



Articles

EU—EU's Top Court Refuses to Bar Third Party Access to Leniency Statements Submitted to National Competition Authorities

By Philipp Werner (McDermott Will & Emery LLP).....p. 3

EU—Upcoming EU Requirements on Goods Treated with Biocidal Substances

By Peter Bogaert and Candido García Molyneux (Covington & Burling LLP).....p. 6

EU—European and Transatlantic Export Controls: Europe's New Dual-Use Green Paper

By Jacques Bourgeois, Naboth van den Broek, Stefan Ohlhoff, Barry J. Hurewitz and Ronald I. Meltzer (Wilmerhale).....p. 9

EU—Roundup: EU Seen Imposing Standards to Avert Trading Glitches; European Pay Curbs to Hit Hedge Funds, Private Equity

By Reuters.....p. 11

Italy—Clarification on Requirements for Dividend-Withholding Tax Reimbursements in Italy

By Mario Martinelli (McDermott Will & Emery LLP).....p. 13

United Kingdom—EU/UK Competition Law Update

By Matthew Hall and Robert Rakison (McGuireWoods LLP).....p. 15

IN THIS ISSUE

Third Parties May Gain Access to Leniency Statements

A recent judgment of the European Court of Justice may open the way for plaintiffs to obtain access to leniency statements submitted to national competition authorities. Companies thinking about applying for leniency anywhere in the EU should consider the risk that sensitive and incriminating leniency documents may fall into the hands of civil damages clients. *Page 3*

Reform of Europe's Dual-use Export Control Regime

The EC recently issued a Green Paper on the EU's export control regulations for dual-use items having both civil and military applications, presenting possible areas for reform. However, the Green Paper devotes little attention to potentially significant transatlantic implications and the ongoing reform of U.S. export control rules. *Page 6*

Italy's Requirements for Dividend-withholding Tax Reimbursements

The Italian Revenue Agency recently issued a circular letter clarifying the requirements that EU-resident companies must fulfill to qualify for the reimbursement of Italian tax withheld on dividends distributed up until 2008. Some of these requirements may prove difficult to fulfill. *Page 13*

UK's Competition Compliance Guidance for Directors

The UK's Office of Fair Trading recently published the final version of its guidance material on competition compliance. *EuroWatch* discusses the OFT's expectations of directors. *Page 15*

Topical Index Page 2

TOPICAL INDEX

Competition Law: EU's Top Court Refuses to Bar
Third Party Access to Leniency Statements
Submitted to National Competition Authorities.....p. 3

Competition Law: EU/UK Competition Law
Update.....p. 15

Export Control: European and Transatlantic
Export Controls: Europe's New Dual-Use
Green Paper.....p. 9

Life Sciences: Upcoming EU Requirements on
Goods Treated with Biocidal Substances.....p. 6

Roundup:.....p. 11

Tax: Clarification on Requirements for Dividend-
Withholding Tax Reimbursements in Italy.....p. 13

On-Line Research Access to
Back Issues of

EuroWatch

For details, please contact
Jay Stanley at
Jay.Stanley@Thomsonreuters.com
or (978) 287-0301.

EUROWATCH®

Publisher: Gary A. Brown, Esq.

Published by WorldTrade Executive,
a part of Thomson Reuters

(ISSN 1063-6323)

Tel: 978-287-0301; Fax: 978-287-0302

www.wtexecutive.com

Managing Editor: Alyson J. Sheehan
Executive Editor: Scott P. Studebaker, Esq.

Production Editor: Heather J. Martel

Marketing: Jon B. Martel

Advisory Board

Joan Sylvain Baughan

Keller and Heckman, Brussels and Washington

Philip Bentley, QC

McDermott Will & Emery / Stanbrook LLP, Brussels

Laura M. Brank, Esq.

Dechert LLP, London and Moscow

Alec J. Burnside

Linklaters, Brussels

José A. Sanchez Dafos

DLA Piper Rudnick Gray Cary, Madrid

Donald C. Dowling, Jr.

White & Case LLP, New York

Peter L'Ecluse

Van Bael & Bellis, Brussels

Gary N. Horlick, Esq.

Wilmer Cutler Pickering Hale and Dorr
Washington, DC

Mark Jones

Norton Rose, London

Alexander Marquardt

Kramer Levin Naftalis & Frankel, Paris

Gareth Morgan

Taylor Wessing, London

Giovanni Nardulli

Gianni, Origoni, Grippo & Partners, Rome

Angus Phang

Willoughby & Partners, Oxford

Daniel J. Plaine, Esq.

Gibson, Dunn & Crutcher, Washington, DC

Douglas E. Rosenthal, Esq.

Sonnenschein Nath & Rosenthal
Washington, DC

Melanie Thill-Tayara

Salans, Paris

Lode Van Den Hende

Herbert Smith, Brussels

Edurne Navarro Varona

Uría & Menéndez, Brussels

Maria Wolleh

Mannheimer Swartling, Berlin

Unauthorized reproduction in any form is prohibited by law. Copyright © 2011 by Thomson Reuters/WorldTrade Executive

EU's Top Court Refuses to Bar Third Party Access to Leniency Statements Submitted to National Competition Authorities

By Philipp Werner (McDermott Will & Emery LLP)

A recent judgment of the European Court of Justice (ECJ) may open the way for plaintiffs to obtain access to leniency statements and related materials submitted to national competition authorities of the EU Member States. (*Pfleiderer AG v Bundeskartellamt* Case C-360/09 – June 14, 2011). The disclosure of such documents is not prohibited under EU rules but a matter for national judges to decide.

The judgment adds an additional layer of complexity and uncertainty to a potential leniency applicant's decision to apply for leniency to EU national competition authorities. First, the decision increases the risk of damages actions, because plaintiffs may have access to documents helping them to substantiate their damage claims against cartelists. Second, the judgment could result in the development of a patchwork of disparate European and national rules, because national judges in different EU Member States may come to different conclusion as to whether disclosure should take place.

While the judgment does only deal with leniency applications submitted to national competition authorities, it could also lead to the situation where the European Commission may find it more difficult to prevent the disclosure of documents provided to it by leniency applicants from being disclosed to private litigants, either in Europe or in U.S. federal class actions, where defendants may be exposed to treble damages claims.

In light of *Pfleiderer's* likely consequences, companies that do business in the EU are strongly advised to factor this risk into their assessment on whether to apply for leniency, and to follow developments in this area carefully.

Background

Private damages actions against cartelists are on the rise throughout the European Union, most notably in the United Kingdom, Germany and the Netherlands. Although much of the political and legal debate concentrates on class action-style litigation (or lack thereof), companies are increasingly willing to go against their suppliers who have been involved in cartels.

Philipp Werner is an Associate based in McDermott Will & Emery's Brussels office. His practice focuses on European and German competition law including State aid, merger control, cartels and abuse of dominance, and his clients include companies in the automotive, infrastructure, transport and health care sectors. (pwerner@mwe.com)

Private damages actions in the EU are mostly follow-on actions, which are brought after and on the basis of a decision by a competition authority finding an infringement of EU or national competition rules. Such decisions are binding on courts with respect to the finding of an infringement. That explains the attractiveness of follow-on actions: plaintiffs do not have to prove the wrongdoing, they only have to prove harm suffered from the wrongdoing. Therefore, the real issue for plaintiffs in any private damage action is proof and calculation of damages. As a

The ECJ's decision increases the risk of damages actions, because plaintiffs may have access to documents helping them to substantiate their damage claims against cartelists.

starting point, damages are calculated as the difference between the actual price charged by the members of the cartel (supposedly a higher price) and the hypothetical "but-for" price in the absence of the cartel. Additional complications concern the passing-on of damages to buyers further down the supply chain and actions by indirect purchasers who have no direct contractual relationship with members of the cartel.

A plaintiff has information about the prices he has paid to one or more members of the cartel during the cartel period. The difficulty for any plaintiff is to get hold of the information needed to calculate the "but-for" price. The non-confidential version of the regulators' infringement decisions only contain some of this information, but mostly the interesting information has been deleted from these versions as business secrets. In the absence of far-reaching discovery rules in European jurisdictions, plaintiffs try to get access to various sources of information, for example to the confidential version of the infringement decision, to the regulator's case file and, more specifically, to the leniency statements and related documents submitted by companies to the regulator. Since leniency applicants are under a duty to cooperate fully with the regulator it is a reasonable assumption that the leniency application

EU's Top Court, continued on page 4

EU's Top Court *(from page 4)*

will contain information useful for plaintiffs, such as in particular price levels outside the cartel period and agreed and implemented price overcharges.

Not surprisingly, defendants oppose the disclosure of such documents to plaintiffs. They have already been fined by competition authorities for their participation in a cartel and try to avoid additional exposure to private damages actions. But regulators are generally not keen on disclosing these documents either. It is not difficult to figure out why: cartel enforcement by competition authorities in Europe relies heavily on leniency application and a disclosure may compromise the effectiveness of the leniency program as companies may become more reluctant to submit leniency applications. But this is not only a choice between effective government enforcement through leniency programs and private enforcement through damages actions. Since plaintiffs bring mostly follow-on actions, a less effective leniency program may ultimately also have crippling effects on private actions.

The European Commission has consistently taken the position that applications for leniency submitted to the European Commission should not be disclosed to third parties. The same question arises in the context of leniency applications submitted to national competition authorities. There was hope that the ECJ would clarify the question in the Pfleiderer case.

National Courts Need to Decide on Disclosure of Leniency Applications Submitted to National Competition Authorities

The ECJ ruling followed a case that originated in Germany. Pfleiderer, a firm active in the wood industry, was considering a damages claim against members of a paper cartel. It sought access to the cartel files held by the German competition authority (FCO) in order to substantiate its claim. A dispute subsequently arose in a German court over whether disclosure of the documents submitted by companies who had cooperated with the FCO would undermine the national leniency program since potential leniency applicants would fear eventual disclosure. The German court referred this question to the ECJ, requesting a preliminary ruling as to whether the provisions of EU competition law are to be interpreted as meaning that cartel victims can be granted access to leniency applications received by an EU Member State.

The Advocate General had in his opinion advised that leniency documents which existed before the cartel was uncovered could be disclosed in follow-on civil proceedings, but that submissions drafted for the purpose of revealing the infringement should be protected from disclosure. The consequences of this approach for both plaintiffs and defendants were controversially discussed, but the approach recommended by the Advocate General had at least the merit of providing legal certainty about

the scope of potential disclosure. In the overwhelming majority of cases, the ECJ follows in its judgment the opinion delivered by the Advocate General. But not this time, taking almost everyone by surprise.

The ECJ focused on the fact that the case concerned national leniency application and came to the conclusion that EU law did not provide a definitive answer. Therefore it was not for the ECJ to rule whether EU rules prohibit (or allow) the disclosure of such documents. Rather, the ECJ held that national courts and tribunals of each Member State have discretion to determine – on a case by case basis – whether leniency documents may be disclosed to claimants, on the basis of their own national law, and balancing the interests protected by EU law.

If leniency statements are disclosed, leniency applicants may paradoxically be in a worse position than those companies that refrained from applying for leniency and instead contested their participation in the alleged cartel.

Problem of Uniform Application

The Pfleiderer judgement only concerns leniency documents submitted to national competition authorities. It does deal with leniency applications to the European Commission. It remains an open question whether or not the European Commission could or should refuse access to such leniency applications. For the time being, the European Commission maintains that the Pfleiderer judgment has no impact on the leniency applications submitted to it under the EU Leniency Programme. The judgment may also give impetus to the Commission's current discussions about new and stronger EU laws aimed at preventing the disclosure of documents submitted to the Commission by companies under the Commission's leniency programme.

On the national level, it is now for national courts in each EU Member State to decide on the disclosure of leniency applications. The ECJ gives significant discretion to EU Member State judges, but did not provide concrete guidance on what factors judges should take into account in assessing whether and which documents should be disclosed. Basically, national courts need to take into account the effectiveness of competition law enforcement as well as the rights of those who suffered harm from a cartel to claim damages. This is not guidance but simply restating the problem. Thus, national courts have a considerable margin of discretion as to what type of leniency document can be disclosed to a cartel victim. But while this provides

parties with room to maneuver in national courts, it also threatens to generate considerable legal uncertainty and unpredictability.

It remains to be seen what the precise consequences of the Pfleiderer judgment will be and how judges will apply the balancing test advocated by the ECJ. It cannot be excluded that different judges may come to different conclusions. Thus, the ECJ's ruling may lead to different results in different European countries, particularly given different legal traditions and national rules in different Member States. The judgment therefore threatens to create an inconsistent and unpredictable legal patchwork in the EU. This is particularly worrisome for companies that have to decide on leniency application in multiple jurisdictions.

Implications for Leniency Applicants

Potential leniency applicants face significant additional complexity in deciding whether to apply for leniency. On the one hand, it will now have to take into consideration not only the remaining risk of an administrative fine and criminal sanctions but also the fact that private damages claimants might get access to leniency documents. Indeed, if leniency statements are disclosed, leniency applicants may paradoxically be in a worse position than those companies that refrained from applying for leniency and instead contested their participation in the alleged cartel.

In particular, leniency applicants face additional problems in multi-jurisdictional leniency applications before several national competition authorities. In such cases, leniency applications may be disclosed by one but not the other competition authority, depending on the future case law of national courts. It must be noted that competition authorities in the EU cooperate in cartel cases through the European Competition Network (ECN) and also exchange information through the network. Competition law enforcement in one EU member state is not

separated from the enforcement in other member states, which makes non-uniform rules on disclosure particularly inappropriate.

Until national courts have developed a consistent case law on the possibility of disclosure, leniency applicants must be aware of the risk of disclosure and take this risk into account when making a decision about whether or not to submit a leniency application to a national regulator. Once the decision is taken, the leniency applicant must carefully select the information, data and documents to be submitted to the regulator so as to limit its exposure to subsequent private damages actions. However, the leniency applicant is also bound by the requirements of the leniency program. Hiding information carries the risk of being ruled ineligible for leniency for failure to fully cooperate with the regulator.

Companies thinking about applying for leniency anywhere in the EU need to consider the risk that sensitive and incriminating leniency documents may fall into the hands of civil damages claimants.

Therefore, companies thinking about applying for leniency anywhere in the EU need to consider the risk that sensitive and incriminating leniency documents may fall into the hands of civil damages claimants. Companies doing business in the EU are therefore strongly urged to follow developments in this area and factor the risk of disclosure into the calculus of whether to apply for leniency. □

Invitation to Publish

Since 1991, WorldTrade Executive, has published periodicals and special reports concerning the mechanics of international law and finance. See <http://www.wtexecutive.com>. If you have authored a special report of interest to multinationals, or compiled data we want to hear from you.

By publishing with WorldTrade Executive, a part of Thomson Reuters, you establish your firm as a thought leader in a particular practice area. We can showcase your work to the many corporate leaders and their advisers who turn to us for insights into complex international business problems. To discuss your project, contact Gary Brown, 978-287-0301 or Gary.Brown@Thomsonreuters.com