

## German Court rejects access to leniency applications in the aftermath of the ECJ's preliminary ruling in *Pfleiderer*

In January 2012, the District Court of Bonn determined that a victim of a cartel seeking damages has no right to access the corporate statements of a leniency applicant.<sup>1</sup> *Pfleiderer*, a customer and alleged victim of the decorative paper cartel, had approached the German Federal Cartel Office (“FCO”) in 2008, and requested full access to the cartel file, including access to the leniency statements. The FCO granted limited access to the file, and denied access to the authority’s internal documents and to corporate statements and associated evidence, *i.e.*, documents that were voluntarily submitted in connection with the leniency application. *Pfleiderer* appealed to the District Court of Bonn, seeking access to the entire file. After obtaining a preliminary ruling from the ECJ, the District Court now upheld the FCO’s decision to reject access to leniency statements. In addition to access to the fining decisions and a list of evidence, the District Court now also allowed access to evidence seized during the proceedings.

The District Court of Bonn rejected the granting of access to the corporate statements relying on a provision that stipulates that access to file may be refused, if the objective of the investigation (be it the procedure at hand or another procedure) appears to be compromised as a result.<sup>2</sup> It reasoned that granting access to corporate statements could compromise investigations of the FCO with the purpose of uncovering and prosecuting cartels. Cartel members would presumably refrain from using the leniency program if their submissions were provided to potential cartel victims seeking private damages.

In balancing *Pfleiderer*’s interest in obtaining access to documents from the FCO’s file to pursue damage claims against the leniency applicants’ interest, the District Court took into account the following considerations:

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<sup>1</sup> AG Bonn (District Court Bonn), decision of January 18, 2012, Case no. 51 Gs 53/09. A German version of the decision is available at: [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil\\_des\\_AG\\_Bonn\\_vom\\_18.01.2012\\_-\\_Az.\\_51\\_GS\\_53-09.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf).

<sup>2</sup> Section 406e para. 2 (2) of the German Code of Criminal Procedure: “Access to file shall be rejected if overriding interests that are worth to be protected, either of the accused or of other persons, conflict. It may be rejected if the purpose of the investigation, also in separate criminal proceedings, appears to be compromised.”

- The leniency applicant had voluntarily created and submitted self-incriminating information, which the FCO would have not have been able to obtain in dawn raids;
- The leniency applicant submitted the information in the expectation that the authority would not disclose it;<sup>3</sup>
- Leniency programs are a very useful tool for the effective enforcement of Article 101 TFEU. Making leniency applications available to third parties could have negative effects on the proper functioning of leniency programs and therefore weaken effective public cartel enforcement;
- It has to be checked which parts of the FCO's file are relevant for the damage claim. The District Court found that *Pfleiderer* was not unduly burdened, as it had received access to the fining decisions and a list of evidence collected during dawn raids. In addition, the District Court granted *Pfleiderer* access to evidence seized during the FCO's proceedings.
- The District Court concluded that the leniency applicants' interests outweighed *Pfleiderer's* interests as far as the leniency submissions were concerned. However, it allowed access to evidence that the FCO had collected during the proceedings. Since the District Court confirmed the original FCO decision in which access to voluntarily submitted documents was denied, it seems that it also considers that documentary evidence submitted as part of the leniency submissions should be treated as confidential part of the leniency application. This is also supported by the fact that the District Court refers to the FCO's Leniency Notice, which specifies that the FCO will reject access to file not only insofar as the corporate statement is concerned, but also as regards the evidence provided by the leniency applicant.<sup>4</sup>

With this decision, the District Court of Bonn eliminates fears that the success of the FCO's leniency program could be undermined by allowing third party access to leniency applications. Originally, the District Court had ordered the FCO to also grant *Pfleiderer*

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<sup>3</sup> See Notice no. 9/2006 of the FCO on the immunity from and reduction of fines in cartel cases of 7 March 2006 ("Leniency Notice"), para. 22: "*Where an application for immunity or reduction of a fine has been filed, the FCO shall use the statutory limits of its discretionary powers to refuse applications by private third parties for access to file or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.*"

<sup>4</sup> The Court held that access to file could be denied as far as documents submitted under para. 22 of the Leniency Notice were concerned. The paragraph reads (emphasis added): "*Where an application for immunity or reduction of a fine has been filed the FCO shall use the statutory limits of its discretionary powers to refuse applications by private third parties for access to file or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.*"

access to materials provided by the leniency applicants. It concluded that *Pfleiderer* had a legitimate interest to access the file, including corporate statements. When the leniency applicants learned of the decision, they filed a complaint based on an infringement of their right to be heard, because the initial decision had been rendered without their involvement in proceedings between *Pfleiderer* and the FCO. The District Court of Bonn reverted its previous decision and asked the ECJ for a preliminary ruling whether EU law prohibited it from granting access to corporate statements. The ECJ ruled that EU law did not generally prohibit national competition authorities from granting access to information and documents obtained from a leniency applicant, but that it is for the national courts to determine the conditions for granting such access, by balancing the competing interests protected under EU law, the interest in effective public enforcement on the one hand and functioning private enforcement on the other hand.

The decision of the Court is final. However, *Pfleiderer* could file a constitutional claim at the German Supreme Court.

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