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# Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law

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# **Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law**

Pablo González de Zárate Catón\*

## **Abstract**

The disclosure of leniency materials held by competition authorities has recently been under the spot. On the one hand, these documents could greatly help cartel victims to prove the damage and the causation link when filing damage actions against cartelists. On the other hand, future cartelists could be deterred from applying for leniency since damage actions could be brought as a result of the information submitted by themselves. Neither the current legislation nor the case law have attained yet to sufficiently clarify how to deal with this clash of interests.

Our approach obviously attempts to strike a balance between both interests. But not only that. We see the current debate as a great opportunity to boost the private enforcement of antitrust law through the positive spillovers of leniency programmes. We hence propose to build a bridge between the public and the private enforcement by enabling a partial disclosure of the documents.

## **1. Introduction**

Let us imagine a city, Antitrust Land, divided in two parts by a river. The growth of the city depends on its capacity to attract visitors. One part of the city attracts a lot of visitors (cartelists) since it is very well connected in terms of access (leniency programmes) and is therefore very rich. Everybody looks happy about that part of the city: the Mayor (the European Commission), since the whole country talks nicely about its access infrastructures, and tourist services (law firms), as they make a lot of money with visitors. This part of the city is called Public Enforcement Town and its citizen is the abstract consumer.

The other part of the city is called Private Enforcement Town, where the concrete consumer lives. It is surrounded by mountains. As a result of this, it is clearly not as wealthy as the other one since visitors hardly ever pass by. Besides, the level of income greatly varies from one neighbourhood to another one as some parts of the town are better connected due to their own cableways. These three neighbourhoods are called United Kingdom, Germany and the Netherlands.

At some point, somebody realizes that a bridge linking both parts (disclosure of leniency materials) of the city could contribute to attract tourists to Private Enforcement Town and therefore to boost its economic growth. Nevertheless, tourist services are clearly against and they say that Private Enforcement Town is so ugly that tourists will immediately leave the city and never be back. They also say that with that bridge in the future nobody will be tempted to come to Antitrust Land.

The question is not as simple as 'bridge: yes or no?'. If yes, it must also be decided its location. It could link the heart of both parts (total disclosure of leniency documents) or it could be built in the surroundings of the city (disclosure of pre-existing documents).

What should the Mayor do?

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This story draws an analogy with the current situation of access to leniency materials in the context of antitrust damages. This issue entails a legal clash between the public and private enforcement of competition law, in particular, leniency programmes versus civil damage actions.

Every time there is a confrontation between two divergent interests we can find stakeholders on both sides. This case is not an exception. However, we think that in this particular one, supporters of public enforcement enjoy more visibility in the EU arena than those who advocate for a stronger private enforcement.

On the public enforcement side we find the European Commission (hereinafter 'Commission'), law firms and the industry. The Commission, although officially puts forward that both public and private enforcement merit the same prominence, is concerned that the disclosure of leniency materials put at risk its successful leniency programme.

Cartelists need the advice of law firms when applying for leniency, and these latter are hence eager to preserve a programme that provides them with a significant source of revenues. In the same vein, the industry does not have any interest in boosting the antitrust private enforcement.

In contrast, it is more difficult to identify the supporters of a stronger private enforcement due to the diffused nature of cartel victims. Direct victims of a cartel usually pass on the increased price to its own buyers. This usually leads to a situation where end consumers are the most affected actors by the cartel.

Who protects end consumers in the field of competition law? Non-governmental organizations, watchdogs, consumer organizations are, *inter alia*, normally responsible for taking this role. Nevertheless, they often focus their efforts on other fields, such as environment and regulatory affairs.

This paper aims to analyse the difficult cohabitation between the leniency programmes and the disclosure of leniency materials to potential claimants. In the second chapter we present the legal framework and functioning of the three cornerstones of the debate: the leniency programmes, the exercise of civil damage actions and the access to documents held by public authorities.

In the third chapter we assess two potential alternatives to gain access to leniency materials held by the Commission: Article 15(1) of Regulation 1/2003 and the Transparency Regulation. The fourth chapter deals with the access to leniency documents held by National Competition Authorities (NCAs) in the light of *Pfleiderer* ruling and the follow-up in some jurisdictions.

In our fifth chapter we present our optimal regime of disclosure of leniency materials by answering seven questions about the most important features of this regime. In the sixth chapter we provide the Major with our solution and we draw our final conclusions.

## **2. Legal framework and functioning at the EU level**

The controversy arising from the disclosure of leniency documents touches upon not only the general regime for the disclosure of documents kept by NCAs and the Commission, but also the legal framework of leniency programmes and the private enforcement of competition law. Therefore, it is noteworthy describing individually the legal framework and functioning of this problematic triangle: leniency programmes, private enforcement of competition law and disclosure of public documents.

### **2.1 Legal framework and functioning of leniency programmes to detect cartels**

Leniency programmes were implemented in the EU in 1996, although the current policy is set by the Commission Leniency Notice (hereinafter 'Notice')<sup>1</sup> from 2006. The Notice established two kinds of immunities: total and partial immunity, but it puts

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<sup>1</sup>Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22.

forward that this does not prevent third parties from filing civil actions as a result of damages arising from the cartel<sup>2</sup>. Nevertheless, it underlines that the making of corporate statements should not entail a comparative disadvantage in the civil litigation for the whistleblower as regards with the rest of cartelists<sup>3</sup>. This leads to a non-disclosure policy of corporate statements and the possibility to provide them orally.

The Notice defines corporate statements as those documents prepared specially to take part in a leniency programme where the undertaking presents its knowledge of a cartel and its role therein<sup>4</sup>. Corporate statements can be accompanied by pre-existing documents<sup>5</sup>, which are those relevant documents to prove the cartel not created for the purpose of applying for leniency. The Notice remains silent as regards with the potential access to pre-existing documents by third parties.

The second guarantee to protect whistleblowers from private actions is the possibility to provide the Commission with oral instead of written corporate statements<sup>6</sup>. This is due to the discovery procedure existing in the Common Law systems, where a judge may impose a party to provide the other party with specific documents in the course of civil litigation. Thus, the oral statement is rendered into writing by the Commission and the whistleblower cannot be forced by a judge to disclose corporate statements since they are not whistleblower's documents.

The evaluation of leniency programme as a policy tool in the EU shows positive outcomes. In the last decade more and more cases have been detected through this system and currently nearly all cartel cases begin with a whistleblower<sup>7</sup>. This has led most of Member States to adopt their own national leniency programmes.

## 2.2 Legal framework and functioning of private enforcement as regards with cartels

The Court of Justice (hereinafter 'the Court') established in *Courage Ltd v Crehan*<sup>8</sup> and *Manfredi*<sup>9</sup> that Article 101 TFEU has direct effect. This means that individuals can invoke it before a national court when filing a damage action for a loss caused by a conduct or contract liable to harm competition. The Court added that, in the absence of EU rules, Member States must provide national procedural and substantive rules to allow the exercise of this right observing the principles of effectiveness and equivalence<sup>10</sup>.

Articles 15 and 16 of Regulation 1/2003<sup>11</sup> touch upon the private enforcement by national courts. They need to be read together with the Commission Cooperation Notice<sup>12</sup>. Article 15 deals with the different types of cooperation between national courts and the Commission. It is noteworthy recalling that, according to the Cooperation Notice, the request by national courts for information or an opinion, does not enable the national court to obtain confidential information and business secrets

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<sup>2</sup> *Ibid*, para.39.

<sup>3</sup> *Ibid*, para. 6.

<sup>4</sup> *Ibid*, para. 31.

<sup>5</sup> *Ibid*, para. 6.

<sup>6</sup> *Ibid*, para.32.

<sup>7</sup> Richard WHISH & David BAILEY, *Competition Law*, p.289, Seventh edition, Oxford University Press, 2012.

<sup>8</sup> Judgment of the Court of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Reference for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division), C-453/99.

<sup>9</sup> Judgment of the Court of 12 July 2006, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*, Reference for a preliminary ruling from the Giudice di pace di Bitonto, Joined Cases C-295/04 to C-298/04.

<sup>10</sup> *Ibid*, rec. 101, point.2.

<sup>11</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25

<sup>12</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004.

unless the court guarantee its protection<sup>13</sup>. Even more interesting, the Commission will not share with national courts the information voluntarily submitted by a leniency applicant without its consent<sup>14</sup>.

Article 16 touches upon the uniform application of EU law and it thus attempts to clarify the effect of Commission decisions on national courts. This article states that national courts are bound by Commission decisions on the same matters<sup>15</sup>, as the Court confirmed in *Europese Gemeenschap v Otis*<sup>16</sup>.

In the context of follow-on actions after a Commission decision, the Court put forward that the national court is required to accept the existence of the infringement. Nevertheless, the plaintiff still needs to prove before the court 'the existence of loss and of direct causal link between the loss and the agreement'<sup>17</sup>. In conclusion, there are three requirements to establish liability for damages: an infringement of competition law, a damage and a casual link between the infringement and the damage. The existence of a previous decision by a competition agency is not indispensable to file an action for damages<sup>18</sup>, but it obviously alleviates the evidentiary burden.

The exercise of actions for damage differs from one Member States to another as a result of different national substantive and procedural rules. In 2004 the Commission entrusted Ashurst to carry out a report to compare the private enforcement systems within the EU and found an 'astonishing diversity and total underdevelopment'<sup>19</sup>.

Rules of evidence concerning the requirement to establish liability also vary across Member States. For instance, although Commission decisions are legally binding to prove an infringement of competition law in all the jurisdictions, this is not the case for NCA decisions: they are accepted as evidence in the proceedings but in some jurisdictions they are not binding<sup>20</sup>.

The functioning of damage claim systems within the EU is far from being optimal. In addition to the hurdles abovementioned, there are other obstacles, such as costs of litigation, limitation periods to bring actions or unfamiliarity with competition law among national judges<sup>21</sup> that undermine the exercise of damage actions.

The Commission is aware of the inefficiencies of the system of damage claims in relation to competition law infringements and has published a Green Paper<sup>22</sup> in 2005 and a White Paper<sup>23</sup> in 2008. The Green Paper identified some of the main obstacles such as rules of access to evidence, the position of indirect purchasers and collective redress mechanisms. The White Paper lays down several recommendations as regards with the level of disclosure to evidence, the binding effect of NCAs decisions or the type of damage that should be claimed.

The Commission has recently launched a proposal of legislation on EU antitrust damage claims which aims to strike a balance between the right to compensation and the smooth functioning of leniency programmes<sup>24</sup>. The most relevant points touched upon by the proposal are:

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<sup>13</sup> *Ibid*, para.22.

<sup>14</sup> *Ibid*, para.23-25.

<sup>15</sup> *Ibid*, para.13.

<sup>16</sup> Judgment of the Court on 6<sup>th</sup> November 2006, *Europese Gemeenschap v Otis NV and Others*, Reference for a preliminary ruling from the *Rechtbank van koophandel te Brussel* (Belgium), C-199/11.

<sup>17</sup> *Ibid*, rec.65.

<sup>18</sup> Regulation 1/2003, Art. 6.

<sup>19</sup> Ashurst (Prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan), *Study on the conditions of claims for damages in case of infringement of EC competition rules COMPARATIVE REPORT*, p.11, 31.8.2004.

<sup>20</sup> *Ibid*, p.79.

<sup>21</sup> The American Antitrust Institute and Jonathan (W. Cuneo, Cuneo, Gilbert & LaDuca) *The International Handbook on Private Enforcement of Competition Law*, p.279, Ed.Alber A. Foer, 2010.

<sup>22</sup> Green Paper - Damages actions for breach of the EC antitrust rules, COM/2005/0672, 19.12.2005.

<sup>23</sup> White Paper on damages actions for breach of the EC antitrust rules, COM/2008/0165, 2.4.2008.

<sup>24</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the

- Rules on disclosure of evidence: three levels of disclosure are established depending on the type of document, for instance, it proposes absolute protection of corporate statements<sup>25</sup>.
- Limited liability for leniency applicants: instead of being severally and jointly liable for the harm caused by the cartel, successful leniency applicants would be only held liable for their share of the cartel<sup>26</sup>.
- Introduction of the passing-on defence: cartelists will be entitled to invoke the passing-on defence when an injured party has reduced its losses by passing to its own customers<sup>27</sup>.

### 2.3 Legal framework and functioning of access to documents held by competition authorities

Public access to documents held by the EU institutions is a citizen's right recognized both in Article 15 TFEU and in Article 42 of the Charter of Fundamental Rights of the European Union. The right is granted to EU citizens, EU residents or legal persons settled within the EU and the applicant can exercise without showing any specific interest.

The secondary law has developed this right through the Regulation 1049/2001 (hereinafter 'Transparency Regulation')<sup>28</sup>, which defines the principles, conditions and limits regarding access to documents held by the institutions. It does not include any reference to competition issues; however, its applicability to competition proceedings was confirmed by the General Court (GC) in *Technische Glaswerke Ilmenau (TGI)*<sup>29</sup>. Likewise, Article 4.2 is often invoked by the Commission to deny public access to competition documents. In particular, it often justifies the refusal on the grounds of the 'commercial interest of a natural or legal person'<sup>30</sup> or/and 'the purpose of inspections, investigations and audits'<sup>31</sup>.

The institution concerned must in principle explain how access to a particular document may affect the interest protected by Article 4.2 following a case-by-case approach. Additionally, the GC put forward in *TGI* that the Commission would be obliged to examine if the disclosure of the documents could specifically and actually harm the interested protected and if there is no overriding public interest in disclosure. This analysis must be accomplished in respect of each document and this had to be shown in the decision<sup>32</sup>.

However, the Court recognizes the possibility for the EU institution to deviate from this case-by-case approach and base its decisions 'on general presumptions which apply to certain categories of documents'<sup>33</sup>. In particular, the Court has already confirmed the existence of these general presumptions which enable the Commission to dismiss requests regarding specific State aid and merger related documents.

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Member States and of the European Union, Stragsbourg, 11<sup>th</sup> June 2013, COM(2013) 404 final,2013/0185 (COD).

<sup>25</sup> *Ibid*, Arts 5-8.

<sup>26</sup> *Ibid*, Arts 9-11.

<sup>27</sup> *Ibid*, Arts 12-15.

<sup>28</sup> Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p.43-48.

<sup>29</sup> Judgment of the Court of First Instance (Fifth Chamber) of 14 December 2006, *Technische Glaswerke Ilmenau GmbH v Commission of the European Communities*, T-237/02.

<sup>30</sup> Regulation (EC) No 1049/2001, Art. 4.2, para.1.

<sup>31</sup> *Ibid*, para.3.

<sup>32</sup> Judgment of the Court of Justice (Grand Chamber) of 1 July 2008, *Sweden and Turco v Council*, Joined Cases C-39/05 and C-52/05, rec. 49.

<sup>33</sup> *Ibid*, rec. 50.

Thus, the Court confirmed in *TGI* that a general presumption arises from Regulation 659/1999<sup>34</sup>, which regulates access to information obtained during State aid proceedings. In the context of proceedings for reviewing State aid, it is presumed that the disclosure of the documents in the administrative file undermines the protection of the objective of investigation activities<sup>35</sup>.

Similarly, in the context of merger documents the Court has recently recognized in *Agrofert* that a general presumption arises from Regulation 139/2004<sup>36</sup>, which provides strict rules as to the access to documents in proceedings for the control of a merger. In particular, there is a general presumption that the disclosure of documents exchanged in a merger file undermines the protection of the commercial interests and the protection of the purposes of the investigations<sup>37</sup>. In this case, the Court puts forward that the general presumption applies regardless of whether the investigation is closed, as disclosure arising after the proceeding before the Commission may deter undertakings in the future from actively cooperating with the Commission<sup>38</sup>.

As regards with cartel-related-documents and, in particular, information submitted by leniency applicants, it could be inferred that the approach concerning the general presumption of certain categories of documents applies. The general presumption would arise from the special interest of maintaining the confidentiality of leniency documents in order not to jeopardize the functioning of leniency programmes. Nevertheless, this question is still unclear. The case *Enbw*, which is pending before the Court, is expected to bring some light to this issue. We will further address the disclosure of leniency documents held by the Commission through the Transparency Regulation in chapter 3.

Concerning leniency documents held by the NCAs, there are not common rules about the disclosure policy of competition documents. The Court has determined in *Pfleiderer* that national courts are responsible to determine under which conditions access must be permitted according to their own national law. We will explore in more detail these issues in chapter 4.

### **3. Access to leniency documents held by the Commission**

The disclosure of leniency documents to third parties affected by a cartel entails a particular clash between the public and the private enforcement of antitrust law. As we have already illustrated, this clash touches upon two different stories. While leniency programmes are deemed a successful approach to strengthen the public enforcement of antitrust law in the context of cartels, the enforcement of competition law through damage actions is weak and concentrated in a minority of Member States.

The application for leniency includes two kinds of documents to prove the existence of the cartel: corporate statements and pre-existing documents. These documents can be very useful for third parties willing to file follow-on damage actions against the cartelist. In particular, they help to prove the existence of damage and the causality between the damage and the infringement. Nevertheless, the cartelist might be deterred from applying for leniency if the competition authority allows third parties to gain access to the documents submitted by the applicants. Since leniency programmes do not grant immunity in the private enforcement arena, leniency applicants could hypothetically be found liable by a national court as a result of the documents they voluntarily submitted.

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<sup>34</sup>Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty, OJ L 83, 27.03.1999, p. 1-9.

<sup>35</sup>*TGI*, *supra*, n. 30, rec. 61.

<sup>36</sup>Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p.1-22.

<sup>37</sup>Judgment of the Court (Third Chamber) of 28 June 2012, *European Commission v Agrofert Holding a.s.*, C-477/10, rec.64.

<sup>38</sup>*Ibid*, rec.66.



Claimants can attempt to request leniency materials through the Transparency Regulation or via national courts on the basis of Article 15(1). We start our analysis by describing and assessing this latter. In the last part of each section we share our thoughts about the use and effectiveness of both channels.

### 3.1 Access via Article 15(1) of Regulation 1/2003

Article 15(1) of Regulation 1/2003 enables national courts 'to ask the Commission to transmit to them information in its possession' in the context of the cooperation between national courts and the Commission. A claimant could thus persuade its national court to invoke this cooperation mechanism so as to obtain leniency materials.

In this section we first present *National Grid*, a cornerstone case in this regard. Then we share some thoughts about the effectiveness of this channel in the context of the exercise of civil damage actions.

#### 3.1.1 *National Grid: a cornerstone case*

*National Grid* can be divided in two parts. The first one touches upon the access to documents held by the Commission, whereas the second one deals with the disclosure of leniency materials in the defendant's possession via a national civil procedure.

National Grid Electricity Transmission (NGET) was claiming damages as a result of the *Gas Insulated Switchgear (GIS)* cartel, which was €750 million fined by the Commission in 2007. The English High Court received a disclosure request from NGET so as to accurately calculate the damage arising from the cartel.

In July 2011 the High Court requested through Article 15 the responses to the Statement of Objections (SO) sent by the Commission to two French defendants, Alstom and Areva. The Commission issued a formal decision on January 2012 providing access to the requested documents excluded leniency materials. This decision was based on two main arguments: (I) the fining decision had been already taken and (II) the documents could not be disclosed solely relying on the discovery mechanism since French law forbade it<sup>39</sup>.

Alstom has appealed this disclosure decision before the GC on 12<sup>th</sup> April 2012 arguing that leniency materials have been disclosed without its consent and has applied for interim measures<sup>40</sup>. On the 29<sup>th</sup> November 2012 the GC suspended the decision since it was not sure the Commission decision complied with the professional secrecy obligations of Article 339 TFEU. This was due, among other factors, to the fact that the confidentiality ring established by the High Court was composed by 92 people and not all of them were lawyers<sup>41</sup>.

In the meantime between the request of information and the decision of the Commission, the Court delivered its preliminary ruling in *Pfleiderer*. According to it, the national court must take a decision as regards with its disclosure weighing the respective interests, the deterrence on one side and the compensation on the other, on a case-by-case basis<sup>42</sup>.

The second part of the case involves a request from NGET for access to documents containing leniency materials (excluded in the first case) in the possession of the defendants ABB and Siemens. This request was made before the High Court following the English discovery procedure. The documents requested were the confidential version of the Commission decision in the *GIS* case, the responses to

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<sup>39</sup>Judgment of the English High Court of Justice Chancery Division *National Grid Electricity Transmission Plc v ABB & others*, 4.4.2012. Case No: HC08C03243, 4.4.2012, rec.13.

<sup>40</sup>Areva initially appealed as well but then withdrew it.

<sup>41</sup>Order of the President of the General Court of 29 November 2012, *Alstom v European Commission*, T-164/12, recs 56-59.

<sup>42</sup>Judgment of the Court of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, Reference for a preliminary ruling: *Amtsgericht Bonn – Germany*, C-360/09, rec.33.

the SO by ABB group defendants, and the replies to the Commission's request for information by the defendants ABB group and other defendants.

In April 2012 the High Court allowed a partial disclosure of the Commission decision, 'very limited passages from a few' of the replies to the Commission's request for information and none of the responses to the SO by the defendants<sup>43</sup>. More relevant than the decision itself is the fact that the High Court had previously asked the Commission for an amicus curiae in relation with an interpretation of the *Pfleiderer* ruling.

The Commission responded that *Pfleiderer* also applied to leniency documents that (I) had been submitted under a Commission's programme (II) were in the possession of the defendant. In other words, a national court could order the disclosure of leniency documents in the possession of the defendant which were previously submitted to the Commission<sup>44</sup>.

The Commission underlined that although Article 15(1) does not allow the disclosure of leniency materials by the Commission, it does not prevent national courts from ordering access to these documents via a discovery procedure applying *Pfleiderer*. Likewise, the national court must assess:

1. Whether disclosure would increase the leniency applicant's liability compared to non-cooperation parties<sup>45</sup>.
2. Whether disclosure is proportionate in the light of its possible interference with leniency programmes<sup>46</sup>.

The High Court followed the criteria put forward by the Commission and carried out a one-by-one analysis of the documents concerned. As regards with the first criterion, it ruled that there was not legitimate expectation of leniency applicants about the confidentiality of their statements<sup>47</sup>. When assessing the second criterion, the High Court acknowledged the relevance of leniency materials to prove the causation and the harm and the difficulty to obtain the requested information through other sources<sup>48</sup>.

### 3.1.2 Comments on Article 15(1) as a mechanism to obtain leniency materials

We would like to provide two remarks in this regard: one concerning the possibility to obtain leniency materials via Article 15(1) and another one about the effectiveness of this mechanism in the context of civil damage actions.

The Cooperation Notice rejects the disclosure of the information submitted voluntarily by a leniency applicant without its consent<sup>49</sup>. This information would cover in principle corporate statements and pre-existing documents. However, it must be recalled that the Cooperation Notice does not have binding force and it only reflects the practice of the Commission. It is therefore interesting to see if the GC addresses this issue in *Alstom* appeal, especially, to see if it draws a difference between corporate statements and pre-existing documents. The disclosure of these latter does not jeopardize as much the use of leniency programmes since they could be obtained by competition authorities through dawn raids and they do not increase the applicant's liability compare to the rest of the cartelists<sup>50</sup>.

However, in our opinion the use of Article 15(1) does not seem very effective to promote civil damage actions. First, it must be recalled that Article 15(1) does not

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<sup>43</sup> *National Grid*, *supra* n.41, rec.59.

<sup>44</sup> Observations of the European Commission pursuant to article 15(3) of Regulation 1/2003 in *National Grid*, November 2011, rec.10.

<sup>45</sup> *Ibid*, rec.16.

<sup>46</sup> *Ibid*, rec.18.

<sup>47</sup> *National Grid*, *supra* n.41, rec.34.

<sup>48</sup> *Ibid*. recs 40-44.

<sup>49</sup> Cooperation Notice, *supra* n.13, para.26.

<sup>50</sup> Opinion of advocate general Mazák on 16 December 2010, *Pfleiderer AG v Bundeskartellamt*, Reference for a preliminary ruling from the *Amtsgericht Bonn* (Germany), C- 360/09, rec.47.

provide claimants with a legal basis to obtain the documents, but they always depend on the receptiveness of the national court to this request. Second, it must be noted that in some jurisdictions, particularly those ones ruled by Civil Law tradition, the practice shows that it is uncommon to approach a national court without the relevant evidences to sustain the claim. Evidences are normally collected prior and not during the trial. The uncertainty regarding the content of the documents to be obtained represents another significant hurdle.

As illustrated by the *National Grid* case, this formula might fit better with those jurisdictions ruled under the Common Law tradition, where collecting evidences during the trial is not so uncommon. Additionally, claimants can take advantage of Article 15(1) so as to strengthen the discovery procedure and gather as many evidences as possible. Likewise, the national court could require the disclosure of an index of content of the information held by the Commission<sup>51</sup>. Once the claimant knows more accurately the extent of the information submitted, it can invoke the discovery procedure so as to gain access to leniency materials in possession of the defendants.

### 3.2 Access via the Transparency Regulation

The access to leniency material through the Transparency Regulation entails mainly two issues. The first one is related to the way the Commission can handle the disclosure requests. The question at stake is if the Commission can dismiss the request on the basis of a general presumption without carrying out a case-by-case analysis through the exceptions of Article 4.2 of the Regulation, following the approach laid down in *Agrofert* regarding merger-related-documents and *TGI* in relation to State aid documents. The second issue touches upon the interpretation of the exceptions concerning the commercial interests and the purpose of investigations.

In this part we plan to present the findings of the GC as regards with these two issues in *CDC Peroxide* and *Enbw*. Then we will provide some remarks about the effectiveness of this mechanism to gain access to leniency documents in the context of civil damage actions.

#### *3.2.1 Findings of the General Court in CDC Peroxide and Enbw*

On 15<sup>th</sup> December 2011 the GC annulled entirely the Commission decision in *CDC Peroxide* and clarified the interpretation of the exceptions contained in Article 4.2. CDC sought access to the statement of contents of the case-file in the Hydrogen Peroxide decision, where the Commission found a cartel in the hydrogen peroxide market. When the Commission dismissed its request on the grounds of the commercial interests and the purpose of investigations exceptions, CDC appealed before the GC.

As regards with the commercial interests exception, the GC did not uphold the arguments of the Commission in the contested decision. In the first place, it pointed out that not all the information concerning the company can be entitled the protection conferred by the commercial interests exception. In particular, only 'information concerning the business relations of the companies concerned, the prices of their products, their cost structure, their market share or similar' should be protected under this exception<sup>52</sup>. The GC added that the interest of the companies that took part in the cartel in avoiding follow-on actions 'cannot be regarded as commercial interests and, in any event, does not constitute an interest deserving of protection'<sup>53</sup>.

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<sup>51</sup>The *CDC Peroxide* case involved this kind of request.

<sup>52</sup>Judgment of the General Court (Fourth Chamber) of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, recs 44-45.

<sup>53</sup>*Ibid*, rec.49.

The purpose of investigations exception was also rejected by the GC. The Commission had invoked this exception by stating that the leniency programme would be undermined if disclosure of leniency materials was allowed, as applicants might refrain from cooperating with the Commission in the future. Nevertheless, this interpretation was not accepted since it 'would amount to permitting the Commission to avoid the application of the Transparency Regulation, without any limit in time, to any competition document merely by reference to a possible future adverse impact on its leniency program'<sup>54</sup>. The ruling also clarified the duration of the purpose of investigations exception as this ground is no longer valid 'once the final decision is adopted, irrespective of where that decision might subsequently be annulled by the courts'<sup>55</sup>.

The second relevant judgement of the GC took place on 22<sup>nd</sup> May 2012 in *Enbw*<sup>56</sup>. This case helped to further clarify how the Commission must deal with request for access to documents under the Transparency Regulation and it basically confirms the interpretation of the exceptions in relation to leniency materials. Energie-Baden-Württemberg (Enbw) was an energy-distribution company that considered itself affected by the GIS cartel. As a result of this, it lodged a request for access to most of the documents related to the proceedings of the GIS cartel's decision. The Commission denied access by arguing that the requested documents were covered by the exceptions touching upon the commercial interests and the purpose of investigations.

As regards with the way the Commission handled the request, it divided the documents in five groups containing the same kind of information: (1) leniency statements and contemporaneous documents, (2) included information requests and their replies, (3) documents obtained in the course of dawn raids, (4) SOs and their replies and (5) internal documents. It pursued that the disclosure of any category would undermine the protection of the purpose of investigations and the disclosure of the first four categories would impede the protection of the commercial interests of the firms concerned.

The GC annulled the decision since it found that the division into categories served no useful purpose. Likewise, the GC put forward that the use of categories of documents to avoid a one-by-one examination is lawful as long as it enables the Commission to apply a single line of reasoning to all the documents within one category<sup>57</sup>. However, the Commission's reasoning for each of categories 1, 2, 4 and 5 in the context of the exception for the purposes of the investigation is largely the same: the disclosure of that information would deter future potential leniency applicants and future addresses of requests for information from cooperating with the Commission<sup>58</sup>.

Furthermore, the Commission argued the existence of a general presumption of no-access to avoid the one-by-one examination as a result of Regulation 1/2003 and Regulation 773/2004, which restricts the access of third parties to the Commission's file during the administrative proceedings, in clear analogy with the *TGI* judgement in the context of State aid. Thus, according to the Commission, the Regulation 1/2003 should be regarded as a *lex specialis* of the Transparency Regulation and therefore prevails over this latter. Since the Commission already qualified as confidential some documents during the administrative proceedings following Regulation 1/2003<sup>59</sup>, it was not required to accomplish an individual examination under the Transparency Regulation.

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<sup>54</sup> *Ibid*, rec.70.

<sup>55</sup> *Ibid*, rec.63.

<sup>56</sup> Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg AG v European Commission*, T-344/08.

<sup>57</sup> *Ibid*, rec.67.

<sup>58</sup> *Ibid*, rec.68.

<sup>59</sup> Regulation 1/2003, *supra* n. 12, Art.27.

The GC also rejected this argument of the Commission to avoid the individual and specific examination of the documents. It held that, whereas Regulation 1/2003 aims to protect the fundamental rights of defence of the investigated undertakings, the Transparency Regulation serves to guarantee the public right to access to the EU institutions documents. Consequently, the GC concluded that the fact that the Commission has already determined the degree of access during the administrative proceedings does not mean that the Commission can automatically avoid the individual examination under the Transparency Regulation<sup>60</sup>.

As regards with the interpretation of the two exceptions in relation to the disclosure of leniency materials, the GC largely follows what stated in *CDC Peroxide*. It confirms that the commercial interests exception does not include the interest in avoiding liability as a result of damage actions and adds that commercial activities may stop being confidential with the passage of time<sup>61</sup>.

Besides, the GC rejected the broad concept of investigations proposed by the Commission, which considers that it is not limited to the proceedings leading to the decision in a cartel case, but it wholly encompasses the Commission's task of public enforcement of competition law. The investigation activities would be thus in peril if leniency documents were disclosed, as this would deter future leniency applicants<sup>62</sup>. The GC rejected this argument by confirming its position in *CDC Peroxide* and adding that the Commission's fears for its leniency programme depend on a number of uncertain factors such as '(1) the use that the parties prejudiced by a cartel will make of the documents obtained, (2) the success of any actions which they may bring for damages, (3) the amounts which will be awarded them by the national courts and (4) the way in which undertakings participating in cartels will react in future'<sup>63</sup>.

### 3.3.2 Comments on the Transparency Regulation as a tool to obtain leniency documents

Our comments touch upon two issues. In the first place we assess in general terms the deterrent effect for future leniency applicants of the disclosure of leniency materials. In the second place, we provide our own legal analysis about the Transparency Regulation as a tool to gain access to leniency materials.

#### What is the deterrent effect of the disclosure of leniency materials?

We are sceptical about the 'official truth' regarding the deterrent effect arising from the disclosure of leniency materials. This official truth is based on the assumption that a cartelist applies for leniency only to totally avoid a financial loss as a result of a sanction. Obviously, for the cartelist it does not make a difference if the financial loss happens as a result of public enforcement or civil damage actions.

This argument can often be true, although we are not sure that is *per se* true. Thus, cartelists sometimes apply for leniency to avoid partially, and not totally, a financial loss. One example of this situation may happen when another cartelist has already blown the whistle. Another example was set by the English High Court in *National Grid*, where it put forward that a cartelist may apply for leniency due to the risk of leniency applications by other participants, although this entailed potential civil damages consequences for all<sup>64</sup>. The high scale of fines set by the Commission together with the lack of treble damages within the EU jurisdictions enable us to think that cartelists might be more afraid of fines than of damages.

It might also be possible that a cartelist decides to blow the whistle not to avoid a financial loss, but to cause a financial loss to its competitors. The whistleblower would be then attempting to gain a comparative advantage *vis-à-vis* its former

<sup>60</sup> *Enbw* ruling, *supra* n. 59, recs 143-145.

<sup>61</sup> *Ibid*, rec.142.

<sup>62</sup> *Ibid*, rec.124.

<sup>63</sup> *Ibid*, rec.125.

<sup>64</sup> *National Grid*, *supra* n.40, rec.37.

partners. This reasoning should not be too easily dismissed if we take into account that cartels normally encompass the main operators in the market.

#### Does the Transparency Regulation allow the disclosure of leniency materials?

The answer to this question is still unclear. This is basically due to the fact that the Court has not followed the same approach of *CDC Peroxide* and *Enbw*, whose judgements were taken by the same GC Chamber, when it overruled the decision of the GC in *Agrofert*.

Thus, in *Agrofert* the Court has recognized the existence of a general presumption that the documents submitted to the Commission during merger proceedings fall under the exceptions of purpose of investigations and commercial interests. Interestingly enough, the Court followed a broader concept of investigation than the one set in *CDC Peroxide* and *Enbw* since it considers that it does not only refer to the period of time until a decision is taken by the Commission. In contrast, it interpreted the exception of the purpose of investigations in an abstract way as encompassing the general activity of the Commission in the enforcement of competition law. It thus concluded that the disclosure of merger-related-documents even after the decision may deter undertakings from cooperating in the future with the Commission.

If the Court decides to take this abstract approach in *Enbw*, it might conclude that the documents submitted by the leniency applicant are presumed to fall within the purpose of investigations exception, since its disclosure may jeopardize the use of the leniency programmes and therefore the investigations activity of the Commission. This is exactly what the Commission argued unsuccessfully in *CDC Peroxide* and *Enbw* before the GC. However, it must be noted that leniency documents are submitted according to the Leniency Notice, which does not have the same normative value as the Transparency Regulation. The Court may not thus recognize the existence of a general presumption arising from a soft law text.

Nevertheless, if the Court decides to still follow the *Agrofert* approach, it should set a difference between the two types of leniency materials: corporate statements and pre-existing documents. As we have already stated, the disclosure of pre-existing documents entails a low deterrent effect. We hence conclude that the general presumption of the purpose of investigations exception should not include them.

As regards with the exception of commercial interests, it would be harder for the Court to follow the reasoning set in *Agrofert*. Documents submitted to the Commission in the context of merger proceedings normally contain sensitive commercial information such as prices, market shares or business strategies. In contrast, we cannot draw the same conclusion in relation with leniency materials, whose content can only be qualified as commercially sensitive on a case-by-case basis.

Our legal analysis of the relevant case law leads us to think that the Transparency Regulation should allow the disclosure of pre-existing documents, but not of corporate statements. These latter would fall under the general presumption regarding the purpose of investigations exception.

#### **4. Access to leniency materials held by NCAs**

The issues related to the clash between private and public enforcement also arise in the context of access to leniency documents in the possession of the NCAs of the EU. The hybrid nature of the NCAs (they apply both national and EU law) together with the lack of clear EU legislation triggered uncertainty as regards with the regime of access to leniency materials held by the NCAs.

We have already seen in *National Grid* that *Pfleiderer* ruling may also have an impact on the access to documents in the possession of the Commission. Nevertheless, we think that this chapter is more appropriate to carry out the description and analysis of *Pfleiderer*, since this ruling mostly targets the functioning of the NCAs. Then, we go

through some examples of the follow-up of *Pfleiderer* in some EU jurisdictions. As usual, we end up the chapter providing some comments about the issues at stake.

#### 4.1 *Pfleiderer* ruling: a case-by-case approach weighing the interests protected by EU law

*Pfleiderer* was the customer of the firms involved in the decor paper industry cartel, which was found by the German NCA as a result of a leniency application. On the 22<sup>nd</sup> February 2008 it sought access to the case file, which was in the possession of the NCA and contained leniency materials and this led to a preliminary reference before the Court.

In his opinion, Advocate General (AG) Mazák tries to conciliate the interests of both public and private enforcement by proposing a distinction between corporate statements, which should always remain confidential, and pre-existing documents, whose disclosure could be granted after an individual examination<sup>65</sup>.

On the 14<sup>th</sup> June 2011, the Court considered that persons seeking to obtain damages cannot be *per se* prevented from gaining access to leniency documents. However, the conditions under such access must be permitted are to be decided by national courts on the basis of their national law. This task entails a case-by-case approach weighing the interests protected by EU law<sup>66</sup>, namely the defence of public enforcement via leniency programmes against the promotion of private enforcement through civil damage actions.

#### 4.2 *The follow-up of Pfleiderer in relation with access to leniency materials held by NCAs*

We have already described the follow-up of *Pfleiderer* ruling and the amicus curiae submitted by the Commission in *National Grid*. Nevertheless, this case does not touch upon documents held by a NCA, but rather upon documents in the possession of either the Commission or the defendants. Hence, in this section we provide a brief overview about how national courts have reacted to *Pfleiderer* ruling when addressing the issue of access to leniency materials held respectively by a NCA and a national court in Germany and Austria.

##### *4.2.1 Germany: a tough approach against disclosure*

The follow-up of *Pfleiderer* once the national court received the preliminary reference from the Court shows that national German courts have adopted a tough approach against disclosure. In January 2012 the court of Bonn refused to grant the disclosure since it considered that the purpose of the investigations could be jeopardized. This legal basis<sup>67</sup> to deny access to documents resembles to the one provided by Article 4.2 of the Transparency Regulation. The German court has followed a broad interpretation of the concept investigation, which is not limited to the investigation at stake, but it also covers the overall activity of competition authorities in detecting cartels.

Since the decision of the *Bundeskartellamt* has binding effect before the national court, it was argued that leniency programmes also contribute indirectly to the success of cartel damage actions. Additionally, it was underlined the limited role of leniency materials in the calculation of the quantum of the damage and the availability of alternative elements to prove the existence of a damage<sup>68</sup>.

##### *4.2.2 Austria: a blanket ban on access to court documents is against the principle of effectiveness*

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<sup>65</sup>Opinion AG Mazák, *supra*, n.51, rec.47.

<sup>66</sup>*Pfleiderer* ruling, *supra*, n.43, rec.32.

<sup>67</sup>Article 406(2)(e) of the German Code of Criminal Procedure.

<sup>68</sup>Judgment of the Amtsgericht Bonn of 18 January 2012, *Pfleiderer v Bundeskartellamt*, 51 Gs 53/09 AG Bonn.

The analysis of the follow-up of *Pfleiderer* ruling before national courts brings us to address the *Donau Chimie* case, which takes place within the Austrian jurisdiction. The case involves a trade association which seeks access to the documents of the file related to the proceedings against the cartel of distributors of printing chemical. It must be noted that in Austria the competition authority acts as a prosecutor before a Court, but it does not adopt administrative infringement decisions. As a result of this, the request of access to the case file was made to the national court and not to the competition authority.

The Austrian Law on Cartels<sup>69</sup> precludes third party access to court files of public law competition proceeding absent the consent of the parties to the proceedings. Nevertheless, the Austrian court wanted to know if this blanket ban on access to court documents was in breach with the EU principles of effectiveness and equivalence.

The Court published its preliminary ruling on the 6<sup>th</sup> July 2013 and also found that the Austrian law was in breach with the principle of effectiveness. It underlines that the access to leniency documents could 'be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation'. It is thus concluded that the Austrian ban makes the exercise of the right to compensation excessively difficult<sup>70</sup>.

#### 4.3 Comments on access to leniency materials held by NCAs

Although less than two years have passed since *Pfleiderer*, we can already see that national courts have taken different approaches as regards with the case-by-case analysis of the disclosure of leniency materials. Likewise, while the German and Austrian courts do not enable claimants to gain access to leniency documents, the English High Court has taken a softer approach. This asymmetry is likely to be reproduced across the rest of EU jurisdictions. Hence, the countries which intervened in support of the Austrian blanket ban rule (Spain, Belgium, Italy and France) are likely to advocate for keeping the confidentiality of leniency documents, whereas nordic countries committed to a high level of transparency might allow partial disclosure.

This brings us to assess the two main criticisms of *Pfleiderer ruling*: the forum shopping and the legal uncertainty arisen as a result of the ruling.

##### *4.3.1 Pfleiderer & forum shopping*

Some commentators have warned that *Pfleiderer* may lead to a situation where damage claimants elect to apply to claimant-friendly jurisdictions for disclosure of leniency materials before in other jurisdictions<sup>71</sup>. However, we think that the impact of *Pfleiderer* in terms of choosing jurisdictions is insignificant.

In any case *Pfleiderer* would affect the behaviour of leniency applicants and not of damage claimants. Leniency applicants are the ones who could be persuaded to apply for leniency in those jurisdictions where leniency materials remain confidential in the possession of competition authorities<sup>72</sup>. Civil claimants would have no choice and would be then forced to request disclosure in those jurisdictions.

In those cases with multiple leniency applications before different NCAs, we acknowledge that the different attitudes towards disclosure among national jurisdictions could be merely one more factor to take into consideration when

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<sup>69</sup>Paragraph 39(2) of the Austrian Federal Law of 2005 on Cartels and Other Restrictions of Competition.

<sup>70</sup>Judgment of the Court on 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, Reference for a preliminary ruling from the *Oberlandesgericht Wien* (Austria), C- 536/11, rec.39.

<sup>71</sup>Gianni DE STEFANO, *Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario*, p.103, Global Competition Litigation Review Issue 3, Sweet and Maxwell, 2012.

<sup>72</sup>We think that this scenario is very unlikely as well.



choosing where to sue. As we presented in the first chapter, private enforcement mechanisms are characterized by a great diversity: substantive provisions, costs of litigation, the duration of the procedures or limitation period of the actions are just examples of the elements to be taken into account in the election of the court. With such a heterogeneous scenario forum shopping might exist with or without *Pfleiderer*.

#### 4.3.2 *Pfleiderer* & legal uncertainty

The second criticism is the legal uncertainty arising as a result of *Pfleiderer*, which may constitute a deterrent effect for potential whistleblowers. In other words, cartelist may be discouraged to apply for leniency not because their documents will be disclosed, but because their documents might be disclosed<sup>73</sup>. This argument seems again unfounded to us.

What law firms criticize in *Pfleiderer* is the fact that the Court has not taken any decision at all and has kicked the ball back into the national field<sup>74</sup>. Obviously, they were expecting a strong statement against disclosure. The problem is that the Court could not say so since there is not a single piece of EU legislation which explicitly forbids the disclosure of leniency materials<sup>75</sup>.

It cannot be said that *Pfleiderer* adds legal uncertainty. Similarly to what happens with forum shopping, we can state that there was already legal uncertainty (otherwise the German court would not have referred a preliminary ruling) and that this did not constitute an obstacle to the success of leniency programmes. Before *Pfleiderer* leniency applicants could neither be entirely sure, nor have a legitimate expectation, that the material submitted was going to remain confidential according to EU law. And this did not prevent them from applying for leniency.

## 5. Recommendations

In the light of our aforementioned comments, we believe that the current legal framework regarding access to leniency materials needs a substantial modification. The Commission shares this idea since it has recently launched a legislative proposal on actions for damages to ensure effective damage actions before national courts for breaches of EU antitrust rules.

Our recommendations regarding the optimal regime of access to leniency materials held by competition authorities can be divided in seven issues. We address each issue with a question and answer.

### 1. Should the disclosure of leniency materials be addressed through a specific or a general regime?

We have seen that the current system of access to public documents at EU level, which does not explicitly refer to leniency materials, represents a source of controversy. We advocate for a specific clause that deals with the disclosure of leniency materials. In the first place, the enforcement of cartel infringement is so important for the society welfare that its different aspects require particular attention. In the second place, leniency materials have features which make them completely different from the rest of the documents held by public administrations.

### 2. Should we have the same disclosure regime for the Commission and the NCAs?

Cartels are often international and competition law is a EU matter. The issues regarding the disclosure of leniency materials are the same regardless the competition authority involved. We cannot but propose the same regime of disclosure for the Commission and NCAs.

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<sup>73</sup>DE STEFANO, *supra*, n.72, p.102.

<sup>74</sup>Andres GEIGER, *The end of the EU cartel leniency programme*, 23<sup>rd</sup> June 2011, Available at: <http://www.euractiv.com/competition/eu-cartel-leniency-programme-analysis-505907>, [Accessed on September 30<sup>th</sup> 2013].

<sup>75</sup>The Leniency Notice is not binding.

### 3. How should the rules dealing with the disclosure of leniency materials be?

They should be easily applied by an administrative body within a short period. We therefore advocate for clear rules that do not involve weighing interests on case-by-case basis. Not only this produces legal uncertainty, but also it entails delays that may jeopardize the exercise of damage actions. In particular, we propose a regime that set a difference between the two main categories of leniency documents: corporate statements and pre-existing documents.

### 4. Should leniency materials be disclosed by competition authorities?

Following our last classification, we think that corporate statements should remain confidential while pre-existing documents should be disclosed upon request on a general basis. We consider that the disclosure of corporate statements entail three potential risks that do not happen with pre-existing documents. First, its disclosure entails a deterrent effect for leniency programmes, since these documents only exists as a result of this kind of programmes. In contrast, pre-existing documents can always be obtained through dawn raids. Second, its disclosure might jeopardize the right against self-incrimination, which is part of the constitutional traditions of some Member States. Third, its disclosure is likely to represent a comparative disadvantage for the leniency applicant *vis à vis* the rest of the cartelists.

The disclosure of pre-existing documents can contribute to foster the private enforcement of cartel infringements and, in particular, help plaintiffs to prove the damage and the causality. As a result of the secret nature of cartels, plaintiffs struggle to obtain evidence to support its claim. It is hence advisable to allow them to take advantage of the information gathered during public enforcement proceedings.

### 5. What happens if leniency materials contain commercial information or if public proceedings are still on going?

We consider that pre-existing documents do not normally contain sensitive commercial information as defined by the GC. In the same vein, we also think that the right of compensation of the victims outweighs the right of the cartelists to avoid the disclosure of such information. Finally, the case-by-case examination of pre-existing documents to determine if they contain commercial interests is time-consuming and undermines the interests of the plaintiffs. We therefore conclude that pre-existing documents do not need an examination to be disclosed.

However, we think that the disclosure of leniency materials must not alter the investigation carried out by competition authorities. We hence advocates for the disclosure of pre-existing document once the infringement decision has been taken.

### 6. Do third parties need to show a legitimate interest to gain access to pre-existing documents?

This is quite a sensitive point since it involves a potential clash between two interests. On the one hand, if a legitimate interest is required, competition authorities will dispose of an easy ground to refuse the requests. In the same vein, the analysis of the legitimate interest constitutes an administrative burden that may lead to a delay to satisfy the request.

On the other hand, if there is no need to show a legitimate interest, the commercial interests that might be included in the pre-existing documents will be available for public at large.

We think that the interest of a proper private enforcement outweighs the confidentiality interest of the cartelists. We therefore consider that third parties do not need to show a legitimate interest.

## 7. How should competition authorities deal with the requests?

We believe that the Commission and some NCAs tend to be reluctant in practice to disclose information. We are concerned about the impact of this in the context of leniency material and private enforcement. Time is a very delicate issue since the limitation period to bring damage actions is usually quite short and not aligned with the time length of administrative proceedings.

We therefore advise competition authorities to give priority to requests of leniency documents, especially if there are clear signs of a legitimate interest. Furthermore, we consider that the Ombudsman and the Court have a key role to play when ensuring that the Commission effectively applies the legal regime regarding the disclosure of leniency documents.

## **6. Conclusions**

The prosperity of Antitrust Land involves attaining a high standard of living of all its citizens. Thus, citizens from Private Enforcement Town (the concrete consumer), deserve the same level of protection than citizens from Public Enforcement Town, (the abstract consumer). Since Public Enforcement Town enjoys already a good health, the Mayor should focus his efforts on strengthening Private Enforcement Town.

In order to achieve this, it is important to foster the interactions between both towns. We hence suggest the Mayor to build the bridge. However, we think it is a bit risky to locate it between the hearts of both towns since tourists might be frightened by the bad reputation of Private Enforcement Town. A bridge linking the surroundings of both towns will be enough to transmit the positive 'spillovers' from Public Enforcement Town to Private Enforcement Town without entailing such a risk.

Our advice to the Major is highly influenced by our perception regarding the deterrence effect of the disclosure of leniency materials. We do not believe that there is a *per se* deterrent effect for leniency programmes linked to the disclosure of leniency material. The disclosure of pre-existing documents entails such a low deterrent effect that it is clearly outweighed by the benefits it brings in the private enforcement arena. However, we agree that the disclosure of corporate statements may prevent future cartelists from applying for leniency.

The current legislation at EU level provides claimants with two potential paths to obtain leniency materials held by the Commission. The mechanisms of cooperation between the Commission and national courts set in Article 15 of Regulation 1/2003 represent the first option. However, this alternative entails several shortcomings that impede its effectiveness in several jurisdictions.

The second option is the Transparency Regulation, whose interpretation as regards with the disclosure of leniency material is to be clarified by the Court in *Enbw*. It is difficult to draw conclusions about its scope, since the GC in *CDC Peroxide* and *Enbw* and the Court in *Agrofert* have hold diverging views in this regard.

According to our legal analysis, the Court should recognize the existence of a general presumption of non-disclosure of corporate statements as a result of the purpose of the investigations exception. In contrast, since the disclosure of pre-existing documents does not jeopardize the existence of leniency programmes, we expect the Court not to include them within the general presumption and therefore to allow its disclosure.

Regardless of the outcome in *Enbw*, we advocate for the adoption of a legislative proposal that establishes a specific regime for the disclosure of leniency materials. This regime should broadly allow the universal disclosure of pre-existing documents, and not corporate statements, to all the individuals once the infringement decision has been taken. Additionally, the proposal should include mechanisms to ensure that the Commission fulfills promptly this duty, since delays jeopardize the exercise of the civil actions.



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