10. November 2011

The *Pfleiderer-Case*: increasing private enforcement of antitrust regulations in Germany?

On 14 June 2011, the European Court of Justice (ECJ) handed down a ruling in the *Pfleiderer-Case* (C-360/09) stating that EU community law does not prohibit access to documents regarding an antitrust investigation, including leniency documents. Rather, national courts will have to determine guidelines on the access to those documents. Hereby, both the effectiveness of enforcement of antitrust law – public enforcement – as well as the effectiveness of damage claims – private enforcement – will have to be balanced out, whereas there is no general ranking order between public and private enforcement.

In the case at hand, *Pfleiderer*, a German company, requested access to leniency documents from the German Cartel Office (*Bundeskartellamt*) in order to substantiate a private claim for damages based on a cartel breach. According to German procedural rules, authorities have to grant such access unless contradicting and overruling public policy considerations are opposed to such access. The German Cartel Office denied access to many corporate statements which it obtained by its leniency programme. Thus, *Pfleiderer* filed an action for disclosure with the local court in Bonn which in turn applied for a preliminary ruling of the ECJ.

With its decision, the ECJ reconfirmed that private enforcement is an important tool of antitrust regulations. However, the ruling did not solve the legal uncertainty under which circumstances access, especially to corporate documents, will be granted. Moreover, as the general rules for access to files differ in each member state of the EU, each of them will have to develop its own guidelines. Hence, there are no unified rulings ensured within the EU.

Some critics argue that the ECJ has weakened the public enforcement of antitrust law: the right to access, especially to corporate statements, may punish participants in leniency programmes. And indeed, the number of claims for damages against such participants is likely to increase if aggrieved parties get hold of confidential information disclosed to public authorities. Those claims for damages may possibly exceed a potential benefit a company achieves by making use of a leniency programme in the first place. Thus, the effectiveness of those programmes will decrease although they are one of the most effective tools of antitrust investigations. The ruling may also complicate international cooperation within the EU because it confirms that the rules of disclosure will be governed by national laws. Regarding international cartels, member states may be unwilling to provide information to states whose rules of disclosure of documents are rather liberal.

One of the first courts to decide after the ruling by the ECJ will be the local court in Bonn. So far, it is likely that the court adheres to its previous preliminary decision granting access to the requested documents to the extent the plaintiff requires the infor-

mation in order to substantiate the claim for damages. In any event, the ruling will become a model case in Germany. However, such decision may be challenged so that the final outcome is far from certain.

In this context, it is interesting to note that rules for private enforcement are rather favourable in Germany. Contrary to most other legal systems, such as Sweden, German law conclusively presumes a cartel breach provided that any cartel office in the EU has identified such breach. Therefore, plaintiffs do not have to prove the existence of a cartel but merely the damage they have suffered. For this reason, Germany is already a very attractive jurisdiction for private claims for damages based on cartel breaches and its attractiveness may yet increase.