



*Resolution of the Meeting of Heads of the European Competition Authorities
of 23 May 2012*

Protection of leniency material in the context of civil damages actions

The purpose of this Resolution is to explain the joint position of all ECN Competition Authorities (CAs) on the importance of appropriate protection of leniency material¹ in the context of civil damages actions. Such protection is fundamental for the effectiveness of anti-cartel enforcement. The CAs consider that it is necessary to reiterate the pertinence of such protection following the *Pfleiderer* judgment².

The application of leniency programmes³ by the CAs has successfully uncovered numerous secret cartels throughout the European Union. These programmes are among the most effective tools for the detection, investigation and punishment of cartels as well as for providing effective deterrence against cartelisation. Anti-cartel enforcement constitutes one of the core competences and obligations of CAs in the general - European and national - interest. The CAs also welcome the developing private enforcement of competition rules, in particular through damages actions, as a complementary tool to enforce competition rules.

¹ The term “leniency material” refers to statements by leniency applicants submitted under the leniency programme and witness statements made by employees and directors of undertakings cooperating under the leniency programme (whether oral or written). Depending on the protection in the relevant jurisdictions, other information submitted to the CA by a leniency applicant (including pre-existing documents) will also qualify for protection as leniency material.

² Judgment of the European Court of Justice in Case C-360/09, *Pfleiderer AG v Bundeskartellamt*.

³ The term “leniency” refers to immunity as well as a reduction of any penalty which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case. A “leniency programme” sets out the framework for leniency in a particular jurisdiction.

Secret cartels are difficult to detect and investigate. Therefore, cooperation by cartel participants is often crucial to uncover and punish these highly detrimental illegal practices. Leniency programmes destabilise cartels as cartelists face the risk that any cartel member may report the cartel to CAs in the light of incentives offered. Through leniency programmes, cartels are uncovered and put to an end, preventing further damage being inflicted on businesses and consumers and helping cartel victims to bring forward their claims for damages. At the same time, the possibility that any cartel member may apply for leniency makes it more risky to form new cartels.

The CAs are determined to defend the effectiveness of leniency programmes in order to ensure a high level of anti-cartel enforcement. This effectiveness heavily depends on the incentives which the leniency programmes offer to potential leniency applicants to come forward and cooperate with CAs. The most important of these incentives is the immunity from penalties (or the reduction of penalties) which would otherwise have been imposed. The experience of the CAs shows that when deciding whether or not to cooperate with CAs under a leniency programme, potential leniency applicants consider as an important factor the impact of such cooperation on their position in civil proceedings as compared with the situation where they decide not to cooperate with CAs.

The CAs recognise the importance of effective recovery of damages caused by cartels. The existence of such a right also strengthens the working of the EU competition rules and discourages illegal practices⁴. From that point of view, civil damage actions can make a very significant contribution to the maintenance of effective competition in the European Union.

Civil damage claims and leniency programmes are complementary tools to enforce competition law and deter further infringements. However, at present, civil damage claims in cartel cases in the European Union mostly rely on public enforcement (follow-on actions) and public anti-cartel enforcement is nourished by leniency programmes. Thus, appropriate protection of leniency material is necessary to ensure the effectiveness of leniency programmes and to enable the authorities to uncover and

⁴ See Case C-360/09, *Pfleiderer AG v Bundeskartellamt*.

terminate cartels as well as to document and establish their existence and the participation therein of the companies up to the requisite legal standard. It is often this action by the authorities that in turn constitutes the basis for civil damages claims for harm caused by cartels. Therefore, if the incentives to cooperate under the leniency programmes are not preserved, the victims of currently hidden and future cartels are unlikely to learn about those cartels in the first place and would be deprived of exercising their rights to an effective remedy. It is thus through the public enforcement of competition law, complemented by the emerging private enforcement, that fierce competition, strong innovation, economic growth and consumer welfare can be fostered in the European Union.

Moreover, an equivalent standard of appropriate protection of leniency material across the European Union facilitates opportunities for constructive cooperation among CAs, as well as the effective allocation of cases and resources and contributes to the effectiveness of their enforcement tools. Competition enforcement is closely interlinked across Europe and even world-wide.

In conclusion, as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, CAs take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes.