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I. INTRODUCTION

Since the European Commission initiated its first leniency program in 1996, such programs have become increasingly popular throughout the European Union, to the point that "the overwhelming majority of the national competition authorities in the 27 Member States [now] operate some form of leniency programme."[2]

After almost two decades of success, however, the level of participation seems to have slightly decreased. While a variety of factors may explain this trend, the most worrying one perhaps relates to the increased disclosure risks associated with private damages litigation.

As a matter of EU law, "any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition."[3] In this context, access to evidence is often very valuable for establishing the wrongful act (e.g. the participation in the cartel), the prejudice, and the causal link. This is particularly the case for leniency documents, which are voluntarily produced or submitted by cartel participants to a competition authority with a view to obtaining immunity from fines or a fine reduction. Indeed, a leniency application must generally contain an admission of guilt and a thorough description (and evidence) of the cartel, its scope, duration, functioning, etc. It is therefore not surprising that over the past few years, litigants have repeatedly attempted to access leniency documents, relying either on national law,[4] Regulation 1/2003,[5] or the Transparency Regulation.[6]

Such attempts and the corresponding risks to leniency applicants have led the Court of Justice of the European Union (the "Court") to recognize in *Pfleiderer* that the effectiveness of

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[2] Advocate-General Mazák, Opinion in Case C-360/09 *Pfleiderer* [2011] ECR I-5161 ('*Pfleiderer*'), ¶33.

[3] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, ¶¶59 and 61.

[4] *See Pfleiderer*; Case C-536/11 *Donau Chemie and Others* [2013] ECR (not yet reported) ("Donau Chemie"); at national level: Amtsgericht Bonn, judgment of 18 January 2012, Case no 51Gs53/09 (following *Pfleiderer*); High Court of Justice (London), judgment of 4 April 2012, *National Grid Electricity Transmission Plc v ABB,* [2012] EWHC 869; Brno Regional Court, judgment of 23 February 2012, ECLR 2012, 33(6), N81-82.

[5] Article 15(1) of Regulation 1/2003; *see* order in Case T-164/12R *Alstom v Commission* [2012] ECR (not yet reported).

[6] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ, 2001, L145/43; Case T-344/08 *EnBW Energie Baden-Württemberg v Commission* [2012] ECR (not yet reported); on appeal: Case C-365/12 P *Commission v Enbw Energie Baden-Württemberg* (pending).

leniency programs could be compromised if leniency documents were to be disclosed.[7] Unfortunately, neither *Pfleiderer* nor the subsequent case law really clarified whether, as a matter of EU law, leniency documents should be disclosed or protected. Ever since, the discoverability of leniency documents and the appropriate balance between the victims' right to compensation under EU law and the attractiveness of leniency programs have raised considerable controversy.

II. PROPOSED DIRECTIVE ON DAMAGES ACTIONS FOR ANTITRUST INFRINGEMENTS

The Commission's proposal for a directive on certain rules governing actions for damages for infringements of competition law (the "Proposed Directive")[8] might clarify where the equilibrium is. The Proposed Directive gives national courts wide latitude in ordering the disclosure of evidence, but also provides absolute protection from disclosure for certain leniency documents.

The Proposed Directive enables national courts to order the disclosure of evidence, regardless of whether that evidence is included in the file of a competition authority. The Proposed Directive also sets out three different levels of discoverability, or "lists":

- the "white" list comprises all those documents which may be disclosed at any time in a damages action;[9]
- the "grey" list concerns information and documents prepared by parties specifically for the proceedings of a competition authority, and materials drawn up by a competition authority during its investigation, which may be disclosed only after the competition authority has concluded its proceedings;[10]
- finally, the "black" list comprises "leniency corporate statements,"[11] which can never be disclosed.[12]

The Commission's proposal to grant the leniency corporate statement such an absolute protection is currently the subject of an intense debate. Within the European Parliament alone, not less than three committees have expressed an opinion. The lead committee—the Committee on Economic and Monetary Affairs—opposes the absolute protection on the ground that it

[7] *Pfleiderer*, ¶¶25-26.

[8] Commission's 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, COM(2013) 404 final.

[9] Proposed Directive, Article 5.

[10] Proposed Directive, Article 6(2).

[11] Which Article 4(14) of the Proposed Directive defines as any:
oral or written presentation voluntarily provided by, or on behalf of, an undertaking to a competition authority, describing the undertaking's knowledge of a secret cartel and its role therein, which was drawn up specifically for submission to the authority with a view to obtaining immunity or a reduction of fines under a leniency program concerning the application of Article 101 of the Treaty or the corresponding provision under national law; this does not include documents or information that exist irrespective of the proceedings of a competition authority ("pre-existing information").

[12] Proposed Directive, Article 6(1). The black list also covers settlement submissions. The present discussion will, however, remain focused on leniency documents.

would "create a too far-reaching level of protection."[13] This committee is supported by the Committee on Legal Affairs.[14] However, a third committee—the Committee on the Internal Market and Consumer Protection—takes the opposite view and even suggests that the absolute protection extend to "[a]ll evidence from leniency applicants […] irrespective of whether they were received in the leniency application or after a request from the competition authority."[15]

The dispute has eventually been resolved in favor of the lead committee's position. As we write, the European Parliament proposes to replace the absolute protection with a limited discoverability of all leniency documents, accompanied with safeguards. The European Parliament is currently defending that position in its discussions with the Council and the Commission. Should the institutions agree on a compromise text, the Proposed Directive could be adopted before the European Parliament breaks up for elections in spring 2014.

This fast-changing legislative context raises the question of whether leniency documents should be "discoverable" at all under EU law, or rather protected from disclosure to third parties. Like Advocate-General Mazák, we "consider that in order to protect both the public and indeed private interests in detecting and punishing cartels, it is necessary to preserve as much as possible the attractiveness of [leniency programs] without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy."[16]

III. PRESERVING THE ATTRACTIVENESS OF LENIENCY PROGRAMS

The vital need to preserve the attractiveness of leniency programs may call for an absolute protection (or non-discoverability) of leniency documents (defined as self-incriminatory documents created specifically for the purpose of obtaining leniency). As explained below, this would serve the interest of both public and private enforcement of antitrust rules.

As regards public enforcement, the Court itself acknowledges that "a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes."[17] As the Court recognizes, the mere possibility of leniency documents being disclosed and used in private litigation discourages, *ex ante*, undertakings from applying for leniency.

Indeed, before applying for leniency, potential applicants always weigh the benefits of immunity against the risks and uncertainties associated with leniency applications (immunity denied or replaced with mere reductions of fines). At that point, a potential liability in damages is

[13] Committee on Economic and Monetary Affairs, 3 October 2013, Draft Report on the 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, PE 516.968v01-00, p. 46.

[14] Committee on Legal Affairs, 27 January 2014, Opinion on the 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, PE 524.711v03-00, p. 3.

[15] Committee on the Internal Market and Consumer Protection, 9 January 2014, Opinion on the 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, PE 519.553v04-00, p. 3.

[16] Advocate-General Mazák, Opinion in *Pfleiderer*, point 42.

[17] *Donau Chemie*, ¶42, *Pfleiderer*, ¶¶25-27 (emphasis added).

already part of the equation, and no one can really tell how many undertakings prefer to keep their cartel secret because the risks outweigh the expected benefits. Adding an EU-wide disclosure risk to the already complicated equation would not really promote the effectiveness of public enforcement.

It is arguable that disclosure would not promote an effective private enforcement system either. Indeed, unlike in the United States, private enforcement of antitrust rules in Europe depends heavily on public enforcement procedures and resources. The (welcome) absence of a broad U.S.-style discovery mechanism, and the absence of punitive damages, largely explain the need to rely on prior public infringement decisions and initiate "follow-on" actions. In such a context, "[i]f there is no or little detection of anticompetitive behaviour, there are ultimately no victims to compensate."[18]

In sum, the mere possibility of leniency documents being disclosed discourages leniency applications, thereby reducing the potential level of cartel detection and enforcement action, and, ultimately, the likelihood of successful private enforcement across Europe. This is why leniency documents should be protected from disclosure.

IV. PRESERVING "EFFECTIVE" ACCESS TO EVIDENCE FOR LITIGANTS

For the European Parliament, absolute protection would run counter to the main judgments of the Court in *Pfleiderer* and *Donau Chemie*, "as it would violate the principle of effectiveness regarding the right to compensation."[19] The principle of effectiveness is certainly an appropriate benchmark in devising EU legislation on this issue. However, effectiveness, as defined and applied in *Pfleiderer* and *Donau Chemie*, cannot really act as a requirement that would constrain the choices of the EU legislature.

A. Existing Case Law Provides a Benchmark, Not a Legal Constraint

Indeed, in both *Pfleiderer* and *Donau Chemie*, the Court's very starting point was the total absence of any binding EU legislation on either leniency programs or access to national leniency documents.[20] The Court then underlined that it was "accordingly"[21] for the national courts to determine, on the basis of their national law, the conditions under which such access must be permitted or refused by weighing the interests protected by EU law. This is a mere application of the principle of national procedural autonomy, which applies whenever a procedural issue is not governed by express EU legislation.

The sole function of the principle of effectiveness, which the Court recalled,[22] is to limit the national procedural autonomy in the absence of express EU legislation. Accordingly, that principle only applies when and to the extent that no EU legislation governs the procedural rule at issue.

[18] Committee on the Internal Market and Consumer Protection, *supra* note 15, p. 23.
[19] Committee on Economic and Monetary Affairs, *supra* note 13, p. 26.
[20] See *Pfleiderer*, ¶20, and *Donau*, ¶¶25-26.
[21] *Pfleiderer*, ¶¶23 and 30.
[22] *Pfleiderer*, ¶30.

But the legal situation changes with the Proposed Directive, which aim is, precisely, to expressly govern access to (leniency) documents. The principle of effectiveness cannot therefore be mechanically transposed to the choices made by the EU legislature.

B. Even if Absolute, the Narrowly Defined Protection of Leniency Corporate Statements Reflects a Balanced Approach to Discoverability

Even if the principle of effectiveness could constrain the EU legislature, a further question is whether the absolute protection advocated by the Commission in the Proposed Directive would fall foul of the requirements laid down in *Pfleiderer* and *Donau Chemie*. In those cases, the Court simply laid down a particular requirement that national courts weigh the interests for and against the disclosure of requested documents "on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case"[23] (the "balancing requirement").

Importantly, however, this balancing requirement was set out in relation to a category of documents (leniency documents) that is slightly broader than the one defined in the Proposed Directive ("leniency corporate statements," to the exclusion of all the annexed and related evidence).

Many elements other than leniency corporate statements can prove useful in building a successful damages claim. Claimants can first rely on the infringement decision itself, which generally constitutes—at least—a significant piece of evidence in court. Where the competition authority is the Commission, the infringement decision even binds all national courts as to the existence of a wrongful conduct.[24] Under the Proposed Directive, claimants could also rely on all the evidence annexed to a leniency submission, as well as the raw evidence and statements collected in the course of the investigation.[25] Even the documents specifically prepared for the purpose of public enforcement proceedings[26] would become discoverable, once the competition authority has closed its proceedings.

In other words, under the Proposed Directive, almost the entire case-file would already be discoverable in a follow-on damages action and would be subject to a balancing exercise—a balancing exercise which Article 5 of the Proposed Directive, in fact, imposes on national courts. This Article indeed requires that the claimant presents "reasonably available facts and evidence showing plausible grounds for suspecting" that it has suffered harm caused by the defendant's infringement. The requesting party must also demonstrate that the evidence is relevant to substantiating its claim (or defense) and must define its request as precisely and narrowly as possible on the basis of reasonably available facts. If granted, the order for disclosure must, in any event, be proportionate.

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[23] *Pfleiderer*, ¶31, *Donau Chemie* ¶34. In *Donau Chemie*, the Court applied that latter requirement and declared incompatible with EU law a national provision making access to "documents forming part of the case file of a competition authority" (i.e. a much broader category than leniency documents only) conditional upon the consent of all the undertakings concerned, without leaving any possibility for the national courts of weighing up the interests involved.

[24] *See* Article 16 of Regulation 1/2003; *see also* Case C-199/11 *Otis and Others* [2012] ECR (not yet reported), ¶¶50-51: the legal authority attached to such decisions was at the root of the issues raised (and settled) in this case.

[25] Under Article 19 of Regulation 1/2003 or its equivalent in national law.

[26] Statement of objections and responses, requests for information and responses, etc.

Therefore, the narrowly defined protection of leniency corporate statements still leaves sufficient "room for balancing the public interest relating to effective implementation of competition rules against the private interests of the victims of infringements of the same rules."[27]

C. Effectiveness and (Limited) Added Value of Leniency Corporate Statements

Interestingly, in *Donau Chemie* the Court emphasized that the balancing of the interests for and against disclosure had to be made "in the light of other possibilities [claimants] may have."[28] Given the narrowly defined protection of leniency corporate statements and the numerous "other possibilities" listed above, the question arises as to whether the added value of such statements is so important.

On the one hand, a leniency corporate statement may prove helpful because it structures the presentation and understanding of the evidence contained in the case file. A leniency corporate statement may thus help to make the evidence "talk" in court. On the other hand, the extent to which such a document actually helps is also extremely variable, depending on all the other—discoverable—elements: the length and detailed nature of the infringement decision, the type of evidence, etc.

Therefore, without denying that leniency corporate statements may help victims prove their case in courts, one fails to see what would be systematically so crucial about these documents that their absence would render the claim "practically impossible or excessively difficult" within the meaning of the effectiveness principle recalled in *Pfleiderer* and *Donau Chemie*.

Finally, it may be worth recalling that the Proposed Directive would, for the first time, establish an EU-wide litigation platform comprising common substantive and procedural rules. Removing the current discrepancies between Member States regarding, *inter alia*, the disclosure of evidence, already constitutes a huge step forward for the private enforcement of antitrust rules. In such a context, and whatever the exact added value of leniency corporate statements, the private enforcement of antitrust rules can only be more effective, once the Proposed Directive is adopted.

It is very difficult to conceive that the legal status of leniency corporate statements, alone, could neutralize such progress. Indeed, the recognition that various documents prepared by parties specifically for the proceedings of a competition authority (the so-called "grey" list) can become discoverable once those proceedings are closed has some commentators saying the Proposed Directive (if adopted) will chill leniency applications as it is taking disclosure too far in favor of private litigants.

V. CONCLUSION

In sum, we side with the Commission and believe that only an absolute protection for certain narrowly defined leniency documents will strike the right balance between the need to preserve the attractiveness of leniency programs and the need to maintain the effectiveness of the

[27] Advocate-General Jääskinen, Opinion in *Donau Chemie*, ¶69.
[28] Donau Chemie, ¶24.

right to damages for victims.[29] Provided that such protection remains limited in scope, it will not deprive the victims' right to compensation of any effectiveness.

The "balance" could be there: The protection of leniency corporate statements may be absolute, but it remains limited in scope.

[29] A position apparently shared by Advocate-General Jääskinen himself: *see* his Opinion in *Donau Chemie*, ¶64.