

Getting the information

Access to leniency documents in Germany

by *Rüdiger Harms and Alex Petrasincu**

Once a cartel has been uncovered, customers that consider bringing damage claims often try to gain access to the investigation files of the competition authorities, in particular in relation to leniency applications. These customers usually hope to gain information about the effects of the cartel and the amount of the cartel overcharge, if any. As evidenced by the ECJ's *Pfleiderer* and *Donau Chemie* decisions or the English High Court's decision in *National Grid*, customers' access to the competition authorities' files – and in particular to leniency statements – plays an increasingly important role all over Europe.

Germany is no exception. Claimants increasingly try to gain access to the files of the German Federal Cartel Office (the FCO) or in the case of bid-rigging – which is a criminal offence under German law – to the criminal files of the public prosecutors as well.

While the FCO, public prosecutors and the German courts have so far unanimously denied plaintiffs access to leniency statements, a decision by the Hamm Court of Appeals from November 2013 is often seen as having paved the way for claimants to obtain access to leniency statements. This decision did not concern a direct request by a claimant for access to the criminal files. Although it was indeed a proposal by claimants, it was actually based upon a request by a civil court, before which a damages action against cartel members was pending, for access to criminal files from a bid-rigging investigation containing (among other things) leniency statements.

However, a recent decision by the German Federal Constitutional Court (the FCC) on a constitutional complaint against the Hamm Court of Appeals' decision arguably creates some obstacles for claimants attempting to access leniency statements by going through a civil court.

In the following, we will first address the requirements under which third parties may access leniency applications. Subsequently, we will discuss the requirements under which a civil court may obtain access to such leniency documents, and we will discuss the most recent decisions of the Hamm Court of Appeals and the FCC in this context.

Third party access to leniency documents

Under German law, an aggrieved third party, through an attorney, may access the files of the FCO provided that the aggrieved third party has a legitimate interest for doing so: see section 406e of the German Code of Criminal Procedure (GCCP). However, access to the files must be refused if the overriding interests of the accused or other persons militate against granting access. In addition, access can be refused if the purpose of the investigation would otherwise be jeopardised: see section 406e (2) GCCP.

While a cartel customer intending to bring a damages action against cartel members generally has a legitimate interest in accessing the FCO's files, the FCO routinely says that this does

not extend to leniency applications and documents provided in support of leniency statements. So far, the German courts have upheld the FCO's position.

Bonn District Court's Pfleiderer decision

In January 2012, the Bonn District Court in its *Pfleiderer* decision upheld the FCO's refusal to grant a potential plaintiff access to corporate statements of a leniency applicant. *Pfleiderer*, a direct customer of the German decorative paper cartel, had requested access to the FCO's cartel file. The FCO granted limited access to the file, but denied access to corporate statements and documents voluntarily submitted in connection with the leniency application. When *Pfleiderer* appealed against the FCO's decision to the Bonn District Court, the court referred the question of whether European Community law required that parties adversely affected by a cartel should not be given access to leniency applications to the European Court of Justice for a preliminary ruling. After the ECJ gave its now famous *Pfleiderer* judgment holding that it is for the courts of the member states to determine the requirements under which access to leniency applications must be permitted or refused by weighing the interests involved, the district court upheld the FCO's decision not to grant access to leniency statements.

The district court held that access to leniency applications had to be refused because otherwise (future) cartel investigations by the FCO could be compromised, as cartel members could refrain from applying for leniency if potential damage claimants were granted access to their submissions.

In addition, the district court held that the leniency applicants' interest in keeping the leniency applications secret outweighed *Pfleiderer's* interests, particularly given that the leniency applicants had voluntarily submitted the self-incriminating information in the expectation that the FCO would not disclose it. Further, the court once again stressed that disclosing the leniency statements could seriously harm the effectiveness of the leniency programme. Finally, the district court held that not disclosing the leniency applications would not unduly burden *Pfleiderer*, as it had already obtained access to the FCO's fining decision, as well as to an index of the evidence seized during the dawn raids.

Düsseldorf Court of Appeals' coffee roaster decision

Likewise, in August 2012, the Düsseldorf Court of Appeals (the DCA) refused customers of the German coffee roaster cartel access to leniency applications, including documents voluntarily submitted in support of the leniency application. The DCA was competent to decide on the request for access to the file as some of the cartel members had appealed against the FCO's fining decision to the DCA, which accordingly was in possession of the FCO's case file.

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In line with the Bonn District Court's reasoning in *Pfleiderer*, the DCA based its decision on the leniency applicants' legitimate expectations that the documents in question would not be disclosed to potential plaintiffs. In addition, the court held that granting potential plaintiffs access to leniency applications might also weaken effective public enforcement of antitrust law. Further, the court ruled that the potential plaintiffs were not unduly burdened when it came to enforcing damages claims without having access to leniency applications, as the court granted the plaintiffs access to a redacted version of the FCO's fining decision; civil courts are bound by the FCO's findings in such a decision regarding the cartel infringement. Finally, the court stated that the leniency applications did not contain any information on the cartel overcharge.

Access by civil courts to leniency documents

While private third parties have to show that they have a legitimate, overriding interest in accessing FCO files, under the GCCP, civil courts (and other public bodies) can obtain access to criminal files or the files of the FCO much more easily.

The Hamm Court of Appeals

In November 2013, the Hamm Court of Appeals held that a public prosecutor could disclose criminal files from a bid-rigging investigation, including a leniency application submitted to the German FCO, to a civil court in Berlin before which a damages action against cartel members was pending.

The bid-rigging investigation in question was targeted at (former) employees of elevator and escalator producers that were found guilty by the European Commission in 2007 to have engaged in bid-rigging in Germany. One of the cartel members applied for leniency not only to the European Commission but also to the FCO. As the leniency application contained allegations of bid-rigging, which under German law is a criminal offence, the FCO forwarded a copy of the leniency application to the Düsseldorf public prosecutor, which in turn opened a criminal investigation against (former) employees of the cartel members.

After several elevator and escalator customers had brought a damages claim before the Berlin Regional Court against the cartel members, the Berlin court – at the request of the plaintiffs – requested access to the Düsseldorf public prosecutor's criminal files. When the Düsseldorf public prosecutor indicated that it intended to grant the Berlin court access, the cartel members appealed against this decision to the Hamm Court of Appeals. Despite the fact that the FCO submitted an *amicus curiae* brief to the Court of Appeals in which it argued against granting the civil court access to the leniency application, the court dismissed the cartel members' appeal.

Courts can access criminal files (or FCO files) if this is "necessary for the administration of justice" (see section 474(1) GCCP). This requires a balancing of the interests involved. However, such a balancing of interests is usually not conducted by the authority keeping the files to which access is requested (ie the FCO or a public prosecutor) but rather by the civil court requesting access to the files (see section 477(4) GCCP). The authority keeping the files can only refuse to grant a civil court access to its files if (1) doing so would endanger the purposes of this particular or another criminal proceeding, or (2) there is a

particular reason for examining the admissibility of granting access in more detail (see section 477(2) and (4) GCCP).

In the case at issue, the Düsseldorf public prosecutor held that there was no reason not to grant the Berlin civil court access to the files – including the leniency application. In particular, the public prosecutor held that he did not even have a discretion to balance the different interests involved, given that the Berlin civil court had already deemed access to the files necessary.

The Hamm Court of Appeals in November 2013 upheld the public prosecutor's decision. According to the Court of Appeals, the mere fact that the criminal files contained a leniency application was not a reason to refuse the Berlin court access to the files. Interestingly, the Hamm Court of Appeals argued that the abstract possibility of future cartel members refraining from co-operating with the European Commission or the FCO under their leniency programmes would not justify a general refusal to grant the Berlin court access to the criminal files.

This decision of the Hamm Court of Appeals stands in contrast to the earlier decisions of the Düsseldorf Court of Appeals and the Bonn District Court, which had refused private parties access to leniency applications for fear that this would undermine the effectiveness of the leniency programmes. However, the Hamm Court of Appeals stressed that its decision granting the court access to the criminal files did not mean that the claimants in the underlying damages action would automatically also obtain access to the criminal files; rather, the civil court would have to balance the interests at stake (again) in deciding whether to grant plaintiffs access to (parts of) the files.

The FCC's take on how to proceed

Finally, the cartel members brought a constitutional complaint against the decision of the Court of Appeals to the FCC, arguing that the decision violated their constitutional rights. While the FCC in March 2014 decided not to hear the case, the FCC did provide valuable clarification on how civil courts will have to proceed in cases such as this one before granting plaintiffs access to criminal (or FCO) files.

In particular, the FCC held that the plaintiffs would not automatically obtain access to the criminal files once they had been transferred to the civil court. Rather, the FCC stressed that the Berlin court would have to weigh the different interests involved in deciding whether to grant access to the criminal files and, in doing so, would have to take due account of the cartel members' rights. According to the FCC, in conducting the balancing of interests, the Berlin court could well take into account the different aspects mentioned in section 406e(2) GCCP.

The FCC's reference to this provision, which is not directly applicable to the granting of access to court files to plaintiffs in civil court proceedings, could be seen as an implicit endorsement by the FCC of the earlier decisions by the Düsseldorf Court of Appeals and the Bonn District Court, which on the basis of this exact provision had refused to grant private third parties access to leniency statements. If the civil courts follow this interpretation, it would ensure that access to leniency statements are subject to the same requirements irrespective of whether an aggrieved party or a civil court, upon request of an aggrieved party, seeks access to them. However, it remains to be seen how the courts will interpret the FCC's decision.