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I. INTRODUCTION

The European Commission has recently proposed a Directive on rules governing actions for damages for the infringement of competition law ("draft Directive").[2] The proposal seeks to regulate—"optimise" in the language of the Commission—the interaction of public and private enforcement in the European Union. At the same time, the proposals seek to ensure that victims of anticompetitive conduct can obtain full compensation for the violation of EU competition law in the courts of the Member States.

The draft Directive is the result of a decade-long debate about the role private claimants should play in the enforcement of EU and national competition rules. It comes in the wake of the seminal *Courage* and *Manfredi* rulings[3] that established a right to compensation for the infringement of EU competition rules, and proceedings in the European and national courts where parties sought access to leniency related material to support such damages claims.[4]

The draft Directive suggests, among other things, the judicially controlled disclosure of evidence in competition litigation to facilitate private antitrust enforcement.[5] The revelation of documents in competition law proceedings is likely to be controversial in many Member States because ordering the defendant to release substantial and potentially damaging material is an alien concept in most EU civil procedure laws. It is often feared that the discovery of documents in the possession of the respective other party could impose a financial burden on defendants and claimants alike.

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[2] European Commission, *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 Member States and of the European Union* (11 June 2013). The draft Directive was accompanied by a Communication on quantifying harm and a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States.

[3] Case C-453/99 *Courage Limited v Bernard Crehan* [2001] ECR I-06297; Case C-295/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

[4] Case T-437/08 *CDC Hydrogen Peroxide Cartel Damages Claims v European Commission* (General Court, 15 December 2011) (*CDC Hydrogen Peroxide*); Case T-344/08 *EnBW Energie Baden-Württemberg AG v European Commission* (General Court, 22 May 2012) (*EnBW Energie Baden-Württemberg*); Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161; *National Grid Electricity Transmission Plc v. ABB Ltd and others* [2012] EWCA 869 (*National Grid II*).

[5] Article 5 draft Directive. The Commission has also suggested rules governing the joint and several liability of offenders, binding effect of agency decisions, passing-on defense, and limitation periods. These topics will not be discussed.

The proposals are also likely to create problems in Member States that already have disclosure rules in place, namely the United Kingdom. If the draft Directive is adopted in its current shape, leniency and settlement submissions are to be excluded from disclosure. The absolute protection of some core documents potentially conflicts with the *Pfleiderer* decision of the Court of Justice of the European Union ("CJEU") and the U.K. High Court of Justice's interpretation of this precedent.

In the United Kingdom, where civil procedure provides for broad disclosure of evidence, the courts have refrained from establishing a privilege for leniency and settlement submissions that would protect them from discovery. On the contrary, the U.K. High Court has applied a weighing test with respect to leniency materials in the *National Grid* litigation.[6] If some documents were absolutely protected from disclosure applications, the national test would need adjustments.

This article looks at the potential impact of the draft Directive on U.K. discovery in antitrust cases and the lessons that have been learned in the U.K. courts so far. The focus will be on the practice involving leniency and settlement documents in private litigation. The U.K. experience may help to understand how discovery procedures could work in other jurisdictions and it also shows that sensible judicial oversight can limit the costs associated with the disclosure of evidence.

Section 2 briefly describes the disclosure regime in the United Kingdom and the likely impact of the EU disclosure proposal. Section 3 looks at how the U.K. courts have solved the specific problem of access to leniency submissions. Section 4 discusses the potential issues arising from the limitations suggested in the draft Directive. Section 5 concludes.

II. GENERAL DISCLOSURE PRACTICE IN THE UNITED KINGDOM

Claimants in the U.K. courts benefit from disclosure in the High Court of Justice and the Competition Appeal Tribunal ("CAT").[7] Parties must disclose documents to each other which are, or have been, in their possession and are material to the case (standard disclosure). The duty to disclose includes the duty to search for documents if necessary and make documents available for inspection and copying. Rule 31 of the U.K. Civil Procedure Rules ("CPR") includes documents the claimant or defendant has or has had the right to inspect.[8] The disclosing party is to reveal information that is both supportive of its case and potentially damaging.[9] Documents in the context of disclosure comprise of any medium on which information of any description is recorded, including written and oral communication, deleted files, and metadata.

General standard disclosure is broad but can be limited. The judge may order a more targeted disclosure relating to individual allegations or issues. In its recent *Google* decision, the

[6] *National Grid Electricity Transmission Plc v. ABB Ltd and others* [2011] EWHC 1717 (*National Grid I*); National Grid II (n 4). A third ruling discussed the effect of a French blocking statute on UK disclosure. *National Grid Electricity Transmission Plc v. ABB Limited and others* [2013] EWHC 822.

[7] The Competition Appeal Tribunal is a specialist court with currently limited jurisdictions for monetary follow-on claims. Section 19 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372) enables the CAT to order the production of documents.

[8] CPR, rule 31.8(2).

[9] CPR 31.6.

High Court, with the parties' consent, limited disclosure to particular allegations of abuse based on the preliminary assumption that Google was likely to be dominant.[10] For the time being, Roth J ordered mainly limited disclosure of pre-existing documents the defendant Google had previously gathered for the Commission's investigation into its alleged anticompetitive conduct.

The draft Directive seeks to encourage claimants to file for redress in the courts by facilitating access to evidence. According to Article 5 of the draft Directive national courts will have to order the disclosure of evidence if it is relevant for the claim or defense, has been precisely defined (as much as possible), and satisfies the proportionality test laid out in Article 5(3). Courts shall *inter alia* take into account whether or not the evidence "[...] contains confidential information [...] and the arrangements for protecting such confidential information [...]." Disclosure orders ought to be available against the defendant and third parties.

The proposed disclosure of evidence in civil competition proceedings will have a considerable impact on many civil law jurisdictions. In the United Kingdom, the introduction of disclosure in competition litigation will require few changes. Given that judges enjoy wide discretion with respect to disclosure, the proportionality test for the release of material in competition cases—if at all different from the existing disclosure test—should be fairly easy to implement. More problematic are the limitations the draft Directive imposes on the release of material that was submitted to competition authorities.

III. DISCLOSURE OF LENIENCY SUBMISSIONS IN THE U.K. COURTS

The point at issues of the Commission's discovery proposal—at least from a U.K. perspective—is that it temporarily or absolutely exempts certain types of documents from disclosure in civil proceedings. To understand the issues arising from the draft Directive I will first outline the current EU and U.K. case law.

In the U.K. courts leniency material has not been given absolute protection. Material that has been submitted to a competition authority for leniency or settlement purposes is not privileged under U.K. law. Privileges—mainly the legal advice and the litigation privilege—exclude certain documents from disclosure in litigation: verbal or written messages exchanged between lawyer and client, and communication for the preparation of litigation.[11] Documents that competition authorities deem confidential such as responses to statement of objections, leniency and settlement statements, or the confidential version of the decision are unlikely to benefit from these privileges. Confidentiality as such does not bar disclosure.

Despite the absence of a disclosure privilege, claimants seem to have refrained from seeking access to leniency statements in the courts. Only in recent years, after the CJEU had handed down its *Pfleiderer* decision, have claimants attempted to obtain access to core leniency documents, i.e. material the successful corporate leniency recipient had gathered for the purpose of its application.

[10] *Infederation Ltd v Google Inc* [2013] EWHC 2295 (Ch).

[11] *See* also section 30 of the Competition Act 1998. The legal advice privilege does not cover in-house communication. Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR I-08301.

In *Pfleiderer* the CJEU established that EU law does not preclude a claimant *per se* from access to leniency documents. An absolute protection of leniency files would hamper the effective enforcement of the right to redress. Whether or not national courts should release confidential information must be decided on a case-by-case basis. In doing so the national courts should "[…] 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."[12]

Subsequently, the High Court applied the *Pfleiderer* balancing standard to disclosure applications aiming at leniency related documents in *National Grid*.[13] National Grid Electricity Transmission operates the U.K. electricity network and claims to have suffered losses from the gas insulated switchgear cartel. The cartel was operated by four corporate groups, including Areva, Alstom, Siemens, and ABB.[14] The European Commission imposed heavy fines on the companies and granted leniency to ABB.

In the course of the proceedings, National Grid sought the disclosure of leniency related material mainly from the leniency applicant ABB but also from some other defendants. The requests included the confidential version of the Commission's decision, the responses to the Commission's statement of objections, and the responses to information requests. All documents contain or may contain leniency material. The High Court, dealing with the disclosure application, applied the test suggested by the Court of Justice of the European Union ("CJEU") in *Pfleiderer*.[15]

The High Court developed a number of criteria that formed part of its weighing exercise:[16]

- Would disclosure increase the leniency applicant's exposure to liability compared to non-cooperating parties?
- Does the gravity and duration of the infringement outweigh the concerns about the deterrence of potential leniency applicants?
- Would disclosure be proportional, i.e. are the documents available from another source and are they relevant for this case?

The High Court ordered the release of some confidential material within a confidentiality ring. Since all cartelists were co-defendants, there was no risk that the leniency applicant would be found liable while non-cooperating co-defendants would shirk away from civil liability. The serious nature of the cartel and its duration of almost 16 years also argued in favor of disclosure. The court was convinced that the information could not be obtained from another source without excessive difficulties for the claimant. To satisfy the proportionality test, Roth J inspected the material in question. He decided that not all documents are relevant for a fair disposal of the claim. The claimant obtained partial access to the confidential version of the Commission's decision and limited access to ABB's response to the Commission's information request. The

[12] *Id.*
[13] *National Grid I* (n 5); *National Grid II* (n 4).
[14] *Gas Insulated Switchgear* (Case COMP/F/38.899) Commission Decision C(2006) 1766 [2007] OJ C 75/19.
[15] *Pfleiderer AG v Bundeskartellamt* (n 4).
[16] Roth J. dismissed the "legitimate expectation of protection" as a factor to be taken into account.

court did not find the other documents relevant or relevant enough to outweigh the confidentiality concerns.

The High Court's approach strikes a balance between access to leniency documents to facilitate damages actions and the protection of voluntary submission from disclosure. It also satisfies the requirements laid out by the CJEU in *Pfleiderer*. The weighing test comes at the cost of diminished certainty for potential leniency applicants as to the width of future civil discovery. Whether or not documents are to be disclosed in follow-on damages proceedings depends on the facts of the individual case, e.g. the number of co-defendants and the access to crucial information through other channels. Only when the case is actually brought before the court can this question ultimately be judged.

IV. A NEW REGIME FOR THE PROTECTION OF LENIENCY DOCUMENTS?

Compared to the discovery exemptions developed by the CJEU and in the U.K. High Court, the draft Directive follows a different approach. It creates three different groups of documents with varying degrees of protection from disclosure. Leniency and settlement submission are absolutely protected from access, responses to statements of objections and information requests are temporarily out of the claimants' reach, and other documents should be made available to claimants.

Leniency statements and settlement submissions enjoy absolute protection and are strictly excluded from disclosure, according to Article 6(1). Article 7(1) clarifies that this would also prevent the disclosure of information that is in the possession of third parties. It looks as if Article 7(1) was written against the background of the *National Grid* litigation where Siemens and ABB were ordered to disclose information they held about their co-defendants.[17] The draft Directive does not specify that this level of protection applies to successful leniency applications only.

The absolute protection of leniency and settlement documents differs from the current U.K. disclosure procedure. It seems to conflict with the case-by-case approach laid out by the High Court and the CJEU. Arguably, it is the weighing approach that may ultimately prevail if these approaches clash. The weighing of interests in each individual case is prescribed by the CJEU in *Pfleiderer* and was recently confirmed in *Donau Chemie*.[18] In *Donau Chemie* the CJEU declared a provision of Austrian law inconsistent with EU law as it fenced in leniency material and precluded any third party access. Consequently, a national provision protecting leniency documents without exemption, as demanded in the draft Directive, would probably violate EU law.

In applying the *Pfleiderer* standard, the High Court has fleshed out the competing individual interests that have to be traded off against each other. The Court appeared to be reluctant to grant government files absolute protection. If Article 6 was implemented, it would reduce the judge's discretion to zero to weigh those factors in favor and against the disclosure of

[17] As parties to the Commission's investigation, Siemens and ABB gained access to the Commission's file and obtained information about Alstom and Areva.

[18] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* (Court of Justice of the European Union, 06 June 2013).

confidential documents. The two approaches, *Pfleiderer* as applied in *National Grid* and the absolute protection of leniency material, are incongruent.

The second type of protection applies to material specifically prepared for an investigation such as responses to information requests and statements of objections. They would still be available for disclosure but only after the investigation has been closed.[19] This temporary protection ought to safeguard the competition authority's investigation. But, as Roth J. mentioned in the UK *Google* case,[20] it may potentially create delays in civil proceedings if the public case goes through several appeal instances.

With respect to other confidential material, such as responses to the statement of objections and information requests, the draft Directive and the High Court have both adopted a temporary protection approach. As long as the investigation has not been concluded, access will be temporarily barred. After the investigation has been closed the disclosure of non-leniency and non-settlement documents would no longer endanger the purpose of this particular investigation.

Other material that falls outside the first two categories should be discoverable in civil proceedings. This will mainly apply to pre-existing documents. However, the Commission encourages the courts not to order the disclosure of information that has been supplied to the competition authority even if it relates to pre-existing information. If firms were forced to release those documents it could reveal the strategy of the competition authority and diminish incentives for the firms to cooperate.[21] The Commission considers broad disclosure requests aiming at these materials disproportionate.

In its recent *Google* decision the High Court did not share the Commission's assessment. It preliminarily limited discovery to the (pre-existing) documents Google had gathered for the Commission's investigation. It argued that limiting discovery to these documents would be easier and less resource-intensive than wide standard discovery.[22]

What is not clear from the draft Directive is how documents that contain some elements of the leniency application are to be treated. In *National Grid* the High Court ordered the release of a redacted confidential version of the Commission's decision. The confidential decision contains elements of the leniency statement. Article 6(1)(a) excludes all material that falls with the category of leniency from disclosure. If one interprets this proposal broadly, all documents that contain some leniency information would be out of the claimants' reach.

Another interesting aspect of the draft Directive is that it does ignore access to documents through the Transparency Regulation 1049/2001. Although the High Court regards civil disclosure as the right means to access leniency documents, the Transparency Regulation may become an alternative route if the draft Directive restricts civil discovery. The General Court has

[19] Article 6(2).
[20] *Infederation Ltd v Google Inc* (n 9).
[21] ¶ 4.2(d) (n 1).
[22] *Infederation Ltd v Google Inc* (n 9).

so far been rather claimant-friendly in both its *CDC* and *EnBW* decision.[23] The limitations suggested in the draft Directive will not affect the interpretation of the Transparency Regulation.

V. CONCLUSIONS

The draft Directive would introduce the disclosure of information in private damages actions in all EU Member States. The limitations that accompany disclosure are strict: no disclosure of leniency and settlement material and the time-barred release of other documents drawn up for competition authorities' investigations. The constraints only affect follow-on damages cases, i.e. actions brought in the aftermath of a government investigation or in parallel to an on-going investigation.

The rigid protection of leniency and settlement documents creates tensions between the draft Directive, EU law, and national procedure. The draft Directive's "absolute" approach may not be in line with the CJEU's weighing standard. The intention to protect documents that fall into the third category ("other material") would limit even sensible disclosure applications if it was actually picked up by national courts.

As for the United Kingdom, the proposed disclosure restrictions will reduce the scope of discovery for claimants in follow-on actions. Few government documents would be available unless the investigation has been closed. The unclear scope of the leniency and settlement document categories would further impede an assessment of what documents would still be available for disclosure. Under the current proposals, claimants in follow-on suits would be worse off compared to the existing discovery rules but they may create more legal certainty for firms that cooperate with competition authorities.

If discovery is to be introduced in the laws of the EU Member States, it would be sensible to grant judges more discretion than is currently suggested. Wide judicial discretion would help to keep disclosure costs low and, ideally, speed up discovery proceedings. The U.K. example shows that judges bear the cost of document search and inspection in mind when ordering disclosure.

It seems unlikely that Member States will welcome the current rigid approach that potentially stifles private antitrust litigation. The disclosure proposals of the European Commission clearly aim at the protection of government investigations. As for the second objective of facilitating compensation, it is hard to see how the draft Directive removes "[...] practical difficulties which victims frequently face when they try to receive a fair compensation [...]" if valuable and crucial information for the claimant cannot be disclosed.[24]

[23] *CDC Hydrogen Peroxide* (n 3); *EnBW Energie Baden-Württemberg* (n 3).

[24] European Commission, Press Release, *Antitrust: Commission proposes legislation to facilitate damages claims by victims of antitrust violations.*