ACCESS BY NATIONAL COURTS AND PRIVATE PLAINTIFFS TO LENIENCY DOCUMENTS HELD BY THE COMMISSION

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Abstract*: A leniency application is an important source of information which can be very useful in supporting potential private claims. In the present article we will discuss access to leniency documents in the possession of the European Commission ("Commission") by national courts and plaintiffs. Access to the Commission's file can be effectuated either indirectly through article 15 (1) of Regulation (EC) No 1/2003 which acknowledges that national courts are entitled to obtain legal and economic information from the Commission or directly through Regulation (EC) No 1049/2001 (the so called 'Transparency Regulation') which legitimates requests for information from the main institutions of the European Union ("EU"), such as the Commission. We will submit that the immunity applicant should be protected in terms of access to evidence. Accordingly, evidence and any corporate statements provided to the European Commission by the immunity recipient shall not be revealed to private plaintiffs for the purpose of private actions. However, documents provided by other leniency applicants should be left open as they do not have the negative effect of disincentivizing leniency applications as long as some mechanisms for guaranteeing the protection of confidential information are assured.*

Summary: I. Introduction. II. Regulation (EC) No 1/2003. III. Access by National Courts under the Duty of Loyal Co-operation between the Commission and the Member States. IV. Regulation (EC) No 1049/2001 ('Transparency Regulation'). 1. The Exception 'Undermine the Protection of the Purpose of Inspections, Investigations and Audits'. 2. The Exception 'Undermine the Protection of Commercial Interests'. 3. The Doctrine of Administrative Burden. 4. General Court and Court of Justice: conflicting views? V. Final Remarks.

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I – INTRODUCTION

> '*Well, I frankly do not see how the obligation to compensate the victims of an antitrust infringement could have a chilling effect on the leniency programmes.*'
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> Neelie Kroes, *Enhancing Actions for Damages for Breach of Competition Rules in Europe*, Speech 05/533 at the Harvard Club, New York, 22nd September 2005

One of the main difficulties for a potential plaintiff is the availability of evidence to sustain his action for damages.[1] The particularity of competition law cases is that they are fact-intensive, frequently require complex economic analysis and are characterized by an asymmetric distribution of the information. The information required is often either held by the defendant or by third parties. In a previous article we assessed the relationship between the leniency programme and actions for damages and concluded that the proper balance between both is obtained by restricting the incentives in the framework of private enforcement only to the successful immunity receiver as a reward for his contribution to the uncovering of a cartel and the need to preserve the attractiveness of the leniency programme.[2] In the present article an analogous conclusion can be drawn from the analysis on the access to the Commission's file for the purpose of sustaining an action for damages. Even though we focus our analysis at the European Union ("EU") level, similar issues can also be relevant in national proceedings.[3] Lastly, rather than

1 See Waelbroeck, Slater & Even-Shoshan, 2004: 52ff.

2 See further my paper, Saavedra, 2010: 21ff.

3 In a reference to a preliminary ruling from the *Amtsgericht Bonn* (Germany) Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, the Court of Justice ('CoJ') ruled that '*the provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union Law competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law*'. In this context it is pertinent to refer to the Draft Directive on rules governing actions for damages for infringements of articles 81 and 82 EC (now articles 101 and 102 TFEU), which provides in its article 8 that: '1. Member States shall ensure that national courts at no point in time order the disclosure of corporate statements or settlement submissions. 2. Member States shall ensure that national courts refrain, to the extent necessary, from ordering disclosure upon application by a competition authority that has shown to the court that disclosure would undermine

evaluating the disclosure of evidence *inter partes*,[4] we will analyse those cases where the information is provided by leniency applicants to the Commission.

In terms of the structure of this paper, we intend to explore some of the main avenues available to national courts and private plaintiffs to accede the Commission's file. After a brief explanation of a private plaintiff's registration as a complainant following the Commission's investigation of an antitrust infringement (Chapter II), we will consider fundamentally two legal alternatives: access to leniency-documents can be carried out either through article 15 (1) of the Regulation (EC) No 1/2003, according to which national courts have legitimacy to ask the Commission for legal and economic information (Chapter III) or directly through Regulation (EC) No 1049/2001 (the so called 'Transparency Regulation') which allows requests for information from the Commission (Chapter IV).

II – REGULATION (EC) NO 1/2003

The procedural framework set out in Regulation (EC) 1/2003 tries to find the balance between the effectiveness of enforcement under articles 101 and 102 Treaty on the Functioning of the European Union ("TFEU"; ex-articles 81 and 82 EC) and the 'legitimate interest of undertakings in the protection of their business secrets'. One of the most important confidentiality obligations imposed upon the Commission as regards information gathered during the investigation proceedings is contained in article 28 (1) of Regulation (EC) No 1/2003, according to which the Commission must use the information obtained during the investigation for the purpose for which it was acquired. Furthermore, there is an obligation of professional secrecy that the Commission and its officials must observe, under article 28 (2) of Regulation (EC) No 1/2003. Notwithstanding these obligations of confidentiality, there are some mitigating disclosure obligations.

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an ongoing investigation concerning a suspected infringement of articles 81 or 82 of the Treaty. 3. Member States shall take the necessary measures to give full effect to all legal privileges and other rights not to be compelled to disclose evidence that exist under the law of the European Union.' This provision is at odds with the referred *Pfleiderer* case law and also with the Commission's public agenda of facilitating private enforcement for cartel members. The Draft Directive is not available in the public domain, but is already subject to criticism, see Alfaro & Reher, 2010; Saavedra, 2009.

4 For further developments, see Commission Staff Working Paper to the White Paper ("SWP to the WP"), paras. 65-133, SEC(2008) 404, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/ documents.html, where the Commission suggests a minimum level of disclosure subject to both reference to evidence in the possession of the other party and to judicial control.

Firstly, article 30 of Regulation (EC) No 1/2003, provides that the Commission's infringement decision

'*shall state the names of the parties and the main content of the decision, including the penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets*.'[5]

The Commission usually publishes a summary of the decision adopted in the Official Journal of the EU and on its website it publishes the complete decision.[6] Publication of these decisions may assist private plaintiffs in actions for damages. In *Bank Austria Creditanstalt AG v. Commission* the Court of First Instance ('CFI') concluded that there is

'*... a public interest in knowing as fully as possible the reasons behind any Commission action, the interest of the economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and in view of the fined undertaking's ability to seek judicial review of such a decision*.'[7]

Secondly, complainants who participated in the public procedure, such as victims of a cartel,[8] are entitled to a copy of the non-confidential version of the statement of objections, but only for the purposes of judicial or administrative proceedings under articles 101 and 102 TFEU (ex-articles 81 and 82 EC).[9] In this respect, the CFI has held that the FPO, a political party,

5 Council Regulation 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 [2003] OJ L1/1, as amended by Council Regulation No. 1419/2006 [2006] OJ L269.

6 See http://ec.europa.eu/comm/competition/antitrust/cases/index.html.

7 See Case T-198/03, *Bank Austria Creditanstalt AG v Commission* [2006] European Court Reports - ECR II-1429, para. 78.

8 Case T-213 and T-214/01 *Oesterreichische Postsparkasse AG and Bank fuer Arbeit und Wirtschaft AG v Commission*, [2006] ECR II-1601, para. 119.

9 See article 6(1) of Regulation (EC) No 773/2004 of 7 April, relating to the conduct of proceedings by the Commission pursuant to articles 81 and 82 of the EC Treaty OJ [2004] L 123/18; Notice on the rules for access to the Commission's file, OJ [2005] C325/7; Notice on the handling of complaints by the Commission under articles 81 and 82 of the EC Treaty, OJ [2004] C101/65; DG Comp – Best practices on the conduct of

'*could validly rely on its capacity as a customer of banking services in Austria and the fact that its economic interests were harmed by anti-competitive practices in order to show a legitimate interest in making an application for a declaration by the Commission that those practices constituted an infringement of [articles 101 and 102 TFEU].*'[10]

However, since Regulation (EC) No 1/2003[11] does not offer any other means to access to the Commission's file and not every victim of an antitrust infringement will register itself as a complainant following the beginning of an investigation, other legal options have to be considered by private plaintiffs.[12]

III – ACCESS BY NATIONAL COURTS UNDER THE DUTY OF LOYAL CO-OPERATION BETWEEN THE COMMISSION AND THE MEMBER STATES

Damages actions must be brought before national courts which apply EU competition law (articles 101 and 102 TFEU – ex-articles 81 and 82 EC) directly.[13] The principle of supremacy of European law and the duty of loyal cooperation under article 4, §3 Treaty of the European Union ("TEU"; ex-article 10 EC) imply the imposition of certain limits to the national procedural autonomy. National courts must apply national laws in light of European law and disapply provisions of national law that run against EU law.[14] However, national courts are able to request the Commission's support, since the principle of loyalty enshrined in 4, §3 TEU (ex-article 10 EC) is not one-sided, *id est*, it imposes duties not only on the Member States, but also on the EU institutions.[15] While article 15 (1) of Regulation (EC) No

proceedings concerning articles 101 and 102 TFEU, para. 127, available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf.

10 Case T-213 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission*, [2006] ECR II-1601, para. 119.

11 As note 5 above.

12 See *infra* Chapters III and IV.

13 See Case 127/73, *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313, para. 16 and article 6 of Regulation (EC) No 1/2003, as note 5 above.

14 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 and Case 106/77, *Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

15 See Cases C-234/89 *Stergios Delimitis v Henninger Brau AG* [1991] ECR I-935, para. 53 and C-2/88 *Criminal Proceedings against JJ Zwartveld et al* [1990] ECR I-3365, paras. 17-18.

1/2003[16] expressly acknowledges that national courts are entitled to obtain legal and economic information from the Commission, it also authorises requests of opinion on issues concerning the application of EU competition law.[17] This legal provision should be read in conjunction with the '*Commission Notice on Co-Operation between the Commission and the Courts of the EU Member States in the Application of articles 101 and 102 TFEU (ex-articles 81 and 82 EC)*' ('Co-Operation Notice').[18] It is important to remember that this kind of soft law document does not bind courts (neither EU nor national) or National Competition Authorities ("NCA's").[19] Nevertheless, they are highly persuasive and quite often are used at the national level as an interpretative instrument.[20]

One type of assistance consists in sending documents in the Commission's possession to the national court. For the purpose of the present paper, it is relevant to know whether leniency-related evidence and corporate statements made in accordance with the Leniency Notice can be indirectly disclosed through the intervention of national courts.[21]

The Co-Operation Notice vehemently negates access to information voluntarily submitted by a leniency applicant, unless the leniency applicant consents (par 26).[22-23] The underlying principle is that a different approach

16 As note 5 above.

17 Wainwright, 2005: 209-216; see Case C-429/07, 11 June 2009, where the CoJ has, for the first time, defined the conditions for the presentation of the Commission's submissions as an *amicus curiae* to the national courts for the purpose of Regulation (EC) No 1/2003.

18 OJ C101/54 [2004].

19 *V.g.*, para. 42 of the Co-Operation Notice; see also Pampel, 2005: 98-99.

20 Parret, 2005: 347.

21 On corporate statements, see SWP to WP, as note 4 above, paras. 118-120. See below chapter IV for direct disclosure, under Council 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 [2001] OJ L 145.

22 See option 28 of the GP (Green Paper – Damages Actions for Breach of the EC Antitrust Rules, Commission of the European Communities, COM (2005) 672 final and Commission Staff Working Paper, SEC (2005) 1732) and also paras. 287 and 293 of the SWP to the WP, as note 4 above, where it is advocated that the safeguards conferred to leniency applications should be granted to applications submitted both under the EC and national leniency regimes. For general background information concerning the issues of private enforcement of competition law in the EU, see my paper, Saavedra, 2010: 22 ff.

23 As to the leniency applicant's authorization in the context of information-sharing within the NCA's, see paras. 37ff and 72 Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03).

would endanger the accomplishment of the Commission's task of enforcing competition law.

In our opinion, however, the Commission's rationale should only apply to the immunity applicant.[24] Accordingly, only information provided by the immunity applicant should benefit from the protection of disclosure in order to avoid the undesirable effect of disincentivizing leniency applications. In relation to the other leniency applicants, conversely, the possibility of having access to leniency documents and corporate statements provided in the context of the leniency programme should be left open,[25] provided the *Postbank* guidelines on protection of confidential information are respected:

> '*[o]nce such documents from the administrative procedure are produced in national legal proceedings, there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure the full effectiveness of the provisions of Community law in accordance with the principle of cooperation laid down in article [4, §3, Treaty of the European Union], these authorities are required to uphold the rights which those provisions confer on individuals.*'[26]

Actions for damages should be an instrument available to most companies. However, private plaintiffs do not have the same investigatory powers as competition authorities and are not always in the position to spend resources in economic studies or expert reports.[27] For that reason, access to the Commission's file can constitute a valuable source of information to substantiate potential civil claims, provided the national court offers enough guarantees that it will protect business secrets and confidential information against third parties. Van Gerven asserts that the evidence available in the public authority's file should be available to private plaintiffs for follow-on actions and suggests alternative solutions to make this proposal effective.[28]

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24 Blake & Schnichels, 2004: 7.

25 Temple Lang, 2003: 432-433, apparently shares the same opinion. *Contra*, see Wils, 2009: 19, and Komninos, 2008: 101, which argues that there are '*less onerous ways for these objectives to be pursued than by disclosing [leniency] documents* (...)'.

26 Case T-353/94 R *Postbank NV v Commission* [1996] ECR II-921, para. 69.

27 Jacobs & Deisenhofer, 2003: section 1.4., on the 'alternative of an administrative complaint to the Commission or a national competition authority': 187-227 and 197-198; Böge & Ost, 2006: 205.

28 Van Gerven, 2005: 307-323, at 315f. Several other commentators stressed that access to disclosure of public enforcement files is crucial: see Forwood, 2010; Marcos & Graells, 2008: 485.

Even in the international forum there is a vivid debate, as some competition authorities

> '*would in principle favour cooperation with courts, and would under certain circumstances make documents in their files available if a court requested them in connection with a private antitrust action, subject to conflicts with confidentiality rules or the risk that handing over documents might interfere with an ongoing investigation*.'[29]

Actions for damages before national courts are based on the direct effect of Treaty provisions. Therefore, public enforcement and the Leniency Notice should not, as a rule, interfere with civil claims and compensation of victims of antitrust infringements. In relation to corporate statements, following the new Leniency Notice, it is common practice that they are orally transmitted and do not include any business secrets or confidential information.[30] This in turn means that the Commission's duty to protect the guarantees given to natural and legal persons under article 339 TFEU (ex-article 287 EC) is already respected, and for that reason corporate statements can be disclosed in actions for damages. Otherwise, and if the protection applies to all corporate statements submitted by any applicant for leniency in relation to a breach of article 101 TFEU 'regardless of whether the application for leniency is accepted, is rejected or leads to no decision',[31] it will constitute an open invitation for abusive utilization of the leniency programme by cartel members who have no chance of receiving leniency (because they cannot offer additional evidence), but who have the iniquitous intention to avoid disclosure to injured parties in actions for damages.

To conclude, access to information provided by all leniency applicants – except immunity applicants – reconciles the various conflicting interests. The Commission's duty pursuant to article 339 TFEU (ex-article 287 EC) is respected, whilst there is an integral respect of the obligation of loyal cooperation between the Commission and the Member States (*in casu*, national courts) which request information under article 15 of Regulation

29 OECD Report on Private Remedies, DAF/COMP(2006)34, of January 2008, available at http://www.oecd.org/competition, p. 19 (consulted on January 2012).

30 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17, para. 39, para. 32.

31 WP, para. 2.9.

(EC) No 1/2003.[32] Consequently, and with the exception of the immunity applicant, on request made by a national court hearing proceedings on the infringement of EU competition rules, the Commission must give its 'active assistance' to such national proceedings, by delivering documents to the national court and authorizing its officials to give evidence in the national proceedings.[33]

Following the analysis of access to leniency-based evidence indirectly through article 15 of Regulation (EC) No 1/2003 (Chapter III), we will now examine access to the referred type of documents through another body of laws, Regulation (EC) No 1049/2001, the so called 'Transparency Regulation' (Chapter IV).

IV – REGULATION (EC) NO 1049/2001 ('TRANSPARENCY REGULATION')

As already noted, a follow-on action before a national court always implies that there was a previous administrative decision of a competition authority. Hence, one source of information is the Commission's file. Curiously, the Green Paper on Damages ('GP') has opened the debate to determine whether there should be any special rules on access to the authorities' file,[34] yet the White Paper on Damages ('WP') and the Draft Directive has only provided solutions as regards the disclosure of evidence by the cartelist.[35] Nevertheless, Regulation (EC) No 1049/2001 – enacted after the introduction of article 255 EC[36] by the Treaty of Amsterdam – is a piece of legislation that can legitimate requests for information from the main institutions of the EU, such as the Commission.[37] The entry into force of the Lisbon Treaty on 1 December 2009 has made it necessary to bring the Regulation into line with the new Treaty provisions, notably to extend public right of access to the documents of all the Union's institutions, bodies, offices and agencies. Following the Commission's proposal to amend Regulation (EC) No

32 As note 5 above.

33 Case 2/88-IMM, order of 13/07/1990, *Zwartfeld*.

34 GP, as note 22 above, options 6 and 7, p. 6.

35 White Paper on Damages, available at COM (2008) 165 final, available at COM (2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html.

36 Currently, the equivalent provision is article 15 TFEU.

37 Council Regulation (EC) No 1049/2001, as note 21 above. See Curtin, 2000: 7; Heliskoski & Leino, 2006: 735; Adamski, 2009: 521.

1049/2001,[38] there has been an intense debate among EU institutions, the civil society and Member States concerning the review process.[39]

1. The Exception 'Undermine the Protection of the Purpose of Inspections, Investigations and Audits'

Under Regulation (EC) No 1049/2001, the EU institutions can deny the disclosure of documents on a number of different grounds.[40] The Commission's official position is that applications under the Transparency Regulation are an inappropriate means for litigants to obtain information for use in damages claims in national courts.[41] The Leniency Notice further adds that the disclosure of leniency documents may undermine the protection of 'the purpose of inspections, investigations and audits'.[42] The use of this exception was invoked in *Verein für Konsumenteninformation* ('VFK') *v Commission*.[43] VFK was a consumer organization who requested the Commission to have access to its file containing 47.000 pages, which had relevant information about the Lombard Club. The underlying intention was to bring an action for damages before the Austrian courts against the banks on the basis of that evidence. In defence of its view to deny the disclosure, two arguments were offered by the Commission.

Primo, access to leniency-based evidence would discourage the cooperation of cartelists with the Commission and deter the former from blowing the whistle.[44] *Secundo*, a re-assessment of the case, following an annulment of the

38 30 April 2008, COM (2008) 229 final – COD 2008/0090. See also Council Annual Report on public access to documents in 2008, 15–16

39 Diamandouros, 2008; Peers, 2008; EP Draft Report [COM(2008)]0229 – C6-0184/2008-2008/0090(COD)]; all available at www.statewatch.org/foi/foi.htm (consulted on January 2012).

40 See article 4(1) (2) (3) and (5) of Regulation (EC) No 1049/2001, as note 21 above; Case C-404/10 P, *Commission v Éditions Odile Jacob SAS*, para. 111.

41 SWP to the WP, as note 4 above, fn 50. This position was further reinforced by a rather disappointing decision of the European Ombudsman who referred that '*the same public benefit of having a more effective system of private enforcement of EU competition law can be achieved through an alternative channel, namely, through article 15 of Regulation (EC) No 1/2003, and that this channel offers guarantees to protect the legitimate interests of third parties, diminishes significantly the weight of the need to grant public access, in the context of the balancing exercise'* – see Decision by the Ombudsman of 6 April 2010 (complaint with reference number 3699/2006/ELB).

42 As note 30 above, para. 40.

43 Case T-2/03 *VFK* [2005] ECR II-1121.

44 *Ibid*, para. 81.

Commission's decision, is endangered if there is a disclosure of documents while an appeal against the referred decision is still pending.[45]

In relation to the first argument, it is clear that the leniency programme is a top priority in the context of the Commission's cartel policy and its protection can be seen in the introduction of the oral leniency programme[46] and in its intervention in private actions as *amicus curiae* to oppose the disclosure of information obtained through the leniency programme.[47] Yet, even if the legitimacy of the Commission in refusing access to leniency documents is accepted, this institution could at least give partial access to documents obtained in the context of the use of its investigatory powers.[48] In our opinion, it is possible to be more ambitious in relation to the disclosure of leniency documents by envisaging a measure where only the leniency documents offered by the immunity applicant would be protected from disclosure. By contrast, the documents submitted by the remaining leniency applicants would be available. There is a minor reduction on the legal certainty, as the leniency applicant is not entirely sure as to whether the information released to the authority is protected or not. In other words, the leniency applicant has no knowledge as to whether he will qualify as an immunity applicant, and therefore benefit from the protection against disclosure. However, the same argument could also be raised in opposition to the policy of offering immunity from fines solely to the first applicant. There is also legal uncertainty in relation to subsequent applicants, since they do not know whether they are the first applicants and for that reason will benefit from a total exemption rather than a fine reduction. Nevertheless, that fact alone and the binding nature of the Commission's infringement decision in follow-on actions are insufficient to jeopardize the confidence of companies in the leniency system. In a similar fashion, the fact that the evidence furnished by subsequent applicants is potentially available to private plaintiffs will not unduly damage the working of the leniency programme.[49] As long as cartel

45 *Ibid*, para. 80.

46 See Berlingen, 2003: 8-10 on the oral leniency procedure.

47 See Norlander, 2004: 646; for an example of *amicus curiae*, see Commission of European Communities Supporting Reversal in *Intel Corporation v. Advanced Micro Devices, Inc.* (SupCt No 02-572).

48 Willis & Chisholm, 2008: 145, at 156.

49 Against, see issue of the ECN Brief (May 2012) and Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 on the protection of leniency material in the context of civil

members have the certainty that the first applicant will benefit from a total exemption, there is no substantial loss in the trust and predictability of the leniency system.[50] As the 2002 Organisation for Economic Co-operation and Development ("OECD") Report has observed

> '*clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for detection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the "best deal", but also that the terms of the deal be as clear as possible at the outset.*'[51]

In the past,[52] the Commission's official position was that there was no entitlement to inform the leniency applicants whether they would benefit from immunity or not, as that fact alone would limit the discretion of the *college* of Commissioners. This argument was put forward despite the EU and US antitrust bars' claims that the undertakings would not file leniency applications without a guarantee of immunity.[53] The need to 'increase ... the transparency and certainty of the conditions on which any reduction of fines will be granted' explains why the Commission changed its policy in the 2002 Leniency Notice in order to confer automatic and full leniency from fines to the first whistle-blower.[54]

As regards the second concern – the risk of endangering a re-assessment of the case – the Commission fails to acknowledge the CFI's decision in *Franchet and Byk v Commission*, where two public servants applied for copies of documents pertaining to an investigation conducted by the European

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damages actions: '*as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, Competition Authorities take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes*'.

50 For a similar argument, in the context of the US leniency programme, where there is no application of fines nor criminal prosecution for the immunity applicant, see Riley, 2005: 377, at 379.

51 OECD 2002 Report, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, p. 8, available at http://www.oecd.org/dataoecd/49/16/2474442.pdf (consulted on January 2012).

52 DG Comp introduced a first Leniency Notice in 1996: Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207, 18.07.1996, pp. 4-6.

53 Joshua, 2000: 20.

54 See 2002 Leniency Notice, Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C45/3, para. 5.

Anti-Fraud Office.[55] The CFI held that to deny access to the documents relating to inspections, investigations or audits which are covered by the exception until the follow-on action to be taken has been decided, would make access to such documents 'dependent on an uncertain, future and possibly distant event'.[56] This judgment may also be applied to the result of appeals against the Commission's decisions. In a similar vein, the outcome in the EU Courts can take years and the follow-on actions before national courts can be negatively affected by limitation periods. Applying *Franchet and Byk* to a competition law context implies that once the Commission's decision has been adopted, or more generously even before such a decision, but in any event after the investigatory phase, the Commission must grant access to evidence collected under the leniency programme. The inspections and investigations are only made vulnerable by the documents' disclosure as long as they are 'still in progress'.[57]

Nevertheless, even if we accept the Commission's argument, it is possible to put forward a solution whereby the information is available only after a finding of an infringement by a competition authority becomes legally binding in relation to the leniency applicant. In parallel, the plaintiff would have an additional limitation period both to claim damages and to gain access to leniency documents. Accordingly, the 'new limitation period' of two years for follow-on damages, which begins to run once the infringement decision has become final,[58] should be applied to the disclosure of leniency-based evidence. The idea is to avoid the expiration of the limitation period before public enforcement has finished.[59]

An exception to the discoverability of the leniency application can be made in relation to the immunity applicant in order to ensure the proper functioning of the leniency mechanism, its attractiveness for potential whistle-blowers, and the respect for the principles of legal certainty and

55 See Cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk v Commission* [1996] ECR II-2023. For a comment on this case see De la Serre, 2006: 82.

56 *Ibid,* Cases T-391/03 and T-70/04, para. 111.

57 *Ibid*, para. 113.

58 SWP to the WP, as note 4 above, paras. 237-240; article 14 of the Draft Directive.

59 SWP to the WP, as note 4 above, para. 237.

legitimate expectations.[60] These proposals are consistent not only with the Commission's suggestions concerning limitation periods,[61] but also with the principle of complementarity of public and private enforcement.[62]

As long as there is an on-going investigation,[63] it is understandable that the Commission can refuse access to the leniency documents or corporate statements as it would otherwise

> '*undermine the effectiveness of the exercise by the authority of its investigatory powers, in particular unannounced inspections*.'[64]

In a similar vein, according to article 15 of Regulation (EC) No 773/2004,[65] the targets of the investigation only have access to the Commission's file after having received the statement of objections.

However, it is unlikely that after the decision has already been adopted, the protection of the investigation is still needed. Since the exceptions to the principle of access to documents must be construed narrowly[66] and the Transparency Regulation is based on the principles of openness and transparency,[67] the Commission cannot expand the scope of the exception to also cover the situation where the infringement decision has been taken.[68] As already noted, a derogation is admissible solely in relation to the evidence submitted by the immunity applicant.

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60 Arguing that the evidence submitted by all leniency applicants should remain confidential, see Wils, 2009: 17-19.

61 SWP to the WP, as note 4 above, para. 237; article 14 of the Draft Directive.

62 For further developments on the question of whether private and public enforcement remain institutionally independent from each other or whether there is a hierarchical relationship between the two referred models, see my paper, Saavedra, 2010: 27 ff.

63 See article 8 (2) of the Draft Directive.

64 See Wils, 2009: 19.

65 Regulation (EC) No 773/2004 of 7 April, relating to the conduct of proceedings by the Commission pursuant to articles 81 and 82 of the EC Treaty OJ [2004] L 123/18; Notice on the rules for access to the Commission's file, OJ [2005] C325/7; Notice on the handling of complaints by the Commission under articles 81 and 82 of the EC Treaty, OJ [2004] C101/65.

66 See Case C-68/94, *Netherlands v Council*, [1996] ECR I-2169; Joined Cases C-174 & 189/98 P, *Netherlands and Van der Wal v Commission*, [2000] ECR I-1, para. 27; and Case C-353/99 P, *Hautala v Council*, [2001] ECR I-9565, para. 25.

67 As note 21 above, 2nd, 3rd and 4th paragraphs of the Preamble.

68 Leniency Notice, as note 30 above, para. 40, *in fine*.

The Commission is not entitled to refuse access to documents in its case file based solely on the general assertion that this would jeopardize the appeal of its leniency programme but has to show that the demanded disclosure is likely to effectively undermine the protection of the purpose of its investigations[69]. The General Court ("GC") emphasized that

> '*the investigation in a given case must be regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts, because it is at that moment that the institution in question itself considers that the procedure has been completed*'[70].

2. The Exception 'Undermine the Protection of Commercial Interests'

In the context of a legal action before the GC on 6 October 2008[71], CDC Hydrogene Peroxide Cartel Damage Claims ('CDC Hydrogene Peroxide') challenged the Commission's decision to refuse access to the index of the administrative file in the cartel case[72]. In a landmark judgment delivered in 15 December 2011, the GC has annulled the decision of the Commission not to grant access to the case-file, as it was made available to the addressees of the statement of objections in the cartel case. First of all, it should be noted that 'the purpose of Regulation No 1049/2001 is to give the public the fullest possible right of access to documents held by the institutions'[73], and that 'since they derogate from the principle of the widest possible access to documents, the exceptions laid down in article 4 of Regulation (CE) 1049/2001 must be interpreted and applied strictly'[74].

Interestingly, the GC analyzed carefully one of the exceptions used by the Commission to deny the disclosure of leniency, in particular 'the protection of the commercial interests of the undertakings in question'[75]. Although the

69 See, to that effect, Commission Case T-36/04 *API v Commission* [2007] ECR II-3201, para. 127.

70 Case T-437/08, *CDC Hydrogene Peroxide v Commission*, Judgment of the General Court (Fourth Chamber) of 15 December 2011, para. 62.

71 Case *CDC Hydrogene Peroxide*, as note 70 above.

72 Case COMP/F/38.620 – *Hydrogen peroxide and perborate*.

73 Recital 4 of the Regulation.

74 Cases C-266/05 *Sison v. Council* [2007] ECR I-1233, para. 63; Case C-64/05 P *Sweden v. Commission* [2007] ECR I-11389, para. 66; and Case *Sweden and Turco v. Council* [2008] ECR I-4723, para. 36.

75 See first indent of article 4(2) of the Transparency Regulation.

concept of 'commercial interests' is not defined in the EU case law, it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of article 4(2) of Regulation No 1049/2001 if application of the general principle of giving the public the widest possible access to documents held by the institutions is not to be frustrated[76].

In the referred decision 'CDC Hydrogene Peroxide', the GC specifically held that

> '(…) *even if the fact that actions for damages were brought against a company could undoubtedly cause high costs to be incurred, even if only in terms of legal costs, and even if the actions were subsequently dismissed as unfounded, the fact remains that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition*.'[77]

As a result of this decision, the Commission will have to provide access to the index which lists the documents contained in the cartel case and is part of the administrative procedure.[78] Apparently, the statement of contents is a mere inventory of documents which, in itself, has only a very relative probative value in the context of an action for damages. However, that inventory could allow the applicant to identify the documents and to request the national judge to issue an order of production of those documents.

We concur with this case law, as it strengthens the right to obtain access to documents contained in the Commission's file in order to substantiate damage claims against cartels, the most serious offences of competition law.

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76 Judgment of 30 January 2008 in Case T-380/04 *Terezakis v Commission*, OJ C 64, p. 33, para. 93.

77 Case *CDC Hydrogene Peroxide*, as note 70 above, para. 49 and also Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paras. 24 and 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paras. 59 and 61.

78 Possibly, the protection of the commercial interests is at stake if the disclosed information refers to the business relations of the companies concerned, the prices of their products, their cost structure, market share or similar information.

3. The Doctrine of Administrative Burden

The CFI in Verein für Konsumenteninformation v Commission ('VFK') has observed that the Commission was obliged, in principle, to carry out an individual and concrete assessment of the documents to find out whether any of the exceptions established by Regulation (EC) No 1049/2001 would have been applicable or whether partial access should have been given.[79] Nevertheless, the CFI affirmed the right of administrative burden according to which an institution has the right

> '... *in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration ...*'[80]

However, as some commentators have pointed out, the CFI erred in law, as Regulation (EC) No 1049/2001 does not contemplate the doctrine of administrative burden.[81] Article 6 (3) of the Transparency Regulation only envisages the option of finding a 'fair solution' through an informal contact between the parties concerned 'in the event of a request relating to a very long document or to a very large number of documents'.

4. General Court and Court of Justice: conflicting views?

As we have seen above, the GC in 'CDC Hydrogene Peroxide' considered that leniency and cooperation programmes are not ranked higher than private damages actions, since both systems contribute to cartel deterrence[82]. On 22 May 2012 the same GC chamber decided in a similar vein in the case 'EnBW' after the Commission's refusal in granting access to its entire file from the 'Gas Insulated Switchgear' cartel case[83]. The essential question raised was whether the Commission could circumvent the obligation to 'carry out a concrete and individual examination' of all the leniency documents,

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79 Case T-2/03 *VFK* [2005] ECR II-1121, paras. 76-92.

80 *Ibid*, para. 102.

81 In this sense, see Heliskoski & Leino, 2006: 759.

82 Case *CDC Hydrogene Peroxide*, as note 70 above, para. 77.

83 Case T-344/08, *EnBW energie Baden-Wuerttemberg AG v European Commission*, [2012] ECR, not yet reported.

on the basis that those documents were entirely covered by an exception to the right of access. As expected, the GC ruled that the Commission could not rely on a general presumption that access to categories of documents of the same nature can be denied and that cartel cases could not benefit from the 'Technische Glaswerke Ilmenau' ('TGI') case law[84]. The CoJ in the case of state aid 'TGI' accepted 'the existence of a general presumption that disclosure of documents in the administrative file undermines protection of the objectives of investigation activities'[85]. However, the GC in case 'EnBW' departed from the 'TGI' case law with the following convincing arguments:

a) The Commission's investigation in 'EnBW' was closed, contrary to the 'TGI' case where a final decision was still pending at the time the Commission received the request for disclosure of its file;
b) In State aid proceedings (as it was the case in 'TGI') third parties have no right to access the file other than the Member State concerned;
c) By contrast, Regulation (EC) No 1/2003[86] cannot constitute the basis for a general presumption for automatically covering all the leniency documents by one of the Transparency Regulation exceptions, as the former piece of legislation provides access to both the cartelists and complainants.

It will be interesting to follow whether the CoJ will support the GC's approach towards an expanded access to the Commission's file in cartel cases. In the field of State aid, in the referred 'TGI' case, the CoJ rejected the GC's reasoning and conceded leeway to the Commission in refusing access to its case file. The same outcome was reached in both merger cases 'Odile Jacob'[87] and 'Agrofert'[88], where the applicants unsuccessfully sought access to the Commission's file in merger proceedings.

Some authors argue that

84 Case C-139/07, *European Commission v Technische Glaswerke Ilmenau GmbH*, [2010] ECR I-5885.

85 *Ibid*, para 61.

86 As note 5 above.

87 Case *Odile Jacobs*, as note 40 above.

88 Case C-477/10, *Commission v Agrofert Holdings as*, [2012], not yet reported.

'*a combined reading of the GC judgment in 'EnBW' and 'CDC Hydrogen Peroxide' with the Court of Justice judgments in 'Odile Jacob' and 'Agrofert' shows that the Court of Justice contradicts the GC on every count*' and that '*there is no apparent reason to consider that the Court of Justice would not be equally sympathetic to the Commission's policy aimed at protecting its leniency system in the context of cartel cases*'[89].

We disagree with this position for a number of different reasons. Firstly, merger control concerns *ex ante* proceedings where the parties to the transaction have to file a notification form with information related to their sales, prices, volumes, turnover, etc., whilst the exception concerning the protection of the commercial interests is not so acute in *ex post* cartel proceedings.

In terms of the hierarchy of norms, the Transparency Regulation is superior to the Leniency Notice. The latter merely 'sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to secret cartels'[90] and is without prejudice to the interpretation of the law by the European courts.

Thirdly, public enforcement is not superior to private enforcement and a balancing test between both is possible when a conflict arises. Where one of the exceptions applies (such as 'the purpose of inspections, investigations and audits') disclosure may still be required if 'there is an overriding public interest in disclosure' (article 4 (2), *in fine* of the Transparency Regulation). The CoJ in 'Turco' annulled the CFI's decision[91] by stating, *inter alia*, that the overriding interest in disclosure does not need to be different from the principles of openness and transparency that underlie Regulation (EC) No 1049/2001 and that the burden of proof rests with the institution concerned.[92] The referred principles apply both to documents drawn up by the EU institutions and to those received by them ('third party documents').[93] In our opinion, leniency documents should be qualified as 'third party documents' within the meaning of Regulation (EC) No 1049/2001 and therefore the 'Turco' ruling is relevant for the purpose of disclosing leniency documents. Moreover, it is possible

89 Botteman & Hughes, 2012: 5 ff..

90 As note 30 above, para. 1.

91 Case T-84/03, *Turco v Council*, [2004] ECR II-040661.

92 Joined Cases C-39/05 P & C-52/05 P, *Sweden and Turco v Council*, [2008], para. 74.

93 Recital 10 of the Transparency Regulation, as note 21 above.

to envisage a quasi-*Pfleiderer* balancing test into play at the level of the EU courts, by considering the apparent conflicting interests of public and private enforcement. Interestingly, in proceedings brought in the Chancery Division of the English High Court, Mr Justice Roth noted that the Commission had accepted in its submissions[94] that, in the light of the general language used by the CoJ in 'Pfleiderer', the principles contained in its judgment covered both the Commission's and the NCA's leniency programmes[95]. In our opinion, the CoJ will not contradict the GC in this respect and will therefore introduce a balancing test at the EU level that mirrors 'Pfleiderer' at the national level, since there is no hierarchy between public and private enforcement.

V – FINAL REMARKS

Finally, it is important to underline that the Commission does not approve the use of Regulation (EC) No 1049/2001 for the purpose of obtaining evidence for follow-on actions.[96] This attitude collides with the Commission's public agenda of increasing private enforcement, because it represents a significant hurdle to cartel victims in proving the infringement in courts. The Association of European Competition Law Judges in its comment to the WP refers that

> '*the supposed negative effects of private enforcement on leniency applications have not been demonstrated and may have been overestimated*' and that '*the increase in the prevalence of follow-on damages actions in recent years does not seem to have resulted in there being fewer leniency applications*'.[97]

The Commission's interpretation has to be firmly rejected as it would otherwise amount to enabling the possibility to avoid the application of Regulation (EC) No 1049/2001, without any limit in time, to any document

94 National Grid Amicus Brief of the European Commission, available at: http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf

95 See *National Grid Electricity Transmission Plc v ABB Ltd, Chancery Division,* [2012], EWHC, 869 (Ch).

96 SWP to the WP, as note 4 above, paras. 90 and 104 and fn 50.

97 Association of European Competition Law Judges, *Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules*, p. 6, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf (consulted on January 2012).

in a competition case merely by reference to a possible future negative effect on its leniency programme.[98]

It is established case law, now recognized in article 2 of the Transparency Regulation, that no reason or justification for a request for access needs to be given.[99] Hence, the same reasoning should be applied to the victim of an antitrust infringement, seeking access to leniency-related evidence in order to claim damages, who should not be placed in a less favourable position than other applicants.

As a result, the Commission has a duty to provide reasons and cannot automatically reject an application on grounds that the disclosure will jeopardize the functioning of the leniency mechanism.[100] Accordingly, each document should be analysed in a concrete and individual manner to assess whether it falls within the exceptions set out in article 4 of Regulation (EC) No 1049/2001.[101]

As we have seen above, the Commission's arguments[102] have been tested by the GC in the case 'CDC Hydrogene Peroxide'[103] and in the case 'EnBW'[104] and their recurring arguments to deny access to its file ('undermining the protection of the purpose of investigations' and 'the commercial interests of the companies') have been dismissed. It will be interesting to closely follow the Commission's pending appeal against the GC's judgment in 'EnBW' which may hopefully continue to lead to greater openness.[105] Contrary to the policy-oriented approach in the field of state aid[106] and merger control[107], the CoJ should not introduce a general presumption to refuse access to leniency documents, but rather bring a quasi-*Pfleiderer* balancing test into play.

98 Case *CDC Hydrogene Peroxide*, as note 70 above, para. 72.

99 *V.g.*, Joined Cases C-174/98 & 189/98 *P, Netherlands and Van der Wal v Commission* [2000] ECR I-0001.

100 Generally, on the duty to give reasons, see Case C-41/00 P, *Interporc v Commission*, [2003] ECR I-2125, para. 55.

101 Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-0000, para. 35.

102 SWP to the WP, as note 4 above, fn 50.

103 As note 70 above.

104 As note 83 above.

105 Case C-365/12 P, *Commission v EnbW Energie Baden-Wuerttemberg,* application: OJ C 287 from 22.09.2012, p. 29.

106 Case *TGI*, as note 84 above.

107 Cases *Odile Jacobs* and *Agrofert*, as notes 41 and 89 above, respectively.

All in all, the proposed solution advanced in the present paper is a reasonable approach, as it preserves the attraction of the leniency programme by protecting the immunity applicant, on the one hand, and further incentivizes follow-on actions as the victims of anti-competitive agreements have an additional source of information to substantiate their claims, on the other hand.

As pointed out by the GC

> '(…) *leniency and co-operation programmes whose effectiveness the Commission is seeking to protect are not the only means of ensuring compliance with EU competition law. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.*'[108]

108 Case *CDC Hydrogene Peroxide*, as note 71 above, para. 77.

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