INFORMATIVE NOTE

EU AND COMPETITION LAW

CJ RULES ON THE ACCESS TO LENIENCY APPLICATIONS

On 14 June 2011, the EU Court of Justice (CJ) issued a preliminary ruling on the discoverability of leniency applications in civil antitrust proceedings[1] .

On 21 January 2008, the Bundeskartellamt fined three European manufacturers of decor paper and five individuals who were involved in a cartel which infringed EU competition law. Upon the closing of proceedings, Pfleiderer, a purchaser of decor paper, submitted an application to the Bundeskartellamt seeking full access to the file, with a view to preparing a civil action for damages. The Bundeskartellamt partly rejected that application and restricted access to the file to a version from which confidential business information, internal documents and documents obtained through leniency applications had been removed.

Pfleiderer thereupon brought an action before the Local Court of Bonn challenging that decision of partial rejection. On 3 February 2009 the Local Court of Bonn delivered a decision by which it ordered the Bundeskartellamt to grant Pfleiderer access to the file, including the material which the applicant for leniency had voluntarily provided. The court considered Pfleiderer to be an 'aggrieved party' within the meaning of the relevant German provisions, and to have a 'legitimate interest' in obtaining access to the documents, since those were to be used for the preparation of civil proceedings for damages.

However, as the Local Court of Bonn took the view that the resolution of the dispute required an interpretation of EU law, it decided to stay proceedings and sought a preliminary ruling from the CJ on the disclosure of leniency documents to plaintiffs on private actions for damages.

Several Member States submitted written pleadings to the CJ, taking the position that parties adversely affected

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[1]Case C-360/09, Pfleiderer AG v. Bundeskartellamt, Judgement of the CJ of 14 June 2011.

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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. Likewise, the Commission considered that a distinction should be made between the voluntary presentations by leniency applicants, which should not be disclosed, and the other pre-existing documents submitted by the leniency applicant. Advocate General Mazák also took the view that access to voluntary self-incriminating statements made by a leniency applicant should not, in principle, be granted[2] .

In its ruling, the CJ held that, since there is no binding regulation under EU law on the subject, it is for Member States to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures. However, the CJ reminded that Member States must exercise that competence in accordance with EU law. Specifically in the area of competition law, they must ensure that national rules do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU.

The CJ stated that two interests must be balanced. On the one hand, it should be kept in mind that the risk of disclosure of elements provided in the context of a leniency application could deter persons or undertakings involved in antitrust infringements from taking the opportunity offered by leniency programmes, which are useful tools in the fight against such infringements. On the other hand, any individual has the right to claim damages for loss caused to him by violations of competition law and the existence of such a right strengthens the working of the EU competition rules.

Accordingly, the CJ considered, in the assessment of an application for access to documents relating to a leniency application, it is necessary (i) to ensure that the applicable national rules do not operate in such way as to make it practically impossible or excessively difficult to obtain compensation, and (ii) 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. That balance exercise, the CJ concluded, can be conducted by the national courts and tribunals only on a case by case basis.

Although the CJ preliminary ruling is not conclusive, it appears to open the door to the possibility of materials handed to the relevant competition authority by the leniency applicant being disclosed to the civil actions' plaintiffs affected by antitrust infringements, contrary to the positions that have been sustained in that regard by the Commission and national competition authorities.

[2] **Case C-360/09, Pfleiderer AG v. Bundeskartellamt, Opinion of AG Mazák delivered on 14 June 2011.**