

## The Disclosure of Leniency Documents: Confidential Documents Still Protected

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On 15 December 2011, the EU General Court ruled that the European Commission should have disclosed the index from a cartel investigation to Cartel Damages Claims (CDC), a company bringing a collective damages action against the cartel defendants.

The decision, which is likely to be lauded by damages claimants, represents a small clarification in the ongoing issue surrounding the right of claimants to have access to documents submitted to EU antitrust authorities in the context of cartel proceedings. The judgment could be interpreted as a step towards making it easier for damages claimants to acquire “hot documents” to bolster their damages claim. A more realistic interpretation would take into account that the judgment only concerns the index of the case file and not a confidential document or a document prepared by the leniency applicants. The decision does, however, highlight the uncertainty surrounding the rights of claimants’ to access antitrust regulators’ files, following the European Court of Justice’s ruling in *Pfleiderer* earlier this year.

### **Background: The Commission’s Decision in The Bleach Cartel And The Follow-on Damages Claim**

On 3 May 2006, the Commission found that nine undertakings had exchanged information on prices and sales volumes, and agreed on prices and the reduction of production capacity, *etc.*, in the hydrogen peroxide market. Consequently, the Commission imposed fines amounting to €338 million on the undertakings that had taken part in that cartel.

CDC—a company that purchases antitrust claims from cartel victims—brought a damages claim against the defendants before the Regional Court of Dortmund, Germany in March 2009. In order to acquire evidence supporting its case, CDC sought access to the index of the Commission’s file so that it could request the disclosure of individual documents before the national court.

The request was rejected by the Commission under the EU transparency rules (Regulation (EC) No 1049/2001) which confer on all EU citizens and companies the right to request copies of

documents held by the Commission, the EU Council, and the European Parliament, subject to certain exceptions.

The Commission argued, *inter alia*, that disclosure of the index would undermine the commercial interests of the companies under investigation through the divulgence of business secrets. It would also undermine the purpose of the Commission's antitrust investigation and its leniency programme by deterring companies from cooperating with the Commission. CDC appealed the Commission's decision.

### **General Court Ruling**

The General Court ruled that the Commission had wrongly refused to disclose the index of its investigative file to CDC. The Court ruled that the Commission had not established that access to the index would undermine the protection of business secrets. According to the General Court, the index does not contain any business secrets so the refusal of its disclosure could not be justified by the protection of business secrets. The General Court did not therefore have to rule on the question of whether the Commission could refuse the disclosure of confidential documents.

The General Court also ruled that the Commission had not established that access to the index would undermine the protection of the purpose of investigations and that leniency and cooperation programmes—the effectiveness of which the Commission sought to protect—are not the only means of ensuring compliance with EU competition law. Accordingly, the Commission had not met the requisite legal standard. The General Court also observed that, as a matter of policy, private damages actions can make as significant a contribution to the maintenance of effective competition in the EU as public enforcement does.

### **Comment**

The General Court's judgment comes in the wake of an important ruling concerning access to documents in cartel damages proceedings before national courts (ECJ, C-360/09 - *Pfleiderer AG v Bundeskartellamt*, 14 June 2011). In *Pfleiderer* it was held that the national courts and tribunals of each Member State have the discretion to determine—on a case by case basis—whether leniency documents held by national competition authorities may be disclosed to claimants on the basis of their own national law.

The General Court's judgment in the bleach cartel goes perhaps one step further in defining what documents can be disclosed. The uncertainty created by *Pfleiderer* remains, but we now have case law establishing that at least one document—the index—is subject to disclosure.

Although the index of the case file is very unlikely to contain incriminating evidence, the fact that at least one document in the case file is open to disclosure means that private damages claimants *might* in the future, get easier access to evidence that is incriminating. This has a number of potential consequences: it may encourage private damages actions, and it may diminish the attractiveness of leniency programs.

This appears to concern the Commission, given its consistent interventions in US federal court proceedings, arguing that its investigative files should not be disclosed as that may place the efficacy of its leniency program in jeopardy. This recent decision could be seen to undermine the Commission's stated position and therefore could be harmful for the leniency program.

Going forward, the one thing we can be sure of is that the Commission will now be very careful when drafting indexes. And it is worth remembering that this case did not, after all, involve an actual leniency document; the possibility of relying on the protection of business secrets for a refusal to disclose sensitive leniency documents has not really been tested and as a principle remains intact.

Ultimately, the rules concerning claimants' access to European antitrust regulators' files remain to be written and the European Commission is expected to come forward with a legislative proposal in the future.

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