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Unforeseen Risks of Disclosure in Leniency Programs

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I. INTRODUCTION

When prosecuting cartel infringements, the European Commission (the “Commission”) most often builds its case on the basis of corporate leniency applications and documents. When the case reaches maturity and results in administrative fines being imposed on the companies implicated in the cartel, it then encourages affected consumers and customers to file-on civil claims against the same companies in national courts. Civil claims are viewed as furthering the Commission’s goal of achieving effective deterrence across the EU. Civil litigation, however, has not been very successful. This may be partially due to potential plaintiffs’ inability to collect the necessary evidence to establish their claims. This issue, and its potential conflict with the Commission’s leniency program, came to a head in *Pfleiderer*. In that case, the European Court of Justice (the “Court”) held that, in the absence of controlling EU-wide legislation on the question, national courts must decide on a case-by-case basis and in accordance with their national procedural laws the level of access a civil plaintiff should have to documents submitted under a cartel leniency program.

What does the Court’s position mean for leniency applicants? The leniency applicants’ submissions will be made public—unless they are not. *Pfleiderer* illustrates how the Court and the Commission are wrestling with the scope of disclosure owed to consumers affected by cartels. Companies ought to consider carefully the civil litigation implications when pressing the leniency button.

II. BACKGROUND

In Case C-360/091,² the Court received a reference for a preliminary ruling from the Amtsgericht Bonn (Germany), Bonn’s district court. The referring court asked *inter alia* whether, and if so to what extent, a national competition authority (“NCA”), in this case the Bundeskartellamt, may disclose information that has been voluntarily submitted to the NCA by a cartel member (under a leniency program) to a plaintiff seeking damages for injury caused by the cartel. *Pfleiderer*, a customer of a cartel member, invoked its right under the German Code of Criminal Procedure to inspect the Bundeskartellamt’s file in order to bring an action for damages. The Bundeskartellamt denied access, relying on its own leniency notice and objecting because:

- access would undermine its ability to enforce EU competition law; and

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² Case 360/09 *Pfleiderer AG v Bundeskartellamt* (reference for a preliminary ruling from the Amtsgericht Bonn (Germany)) [2011] ECR not yet published.

- disclosure might undermine cooperation within the network of NCAs and with the Commission.³

III. ADVOCATE GENERAL'S OPINION

In his Opinion,⁴ Advocate General Mazák considered the Commission's position in the 2006 Leniency Notice, namely that oral corporate leniency statements should not be accessible because access would put a leniency applicant in a worse position in a civil action than other infringing undertakings. This would undermine the leniency program's effectiveness—it would clearly become an unattractive route.⁵ Allowing access to such statements would considerably jeopardize the Commission's ability to prosecute cartels, since most proceedings are initiated as a result of its corporate leniency program.

AG Mazák pointed out that, while the Commission refuses access to leniency applicants' corporate statements, the 2006 Leniency Notice⁶ is silent on the treatment reserved for pre-existing documents that are submitted in support of an immunity/leniency application under the 2006 Leniency Notice. Since the Notice does not define "preexisting documents," the Advocate General concluded that they must be categorized as "[o]ther evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement."⁷

Turning his attention to the relationship between individual claims for damages and infringements of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), AG Mazák highlighted the fact that individuals have a right to claim compensation for harm suffered as a result of an infringement if there is a causal relationship between the harm suffered and the prohibited behavior. If an NCA were to deny individuals access to evidence that substantiates their claims, this could interfere with and diminish a party's fundamental right to an effective remedy, which the TFEU guarantees. It is here that the Commission's enforcement policies promote conflicting objectives: on the one hand, the Commission has a profitable leniency program both in terms of collected fines and number of applicants; on the other hand, individuals have a right, which the Commission wants them to exercise, to bring private actions.

AG Mazák chose his camp. After concluding that public enforcement of EU competition law is of greater importance than private enforcement, AG Mazák sought to strike a balance between the effective operation of a leniency program and the rights of individuals to claim damages. He concluded that all pre-existing documents other than oral leniency statements submitted as part of a leniency application should be made available to a third party seeking damages for injury caused by a cartel.

IV. COURT'S JUDGMENT

The Court, ruling in Grand Chamber, had other views. The Court pointed out that the Commission's Notices, including the 2006 Leniency Notice and Notice on Cooperation within

³ OJ [2003] L 1/1, Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [establishing the European Community], Articles 11 and 12.

⁴ Opinion of Advocate General Mazák delivered on 16 December 2010 in Case 360/09, *Pfleiderer AG v Bundeskartellamt* [2010] ECR not yet published.

⁵ *Id.* ¶ 17.

⁶ O.J. [2006] C 298/17.

⁷ *Id.* point 9(b).

the Network of Competition Authorities, are not binding on Member States and only concern the Commission's leniency program. Therefore, Member States retain discretion to establish national rules on the rights of individuals affected by cartels to access documents submitted under national leniency programs. However, the rules must not: (i) be less favorable than those that govern similar domestic claims; and (ii) make it practically impossible or excessively difficult for individuals to obtain the compensation they seek.

The Court concluded this weighing exercise, which the Advocate General performed in his Opinion, must be conducted by national courts and tribunals and it must be done on a case-by-case basis. In practice, the national court/tribunal must determine the conditions under which access will be permitted or refused any time a plaintiff seeking to obtain damages for cartel injury requests access to documents submitted under a national leniency program, including corporate statements. On its face this would appear to be a most cumbersome and unwieldy solution. Indeed, it not only requires the court and the NCAs to review leniency material on its own merits in order to determine whether such material is accessible to plaintiffs, but also it creates a situation where access may vary depending on the judge in charge of the matter and the jurisdiction in which the claims are brought.

V. ACCESS TO DOCUMENTS OF THE COMMISSION: WHAT IS THE CURRENT SITUATION?

Plaintiffs rely on *Regulation 1049/2001 Regarding Public Access to European Parliament, Council, and Commission Documents*⁸ to seek direct access to the Commission's cartel files. According to Regulation 1049/2001, subject to the protection of certain public and private interests, all of the institutions' documents should in principle be accessible to the public. Certain public and private interests are protected by exceptions to this rule.⁹ Among the protected interests are the protection of "the purpose of inspections and investigations" as well as the protection of internal documents where disclosure would undermine the institution's decision-making process.¹⁰ With respect to third-party documents that are held by the Commission, the Commission should consult the party prior to disclosure with a view to assessing whether any exception applies.

The Commission cannot blindly apply Regulation 1049/2001. According to consistent case law, it must engage in a case-by-case analysis—precisely what the Court instructs national courts/tribunals to do in *Pfleiderer*. Below, we look at cases interpreting the relationship between EU competition law and Regulation 1049/2001.

VI. VEREIN FÜR KONSUMENTENINFORMATION V COMMISSION AND TECHNISCHE GLASWERKE ILMENAU GMBH V COMMISSION

In Case T-2/03,¹¹ Verein für Konsumenteninformation ("VKI"), an Austrian consumer group that had the right to bring civil proceedings on behalf of consumers to claim damages, wanted access to the files in the Commission cartel case concerning Austrian banks—*Lombard Club*.¹² VKI requested the documents in order to put forward in its civil proceedings specific claims regarding both the defendant's illegal conduct and the effects of that conduct. After

⁸ 7 O.J. [2001] L 145/43.

⁹ *Id.* recital 11.

¹⁰ *Id.* Article 4.

¹¹ T-2/03 Verein für Konsumenteninformation v Commission, [2005] ECR II-01121.

¹² O.J. [2004] L 56/1.

engaging in various discussions and correspondence with the Commission, the Commission divided the 47,000 pages of documents (excluding internal documents) into 11 separate categories and then explained how each category was covered by one or more of Regulation 1049/2001's exceptions.

The [General] Court disagreed with the Commission's broad-brush treatment of the documents. Instead, the Commission must assess whether: (i) access to the document would specifically and actually undermine the protected interest; and (ii) there is no overriding public interest in disclosure. The risk of the protected interest being undermined must be reasonably foreseeable. It cannot be purely hypothetical. The Court pointed out that this examination must be carried out in a "concrete manner" and must be carried out for each document covered by the request for access.¹³

This process allows the Commission to determine the extent to which an exception to disclosure applies and, if so, whether at least partial access to the document is desirable. That said, the Court concluded that this type of analysis is unnecessary if, due to the particularities of the case, "it is obvious that access must be refused, or on the contrary, granted." For example, if the documents are manifestly covered in their entirety by an exception to the right of access.¹⁴

The Court reviewed the various exceptions raised by the Commission, including protection of the purpose of inspection, which included a reference to the fact that a large number of the documents were submitted under the Leniency Notice. The Court concluded, however, that the Commission was not entitled to reach such a blanket conclusion concerning the whole file without conducting a thorough individual examination of the relevant documents.¹⁵

The following year, in Case T-237/02,¹⁶ Technische Glaswerke Ilmenau GmbH requested documents concerning two State aid proceedings, in one of which it was an involved party. The Commission refused to disclose the documents that related to the applicant's proceeding, citing the protection of an investigation. Interestingly, the Court commented that the timing of an investigation might be a relevant factor, although it failed to provide any guidance in this regard. The Commission had referred to the documents as being part of "current investigations." But, at least one proceeding had ended with a decision. Thus, the Court pondered, but did not decide on, whether documents in the file of a concluded investigation could benefit from such an exception.¹⁷

VII. AGROFERT HOLDING A.S V COMMISSION AND SWEDEN/MYTRAVEL V COMMISSION

Shortly before AG Mazák's Opinion in *Pfleiderer*, the General Court ruled in Case T-111/07,¹⁸ which concerned Agrofert Holding a.s., a company that had requested access to documents concerning pre-notification and notification of a merger affecting its market. The Commission denied access, citing the exceptions in Regulation 1049/2001, as well as the duty of

¹³ *Supra* note 11, ¶¶ 69-71.

¹⁴ *Id.* ¶ 75.

¹⁵ *Id.* ¶¶ 79-88.

¹⁶ T-237/02 Technische Glaswerke Ilmenau GmbH v Commission [2006] ECR II-5134; see also the subsequent appeal C-139/07 P.

¹⁷ *Id.* ¶ 93.

¹⁸ T-111/07 Agrofert Holding a.s. v Commission [2010] ECR not yet published.

professional secrecy laid down in the Treaty [establishing the European Community] and the provisions on professional secrecy in the Merger Regulation.¹⁹

Looking at the first exception invoked under Regulation 1049/2001—namely, the protection of commercial interests unless there is an overriding public interest in disclosure—the Court succinctly laid out the following three-pronged test:

1. Do the documents come within the scope of the exception?
2. Might their disclosure specifically and actually undermine the protected interest?
3. If so, do the documents need to be protected in their entirety?²⁰

The Court went on to discuss the relationship between the Merger Regulation and Regulation 1049/2001. The Court held that public access to documents relates to all documents drawn up or received by the Commission and in its possession, in all areas of activity of the EU. No general carve-out exists for documents containing commercial secrets submitted under the Merger Regulation. Each document must be considered separately to see if it qualifies for any of the exceptions of Regulation 1049/2001.²¹

The Commission argued that by disclosing the documents it would be undermining “the climate of trust and mutual cooperation,” which, in turn, would compromise its merger reviews. The Court found this argument to be a mere assertion, and consequently hypothetical. While certain information or whole documents may need to be treated as confidential, the Commission cannot rely on an abstract concept of harm that might result from disclosure of the requested information.²²

The Court also tackled the timing issue, which was also raised in *Technische Glaswerke Ilmenau GmbH*. The Commission alleged that disclosing the documents would jeopardize the completion of its inspections. However, the Court pointed out that the Commission had already issued a decision on the matter and, therefore, disclosure of the documents could not jeopardize the investigation.²³ Interestingly, just this summer the Court handed down another judgment that looks at another twist to the timing issue (pre- versus post-decision). In *Sweden/MyTravel v Commission*,²⁴ Sweden appealed the General Court’s ruling that upheld the Commission’s refusal to grant MyTravel access to documents.

Those documents related to: (i) the Commission’s decision prohibiting MyTravel (then Airtours) from acquiring all of First Choice’s equity,²⁵ which was subsequently overturned by the General Court;²⁶ and (ii) the working group set up by the Commission to determine whether it was appropriate to appeal the Court’s judgment overturning the decision.

¹⁹ O.J. [2004] L 24/1.

²⁰ *Supra* note 18, ¶ 53.

²¹ *Id.* ¶ 80.

²² *Id.* ¶¶ 100-104.

²³ *Id.* ¶¶ 94-99

²⁴ C-506/08 P Kingdom of Sweden v Commission [2011] ECR not yet published (Sweden appealed the (then) Court of First Instance’s judgment of 9 September 2008 in Case T-403/05 MyTravel Group plc v Commission [2008] ECR II-02027).

²⁵ Case IV/M.1524 – Airtours/First Choice, O.J. [2000] L93/1.

²⁶ T-342/99 Airtours v Commission [2002] ECR II-2585.

The Commission rejected access to the documents, relying on various exceptions including Article 4(3), second paragraph, of Regulation 1049/2001 which applies to documents “containing opinions for internal use as part of deliberations [...] preliminary consultations within the institutions,” which can apply even after the decision has been taken if it would “seriously undermine” the decision-making process. This exception, like the others, only applies if there is no overriding public interest in favor of disclosure.

The Court held that the Article 4(3) exception draws a clear distinction between pre- and post-decision. The first paragraph concerns documents for internal use or received by *inter alia* the Commission, which relate to a matter where a decision has not been taken. The second paragraph provides that, after the decision has been taken, the exception covers only documents containing opinions for internal use as part of the deliberations and preliminary consultations within *inter alia* the Commission.²⁷ Thus, the same document may be covered by the exception before the decision is issued but not after the decision has been issued.

VIII. APPLICATION TO EU CARTEL INVESTIGATIONS

In its 2006 Leniency Notice, the Commission states that, normally, public disclosure of documents and written/recorded statements received under the Notice would undermine certain private or public interests, such as the purpose of inspections and investigations under Regulation 1049/2001, even after issuing a decision.²⁸ Such a statement from the Commission is unsurprising, but is it really enforceable in light of the above case law? As we have seen, the Court tends to treat these types of sweeping justifications as too broad and too vague and obliges the Commission to actually take the time to look at the documents that have been submitted irrespective of the reason for their submission.

Before *Pfleiderer*, since the Court does not have the power to compel the Commission to *inter alia* disclose specific documents, the Commission may have simply provided blanket exceptions against disclosure, which would amount to denying access of leniency documents to plaintiffs. The only remedy available to the latter would have been to lodge an appeal before the General Court. Since the General Court could only find that the Commission has misapplied Regulation 1049/2001, effective access to leniency documents under EU law could be denied repeatedly and, hence, would de facto be unavailable. Recent efforts from EnBW to access leniency materials relating to the *Gas insulated Switchgear cartel* through an appeal to the General Court may, however, unfold differently.²⁹ We will see how receptive the Court is to the Commission’s insistence that Regulation 1049/2001 is “not an appropriate means” to obtain access to documents for private claims.

Following *Pfleiderer* and a number of pending cases the Commission’s evasive tactics might soon become unsustainable. Indeed, access to documents submitted under national leniency programs could be granted to plaintiffs, while documents submitted under the Commission’s program would still be protected against disclosure through a strategy of foot-dragging.

²⁷ *Supra* note 23, ¶¶ 78-79.

²⁸ *Supra* note 5 at ¶ 40.

²⁹ T-344/08 EnBW Energie Baden-Württemberg v Commission, see Hearing Report of 29 November 2011.

IX. TWO UNWORKABLE SYSTEMS OR ONE-SIZE-FITS-ALL?

The effects of the Court's ruling in *Pfleiderer* have already trickled down to national courts. Indeed, Justice Roth, the judge presiding over *National Grid Electricity Transmissions Plc v ABB Limited & Ors*³⁰ broke from proceedings temporarily to read the judgment. In this case (before the English High Court), the plaintiff is seeking access to documents cartel members submitted to the Commission under its leniency program in *Gas-Insulated Switchgear*.³¹

Justice Roth has signaled that he will have to ask the Commission to state its position on the request for disclosure of the documents and may submit a reference for a preliminary ruling to the Court. In an article published by *The Guardian*, the Justice commented that the documents for which National Grid is seeking disclosure are documents that “are relevant to these proceedings and are documents to which [National Grid] would be entitled by way of standard disclosure under English rules in the absence of some supervening provision of EU laws.”³²

It is not entirely clear how Justice Roth's observation squares with the Office of Fair Trade's (“OFT's”) leniency program. The OFT's “Guidance Note on the Handling of Applications”³³ states that “[a]s a matter of general policy, the OFT would firmly resist, on public interest grounds, request for disclosure of leniency material [...] where such requests are made, for example, in connection with private civil proceedings,” although the accompanying footnote states, “Obviously where a court has made an order with which the OFT was bound to comply, the OFT would discharge its duty to the court.”³⁴ It sounds like it is time for some courts to make some decisions.

Any reference to the Court for a preliminary ruling may finally clarify the rules on the disclosure of leniency documents regardless of where the leniency application was submitted. As it stands, *Pfleiderer* requires a Member State's national court/tribunal to determine the conditions under which the access to leniency documents submitted under a national leniency program will be permitted or refused. EU case law on access to documents requires the Commission, in most cases, to look at each document submitted under its leniency program and determine whether an exception under Regulation 1049/2001 prevents its (partial) disclosure. It is hard to imagine that two systems, both of which rely on case-by-case analyses, are sustainable. Indeed, one leniency document would be treated in 28, let alone 2, different ways if each of the 27 Member States and the Commission were to look at its accessibility.

X. MEANTIME....

The Court's case law created uncertainty. So far, undertakings that have submitted oral statements under the Commission's leniency program have felt relatively comfortable in the knowledge that such statements would not be turned over to plaintiffs in a civil case—so far, so good. It is not entirely clear why such statements have been protected, although we know that the European Union has been quite successful in keeping such statements out of plaintiffs' hands in the United States by relying on rules on comity. Maybe statements are statements, not documents.

³⁰ [2009] EWHC 1326 (Ch).

³¹ [2008] O.J. C 5/7.

³² Available at: <http://www.guardian.co.uk/business/2011/jul/07/national-grid-cartel-documents-lawsuit>.

³³ http://www.of.gov.uk/shared_of/reports/comp_policy/of803.pdf.

³⁴ *Id.* ¶ 8.49 and footnote 77.

Alternatively, since the Commission tends to classify the transcripts of oral statements as “internal documents” it is likely that the documents are within the scope of the exception provided by Regulation 1049/2001’s Article 4(3). However, as we have seen, an issue of timing arises. Once the decision has been issued, can the transcript still be covered?

Yet another alternative is that such statements go to the purpose of an investigation and that there is no overriding public interest to disclose such statements—again we run into a timing issue. Furthermore, if the statement is regarded as a third party statement, the Commission must consult the third party in order to assess whether an exception applies (unless it is already clear that the document will or will not be disclosed). We can come up with any number of reasons why an exception would apply in any case.

As for pre-existing documents, while it is true that EU case law requires the Commission to engage in a case-by-case (possibly document-by-document) analysis, so far it appears that the system in place has not created any type of stumbling block for leniency applicants. Admittedly the Commission has created a somewhat bizarre situation since DG Competition has just published its draft guidance paper entitled, “Quantifying Harm in Actions for Damages on Breaches of Article 101 or 102 [TFEU].”³⁵ It seems rather odd that the Commission would focus on how damages should be calculated in civil proceedings if actions for damages may never be successful in the first place due to the lack of evidence available to plaintiffs.

EU law does not require the Commission to disclose documents in the way that, for example, the applicable provisions in the German criminal code did in *Pfleiderer*. The Commission will not receive an order from a national court or the Court requiring it to disclose documents in a civil case. And, as stated in its Notice on the co-operation between the Commission and courts of the EU Member States in the application of [Articles 101 and 102 TFEU], it will not hand over to national courts “information that is voluntarily submitted by a leniency applicant without the consent of that applicant.”³⁶ Plaintiffs in civil cases must request the documents from the defendants, the cartel members, and/or submit a request directly to the Commission for access to Commission documents pursuant to Regulation 1049/2001. Thus far, it has been relatively difficult for plaintiffs to obtain the leniency documents they seek.

None of this discussion even touches on the issues surrounding the relationship between the disclosure of leniency documents and criminal proceedings. This is a very real issue that the English courts have had to wrestle with recently and which deserves more attention over the coming months. One can imagine a situation where negotiations with authorities during the leniency process may keep an undertaking’s employees out of jail, but its leniency documents may ultimately be disclosed in the criminal trial of another undertaking’s employee.

It is clear that undertakings must engage in serious risk management analyses before submitting leniency applications to NCAs. A number of questions should be asked, including:

- In which Member State(s) is the cartel most active and likely to be prosecuted?
- Which Member States impose criminal as well as administrative sanctions (e.g. board disqualification or prison sentences)?

³⁵ Available in various languages at: <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

³⁶ O.J. [2004] C 101/54, ¶ 26.

- Do these Member States encourage their citizens to initiate civil proceedings?
- If so, are the damages significant?
- If a leniency application is submitted, is it likely to be successful (will the undertaking be granted a significant reduction or immunity)?
- What type of information should be included in a leniency application if it may be disclosed to a third party (only oral statements or a combination of oral statements and pre-existing documents)?
- Is the cartel likely to be prosecuted in third countries such as the United States, Korea, or Japan?
- Should the undertaking prepare a coordinated global approach or deal with each jurisdiction in turn?

The Commission has said that leniency programs must remain attractive to undertakings. The Court has held that the disclosure of documents must be considered on a case-by-case basis, and the Commission is bound to comply. So far, we have seen the Commission deny plaintiffs' requests for access to leniency documents after it has conducted its case-by-case analyses under Regulation 1049/2001.

However, the time may have arrived where the Commission's de facto denial of access to documents has come to an end. Indeed, the European Parliament is currently looking at revising Regulation 1049/2001 in order to make documents more accessible to the public. Furthermore, with both *EnBW* and *CDC Hydrogen Peroxide*³⁷ pending, the latter requesting the Commission's index to the file so that it can request under national law that the defendants turnover specific documents, the [General] Court is coming under increasing pressure to finally take a position on the scope of disclosure that should be required of the Commission. Soon, potential leniency applicants will need to conduct risk management analyses before submitting leniency applications to the Commission, too.

³⁷ T-437/08 *CDC Hydrogen Peroxide v Commission*, see Hearing Report of 14 June 2011