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## No Access to Leniency Documents for Private Plaintiffs in Germany

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In a decision published at end of January, the Local Court of Bonn, Germany denied a private party making a damage claim access to documents in the files of the German Federal Cartel Office (FCO) that an applicant had provided as part of the leniency application process.<sup>1</sup> This is the first decision of a national court implementing the *Pfleiderer* decision (C-360/09) of the Court of Justice of the European Union (Court of Justice) concerning access by private claimants to leniency applications in cartel investigations conducted by Member State authorities. The present ruling not only sets an important precedent for Germany, but may also influence the current discussions at the EU level and in other Member States regarding whether damage claimants can be denied access to leniency documents.

### Background

In 2008, the German FCO fined three manufacturers of decor paper for price fixing and other cartel arrangements. *Pfleiderer*, a major purchaser of decor paper, requested access to the FCO's file, including leniency applications, to prepare damages actions. In accordance with its leniency notice, the FCO denied access to the leniency documents. *Pfleiderer* appealed to the Local Court of Bonn, which then referred the question to the Court of Justice of whether EU law would prohibit a disclosure of leniency documents submitted to Member State authorities in cartel investigations. In *Pfleiderer*, the Court of Justice held in June 2011 that EU competition law, itself, does not prevent a party seeking damages for cartel infringements from gaining access to such documents. The Court also found, however, that it would be for national courts to determine on a case-by-case basis the conditions under which such access must be granted or denied. In making that determination the national courts must weigh interests protected by European Union law, particularly the interests in effective cartel enforcement that is promoted by leniency programs and the rights of private plaintiffs to claim damages for competition law infringements.

### The Decision of the Local Court of Bonn

In applying the criteria outlined by the Court of Justice and the German rules on access to files in criminal investigations, the German court has now denied *Pfleiderer* access to the leniency applications and evidence voluntarily supplied by the leniency applicants. The court held that such

disclosure could undermine the effectiveness of the FCO's leniency program. Cartel members could be deterred from making leniency applications with self-incriminating information if private plaintiffs are later entitled to receive access to these documents. This could impede the effective detection and prosecution of cartels.

In weighing the relevant interests in effective public and private competition law enforcement protected by European Union law, the court ruled that the refusal to provide access to the leniency applications would not make it "practically impossible or excessively difficult" for Pfeleiderer to obtain a compensation for the damages suffered. First, Pfeleiderer would receive access to the non-confidential versions of all other documents in the FCO's file, including non-confidential versions of documents seized during dawn raids (which took place before the leniency applications were filed). Second, the court stressed that German courts dealing with follow-on damage claims are bound by findings in final decisions of cartel authorities under German law. Accordingly, Pfeleiderer would not require the leniency documents to show that a competition law infringement occurred, but could rely on the FCO's fining decisions.

### **Plans for Statutory Exclusion of Access Rights in Germany**

The court's decision coincides with plans of the German Ministry of Economic Affairs to include a provision in the upcoming amendment of the German Act against Restraints of Competition that would generally exclude leniency documents from the class of files to which damage claimants are entitled. Whether such statutory rules blocking access to leniency documents are compatible with EU law is a question currently pending before the Court of Justice in a referral by an Austrian court (Case C-536/11).

### **Ongoing Debate in the EU**

Although the Bonn court's decision has brought clarity to the legal issue in Germany for the time being, whether damage claimants should be entitled to obtain leniency documents will likely remain the subject of debate in other Member States and at the EU level. The European Commission has recently been successful in preventing disclosure in discovery disputes before US courts, for example in the air cargo shipping case.<sup>2</sup> However, plaintiffs continue to seek access to similar documents through the EU Transparency Regulation No. 1049/2001, which provides general access rights to files of EU institutions. The extent to which leniency documents should be protected from disclosure through the Transparency Regulation is a question currently pending before the EU General Court in *EnBW v. Commission* (Case T-244/08). In a judgment of 15 December 2011 (*CDC v. Commission*, T-437/08)—which concerned access to the table of contents of the Commission's file, but not the leniency applications itself—the General Court indicated that it would take a disclosure-friendly position and emphasized that exceptions to the right of access under the Transparency Regulation must be construed narrowly.

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<sup>1</sup>Local Court of Bonn (Amtsgericht Bonn), Case No. 51 Gs 53/09, decision of 18 January 2012.

<sup>2</sup> *In re Air Cargo Shipping Services Litigation* (United States District Court, E.D.N.Y., Docket No MD-06-1775), the court rejected the plaintiff's discovery motion to compel production of leniency

documents based on international comity. The court gave substantial weight to a submission filed by the Commission stating that disclosure would be highly detrimental to the sovereign interests and public policies of the European Union.

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