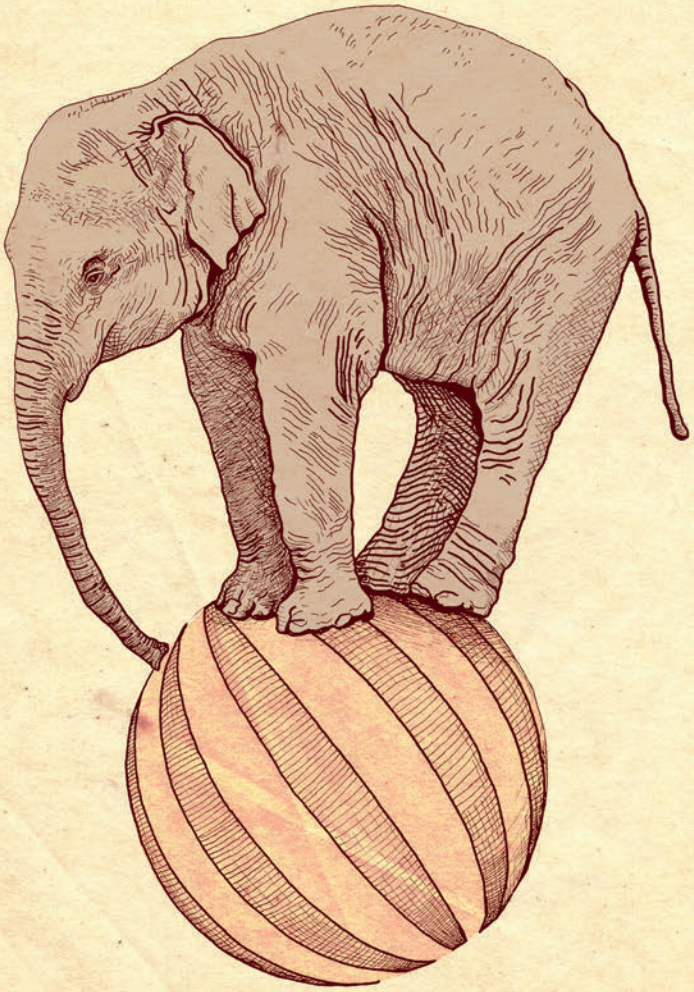
BALANCING EFFECTIVE PUBLIC ENFORCEMENT AGAINST THE NEEDS OF ACCESS TO JUSTICE: CURRENT DEBATES ON THE ACCESS TO NCA-HELD EVIDENCE IN THE COURSE OF CIVIL PROCEEDINGS



BY ARIANNA ANDREANGELI[1]

1 Senior Lecturer in Competition Law, Edinburgh Law School, University of Edinburgh. Heartfelt thanks are owed to Dr. Grant Stirling of Hull Law School for his comments on an earlier draft of this paper. Any errors or omissions are the author's only responsibility.

CPI ANTITRUST CHRONICLE
FEBRUARY 2019

I. INTRODUCTION

Allowing claimants seeking compensation for antitrust injuries to access the evidence they need in order to bring their claim has been a hotly debated subject. The confidentiality of the National Competition Authorities' ("NCAs") case files, and in particular of leniency statements and settlement submissions, as well as concerns over the effectiveness of public enforcement, have provided powerful arguments for limiting the possibility of litigants to petition competition agencies for access to this evidence. The 2014 Directive on action for competition damages sought to address this important question. It strengthened the role of national courts in adjudicating questions of disclosure of evidence held by third parties, including NCAs. However, it excluded outright the possibility of accessing leniency statements and settlement submissions in a trial.

This paper will consider whether this position strikes an appropriate balance between maintaining the effectiveness of public enforcement and securing the right of access to justice for antitrust victims. It will analyze the rules on disclosure contained in the 2014 Directive with particular regard to leniency statements and settlement submissions. It will be argued that the emphasis placed on the position of national courts as the prime decision-makers on questions of access to evidence is welcome since it allows the competing interests of the litigants to be decided in an *inter partes* manner.

However, we will question whether having a total ban on the disclosure of specific types of evidence may be a proportionate response to the concerns for maintaining the secrecy of leniency and settlement submissions vis-à-vis ensuring that claimants can obtain evidence that is both relevant and necessary for building their case in court. The paper will submit that the approach adopted by the 2014 Directive risks jeopardizing the position of antitrust claimants in those cases where evidence for their claim can only be found in NCAs' files, as well as shielding defendants who may have benefitted already from immunity from fines or the civil consequences of their unlawful behavior.

It will be concluded that while the 2014 Directive brought in much needed clarity on several issues surrounding the access to evidence in civil competition proceedings, it did not address in a fully satisfactory manner the question of how far protecting the effectiveness of public enforcement should go without unduly restricting the right of access to justice for antitrust victims. It will also be suggested that the Directive might be part of a broader trend towards reinforcing the position and role of the competition authorities. However, it is not clear how a transition toward making the NCAs the "stronger partner" in what should be a complementary and thus egalitarian relationship could be reconciled with the current EU acquis.

II. LENIENCY DOCUMENTS, EQUALITY OF THE ARMS AND EFFECTIVE JUDICIAL PROTECTION—SQUARING THE CIRCLE?

A. Judicial Approaches to Balancing Access to Justice Against the Effectiveness of the Promise of Immunity

The question of whether a judge could order the disclosure of NCA-held documents was controversial for a long time: it is undoubted that these documents are particularly important for, and hence coveted by, competition claimants, who are usually disadvantaged when it comes to gathering evidence of secret collusive behavior on which to found their claims.[2] However, allowing access to sensitive evidence and in particular to leniency documents and statements made by an undertaking with a view to settling a competition investigation could discourage cartel members from cooperating with NCAs and thereby weaken the effectiveness of these tools in detecting competition infringements.[3]

How can these apparently competing public interest concerns be reciprocally counterbalanced? In respect of documents held by the EU Commission, the Court of Justice held in, inter alia, the CDC decision that the Transparency Regulation (namely Council Regulation No 1049/20014) was applicable to competition case files. However, it made clear that the EU Commission could rely on the general public interest of maintaining the effectiveness of competition enforcement as a ground for refusing access to evidence gathered during the course of antitrust investigations.[5]

Coming to domestic competition proceedings, in the *Pfleiderer* and *Donau Chemie* decisions[6] the Court of Justice recognized that in the absence of harmonization each member state could decide how to regulate access to competition files, subject only to the limits of effectiveness and equivalence.[7] Thus, it held that a claimant seeking redress for a competition injury should not be prevented outright from seeking access to documents obtained by a competition agency as the result of an application for leniency.[8] The national court seized of the damages' action should therefore weigh up the competing interests of, respectively, maintaining the secrecy of the evidence in issue and to safeguarding the effectiveness of the claimant's right to seek compensation, in light of the circumstances of each case.[9] Safeguarding the effectiveness of the promise of immunity as a tool to boost detection of cartels could justify restricting judicial powers of disclosure[10] but could not be relied on as a ground for a "systematic ban" on revealing documents contained in the case file of a NCA.[11] To hold otherwise would have amounted to allowing the defendant—who had already benefitted from full or partial immunity from fines—to circumvent the civil consequences of unlawful behavior.[12]

The *Pfleiderer* and *Donau Chemie* preliminary rulings were welcomed as a restatement of the centrality of domestic courts in the adjudication of these claims. [13] However, the position of the Court of Justice was criticized as creating legal uncertainty around the accessibility of

2 See inter alia Gamble, "The European embrace of private enforcement," (2014) 35(10) ECLR 469, especially pp. 478-479; also id., "The Parliament, the Commission and the Court - three institutions and their effect on private enforcement of anti-competitive conduct in the EU," (2015) 36(12) ECLR 501, pp. 503-504; see also Juska, "The future of collective antitrust redress: something new under the sun?," (2015) 8(1) GCLR 14 at 23-24.

3 See inter alia Slot, "Does the Pfleiderer judgment make the fight against cartels more difficult?," (2013) 34(4) ECLR 197 at 205-206.

4 Regulation (EC) of the European Parliament and the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43 ("the Transparency Regulation").

5 *CDC Hydrogene Peroxide Cartel damage Claims v. Commission*, [2011] ECR II-8251, especially para. 35-36 and 49-51; Case C-365/12P, *EnBW Energie v. Commission*, [2014] ECR I-112, especially para. 62-64, 83 and 100-101. For commentary see e.g. Rey, "The interaction between public and private enforcement of competition law, and especially the interaction between the interests of private claimants and those of leniency applicants," (2015) 8(3) GLCR 109, p. 117. See also Lianos, Nebbia & Davis, "Damages claims for the infringement of EU Competition Law," 2015: OUP, p. 267.

6 Case C-360/09, *Pfleiderer*, [2011] ECR I-5161; Case C-536/11, *Donau Chemie*, [2013] ECR I-366.

7 Id., para. 23-24; see also para. 26.

8 Id., para. 30-32.

9 Id., para. 32.

10 *Donau Chemie, supra* note 6, para. 43.

11 Id., para. 43-44.

12 Id., para. 44.

13 See *Pfleiderer*, *supra* note 6, para. 31-32; for commentary see e.g. Lianos et al, *supra* note 5, p. 271-272; see also, inter alia, Rizzuto, "The procedural implications of Pfleiderer for the private enforcement of European Union competition law in follow-on actions for damages," (2011) 4(3) GCLR 116 at 119, p. 121.

NCA-held documents across the Union[14] and as potentially jeopardizing the efficacy of the promise of immunity as a tool for cartel detection.[15] It was therefore inevitable that the 2014 Directive would have addressed the issue of disclosure of third party-held evidence, including evidence contained in NCAs' case files. The next section will consider the legislative response to this issue.

B. The 2014 Directive on Antitrust Damages and the Disclosure of "Sensitive" Documents: Does Cartel Detection Trump Access to Justice?

The previous section sketched out the EU Court of Justice's approach to the disclosure of NCA-held documents in court proceedings, concentrated on evidence linked to leniency applications, and suggested that the position adopted in the *Pfleiderer* decision, despite being consistent with demands of access to justice, could have potentially jeopardized the role of leniency in boosting cartel detection. This section will examine how the 2014 Directive addressed this issue.

Providing a "minimum level of disclosure *inter partes*" was identified as one of the tools to allow "weaker" litigants, namely those who are more disenfranchised and who lack access to relevant evidence, to obtain those documents that are necessary to substantiate their claims.[16] Thus, Article 5 of the 2014 Directive obliged the Member States to set up a mechanism for the court-ordered disclosure of evidence held by either another litigant or by a third party. The national courts must be satisfied that the claim made by the requesting party is specific and "plausible" and backed up by a "reasoned justification containing reasonably available facts and evidence" pointing to a *prima facie* case.[17] The request must be justified by the nature of the claim, the evidence submitted to it, and the scope and cost of each disclosure. The court must take into due consideration the interests of all parties and can devise "arrangements (…) for protecting (…) confidential information."[18]

Article 6 extends the regime of Article 5 to the disclosure of documents held by a national competition authority. However, it provides special rules for particular types of NCA-held evidence. Documents prepared by an investigated undertaking "specifically for proceedings before a competition authority" can be disclosed in court proceedings only after the investigation has been closed.[19] Documents prepared by the NCA during the course of an investigation can be disclosed at any time, subject to an appraisal of their relevance and of the conformity of the request with the criteria listed in Article 5.[20]

Leniency statement and settlement submissions, however, are subject to absolute immunity from disclosure.[21] Article 6(7) provides that if a controversy arises as to whether a specific document is potentially immune, the Court, after hearing the parties, can ask the competition authority to have sight of it so as to decide whether the disclosure ban applies or not. The national courts can order the release of redacted versions of documents to exclude statements in themselves immune from disclosure.[22]

It is suggested that the Directive's approach is broadly consistent with the Court of Justice's solution in *Pfleiderer*, since it focuses on the role of the national courts as regards the adoption of decisions on whether specific evidence that is held by a third party (including NCAs) should be disclosed.[23] The outright ban on the disclosure of leniency statements and of settlement submission, however, sits somewhat at odds with the trust that the EU legislature has placed on the domestic courts as well as with the paramount objective of the Directive, namely strengthening

14 See inter alia Guttuso, "The enduring question of access to leniency materials," (2014) 7(1) GCLR 10, pp. 19-20.

15 Inter alia, Rey, *supra* note 5, pp. 110-111; see also Lianos et al., *supra* note 5, p. 272.

16 2014 Directive, Preambles 21-23. For commentary, see e.g. Vandenborre et al., "Actions for antitrust damages within the European Union," (2014) 7(1) GCLR 1, especially pp. 3-4; also Andreangeli, "Competition litigation in the EU and the UK after the 2014 Antitrust Damages Directive," (2016) 35(4) CJQ 342 at 350-351.

17 Article 5(3), 2014 Directive.

18 Article 5(4), 2014 Directive.

19 Article 6, 2014 Directive; for commentary see e.g. Singh, "Disclosure of leniency evidence: examining the Directive on damages actions in the aftermath of recent ECJ rulings," (2014) 7(4) GCLR 200 at 206-207; also Andreangeli, *supra* note 16, pp. 356-357.

20 See inter alia Lianos et al., *supra* note 5, pp. 255-256.

21 See Singh, *supra* note 19, p. 207.

22 Lianos et al., *supra* note 5, p. 257.

23 See e.g. Lucey, "EU Competition law Damages Directive: recalibrating the equilibrium between private and public enforcement?," (2018) 5 JBL 390, p. 398.

the right of access to justice of competition claimants.[24] It is submitted that denying access to leniency statements and settlement submissions outright and without exceptions could prevent certain claimants from accessing the evidence that they need to support their plea and access to which cannot be secured in any other way.[25] It would also shield successful whistleblowers from an action for damages in certain cases, thereby allowing them to avoid the civil consequences of their unlawful behavior.[26]

It is therefore unclear whether the 2014 Directive provided a satisfactory response to the concern for the effective judicial protection of claimants. It is acknowledged that the demands of public enforcement should be considered when seeking to enhance the effectiveness of competition litigation. It is argued, in this respect, that striking a fair balance between these concurrent interests conforms to viewing the relationship between public and private antitrust enforcement as complementary and mutually reinforcing, in accordance with the EU Court of Justice's case law.[27]

However, it is legitimate to query whether restricting so significantly the access to evidence held by a NCA in cases where a decision was either taken following a leniency application or as a result of a settlement would be consistent with this vision or indeed with the 2014 Directive's objectives.[28] It is submitted that due to the secrecy of cartel behavior and to the confidentiality surrounding these proceedings, together with the summary nature of settlement decisions, the approach enshrined in Article 6 of the 2014 Directive could lead to a denial of justice for antitrust victims wishing to take action against either successful whistleblowers or undertakings who settled with competition agencies, since the former would not be able to access perhaps the only evidence that is indispensable to found their claim.[29]

It is concluded that the 2014 Directive, while constituting a valiant attempt at facilitating access to justice for competition claimants, does not appear to have resolved some of the questions that arise from the complex relationship between competition litigation and the detection and sanctioning of cartels by the competition agencies and that could affect the access to justice for individual victims.

C. Disclosure of Evidence in Competition Damages Actions Post-2014 Directive: Just More of the Same? Implementing Legislation in the United Kingdom, Italy, and Ireland

The previous section summarized the features of the 2014 Directive and argued that Articles 5 and 6, despite attempting to balance the concurring interests of effective access to justice and public enforcement of competition rules, seemed to privilege the latter at the expense of the antitrust damages remedy option. A quick examination of the measures adopted in the United Kingdom, in Ireland and in Italy to transpose the 2014 Directive indicate that Articles 5 and 6 were implemented almost verbatim.

In the UK Section 30(2) of Part 6 of the new Schedule 8A to the Competition Act 1998[30] empowers a court to order the competition authority to disclose documents it holds in its case files if the judge is "satisfied that no-one else is reasonably able to provide the documents or information." Sections 32 to 34 reiterate almost word for word the ban on the disclosure of leniency statements and settlement submissions as well as the stipulation that other documents held in the file should be disclosed only after the investigation has been closed.

24 See e.g. Singh, *supra* note 19, p. 208; also Andreangeli, *supra* note 16, p. 360. See also European Parliament, Report on the Draft 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 of February 4, 2014, COM(2013)0404, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0089+0+DOC+XML+V0//EN (the Schwab report), recitals 4-5.

25 See e.g. Andreangeli, *supra* note 16, pp. 353-354.

26 Id., p. 354; see also, inter alia, Wardaugh, "Cartel leniency and effective compensation in Europe: the aftermath of Pfleiderer," (2013) 19(3) Web Journal of Current Legal Studies, available at: http://webjcli.org//article/view/251, p. 22.

27 See inter alia Case C-295/04, *Manfredi v. Lloyd Adriatico SpA*, [2006] ECR I-6619, see e.g. para. 41.

28 See Lucey, *supra* note 23, pp. 399-400.

29 See Wardaugh, *supra* note 26, p. 21-22.

30 Schedule inserted in the Competition Act 1998 by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, SI 2017/385.

Similarly, in Italy Article 4(5) of the Legislative Decree No 3/2017[31] forbids the courts from disclosing to a third party any of the "sensitive documents" identified by Article 6(6) of the 2014 Directive. As for other documents, judges can order disclosure of other evidence only if the applicant is seeking access to the evidence as part of an action for competition damages and has identified reasonably clearly the evidence of which he or she is seeking to have sight. In this assessment, the judge must also take into consideration the demands of effective public enforcement (Articles 3 and 4).

As for Ireland, according to Regulation 5 of Statutory Instrument No 43/2017,[32] the courts can order disclosure of third-party held evidence subject to several conditions: the claimant must have made a prima facie case and the request must not be generic; the court must also consider whether the documents are of a confidential nature[33] and must give due consideration to the effectiveness of public enforcement.[34] According to Subsection 33, documents held by a NCA as part of a case file that originated from the investigated part can only be shown after the closure of the investigation. Subsection 4 reproduces verbatim the ban on disclosure of leniency statements and settlement submissions.[35]

It is submitted that the 2014 Directive had a significant impact on the procedural laws of the member states considered above: the national courts seized with competition law disputes now enjoy strong disclosure powers vis-à-vis third parties, including the NCAs.[36] However, it is unclear whether the verbatim implementation of the ban on the disclosure of leniency documents and settlement submissions may be consistent with the access to justice objectives that the 2014 Directive aims to achieve.[37]

It is acknowledged, as was illustrated earlier, that protecting the efficacy of these cartel detection tools constitutes a legitimate concern which must be counterbalanced against the demands of access to justice of antitrust claimants. Nonetheless, it is argued that when a damages' action is launched against a successful whistle-blower, the claimant would find it very difficult, due to the secret nature of cartel behavior and the confidentiality of the leniency proceedings, to gather any evidence supporting his or her claim[38] and consequently to obtain compensation for the losses suffered as a result of the defendant's unlawful behavior.[39] Accordingly it is unclear whether the new disclosure rules would uphold the commitment to the effectiveness of the EU law right to seek competition damages[40] which is at the core of the 2014 Directive.[41]

More generally, it is submitted that the 2014 Directive's stance on disclosure of evidence held by the competition agencies could signify a slow shift from a complementary relationship to one in which a hierarchy exists between the administrative detection and sanction of anti-competitive behavior and the private enforcement of competition rules.[42] It is argued that the fact that in matters of evidence the demands of public enforcement are ultimately given greater prominence than those of an effective civil adjudication of antitrust claims might be interpreted as heralding a transformation in this complex interplay,[43] as a result of which the enforcement by NCAs is the stronger partner vis-à-vis civil

31 Decreto Legislativo 19 gennaio 2017, n. 3, Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell'Unione europea (17G00010), GU Serie Generale 15 of 19 Janiary 2017; available at: http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2017-01-19&atto.codiceRedazionale=17G00010&elenco30giorni=true.

32 EU (Actions for damages for infringements of EU competition law) Regulations 2017, SI No 43 of 2017, available at: http://www.irishstatutebook.ie/eli/2017/si/43/made/en/pdf.

33 Part 2, section 5.

34 Id., section 6.

35 Id., section 6(4).

36 See, inter alia, Singh, *supra* note 19, p. 206; see also Wardaugh, *supra* note 26, pp. 21-22; see also Case C-360/09, *supra* note 6, per AG Mazak, para. 40.

37 See inter alia Lucey, *supra* note 23, p. 400; also Andreangeli, *supra* note 16, p. 356-357.

38 Wardaugh, *supra* note 26, p. 22; see also Singh, *supra* note 19, p. 209-210.

39 See inter alia Sitarek, "The impact of EU law on a national competition authority's leniency programme," (2014) 7(9) Yearbook of Antitrust and regulatory Studies 185, pp. 194-195 and 200-202; also Neumayr and others, "The Gordian know of access to file: legislation will have to resolve it," (2014) GCLR 7(3) GCLR 186 at 190-191.

40 See inter alia Andreangeli, *supra* note 16, p. 353-354.

41 Inter alia, see Singh, *supra* note 19, pp. 209-210; also Lucey, *supra* note 23, p. 403.

42 See Lucey, *supra* note 23, p. 400.

43 Id., p. 403; see also Wardaugh, supra note 26, p. 20-21.

antitrust litigation.[44] It is however unclear whether this outcome could "fit within" the principles governing this relationship: some argue that it would be difficult to reconcile with the Court of Justice's longstanding view of this relationship, according to which public and private enforcement "complement" one another and are therefore linked by an egalitarian relationship.[45]

In conclusion, the new rules have certainly brought about much needed certainty to several areas surrounding the litigation of competition claims. It is clear, however, that the Directive's approach to accessing NCA-held evidence may have an unforeseen impact on the future interplay between public competition enforcement and civil antitrust litigation and may even jeopardize the right of access to justice for certain claimants.

III. ENCOURAGING COMPETITION CLAIMANTS OR BOOSTING PUBLIC ENFORCEMENT? TENTATIVE CONCLUSIONS

The 2014 Directive on competition damages was hailed as a step forward for private antitrust enforcement in Europe since it sought to make it easier for claimants to overcome the "information gap" with defendants by granting the national courts a stronger role in adjudicating over the disclosure of third-party documents. In this context, it is legitimate to impose limits to the exercise of this judicial power in order to safeguard the effectiveness of public enforcement. However, can an entire category of documents be excluded outright from the national courts' jurisdiction? The previous sections discussed the issues arising from the disclosure in court proceedings of leniency statements and settlement submissions. It was argued that denying access to those sensitive documents in all cases could lead to a denial of justice for claimants who have no other way of gathering evidence in support of their pleas, and at the same time could result in successful whistleblowers being sheltered from the civil consequences of their unlawful conduct.

The forgoing analysis led to more general questions about the impact of the 2014 Directive on the interplay between public enforcement and private litigation in competition cases. It was questioned whether upholding the secrecy of certain type of evidence in all cases, in the interests of cartel detection, could over time lead to making the NCAs the "strong partner" vis-à-vis the civil courts. However, it was argued that moving away from an egalitarian relationship to one that is more hierarchical in nature would be difficult to justify in light of the EU acquis and could even undermine the Directive's own efficacy.

It is concluded that the rules on disclosure of evidence contained in the 2014 Directive should be welcomed as an attempt to facilitate competition claims. However, to the extent that they contain a blanket ban on the handing of certain evidence, namely leniency statements and settlement submissions, they appear to hint toward privileging the demands of public enforcement at the expense of providing an effective judicial remedy to antitrust victims. It is acknowledged that the 2014 Directive should be seen against a background in which strengthening the NCAs is at the forefront of the legislative debate.[46] However, it is unclear whether encouraging the creation of a hierarchy between public enforcement and civil competition litigation would enhance access to justice for antitrust victims.

44 Inter alia, see Singh, *supra* note 19, pp. 209-210; also Lucey, *supra* note 23, p. 403.

45 Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6297, para. 26-27; Case C-295/04, *Manfredi v. Lloyd Adriatico SpA*, [2006] ECR I-6619, see e.g. para. 41.

46 Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017) 142final (2017/0063 COD), available at: http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf. See also Press Release of May 30, 2018 (18-3996), available at: http://europa.eu/rapid/press-release_STATEMENT-18-3996_en.htm.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.