

Belgium

Belgian Supreme Court Confirms Heavy Burden of Proof to Oppose Disclosure of Leniency Documents to Parties Claiming Damages in Follow-On Proceedings

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I. Introduction

On 22 March 2018, the Belgian Supreme Court ruled on the conditions for disclosing leniency documents to parties claiming damages in follow-on proceedings.¹ The facts of the underlying case were rather unique as the claimant was the European Union (Union, or EU) and the request for access to leniency documents was directed to the cartel members and not to the European Commission (Commission). The judgment demonstrates that cartel members opposing the disclosure of leniency documents bear a heavy burden of proof. Although the Damages Directive² was not yet applicable in this case, the judgment under scrutiny also provides guidance on how to apply the Directive's provisions on the disclosure of evidence.

II. Background and Facts

In 2007, the Commission fined four elevator companies a total of €992 million for their participation in the lifts and escalators cartels.³ The Union, represented by the Commission, subsequently brought a civil action before the Brussels Commercial Court seeking compensation from the cartel members for the damage the Union incurred as a result of this cartel.

The Commercial Court first referred several questions to the Court of Justice of the European Union ('CJEU') for a preliminary ruling. In its judgment of 6 November 2012, the CJEU ruled that the mere fact that the Commission itself conducted the cartel investigation does not preclude it from claiming follow-on cartel damages on behalf of the Union.⁴ In essence, the CJEU considered that since the Union's claim was based on the non-confidential version of

the cartel decision, there was no violation of the 'equality of arms' principle.

In its ruling of 24 November 2014, the Brussels Commercial Court nevertheless dismissed the Union's claim due to a lack of evidence with respect to the actual harm suffered.⁵

The Union appealed against this judgment before the Brussels Court of Appeal. In this context, the Union requested to order the cartel members to disclose certain recitals of the confidential version of the Commission's cartel decision as well as the documents to which these recitals referred. The Union suggested that certain confidential information could be omitted (ie internal documents of the Commission, personal data, corporate statements submitted in the framework of the leniency programme and information that could identify a leniency applicant).

The Court of Appeal granted this request entirely in its interim judgment of 28 October 2015 and or-

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- 1 *European Union v Otis and Others*, judgment of the Belgian Supreme Court of 22 March 2018 (C.16.0090.N) <http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20180322->6 accessed 19 November 2018.
- 2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ('Damages Directive').
- 3 *PO/Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision of 21 February 2007.
- 4 Case C-199/11 *Otis and Others* [2012] ECLI:EU:C:2012:684.
- 5 For a critical analysis of this judgment, see Thierry Bontinck and Pierre Goffinet, 'Le jugement du 24 novembre 2014 du Tribunal commerce néerlandophone de Bruxelles: le private enforcement au point mort?' [2015] TBM, 47-56.

dered each cartel member to submit the requested documents after deletion of the confidential information as suggested by the Union.⁶ The companies could, however, request to leave out more information by submitting a confidential memo stating the reasons for maintaining the confidentiality of that information. The Court of Appeal would then decide on this request after hearing the other parties' counsels in absence of the parties themselves. Moreover, the companies were also ordered to submit a complete confidential version of the cartel decision and the underlying documents concerned in a sealed envelope.

The cartel members challenged this ruling before the Belgian Supreme Court which upheld the Brussels Court of Appeal's reasoning in its judgment of 22 March 2018.

II. The *Pfleiderer* Balancing Test

The case at hand illustrates the importance for a claimant seeking compensation for cartel damages to have access to documents of the Commission's leniency programme involving the cartel for which damages are claimed. It also demonstrates how the claimant's right to private enforcement interferes with the cartel members' interests and even the public interest.

The issue of whether a claimant could have access to leniency documents in order to substantiate its claim for damages in follow-on proceedings, was for

the first time addressed in *Pfleiderer*⁷. In this case, the Court held that EU competition law does not preclude a party seeking damages from being granted access to leniency documents.⁸ Although the CJEU left it to the national courts to determine when access should be granted, it also stated their decision should be the result of a balance of the interests protected by EU law.⁹ In subsequent case law the Court clarified that an absolute ban on the access to leniency documents in proceedings relating to follow-on actions for damages is not permitted.¹⁰

In the meantime, the Damages Directive laid down clear rules regarding the disclosure of evidence in follow-on proceedings, including a proportionality test which is similar to the balance test foreseen in *Pfleiderer*.¹¹ However, these rules do not apply to action for damages brought before court prior to 26 December 2014.¹² National courts faced with a request for disclosure of leniency documents relating to an action for damages initiated prior to 26 December 2014 must therefore take into account the *Pfleiderer* balance test.

III. Balance of Interests in the Disclosure Order

It is clear from the judgment of the Brussels Court of Appeal that it balanced the diverging interests at stake before ordering the disclosure of the requested documents.

As a preliminary point, the Court of Appeal considered that there were sufficient indications that the requested documents could support the Union's claim. It pointed out, in particular, that a claimant requesting disclosure of confidential information from a cartel decision must not demonstrate that the decision contains an evaluation of the exact effects of the cartel.

The Court of Appeal then weighed the Union's interest in having access to the leniency documents against the allegedly overriding interests invoked by the cartel members, ie their interest in maintaining the confidentiality of the documents and the public interest in safeguarding the leniency programme's objectives. The Court found that according to EU law¹³ it is for the party invoking an allegedly overriding interest to provide explanations as to how access to a certain document could specifically and actually undermine that interest. When applied to the

6 *European Union v Otis*, judgment of the Brussels Court of Appeal of 28 October 2015 (2015/ AR/95), *Jaarboek Marktpraktijken* 2015, 754.

7 Case C-360/09 *Pfleiderer* [2011] ECLI:EU:C:2011:389.

8 *ibid* para 32.

9 *ibid* para 32; Case C-536/11 *Donau Chemie and Others* [2013] EU:C:2013:366, paras 30 - 31; Case T-345/12 *Akzo Nobel NV* [2015] ECLI:EU:T:2015:50, paras 83-85.

10 *Donau Chemie and Others*, para 49 and Case C-557/12 *Kone and Others* [2014] EU:C:2014:1317, para 37; Also discussed in Baskaran Balasingham, '15 Years after Courage v Crehan: The Right to Damages under EU Competition Law' (2017) 1(1) *CoRe* 11, 20-22.

11 arts 5(3) and 6(4) Damages Directive.

12 art 22(2) Damages Directive.

13 The Belgian Court of Appeal referred to art 4(2) of 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 and Case C-365/12 P *EnBW Energie Baden-Württemberg* [2014] ECLI:EU:C:2014:112, paras 63-64.

case at hand, this meant that the cartel members opposing the disclosure of information had to justify on a document-by-document basis how disclosure could undermine their own commercial interests or (the efficacy of) the leniency programme. The Brussels Court of Appeal eventually concluded that in this case the cartel members did not meet this burden of proof. Moreover, as regards the argument of confidentiality, the Court of Appeal also observed that the information was more than ten years old and therefore - pursuant to EU case law¹⁴ - no longer confidential unless demonstrated otherwise.

This approach is also reflected in the modalities the Court of Appeal laid down for the submission of the requested information. Indeed, the cartelists were ordered to submit all the requested information to the court's registry. The cartelists that considered certain information should be left out had to submit a request in which it provided due justification to that effect.¹⁵

In their appeal to the Belgian Supreme Court the cartel members essentially criticised the way the Court of Appeal carried out the *Pfleiderer* balance test. More specifically, they argued that the latter did not sufficiently take into account the confidential nature of all types of leniency documents and the adverse effects on the effectiveness of the leniency programme.

The Supreme Court, however, rejected these arguments and upheld the reasoning of the Court of Appeal. It refuted the 'confidentiality' argument by simply stating that it was clear from the judgment under appeal that the Court of Appeal did consider the confidential nature of all types of leniency documents. As regards the adverse effects of disclosure on the leniency programme, the Supreme Court referred to EU case law¹⁶ according to which non-disclosure is justified only if there is a genuine risk that a specific document may actually undermine the effectiveness of the leniency programme. The Supreme Court subsequently confirmed that, in the case at hand, the Court of Appeal did take into account the adverse effects on the leniency programme when ordering disclosure of the requested leniency documents.

IV. Heavy Burden of Proof to Oppose Disclosure of Leniency Documents

This judgment demonstrates that it is difficult for cartel members to prevent the disclosure of leniency documents to a party claiming damages in follow-on proceedings.

The argument that disclosure could undermine the efficacy of the leniency programme will hardly ever be successful as cartel members must demonstrate for each individual document that it could actually undermine the leniency programme. They cannot argue that the disclosure of a great number of documents (or the combination of certain information) could undermine the leniency programme.

As a consequence, the main argument for opposing disclosure of leniency documents seems to be that the information must remain confidential (for instance because it contains business secrets). However, the Supreme Court now confirms that a party invoking its commercial interest in maintaining the confidentiality of leniency documents must demonstrate that disclosure could actually undermine its commercial interest. This evidently results in a heavy burden of proof, especially since documents that are more than five years old are deemed to have lost their confidential or secret nature unless demonstrated otherwise.

The approach followed in this case is also interesting when assessing requests for disclosure of leniency documents in light of the Damages Directive. Articles 5(3)(c) and 6(4)(c) of the Damages Directive provide that national courts assessing the proportionality of a disclosure order should take into account the confidential nature of the requested information and the need to safeguard the effectiveness of the public enforcement of competition law.

14 The Belgian Court of Appeal referred to T-341/12 *Evonik Degussa* [2015] ECLI:EU:T:2015:51, para 84-86. Note that this judgment was transformed under appeal on other grounds, see Case C-162/15 P *Evonik Degussa* [2017] ECLI:EU:C:2017:205.

15 Note that art 5.7 of the Damages Directive obliges Member States to ensure that those from whom disclosure is sought, are provided with an opportunity to be heard before court.

16 *Donau Chemie and Others* (n 9) paras 47-48 and Case T-677/13 *Axa Versicherung v Commission* [2015] ECLI:EU:T:2015:473.