 22 of the FCO's leniency program in a legal provision with general binding effect, including for the courts. (The FCO's leniency program represents administrative guidelines and only binds the FCO.)

Interestingly, the protection under para. 22 of the FCO's leniency program (and under the proposed amendment) seems broader than the protection the Commission would be willing to grant in its own cartel proceedings. In the *Pfleiderer* proceedings before the Court of Justice, the Commission stressed the distinction between (i) corporate leniency statements and (ii) so-called pre-existing evidence, and indicated that it would only protect the first from access to file requested by third parties.

It would be desirable that the Commission equally protects the evidence provided by leniency applicants, so that there would be a high protection of the functioning of leniency programs throughout the ECN, given their significant role in cartel detection. That there should be a level playing field for access to file rules and information provided by leniency applicants has also been voiced by Jan Mazak, the General Advocate in *Pfleiderer*, who followed, however, the Commission's approach in his opinion.

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