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Competition Litigation 2013

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Chapter 2

It is Always Darkest Before the Dawn: Litigating Access to Cartel Leniency Documents in the EU

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Once confined to US class actions, litigation by plaintiffs seeking to gain access to leniency documents in order to bolster their cartel damages claims has spread to European courts. These efforts have enjoyed a measure of success, both before national judges and the EU courts in Luxembourg. However, recent developments indicate that this success may be short-lived. Ultimately, legislation is required to ensure legal certainty and a level-playing field throughout the EU, and to safeguard the EU and national leniency programmes as a vital public enforcement tool against cartels; one without which plaintiffs could not bring any cartel damages claim in the first place.

It all started in America

US class actions litigants have long sought to get their hands on leniency documents. Statements by leniency applicants admitting to facts can be particularly persuasive evidence in a civil trial, particularly in the early stages where plaintiffs' representatives are trying to gain class certification and to survive motions to dismiss their claims. To address this threat, applicants under the US DOJ antitrust leniency programme have had recourse to a largely paperless process.

US plaintiffs therefore sought access to EU investigation materials, as a potentially much richer source of incriminating documents. While the European Commission quickly accepted to turn the leniency application procedure into a paperless process, EU cartel proceedings are essentially conducted in writing. Information extracted from leniency statements is incorporated in Commission Statements of Objections (SO) and in the ultimate fining decisions, and can also be used in Commission written Requests for Information (RFI). The cartel defendants may also want to refer to this information when responding to RFIs or to the SO.

The European Commission reacted by writing to or intervening as *amicus curiae* before US courts to oppose plaintiffs' motions to compel discovery of leniency documents [see Endnote 1]. With one notable exception in the *Vitamins* litigation, the Commission has been broadly successful in preventing the disclosure of leniency documents through the use of US pre-trial discovery.

Significantly, the Commission was not content to intervene with US courts to prevent the disclosure of leniency documents, it sought to promote the adoption of a legislative solution. On 6 April 2006, then Director General of DG Competition Philip Lowe wrote to the US Antitrust Modernization Commission, to ask whether specific measures could be considered "to limit the impact of US discovery rules on the European Commission's ability to detect and punish cartel behaviour". In the same cover letter to DG COMP's submission to the Commission, Director General Lowe argues that "(t)he very fact that the US courts address these issues on a case-by-case basis" creates an inherent risk and "(t)he resulting uncertainty might in itself be sufficient to have a chilling effect on the EC Leniency programme".

In its submission to the Modernization Commission, DG COMP took a firm stand, asserting that "European rules protect the confidentiality and prevent disclosure of submissions that have been specifically produced within the context of a leniency application. DG Competition strongly believes that the fact that US courts might regard such submissions as discoverable harms the effective enforcement of EC competition law" [see Endnote 2].

To European practitioners, these statements, while highly reassuring as to DG COMP's principle stance to protect the leniency process, begged the question: Are European rules as uncompromisingly protective as asserted by DG COMP in the US and if that is not the case, why does the Commission not seek to protect leniency documents through legislation, as it recommended should be done in the US? After all, there had been indications from the EU courts that matters might not be as clear as DG COMP would like them to be [see Endnote 3].

And then there was *Pfleiderer*

The crucial importance of the question was confirmed by the judgment of the Court of Justice of the EU in *Pfleiderer*. A customer of German decorative paper producers found to have engaged in cartel activities by decision of the Bundeskartellamt sought to obtain access to the Bundeskartellamt's file to strengthen its damages claim against the producers. Under German procedural rules, by extension of criminal procedure rules, lawyers for the victims of cartel behaviour can request the prosecuting authority, i.e. the Bundeskartellamt, for access to that authority's file. The Bundeskartellamt granted that request but refused access to all leniency documents. Upon appeal by Pfleiderer, the Amtsgericht Bonn disagreed with the Bundeskartellamt and considered that Pfleiderer was entitled to access under German rules. The Amtsgericht did however agree, upon urging by the Bundeskartellamt, to refer preliminary questions to the Court of Justice, to make sure that access under German rules would not fall foul of EU rules, and in particular of Regulation 1/2003, which contains a number of provisions restricting access to the file in competition proceedings.

Advocate General Mazak considered that the German court's question required the Court of Justice "to weigh and balance the possibly diverging interests of ensuring the efficacy of leniency programmes established for the purpose of detecting, punishing and ultimately deterring the formation of illegal cartels pursuant to

Article 101 TFEU, with the right of any individual to claim damages for harm suffered as a result of these cartels". [See Endnote 4.] He argued that the case-law of the EU Courts on public access to documents held by the institutions was of little help in carrying out this balancing, since applying this case-law "could incorrectly limit what appears to be a more extensive right of access to evidence by an allegedly injured party such as Pfleiderer for the purpose of establishing a civil claim before the courts under (the relevant German criminal procedure rules)" [see Endnote 5]. He also noted that the Bundeskartellamt's investigation into the decorative paper cartel was over, so that access to the leniency documents could not harm the investigation in that particular case. "The issue remains, however, whether access to the category of documents voluntarily communicated in the context of a leniency programme, could undermine in general the investigative process relating to infringements of Article 101 TFEU and thus the enforcement of these provisions by the Bundeskartellamt and other national competition authorities in accordance with the powers and duties accorded to them pursuant to Regulation No 1/2003." [See Endnote 6.]

The Advocate General answers this question in the affirmative: "the disclosure by a national competition authority of all the information and documents submitted to it by a leniency applicant could seriously undermine the attractiveness and thus the effectiveness of that authority's leniency programme as potential leniency applicants may perceive that they will find themselves in a less favourable position in actions for civil damages, due to the self-incriminating statements and evidence which they are required to present to the authority, than the other cartel members which do apply for leniency... A cartel member may therefore abstain from applying for leniency altogether or alternatively be less forthcoming with a competition authority during the leniency procedure" [see Endnote 7].

The Advocate General concedes that EU law has not established "any *de jure* hierarchy or order of priority between public enforcement of EU competition law and private actions for damages" but considers "the role of the Commission and national competition authorities is ... of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU" [see Endnote 8]. He notes further that victims of cartels also benefit from effective leniency programmes and concludes that "disclosure to civil litigants of the contents of voluntary self-incriminating statements made by leniency applicants" should not be granted [see Endnote 9]. As regards pre-existing documentary evidence submitted by a leniency applicant, however, the Advocate General considers that access to this information can be granted to plaintiffs [see Endnote 10].

The opinion of the Advocate General thus mirrors the position defended by the European Commission in US civil damages cases. However, the Grand Chamber of the Court of Justice of the EU chose not to take a clear-cut position, holding that it would be "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, by persons adversely affected by a cartel, to documents relating to leniency procedures" [see Endnote 11].

The Court acknowledged both the usefulness of leniency programmes as an enforcement tool and the risk that would-be leniency applicants would be deterred from applying for leniency by the possibility that leniency could be disclosed to plaintiffs seeking to bring a damages claim [see Endnote 12].

But it also reaffirmed the right of victims of anticompetitive behaviour to seek compensation for losses suffered as a result of such behaviour [see Endnote 13]. In doing so, it repeated the mantra that actions for damages participate to the deterrence of anticompetitive conduct and therefore "can make a significant contribution to the maintenance of effective competition in the European Union" [see Endnote 14]. That last assertion, clearly inspired by US concepts such as those behind the Supreme Court's *Hanover Shoe* [see Endnote 15] and *Illinois Brick* [see Endnote 16] rulings, is by no means uncontroversial in the EU. First of all, most civil liability systems in the EU are purely compensatory in nature and do not allow any "punitive" element in a damages award, as their purpose is not deterrence. Second, administrative fines for anticompetitive conduct, which have attained huge levels of late, are specifically set at a level that will ensure deterrence, so that the necessity of additional monetary awards against cartel defendants for deterrence purposes has not been satisfactorily demonstrated. Third, and perhaps most important as far as cartels in the EU are concerned, all cartel damages actions to date have been so-called "follow-on" actions, i.e. actions that were only started following on the announcement that a public enforcement investigation had been initiated, more often than not based on a leniency application. These actions do not help to uncover covert cartel activity and are wholly dependent on the success of public enforcement endeavours. This is precisely what led Advocate General Mazak to opine that preference should be given to public over private enforcement, in the absence of current EU legislation establishing such *de jure* hierarchy.

The Court held back from enacting such a clear preference. It noted that applicable national disclosure rules should not operate in such a way as to make it practically impossible or excessively difficult for plaintiffs to obtain compensation, and concluded that it would be up to the national courts "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" [see Endnote 17], adding that such balancing exercise would have to be conducted "only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case". [See Endnote 18.]

The Vagaries of Case-by-Case Balancing: *Pfleiderer* and *National Grid*

By the time the Amtsgericht Bonn was called upon to adjudicate definitively on Pfleiderer's request to access the leniency documents held by the Bundeskartellamt, it would appear that the presiding judge was no longer the one who had referred the question discussed above to the Court of Justice. In a ruling dated 18 January 2012 [see Endnote 19], the judge decided that, under German law, it would not be in the public interest to disclose any leniency document to Pfleiderer. Referring several times with approval to the opinion of Advocate General Mazak, as well as to paragraphs 26 and 27 of the Court of Justice's judgment, the judge held that disclosing the leniency documents would prejudice the success of the Bundeskartellamt's leniency programme [see Endnote 20], which is a primary tool in fighting cartels [see Endnote 21]. For good measure, the judge then added that the balancing of interests prescribed by the Court of Justice under EU law did not lead to a different conclusion. In reaching that conclusion, he held that the leniency documents were not necessary for Pfleiderer to bring its damages claim and that failure to disclose these documents did not make the claim practically impossible or excessively difficult [see Endnote 22].

Given this anticlimactic conclusion to the *Pfleiderer* saga, one might perhaps be forgiven for thinking that the general consternation and flurry of speeches by practitioners and calming statements by the EU Commission and national competition agencies following the Court of Justice's judgment may have been a storm in a teacup. This would be a wrong perception, however.

As the Court of Justice was considering the Amtsgericht Bonn's questions, the chancery division of the English High Court was being called upon to adjudicate in a dispute relating to pre-trial disclosure between National Grid Electricity Transmission PLC and 23 defendants belonging to groups found guilty to have participated in a cartel between producers of gas insulated switchgear [see Endnote 23]. National Grid was seeking from the defendants principally disclosure of the unredacted version of the European Commission decision against the switchgear cartel. Following the Court of Justice's ruling in *Pfleiderer*, however, National Grid amended its request to include a number of documents from the Commission's file (such as responses to the SO and responses to RFIs), about which it was common ground that they may contain extracts from leniency materials [see Endnote 24].

The High Court invited the European Commission to intervene, whereupon the Commission submitted written observations, pursuant to Article 15 (3) of Regulation 1/2003. Rather surprisingly, in these observations presented in November 2011, the Commission conceded that the Court of Justice's ruling in *Pfleiderer*, which concerned access to leniency documents in a national competition authority's file, applied by analogy to disclosure requests for leniency documents created for the purposes of a Commission investigation [see Endnote 25]. This position was based on the consideration that the Court of Justice's ruling is couched in generic terms, and does not appear to distinguish between the two situations. The High Court concurred with this view [see Endnote 26]. Yet, the fact remains that the Court of Justice had been asked by the German Court to consider whether EU law opposed disclosure of leniency documents generated in the course of a national competition authority's investigation, not the European Commission, and that arguments specific to the latter situation were not put to the Court of Justice. Indeed, the specific German criminal law disclosure procedure which allowed Pfleiderer to gain access to the Bundeskartellamt's files does not apply to European Commission files [see Endnote 27]. The question is far from academic as it is the purported all-encompassing scope of the Court of Justice's ruling in *Pfleiderer* which allowed the English High Court to dismiss the cartel defendants' claims of legitimate expectations that leniency materials provided to the Commission would never be disclosed [see Endnote 28].

The High Court therefore proceeded to conduct the balancing exercise between the plaintiff's interest in disclosure and the public need to protect an effective leniency programme, as envisaged in *Pfleiderer*. The High Court considered that, in the light of its knowledge of National Grid's complaint, it was better placed than the European Commission to conduct this balancing exercise [see Endnote 29]. The seemingly peremptory fashion with which it dismissed concerns that access to leniency documents may endanger the success of the Commission's leniency programme [see Endnote 30] begs the question whether a court is better placed than a competition agency to assess the effectiveness of its enforcement tools. A comparison with the Amtsgericht decision of 18 January 2012 shows that the High Court did not, for instance, consider that access to leniency documents, which by definition say more about the leniency applicant's own actions, pricing and customers than about those of other cartel defendants, may place the leniency applicant in a position where, contrary to other cartel defendants who have chosen not to cooperate with the Commission's investigation, its contributory role to the cartel and the ensuing loss for the plaintiff may be unfairly emphasised.

Be that as it may, the High Court considered that risks to the Commission's leniency programme could not justify a wholesale refusal of disclosure of leniency materials. This was the position that Advocate General Mazak had advocated in his opinion, but the *Pfleiderer* Court chose not to follow that route [see Endnote 31]. Yet, nothing indicates that this could not be the result of the balancing exercise that the Court of Justice entrusted to national courts, as shown by the Amtsgericht decision in that very case.

The High Court concluded that, in assessing National Grid's disclosure request, it would take into account the public interest in protecting the Commission's leniency programme through the proportionality review inherent in applying English rules on discovery, in particular through checking "(a) whether the information is available from other sources and (b) the relevance of the leniency materials to the issues in this case" [see Endnote 32]. This standard potentially does not place much restraint on a disclosure request, and certainly seems much laxer than the standard of excessive difficulty or practical impossibility to bring a damages claim without the requested documents, which was applied by the Amtsgericht in conformity with the Court of Justice's *Pfleiderer* ruling. The fact that a document is relevant and that the information it contains is not available elsewhere does not mean that it is necessary for the plaintiff to bring its damages action. The High Court does, however, temper its own standard by holding that it will concretely "ascertain whether the particular documents or parts of the documents really are *of such potential relevance* that specific disclosure should be ordered" [see Endnote 33].

Ultimately, the standard of heightened relevance applied by the High Court may not be very far from a necessity standard, in the light of the apparently relatively limited number of passages from documents for which it grants National Grid's disclosure request. The judgment does not, however, offer much information as to how the judge conducted his concrete assessment based on his review of the requested documents, leaving the reader, and, above all, future leniency applicants, in complete uncertainty as to the level of protection afforded to the leniency information they may consider bringing to the attention of a competition authority in the EU.

Meanwhile, back in Luxembourg...

As important as the various rulings in *Pfleiderer* and *National Grid* are, they only concern jurisdictions where plaintiffs can obtain pre-trial disclosure from cartel defendants or national competition authorities. In most jurisdictions, plaintiffs do not have this possibility. In order to get their hands on leniency documents held by the European Commission, their only potential recourse would appear to be making a request for public access to Commission documents pursuant to the provisions of the Transparency Regulation.

Following an initial, albeit limited, success in the *VKI* case [see Endnote 34], plaintiffs took heart from the judgment of the General Court in the *Odile Jacob* case, where the Court decided that a party challenging before the EU Courts the Commission's approval of a concentration pursuant to the EU Merger Control Regulation was entitled to obtain access to most of the Commission's file [see Endnote 35]. While this case concerned a merger rather than a cartel investigation, the sweeping manner in which the General Court dismissed the Commission justifications for refusing access to its files, based on the need to protect the purpose of its investigation and the commercial interests of the merging parties, bode ill for the Commission's efforts to resist requests for access to leniency documents in a cartel investigation.

In *Odile Jacob*, the Commission had sought to refuse access to its file purely on the grounds for justification laid down in the Transparency Regulation. Attempts by the intervening merger parties to raise the question whether the Transparency Regulation applied at all in the field of mergers, where the EU Merger Control

Regulation provides for its own, restrictive, mechanism for access to the Commission's files, were dismissed by the Court as inadmissible [see Endnote 36].

The question was nevertheless a real one, and even more so in the field of cartel investigations pursuant to Regulation 1/2003, which contains similar provisions as to confidentiality, professional secrecy and restrictive access to the Commission's file as the Merger Control Regulation. Indeed, where Odile Jacob was seeking access to the Commission's file to assist in its challenge of the Commission's approval of the merger contested by Odile Jacob, civil plaintiffs seeking damages for losses incurred as a result of a cartel violation do not require access to leniency documents to better understand the Commission's fining decision, to control the Commission's application of its fining powers or to prepare a challenge of that Commission decision. They are seeking access to the Commission's files to bolster their private damages action against the cartel participants, thus circumventing the limitations of their disclosure rights under the appropriate national civil damages procedural rules. This is not the aim of the EU Transparency Rules. As the General Court acknowledged in *Odile Jacob*, the objective of the Transparency Regulation is to ensure public access to the documents of the institutions "with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers" [see Endnote 37]. In the same judgment, the General Court concedes that the principle of transparency "seeks to ensure greater participation by citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system" [see Endnote 38]. Democracy is not in play when civil plaintiffs request access to leniency documents.

The General Court's uncompromising stance for the widest possible access to Commission competition files, irrespective of the more restrictive specific access rules laid down in EU regulations on competition procedures, was confirmed in the starkest possible terms in the recent *EnBW* judgment [see Endnote 39]. That case concerned an attempt by a German electricity distribution company to gain access under the EU Transparency Regulation to the file of the Commission's gas insulated switchgear cartel investigation, the very same investigation which had triggered the *National Grid* damages litigation in England, including any leniency documents contained therein.

The General Court rejected the Commission's attempt to justify its wholesale refusal to grant access to leniency documents on the grounds that it was plain that access should be refused, in the light of the specific restrictive rules governing access, laid down in Regulation 1/2003 and further implementing regulations. The Court held that these rules did not completely rule out access and could therefore not justify a refusal without a specific analysis of the contents of each document in the Commission's file, to see if they raised one of the concerns admitted by the Transparency Regulation as justifying a refusal [see Endnote 40]. The Court also held that the Commission's review of its file to consider access by grouping documents in a number of distinct categories was mostly useless, since the categories were based on the type of documents concerned, rather than on their concrete content [see Endnote 41]. Moreover, looking at the justification for the Commission's refusal to grant access to each of the defined categories of documents, the Court held that this was substantially the same for all categories, thus further demonstrating that the categories defined by the Commission served no useful purpose [see Endnote 42].

On this basis, the Court held that the Commission had failed to conduct a concrete, individual examination of the documents requested, which was sufficient to annul its refusal to grant access to its file with respect to most of the documents therein [see Endnote 43].

Turning to the actual justifications for the Commission's refusal to grant access to its file, the General Court first held that the public interest in protecting the purpose of Commission investigations, enshrined in the third indent of Article 4 (2) of the Transparency Regulation, could not justify the refusal to grant access as far as the Commission's investigation into the gas insulated switchgear cartel is concerned, because the Commission had long since completed that investigation [see Endnote 44].

The Commission had, however, also invoked the broader impact on Commission cartel investigations: "Given that, in proceedings against cartels, the Commission is reliant on the cooperation of the undertakings concerned, it submits that, if the documents that those undertakings provides it with were not kept confidential, the undertakings would have less incentive to file leniency applications and would also restrict themselves to the bare minimum when providing all other information, in particular as regards requests for information and inspections. The protection of confidentiality is thus a prerequisite for the effective prosecution of infringements of competition law and, by the same token, an essential component of the Commission's competition policy." [See Endnote 45.]

The General Court rejects that argument as it would be tantamount to permitting the Commission to always refuse access to its files relating to competition investigations, which, rather ironically, was precisely the Commission's point in arguing that it could reject the access request wholesale [see Endnote 46]. The General Court further considered that nothing in the Transparency Regulation "gives grounds for assuming that EU competition policy should enjoy, in the application of that regulation, treatment different from other EU policies" [see Endnote 47], thus ignoring the fact that the reason for such different treatment is to be found in the specific confidentiality and access rules of Regulation 1/2003, which has the same legal force as the Transparency Regulation, so that both instruments have to be read together in a coherent fashion. Finally, the Court summarily dismissed the importance of protecting leniency applications as a paramount enforcement tool, holding simply that actions for damages also contribute to the deterrence of cartels [see Endnote 48]. We have already shown above that the contribution of private damages claims to the deterrence of cartels is doubtful at best, while these claims do not contribute at all to the detection of cartels, for which the Commission's leniency programme has proven by far the most effective tool. Even more concerning, the General Court thus appears to reject the case-by-case balancing exercise between the public interest in protecting the leniency programme and the private interests of civil plaintiffs prescribed by the Court of Justice in *Pfleiderer*. Rather, the General Court appears to issue a generic edict, according to which the interest in protecting the leniency programme can never be invoked to refuse access to the Commission's files.

Turning to the protection of the commercial interests of the undertakings concerned, enshrined in Article 4 (2), first indent, of the Transparency Regulation, the General Court considered that the most of the information contained in the files was over five years old. Although the age of the information cannot be applied strictly to determine whether it is commercially sensitive, that fact alone justified a specific, individual appraisal of each document, which the Commission failed to conduct [see Endnote 49]. The Court dismissed the notion that the Commission's assessment of confidentiality for access to file purposes in the course of its cartel proceedings as well as when publishing a non-confidential version of the fining decision dispensed it from conducting a fresh review of the documents. The General Court went further, holding that the interests of cartel defendants not to have their information disclosed

to the EnBW "cannot be regarded as commercial interests in the true sense of those words". Rather, these interests seem to reside "in a desire to avoid actions for damages being brought against them before the national courts" [see Endnote 50].

The General Court went on to state: "Even though the fact that actions for damages are brought against a company can undoubtedly cause high costs to be incurred, be it only in terms of legal costs, even where the actions are subsequently dismissed as unfounded, the fact remains that the interest of a company which has taken part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition." [See Endnote 51.]

In this rather sweeping statement, the Court assumes facts not in evidence, i.e. that being denied access to the Commission's file will make it impossible for plaintiffs to file damages actions, thus allowing the cartel defendants to avoid such litigation. It further interprets the notion of "commercial interests" in Article 4 (2), first indent, of the Transparency Regulation contrary to the plain meaning of these words: the information belonging to cartel participants contained in the Commission's files, no matter how old, is not public information and – unless national rules on pre-trial disclosure in civil damages claims so provide – the cartel participants have no legal duty to disclose it to anyone. This information has been provided to, or collected by, the European Commission pursuant to Regulation 1/2003, which provides that this information will be kept confidential and will not be used beyond the specific purposes envisaged in the regulation, which do not include the use in private damages litigation. To the extent that their information contained in the Commission's file could be used by the plaintiffs to bolster a civil claim against them, the cartel defendants have a commercial interest that this information not be provided to the plaintiffs. Branding this interest as undeserving of protection because plaintiffs have a right to claim for damages ignores both the fact that the Transparency Regulation has not been enacted to promote plaintiffs' interests in private litigation, but to ensure transparency and democracy in the working of the EU institutions, and the fact that national procedural rules applicable to these civil claims do not entitle plaintiffs to obtain access to these documents, which means that cartel defendants are legally entitled to deny these documents to the plaintiffs [see Endnote 52]. Finally, allowing such use of non-public information for reasons other than those under which the Commission was authorised to obtain it violates the cartel defendants' right to privacy, as protected by Article 8 of the European Convention on Human Rights and Article 7 of the EU Charter on Fundamental Rights.

Whatever the criticism that can be levied at this ruling, the General Court's judgment in *EnBW* indisputably raises a major issue for the continued effectiveness of the Commission's leniency programme. Based on that ruling, the Commission may indeed not raise the danger to its leniency policy as a reason to refuse access to leniency documents. Given that the protection of commercial interests cannot be raised as a justification of refusal either, it follows that plaintiffs should now be entitled to obtain access to most documents in a Commission cartel investigation file, including leniency documents.

Yet, the picture may not be as bleak as meets the eye for the Commission's leniency policy. The Commission has announced its intention to appeal the General Court's judgment to the Court of the Justice and, based on a very recent judgment of the higher Court, the chances of reversal of the *EnBW* ruling appear very high indeed.

Barely one month after the General Court's judgment, the Court of Justice ruled on the Commission's appeal against the General Court's 2010 judgment in the *Odile Jacob* case [see Endnote 53]. In reversing the General Court's judgment, the Court of Justice disagreed with virtually every consideration in the lower Court's ruling.

First, the Court of Justice considered that the Transparency Regulation and the confidentiality and access rules in the Merger Regulation had to be read together, "in a manner compatible with the other and which enables a coherent application of both of them" [see Endnote 54]. In light of the "strict rules as regards the treatment of information obtained or established in [merger] proceedings", the Commission is entitled, when assessing a request for access to its merger investigation files pursuant to the Transparency Regulation, to base itself on general presumptions applying to categories of documents in its file [see Endnote 55]. Generalised access to merger files pursuant to the Transparency Regulation would "jeopardise the balance which the European Union legislature sought to ensure in the merger regulation between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other" [see Endnote 56]. "Consequently […], the General Court should have acknowledged the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure." [See Endnote 57.]

The Court added that this principle objection to access to merger control files applies irrespective of whether the merger investigation in question is already closed or still pending at the moment access to the file is requested under the Transparency Regulation: "The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending." [See Endnote 58.]

The reasoning of the Court of Justice would appear to apply with equal, if not greater, force to the chilling effect that access to leniency documents could have on leniency procedures.

Legislation is Needed to Ensure Legal Certainty

Even if, as expected, the Court of Justice reverses *EnBW*, much uncertainty will remain in a domain where every unclear element reinforces companies' natural reluctance in availing themselves of the leniency programme. The Court of Justice closing the door on transparency requests for access to cartel investigation files will not directly impact the case-by-case balancing exercise that national courts whose procedural rules provide for some type of pre-trial disclosure are still meant to carry out according to the Court of Justice's *Pfleiderer* ruling. Following *Pfleiderer*, the European Commission and the German Ministry of Economic Affairs both indicated that they would work on legislation to protect the integrity of their leniency programmes. The UK Government has also indicated its willingness to consider legislation in this respect, while expressing a hope that EU level legislation could be enacted soon [see Endnote 59].

Endnotes

1 Re *Vitamins Antitrust Litigation*, Misc. No. 99-197, Docket No. 3079 (D.D.C. May 20, 2002); Re *Methionine Antitrust Litigation*, Misc. No. C-99-3491, MDL No. 1311 (N.D. Cal. June 17, 2002); Re *Rubber Chemicals Antitrust Litigation*, 486 F.Supp. 2d 1078 (N.D. California 2007); Re *Flat Glass Antitrust Litigation*, No. 08-180 MDL (W.D. Penn, 2009); Re *TFT-LCD (Flat Panel) Antitrust Litigation*, No. M:07-1827 (N.D. Cal.2011); Re *Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D. N.Y.).

2 DG COMP, Submission to the Antitrust Modernisation Commission, Brussels, 4 April 2006, section 2.7 at page 7.

3 Case T-2/03, *Verein für Konsumenteninformation*, 13 April 2005.

4 Opinion of AG Mazak in case C-360/09, at point 2.

5 *Idem*, at point 19. Recent developments in the case-law relating to access to European Commission competition files pursuant to Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ("the Transparency Regulation") will be discussed below.

6 *Idem*, at point 20. Note that the Advocate General does not mention the impact on European Commission investigations under Regulation 1/2003. That issue was not directly raised by the Amtsgericht Bonn's question.

7 *Idem*, at point 38.

8 *Idem,* at point 40.

9 *Idem,* at points 41 to 46.

10 *Idem,* at point 47.

11 Judgment of the Grand Chamber of 14 June 2011, case C-360/09, paragraph 23.

12 *Idem,* at paragraphs 25 to 27.

13 *Idem,* at paragraph 28.

14 *Idem,* at paragraph 29 referring to the Court of Justice's ruling in *Courage and Crehan*, case C-453/99, judgment of 20 September 2001, paragraph 27.

15 392 U.S. 481 (1968).

16 431 U.S. 720 (1977).

17 Case C-360/09, at paragraph 30.

18 *Idem,* at paragraph 31.

19 Amtsgericht Bonn, 51 Gs 53/09, available at. http://www.justiz.nrw.de; see also the English press release dated 30 January 2012, published by the Bundeskartellamt on its website http://www.bundeskartellamt.de.

20 Amtsgericht Bonn, at points 28 to 30.

21 *Idem,* at point 34.

22 *Idem,* at points 36-37.

23 Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement, case COMP/F/38.899 – Gas insulated switchgear.

24 *National Grid Electricity Transmission plc v ABB Ltd and others*, judgment of 4 April 2012, [2012] EWHC 869 (Ch), point 17.

25 See Commission observations, at point 10.

26 Judgment of 4 April 2012, point 25.

27 A German plaintiff seeking access to European Commission files would have as its only recourse a request for access under the EU Transparency Regulation, as vividly illustrated by the *EnBW* case discussed below, which concerned the same European Commission investigation into the gas insulated switchgear cartel as *National Grid*.

28 Judgment of 4 April 2012, point 34. The terms of the judgment appear to indicate that, like the Court of Justice (but we contend that that Court did not have to consider this factor since its ruling was in fact confined to access to national competition authority files), the High Court was not made aware of the significance of the unequivocal claim of confidentiality of leniency materials which the European Commission had made in 2006 to the US Antitrust Modernization Commission.

29 Judgment of 4 April 2012, point 26.

30 *Idem*, points 36-37.

31 *Idem*, point 36.

32 *Idem*, point 39.

33 *Idem*, point 52.

34 Case T-2/03, *Verein für Konsumenteninformation*, 13 April 2005.

35 Case T-237/05, *Odile Jacob*, judgment of 9 June 2010.

36 *Idem*, paragraph 38. An intervener in EU courts' proceedings may only support the form of order sought by the party it wishes to support through its intervention. Since the Commission had not asked the Court to rule that the Transparency Regulation did not apply to access to merger investigation files, the intervener's argument to that effect went beyond the form of order sought by the Commission and was therefore inadmissible.

37 *Idem*, paragraph 75.

38 *Idem*, paragraph 161. On appeal, the Court of Justice will confirm that the Transparency Regulation is "designed to facilitate as far as possible the exercise of the right of access to documents, and to promote good administrative practices", case C-404/10 P, *Commission and Odile Jacob*, judgment of 28 June 2012, paragraph 109.

39 Case T-344/08, *EnBW Energie Baden-Württemberg*, judgment of 22 May 2012.

40 *Idem*, paragraph 61.

41 *Idem*, paragraph 68.

42 *Idem*, paragraph 74.

43 *Idem*, paragraph 109 and 111. The Court found that only one category of documents defined by the Commission served a useful purpose. This was the category of documents seized during the Commission's surprise inspections at the premises of several cartel participants. All these documents had been seized against the will of the companies concerned, which according to the Court raised inherently different expectations of confidentiality than leniency documents, even though these expectations could in both cases be linked to Article 28 of Regulation 1/2003, which provides that information obtained by the Commission through the use of its investigatory powers conferred by Regulation 1/2003 will be kept confidential and only used for the purpose for which it was gathered, see judgment at paragraph 77. Note that the fact that the General Court accepted that the category defined by the Commission was relevant and useful for the analysis of EnBW's request for access does not mean that the General Court agreed that the Commission was entitled to refuse access to this category of documents. The General Court in fact rejected the reasons provided by the Commission to justify this refusal.

44 *Idem*, paragraph 122.

45 *Idem*, paragraph 124.

46 *Idem*, paragraph 125.

47 *Idem*, paragraph 127.

48 *Idem*, paragraph 128.

49 *Idem*, paragraph 142.

50 *Idem*, paragraph 147.

51 *Idem*, paragraph 148.

52 Unless it would be shown that, without access to these documents, it would be practically impossible or exceedingly difficult for plaintiff to bring their claim, a demonstration that has not been made so far and that the Amtsgericht Bonn specifically rejected on the facts in its 18 January 2012 ruling in *Pfleiderer*.

53 Case C-404/10 P, *Commission and Odile Jacob*, judgment of 28 June 2012.

54 *Idem*, paragraph 110.

55 *Idem*, paragraph 118.

56 *Idem*, paragraph 121.

57 *Idem*, paragraph 123.

58 *Idem*, paragraph 124.

59 Department for Business, Innovation & Skills, Private Actions in Competition Law: A Consultation on Options for Reform, 24 April 2012.

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