

E-ALERT | Antitrust Litigation

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ACCESS TO CARTEL EVIDENCE: NO FULL SHIELD FROM CLAIMANTS' GRIP

The European Union's Court of Justice (CJEU) has handed a victory to cartel damage claimants. In its 6 June *Donau Chemie* ruling,¹ the CJEU held that EU Member States cannot adopt legislation that deprives plaintiffs of all rights to access evidence in a cartel file of an antitrust authority.

The issue was referred to the CJEU in the context of a cartel damage claim filed before an Austrian court. The plaintiff had requested access to the file from the proceedings between the cartel participants and the Austrian Competition Authority, which also contained materials received as part of leniency applications. Austrian law provides that plaintiffs may access such files only with the defendants' consent; in practice, defendants never consent. In its ruling the CJEU took issue with the Austrian law, finding that it effectively bars claimants from exercising their right under EU law to seek compensation for cartel harm.

Weighing public vs. private enforcement interests: a standard filled with uncertainty

In its June 2011 *Pfleiderer* judgment the CJEU refused to guarantee the secrecy of leniency submissions, and instead left the delicate task to balance public and private enforcement objectives to the national courts. Following this approach, the *Donau Chemie* judgment held that it is a matter for national judges to weigh the public interests for and against disclosure to determine whether, in each individual case, plaintiffs should be provided with access to some or all of the cartel file. This balancing exercise requires national judges to consider all of the relevant factors in the case, including whether opening the cartel file is the only avenue for plaintiffs to obtain the evidence that they need to support their claim.

The CJEU also disagreed with the Austrian government on the potential impact of such access on leniency programs. While it acknowledged that leniency programs are good instruments to fight cartels, the CJEU held that this cannot justify systematic refusal to disclose leniency materials. Instead, the CJEU held that national courts must balance the public and private enforcement interests with respect to each leniency document, and should refuse access to a particular leniency document only if there are "*overriding reasons*" to keep the document away from the claimant. The CJEU did, however, note that the "*mere risk*" of undermining the effectiveness of a national leniency program is "*liable to justify*" a refusal to disclose an individual leniency document.

While yesterday's ruling does not represent a significant departure from the approach initially adopted in *Pfleiderer*, it is bad news for (prospective) leniency applicants as it confirms that they cannot be certain *ex ante* as to whether and which of their leniency materials may end up in the hands of plaintiffs in follow-on damages actions. In addition, the ruling leaves leniency applicants with the likelihood that they will face different levels of disclosure in different jurisdictions: courts across the EU may well take different views as to what amounts to a "mere risk" of undermining a leniency program.

¹ Case C-536/11.

More certainty to come?

Greater certainty may, however, be on the way. The EU Commission is slated to issue a proposal for a directive on private antitrust claims that will attempt to bring more certainty regarding access to cartel files and disclosure of leniency materials on June 11, 2013. The EU Commission has been concerned since the *Pfleiderer* judgment that (prospective) leniency applicants would be made more reluctant to blow the whistle, or would be more cautious in their statements, to reduce the risk that they could be used in subsequent private litigation.

We understand that the proposed directive will propose that absolute secrecy be given to certain types of documents such as corporate statements, while other types of documents such as responses to the competition authority's requests for information will enjoy only temporary protection.

The EU landscape is becoming more claimant friendly

Beyond the question of access to cartel evidence, it is clear that the EU Member States are becoming increasingly attractive fora for private antitrust damage claims:

- Some Member States, [including the UK](#), are mulling legislation to introduce "opt-out" mechanisms for collective redress (with some procedural safeguards); and
- The EU Commission's proposed directive will not be limited to access to file issues. It will also address statute of limitation and causation issues. In addition, the EU Commission is expected to simultaneously issue guidance to quantify harm suffered by cartel victims, as well as non-binding recommendations to promote collective actions (with safeguards intended to preclude abusive mass claims).

These ongoing developments at the EU and national levels are likely to significantly change the landscape for follow-on damages claims. Companies engaged in – or about to become engaged in claims – would be well-advised to carefully consider the impact of these developments on their litigation strategies.

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