JUDGMENT OF THE COURT (Grand Chamber)

14 June 2011 *

In Case C-360/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Amtsgericht Bonn (Germany), made by decision of 4 August 2009, received at the Court on 9 September 2009, in the proceedings

Pfleiderer AG

v

Bundeskartellamt,

THE COURT (Grand Chamber),

composed of A. Tizzano, President of the First Chamber, acting for the President, J.N. Cunha Rodrigues, K. Lenaerts and J.-C. Bonichot, Presidents of Chambers, E. Juhász (Rapporteur), G. Arestis, A. Borg Barthet, M. Ilešič, J. Malenovský, L. Bay Larsen and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 September 2010,

after considering the observations submitted on behalf of:

— Pfleiderer AG, by T. Kapp, M. Schrödl and M. Kuhlenkamp, Rechtsanwälte,

— Munksjö Paper GmbH, by H. Meyer-Lindemann, Rechtsanwalt,

— Arjo Wiggins Deutschland GmbH, by R. Polley and S. Heinz, Rechtsanwältinnen, and by O. Ban, acting as an authorised representative,

— Felix Schoeller Holding GmbH & Co. KG and Technocell Dekor GmbH & Co. KG, by T. Mäger and D. Zimmer, Rechtsanwälte,

— Interprint GmbH & Co. KG, by T. Veltins, Rechtsanwalt,

— the German Government, by M. Lumma, J. Möller and C. Blaschke, acting as Agents,

— the Belgian Government, by J.-C. Halleux, acting as Agent,

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,

— the Spanish Government, by J. Rodríguez Cárcamo, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Arena, avvocato dello Stato,

— the Cypriot Government, by D. Kallí, acting as Agent,

— the Netherlands Government, by Y. de Vries, acting as Agent,

— the European Commission, by V. Di Bucci, P. Costa de Oliveira and A. Antoniadis, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis and M. Schneider, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and the second paragraph of Article 10 EC, read in conjunction with Article 3(1)(g) EC.

2 The reference has been made in the context of proceedings between Pfleiderer AG ('Pfleiderer') and the Bundeskartellamt (the German competition authority) concerning an application for full access to the file relating to the imposition of a fine as a result of a cartel in the decor paper sector. The application for access, which extends to the documents relating to the leniency procedure, was made by Pfleiderer, a customer of the fined undertakings, in order to prepare a civil action for damages.

Legal context

European Union legislation

3 The first sentence of recital 1in the preamble to Regulation No 1/2003 states:

'In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 [EC] and 82 [EC] must be applied effectively and uniformly in the Community.'

4 Article 11 of Regulation No 1/2003, headed 'Cooperation between the Commission and the competition authorities of the Member States', is worded as follows:

'1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 [EC] or Article 82 [EC], inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 [EC] or Article 82 [EC].

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

…'

5 Article 12 of Regulation No 1/2003, governing the exchange of information, states:

'1. For the purpose of applying Articles 81 [EC] and 82 [EC] the Commission and the competition authorities of the Member States shall have the power to provide one another with, and use in evidence, any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 [EC] or Article 82 [EC] and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

— the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 [EC] or Article 82 [EC] or, in the absence thereof,

— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.'

6 Article 35(1) of Regulation No 1/2003 states:

'The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 [EC] and 82 [EC] in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.'

National legislation

7 Paragraph 406e of the German Code of Criminal Procedure (Strafprozessordnung) is worded as follows:

'(1) On behalf of an aggrieved person, a lawyer may inspect the documents which have been submitted to a court or, if a public prosecution were commenced, would have to be submitted, and may inspect evidence held by the authorities, in so far as the aggrieved person demonstrates a legitimate interest. In the cases mentioned in Paragraph 395, such legitimate interest need not be shown.

(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. Access may be refused if the purpose of the investigation appears to be compromised as a result or if it would give rise to a significant delay in the proceedings …

(3) Upon application, and unless precluded by compelling reasons, the lawyer may be permitted to take the files, but not the evidence, to his offices or place of residence. Such a decision cannot be challenged.

(4) The decision on whether to permit inspection of the files shall be made by the public prosecuting authority in preparatory proceedings and after final determination of the proceedings and, in other circumstances, by the presiding judge of the court seised of the case. The court with jurisdiction under Paragraph 161a(3)(2) to (4) may be requested to reverse such a decision of the public prosecuting authority under the preceding sentence. … Reasons for those decisions shall not be stated, where attainment of the investigation's objective might be jeopardised by their disclosure.

(5) Under the conditions in subparagraph (1), the aggrieved person may be given information and copies of the files; …

…'

8 Paragraph 46 of the Law on administrative offences (Gesetz über Ordnungswidrigkeiten), in the version of 19 February 1987 (BGBl. 1987 I, p. 602), as last amended by Paragraph 2 of the Law of 29 July 2009 (BGBl. 2009 I, p. 2353; 'the OWiG'), provides:

'(1) Unless otherwise herein provided, the provisions of the general legislation on criminal procedure, that is to say, the Code of Criminal Procedure, the Law on Court Organisation (Gerichtsverfassungsgesetz) and the Law on Youth Courts (Jugendgerichtsgesetz) shall apply to the procedure for imposing fines.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 On 21 January 2008, pursuant to Article 81 EC, the Bundeskartellamt imposed fines amounting in total to EUR 62 million on three European manufacturers of decor paper and on five individuals who were personally liable for agreements on prices and capacity closure. The undertakings concerned did not appeal and the decisions imposing those fines have now become final.

10 On the conclusion of that procedure, Pfleiderer submitted an application to the Bundeskartellamt on 26 February 2008 seeking full access to the file relating to the imposition of fines in the decor paper sector, with a view to preparing civil actions for damages. Pfleiderer is a purchaser of decor paper and, more specifically, special paper for the surface treatment of engineered wood. Pfleiderer is one of the world's three leading manufacturers of engineered wood, surface finished products and laminate flooring. It stated that it had purchased goods with a value in excess of EUR 60 million over the previous three years from the manufacturers of decor paper which have been penalised.

11 By letter of 8 May 2008 the Bundeskartellamt replied to the application for access to the file by sending three decisions imposing fines, from which identifying information had been removed, and a list of the evidence recorded as having been obtained during the search.

12 Pfleiderer then sent a second letter to the Bundeskartellamt expressly requesting access to all the material in the file, including the documents relating to the leniency applications which had been voluntarily submitted by the applicants for leniency and the evidence seized. On 14 October 2008 the Bundeskartellamt partly rejected that application and restricted access to the file to a version from which confidential

business information, internal documents and documents covered by point 22 of the Bundeskartellamt's notice on leniency had been removed, and again refused access to the evidence which had been seized.

13 Pfleiderer thereupon brought an action before the Amtsgericht (Local Court) Bonn challenging that decision of partial rejection, pursuant to Paragraph 62(1) of the OWiG.

14 On 3 February 2009 the Amtsgericht Bonn delivered a decision by which it ordered the Bundeskartellamt to grant Pfleiderer access to the file, through its lawyer, in accordance with the combined provisions of Paragraph 406e(1) of the Code of Criminal Procedure and Paragraph 46(1) of the OWiG. In the view of the Amtsgericht Bonn, Pfleiderer is an 'aggrieved party' within the meaning of those provisions, given that it may be assumed that it paid excessive prices, as a result of the cartel, for the goods which it purchased from the cartel members. Further, the Amtsgericht held, Pfleiderer had a 'legitimate interest' in obtaining access to the documents, since those were to be used for the preparation of civil proceedings for damages.

15 The Amtsgericht Bonn therefore ordered access both to the material in the file which the applicant for leniency had voluntarily made available to the German competition authority pursuant to point 22 of the Bundeskartellamt notice on leniency and to the incriminating material and evidence collected. Access to confidential business information and internal documents, that is to say, notes on legal discussions of the Bundeskartellamt and correspondence within the framework of the European Competition Network ('the ECN'), was limited. According to the Amtsgericht Bonn, various interests had to be weighed in order to determine the extent of the right of access, which is restricted to documents required for the purpose of substantiating a claim for damages.

16 The reference for a preliminary ruling states that enforcement of the decision was however, stayed by the Amtsgericht Bonn.

17 It can also be seen from the reference for a preliminary ruling that the Amtsgericht Bonn wishes to adopt a decision in the same terms as that of 3 February 2009. However, that court states that the decision which it is inclined to take could run counter to European Union law, in particular the second paragraph of Article 10 EC, Article 3(1)(g) EC and Articles 11 and 12 of Regulation No 1/2003, which provide for close cooperation and the mutual exchange of information between the Commission and the national competition authorities of the Member States in proceedings for the enforcement of Articles 81 EC and 82 EC. In order to ensure the effectiveness and proper functioning of those provisions, which are crucially important for the ECN and for the decentralised application of competition law, it might prove necessary, in relation to the impositions of fines in cartel proceedings, to deny to third parties access to leniency applications and to documents voluntarily submitted by applicants for leniency.

18 As it took the view that the resolution of the dispute before it required an interpretation of European Union law, the Amtsgericht Bonn decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC?'

The question referred for a preliminary ruling

19 It must be recalled at the outset that the competition authorities of the Member States and their courts and tribunals are required to apply Articles 101 TFEU and 102 TFEU, where the facts come within the scope of European Union law, and to ensure that those articles are applied effectively in the general interest (see, to that effect, Case C-439/08 *VEBIC* [2010] ECR I-12471, paragraph 56).

20 Neither the provisions of the EC Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure which have been voluntarily submitted to a national competition authority pursuant to a national leniency programme.

21 With regard to the Commission notices, one on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) and one on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), it should be pointed out that those notices are not binding on Member States. Further, the latter notice relates only to leniency programmes implemented by the Commission itself.

22 Within the ECN, a model leniency programme, designed to achieve the harmonisation of some elements of national leniency programmes, was also drawn up and adopted in 2006. However, that model programme likewise has no binding effect on the courts and tribunals of the Member States.

23 Accordingly, even if the guidelines set out by the Commission may have some effect on the practice of the national competition authorities, it is, in the absence of binding regulation under European Union law on the subject, for Member States to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures.

24 However, while the establishment and application of those rules falls within the competence of the Member States, the latter must none the less exercise that competence in accordance with European Union law (see, to that effect, the judgment of 12 November 2009 in Case C-154/08 *Commission* v *Spain*, paragraph 121 and the case-law cited). In particular, they may not render the implementation of European Union law impossible or excessively difficult (see, to that effect, Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraphs 23 and 24 and the case-law cited) and, specifically, in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (see, to that effect, *VEBIC*, paragraph 57).

25 However, as maintained by the Commission and the Member States which have submitted observations, leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU.

26 The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed.

27 The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided.

28 Nevertheless, it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 59 and 61).

29 The existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union (*Courage and Crehan*, paragraph 27).

30 Accordingly, in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (see, to that effect, *Courage and Crehan*, paragraph 29) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.

31 That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.

32 In the light of the foregoing, the answer to the question referred is that the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an

infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

[Signatures]