

Newsletter, 30 November 2015

Access to file by third parties in German administrative antitrust proceedings

Federal Court of Justice strengthens the position of antitrust damage claimants

In a recent judgment the Federal Court of Justice concluded that the Hessian cartel authority was wrong in categorically denying a potential claimant of antitrust damages access to a file concerning an abuse of dominance case. The judgment concerns the issue of third party access to antitrust related documents and includes two noteworthy features in this context. First, the cartel authority closed its investigation due to commitments offered of the undertakings concerned, thereby not establishing an actual violation of competition/antitrust law. Second, it is the first time that a request for access to file has been judicially examined in the context of German administrative antitrust proceedings (as opposed to quasi-criminal cartel proceedings in which fines can be imposed).

Facts of the Case

In 2009, the cartel authority of the German State of Hesse conducted a preliminary investigation against the water utility undertaking HEAG Süd Hessische Energie AG (“HEAG”) suspected of abusing its dominant position by offering excessive water prices. In the course of the abuse proceedings HEAG committed itself to reduce its water prices significantly. The case was then closed in line with Sec. 32b (1) Act Against Restraints of Competition (“GWB”) making HEAG’s commitments binding.¹ Subsequently, a private customer of HEAG requested access to the cartel authority’s file according to Sec. 33 GWB in order to examine the possibility of claiming antitrust damages. Such request was denied by the Hessian cartel authority. The applicant successfully appealed to the Higher Regional Court of Frankfurt. The court held that it was in the authority’s due

discretion whether and to which extent to grant access to file, but that the applicant was entitled to a discretionary decision free of any error.² It concluded that the cartel authority erred in the case at hand since it did not weigh the conflicting interests of the applicant and HEAG within its discretionary decision. The Hessian cartel authority as well as HEAG brought an appeal to the Federal Court of Justice (in the following “the Court”) which upheld the Higher Regional Court’s decision.³

Reasoning of the Court

The Court confirmed that the applicant was, on a non-statutory basis, entitled to a reasoned and discretionary decision free of any error. The claim could not be based on Sec. 29 Code of Administrative Procedure (“VwVfG”), laying down the rules of access to file in German administrative proceedings, since the applicant was not a party to the proceedings, which were already closed when requesting access and since the claim concerned interests (i.e. preparing a civil damages claim) outside the scope of the administrative proceedings.⁴ The claim could also not be directly based on Sec. 40 VwVfG authorizing authorities to act at their own discretion. However, a third party could have a legitimate interest to access administrative files upon which the authority has to decide by exercising its due discretion free of any error in accordance with Sec. 40 VwVfG.⁵ This requires, however, that in its request for access to file the applicant substantiates an individual and legitimate interest in such information which could not be satisfied otherwise.⁶

In order to come to a reasoned decision the cartel authority was required to comprehensively weigh all conflicting interests,

¹ Hessian cartel authority, [press release](#) of 20 September 2013.

² Higher Regional Court of Frankfurt, decision [11 W 3/14 \(Kart\)](#) of 4 September 2014.

³ Federal Court of Justice, decision [KVR 55/14](#) of 14 July 2015.

⁴ *Ibid.*, para 7 in conjunction with 13.

⁵ *Ibid.*, paras 14 et seqq.

⁶ *Ibid.*, para 16.

i.e. the interests of the undertaking concerned (protecting business secrets and self-incriminating information provided voluntarily in leniency applications or commitments), the interests of the applicant (examining the possibility of claiming antitrust damages), as well as the public interest in effectively pursuing infringements of competition law. In this balancing of interests the capacity of the cartel authority to process multiple requests can also be taken into account, the Court stressed.⁷

In the case at hand, the Court stated that the applicant had a legitimate interest in accessing the files since, being a customer of HEAG, he could be entitled to damages and gain decisive information from the authority's file in order to bring his claim.⁸ This applied all the more in the case of a settlement decision on the basis of commitments according to Sec. 32b GWB since such decision does not contain a binding statement whether there was in fact a competition law infringement.⁹ This means that it is upon the claimant to prove the infringement without being able to benefit from the binding effect of the cartel authority's findings in a final decision according to Sec. 33 (4) GWB.

In line with the rules to access files in a quasi-criminal cartel proceedings according to Sec. 406e Code of Criminal Procedure the claimant was not required to request access to specific documents of the file.¹⁰ It was the authority's task to define the scope of the requested access by weighing all interests concerned. However, by referring to Art. 6 (6) EU Antitrust Damages Directive¹¹ the Court considered that it might be sufficient to merely exclude the information provided voluntarily by HEAG from the access to file and to blacken its business secrets.¹²

Comment

The decision at hand is a further piece of the puzzle to comprehensive rules under which conditions and to which extent individuals, undertakings or public authorities having suffered damage due to a competition law infringement and seeking compensation via private antitrust enforcement are entitled to access the files of the respective competition authority. By referring to the landmark decision of the European Court of Justice in the *Pfleiderer* case¹³ (concerning the access to a

leniency application in quasi-criminal cartel proceedings) the EU Antitrust Damages Directive states that all national rules governing the right to compensation for harm resulting from an infringement of Article 101 or 102 Treaty of the Functioning of the EU should not be applied in a way that “makes it excessively difficult or practically impossible to exercise the right to compensation”.¹⁴ It is therefore only consequent that in the administrative antitrust proceedings at hand which were closed with commitments the Federal Court of Justice requires a balancing of all interests concerned as the European Court of Justice did in *Pfleiderer*. However, while the scope of the access to file in quasi-criminal cartel proceedings in Germany is generally limited to the blackened fining decision, the potential claimant for damages might have the chance, based on the Federal Court of Justice's considerations, to gain a wider-ranging access to the cartel authority's files in administrative proceedings, in particular if they were settled by way of commitments offered by the alleged infringer.

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⁷ Ibid., para 23.

⁸ Ibid., paras 29 et seqq.

⁹ Ibid., paras 22, 31, 40.

¹⁰ Ibid., paras 33 et seqq.

¹¹ EU Directive [2014/104/EU](#) on Antitrust Damages Actions, OJ L 349/1 of 5 December 2014.

¹² Federal Court of Justice, decision [KVR 55/14](#) of 14 July 2015, para 41.

¹³ See Commeo Newsletters “[Leniency applications still protected from disclosure?](#)” of 16 June 2011 and “[Keine Akteneinsicht in Kronzeugenanträge](#)” of 6 March 2012.

¹⁴ EU Directive [2014/104/EU](#) on Antitrust Damages Actions, OJ L 349/1 of 5 December 2014, recital (11).