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LENIENCY**U.S. Companies Facing Cartel Investigations:
Is Leniency in Europe Still Worthwhile?**

By J. BRADY DUGAN AND MOLLIE M. LEMBERG

A company accused of participating in an international cartel must quickly grapple with whether to apply for leniency to the relevant competition authorities around the world.

That complex decision was recently made even more difficult when several European courts issued decisions in favor of disclosure of the confidential information set forth in leniency applications.

Civil damages plaintiffs in Europe now have a better chance of discovering this material. This willingness by European courts to provide private plaintiffs with confi-

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dential materials from leniency applications will inevitably cause ripple effects in the United States.

When a plaintiff asks a U.S. court for discovery of material contained in a foreign leniency application, the U.S. court considers whether comity concerns would be harmed by ordering disclosure of material that a foreign government considers confidential. U.S. courts will likely be disinclined to accord greater deference to requests from European governments for confidentiality protections than such requests receive in European courts: increased disclosure of such materials in the U.S. is likely.

Thus, before a company decides to apply for leniency from competition authorities in Europe, it must consider the cost of having its own words used against the company, not just in European damages actions, but also in U.S. courts. The benefits of leniency in Europe—a reduction in the amount of a corporate fine—may well be outweighed by the cost of helping plaintiffs win damages actions against the company in Europe and the U.S.

International Cartel Investigations and Leniency.

International cartel investigations often start with a bang—dawn raids executed in the U.S., Europe and elsewhere.

But very quickly after the shock of the raid, a company must consider whether leniency is available, and if so, whether it makes sense for the company to make leniency applications. In an international investigation, that question must be asked with regard to each jurisdiction involved. Each competition authority's leniency policy has unique features and requirements.

For instance, the U.S. has a "winner take all" system, where leniency only matters to the first company to qualify—that company gets complete immunity from criminal charges and has the opportunity for reduced damages in any civil follow-on suits.¹ Subsequent com-

¹ U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), available at <http://www.justice.gov/atr/public/guidelines/>

panies that cooperate with the Department of Justice (DOJ) can only get a fine reduction if they accept a plea bargain. Moreover, by the time a dawn raid has been executed, there is often already a leniency applicant in the U.S. Other jurisdictions, such as the European Commission (EC), while offering full immunity to the first leniency applicant, also allow other cartel participants varying degrees of fine reductions in exchange for cooperation with the investigation.

Virtually all jurisdictions offering leniency for a cartel offense require cooperation from the leniency applicants. The cooperation required varies from jurisdiction to jurisdiction. In the U.S., the DOJ relies heavily on witness interviews and documents created in the ordinary course of business. In the EC, there is an expectation of a formal leniency application which includes a confidential corporate statement detailing the company's participation in the cartel.² The Commission relies on that statement in forming its charging document as well as its final decision. Companies seeking fine reductions in Europe are given an opportunity to review the corporate statement, though they must maintain its confidentiality, and they are allowed to file confidential replies to the charges detailing their involvement.³ Thus, a number of documents that are part of the EC leniency application are created by and reside in the files of the companies accused of belonging to the cartel. It is these documents, all of which are considered confidential by the EC, that plaintiffs in the U.S. have sometimes sought in civil actions following a cartel.

Given the amount of incriminating and sensitive information revealed in a leniency application, it is unlikely that companies would be as willing to self-report without a guarantee of confidentiality. According to the EC, "strict confidentiality [of leniency documents] is vital to the success of the [European] Commission's system of investigating and punishing cartel activity because self-reporting and cooperation in the investigation depends on candor, which in turn is dependent on the degree of confidentiality that parties can expect."⁴ In the U.S., where much of DOJ's success in cartel enforcement comes from its leniency program, DOJ treats information submitted by a leniency applicant with the protections given information reported by a confidential informant.

Confidentiality benefits leniency applicants by protecting the competitively sensitive information they divulge. Confidentiality also prevents civil plaintiffs from gaining access to leniency materials that could provide them with a road map to proving their damages. Without the assurance of confidentiality, companies would be less inclined to participate in leniency programs and those that did participate would likely be more guarded and selective about the cooperation they provided.

0091.pdf; see also Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Antitrust Pub. L. 108237, 118 Stat. 661 (2004).

² Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 11 (note that the statement can be oral, though the EC will transcribe the statement).

³ Directorate General for Competition, *Antitrust Manual of Procedures*, available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

⁴ Memorandum of Law in Support of European Commission's Motion to Intervene at 3, *In re Flat Glass Antitrust Litigation (II)*, No. 08-mc-180 (Oct. 8, 2009).

U.S. Plaintiffs Seek to Discover EC Leniency Applications.

Because of its perceived usefulness to civil follow-on lawsuits, U.S. plaintiffs have sought discovery of material from companies' European leniency applications.

The success of such requests has been mixed. For example, in *In re Vitamins Antitrust Litigation*, despite the EC's intervention in the litigation to oppose discovery, the district court allowed discovery of communications submitted to the EC as part of a leniency application.⁵ In *In re Rubber Chemicals Antitrust Litigation*, however, the court refused to allow discovery of communications between a leniency applicant and the EC.⁶ And in *In re Flat Glass Antitrust Litigation II*, after the court had ordered discovery of documents that were part of the EC's administrative file, the EC moved to intervene to prevent the discovery, but the matter settled before the court ruled on the EC's motion.⁷

The proper analysis for U.S. courts considering whether to order discovery of documents that implicate the files of foreign governments was set forth by the Supreme Court in *Societe Nationale Industrielle Areospace*. The *Areospace* court admonished lower courts to undertake a comity analysis, balancing the five factors set forth in the Restatement of Foreign Relations Law:

- (1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.⁸

When the EC has sought to prevent U.S. courts from ordering discovery of leniency documents, it has emphasized its strong interest in maintaining the confidentiality of the documents.⁹ This interest is embodied in the fifth factor of the *Areospace* balancing test. And it is precisely this interest that is undermined by recent case law in Europe.

Recent Cases in Europe Limit the Confidentiality Afforded European Leniency Applications.

While private damages actions are a newer phenomenon in Europe than the U.S., such suits are becoming increasingly common following EC cartel investigations.

And in a number of recent damages cases in which plaintiffs have sought leniency materials, courts have considered the level of deference that must be given to the EC's requests for confidential treatment of such in-

⁵ No. 99-197, 2002 U.S. Dist. LEXIS 26490 (Jan. 23, 2002).

⁶ 486 F. Supp. 2d 1078 (N.D. Cal. 2007).

⁷ See Consent Order, *In re Flat Glass Antitrust Litigation (II)*, No. 08-mc-180 (Dec. 11, 2009).

⁸ *Societe Nationale Industrielle Areospace v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n. 28 (1987).

⁹ See, e.g., Memorandum of Law in Support of European Commission's Motion to Intervene, *In re Flat Glass Antitrust Litigation (II)*, No. 08-mc-180 (Oct. 8, 2009).

formation. The trend in these few cases has been in favor of disclosure rather than confidentiality.

European regulations generally allow for broad public access to documents from institutions of the European Union.¹⁰ On the other hand, the regulation dealing with competition policy makes clear that competition investigations should recognize the need to protect confidential business information.¹¹ The tension between these conflicting interests has, in recent cases, been resolved in favor of disclosure.

The case that set the trend in favor of discovery in Europe was *Pfleiderer AG v. Bundeskartellamt*.¹² *Pfleiderer* involved a cartel investigation by the German competition authority rather than the EC. After the competition authority found a cartel among manufacturers of decor paper, a purchaser of that product brought a damages suit in German court seeking information, including leniency materials, from the German competition authority. The German court asked the European Court of Justice (ECJ) to decide whether EU law prohibits a plaintiff from obtaining leniency information from a Member State competition authority. The ECJ ruled that Regulation No. 1/2003 should not be read as barring plaintiffs from accessing leniency files. Instead, access to files of a member state's competition authority should be determined by that member state, with the court balancing the competing interests for and against disclosure.

In April 2012, a U.K. court extended the holding in *Pfleiderer* to leniency applications made to the EC. *National Grid Electricity Transmission PLC v. ABB Ltd.* was a follow-on suit for damages after the EC found liability and issued fines in the Gas Insulated Switchgear (GIS) cartel.¹³ National Grid requested disclosure of material produced to the EC, including leniency material. The UK court determined that the *Pfleiderer* balancing test for disclosure of leniency materials applied not just to disclosure of leniency applications made to member states, but also to disclosure of EC leniency applications. The court included in the balancing test consideration of whether the information was available from other sources and the relevance of the material to the issues in the case. Notably, the court in *National Grid* gave no weight to the defendants' arguments that they had a legitimate expectation of privacy in their leniency materials. Ultimately, the *National Grid* court ordered disclosure of some of the leniency materials produced to the EC.

Most recently, in May 2012, the European General Court continued the trend toward disclosure in a suit by

¹⁰ See, e.g., Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43.

¹¹ See Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1 (EC).

¹² Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 2011 EUR-Lex 62009CA0360 (June 13 2011).

¹³ *National Grid Electricity Transmission PLC v. ABB Ltd.*, [2012] EWHC 869 (Ch).

another plaintiff allegedly harmed by the GIS cartel.¹⁴ After the EC refused *Energie Baden-Württemberg (EnBW)*'s requests for leniency material and other documents, the company challenged the EC's decision in court. Emphasizing that Regulation No 1049/2001 provides "as wide a right of access as possible" to EU institution documents and that exceptions to the law "must be interpreted and applied strictly," the court concluded that the EC erred in refusing plaintiff's access to leniency documents.¹⁵ The court overturned the EC's decision limiting disclosure.

Implications for U.S. Companies Considering Leniency in Europe

From *Pfleiderer*, *National Grid* and *EnBW*, it is clear that plaintiffs in European damages actions can discover materials submitted by companies in leniency applications to either the European Commission or an EU member state's competition authority.

This evolution in the law in Europe may change the outcome of the *Areospace* comity analysis that U.S. courts undertake when U.S. plaintiffs seek discovery of European leniency materials. If European courts are unwilling to protect the confidentiality of European leniency materials, why should their confidentiality matter to U.S. courts? Moreover, the changes in European case law may cause the EC to be less willing to intervene in future U.S. damages suits seeking to protect EC leniency materials.

For companies facing cartel investigations in the U.S. and Europe, the decision whether to apply for leniency in Europe has become much more complicated. For each document that the company creates in its leniency application, the company must consider the impact that document might have on private damages cases in both Europe and the U.S. Would the potential harm caused by revealing the document in the U.S. and European damages suits be offset by the fine reduction that may be available if the document is included in the European leniency application? Are there ordinary course documents that can be used in the European leniency application instead of prepared responses?

Even if a company decides to apply for leniency in Europe, this kind of strategic thinking regarding the leniency application, which is made necessary by the change in European law, will inevitably cause the company to be more guarded and less forthcoming in its cooperation. If the trend in the recent case law continues, the EC can expect fewer leniency applications and more cautious cooperation in international cartel investigations. Indeed, this prospect has alarmed at least some within the EC to the point of seeking legislation that would overturn the recent European cases.¹⁶ Until that happens, however, U.S. companies should proceed with caution when considering filing a leniency application in Europe.

¹⁴ Case T-344/08, *EnBW Energie Baden-Württemberg AG v. Comm'n*, 2012 EUR-Lex 62008TA0344 (May 22, 2012).

¹⁵ *Id.*, ¶¶ 39-41.

¹⁶ See Stefano Berra, *EU Official Calls for Legislation to Address Pfleiderer*, GLOBAL COMPETITION REVIEW (Sept. 17, 2012), <http://www.globalcompetitionreview.com/news/article/32323/eu-official-calls-legislation-address-pfleiderer/>.