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THE BLANKET PROHIBITION OF DISCLOSURE OF CORPORATE STATEMENTS CONTAINED IN ARTICLE 6(1) OF THE DIRECTIVE FOR ACTIONS FOR ANTITRUST DAMAGES: PROPORTIONAL SAFEGUARD OF PUBLIC ENFORCEMENT OR INSURMOUNTABLE BURDEN FOR CLAIMANTS?**

ABSTRACT

The present paper will examine whether the blanket prohibition of disclosure of corporate statements contained in Article 6(1) of Directive 2014/104 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 is necessary to safeguard the attractiveness of the Commission's leniency programme or whether it represents an insurmountable burden for claimants that will in the long run severely hamper the private enforcement of EU Competition law (a most unfortunate outcome considering the main objective of the Directive is precisely the opposite). On the one hand, excessive protection of leniency applicants' clemency submissions may lead to useless litigation and

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ultimately render the private enforcement of competition law in the EU pointless, as claimants are denied (purportedly) essential evidence for building stout damages cases. On the other hand, a more permissive approach towards the disclosure of such information may cripple the public enforcement of Competition law by discouraging cartelists to come forward in the first place. Given the fact that follow-on claims constitute a lion's share of current actions for antitrust damages brought in the EU, such a result would almost certainly have catastrophic consequences for individuals' right to compensation for the harm caused by infringements of Article 101 of the Treaty on the Functioning of the European Union as recognised by the European Court of Justice in the Courage and Crehan and Manfredi and others judgments. We conclude that the Commission seems to be privileging immunity recipients at the cost of injured parties by imposing remedies that are too far reaching for the protection of the effectiveness of the leniency programmes, especially taking into consideration the lack of conclusive evidence proving that disclosure of corporate statements would discourage potential leniency applicants from collaborating with the competition authorities in the first place. In light of this, we contend that a case-by-case approach such as the one envisaged by the European Court of Justice in Pfleiderer is more adequate to strike the balance between the injured parties' right to redress and the effectiveness of the leniency programmes – at least for the time being. The topic is especially relevant today, given the Commission's duty to review the Directive by December 27 2020, as follows from Article 20 thereof.

Keywords: EU, antitrust damage, private enforcement, right to compensation, prohibition of disclosure of corporate statements.

> *Propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process, which provide the best constructive interpretation of the community's legal practice. Lawyers are invited to search for an answer in legal materials using reasons and imagination to determine the best way to interpret legal data. It is therefore possible for lawyers to confront fresh and challenging issues as a matter of principle, and this is what law as integrity demands of him.*
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> R. Dworkin, *Law's Empire* (1986)

Introduction

In 2013 the European Union Commission (hereinafter 'the Commission') put forth a draft proposal 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[1] ('the Directive'). In the Commission's own words, the directive aims at facilitating damage claims by injured parties in civil actions for antitrust damages without hindering or in any way adversely affecting the hitherto successful public enforcement of European Union ('EU') Competition law.[2] Yet a closer examination of certain precepts contained in the directive suggests that such a balance may in fact be difficult to strike in practice. In this sense, Article 6(1) of the directive prohibits the disclosure of corporate statements to private plaintiffs in actions for damages resulting from breaches of competition law (henceforth referred to simply as 'actions for antitrust damages').[3] As some commentators have denounced, this precept may prove problematic in the light of the importance attached to corporate statements in the process of proving causation and quantifying the harm inflicted by cartels, by virtue of which forbidding claimants access to such documents may well be tantamount to condemning the private enforcement of EU Competition law to an early grave.[4] This would in turn imperil the right of cartel victims to obtain full compensation for the harm suffered as a result of infringements of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'),[5] as established in the seminal *Courage and Crehan*[6] and *Manfredi and others*[7] rulings of the

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[1] 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, 2013/0185 (COD).

[2] See the explanatory memorandum of the Directive; Public enforcement of competition law is taken to mean the application of the EU competition rules by the Commission and national competition authorities ('NCAs'). On the other hand, private enforcement of competition law is taken to mean the exercise of the rights arising from the direct effect of articles 101 and 102 TFEU by individuals, which can be enforced by national courts. This is the definition offered by the Commission in the explanatory memorandum of the directive and the one we will follow throughout the present work.

[3] 'Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: leniency corporate statements; and settlement submissions.'

For the purpose of the present work, we shall focus only on leniency corporate statements.

[4] See, for instance, Albert Sánchez Graells, 'Why is competition law so special? Or how leniency will kill private damages actions', available at: *http://howtocrackanut.blogspot.co.uk/2013/02/why-is-competition-law-so-special-or.html*. 'Maybe it is better to accelerate the process and not wait for leniency protection to (slowly) kill private actions. Let's just bury them and avoid unnecessary litigation'.

[5] Consolidated version of the Treaty on the Functioning of the European Union, C 326/49. 26.10.2012.

[6] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

European Court of Justice ('ECJ').[8] In addition, such an outright ban on the disclosure of corporate statements could amount to a disproportionate curtailment of the right to an effective remedy and a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union[9] ('The Charter'), as well as a breach of the principle of proportionality contained in Article 19 of the Treaty on European Union ('TEU').[10] On the other hand, it has been argued that cartelists may be dissuaded from whistle-blowing where there is a possibility that the self-incriminating evidence contained in the corporate statement might be used against them in subsequent civil proceedings, leaving them worse off than if they had not come forward and in an altogether more precarious position than their co-conspirators. Considering the fact that nearly 90% of cartels are uncovered following a leniency application[11] and given that follow-on claims[12] constitute a lion's share of actions for damages brought in the EU, such a result would surely have catastrophic consequences for the still very much nascent private enforcement of EU Competition law. However, it would appear that the exception to the general rule of the joint and several responsibility of the infringers for the harm caused by a cartel operating in favour of the immunity recipient contained in Article 11(2) of the Directive, whereby his liability is limited to the damage caused to his direct and indirect purchasers unless claimants prove they cannot obtain full compensation from the other defendants, significantly alleviates this concern. This precept, which was introduced as an amendment by the European Parliament, seems to privilege immunity recipients at the cost of injured parties as it limits the claimants' choices upon seeking compensation for the harm suffered and imposes the additional burden of having to prove that redress cannot be obtained from the other infringers. Coupled with the aforementioned absolute ban on the disclosure of corporate statements, Article 11(2) may be the final nail in the

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[7] Joined Cases C-295 to 298/04 *Manfredi* [2006] ECR I-6619.

[8] Para. 26 of *Courage and Crehan*.

[9] Charter of Fundamental Rights of the European Union (2010/C 83/02).

[10] The Charter became legally binding on the EU institutions and on national governments in 2009 with the entry into force of the Treaty of Lisbon. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. 2007/C 306/01.

[11] See Section 1.2.

[12] Follow-on claims are those which are brought after the establishment of a Competition law infringement by the NCAs or the Commission. The present work will focus exclusively on follow-on damages claims. Stand-alone claims shall therefore not be discussed.

coffin of the right to obtain full compensation for the harm caused by anticompetitive conduct.

In view of the above situation, the present contribution will attempt to shed light on the question of whether, and if so to what extent, the blanket prohibition of disclosure of information contained in corporate statements contemplated in Article 6(1) of the Directive is likely to constitute an impediment to the effective redress of antitrust damages victims and a hurdle to private enforcement of EU Competition law.[13] While the focus will be on Article 6(1), the interplay of said precept with Article 11(2) of the Directive will be touched upon, albeit shortly given the brevity of the present work. For the purpose of clarity and coherence, the organization of the paper will be as follows. (i) Part one will aim to provide a concise overview of the context in which Article 6(1) is set to operate in and a background to the ensuing debate. To this end, three issues shall be briefly discussed: (a) the traditional preponderance of public over private enforcement of EU Competition law, (b) the paramount importance of leniency programmes for the success of public, and consequently private, enforcement and (c) the rise of private enforcement of EU Competition law as a result of a (relatively) recent heightened awareness of its importance. (ii) Part two will assess the main arguments for and against a hard-and-fast rule prohibiting the disclosure of information contained in leniency submissions drawing on the ECJ's case-law. (iii) Part three will examine possible trade-offs and alternative solutions to the issue of disclosure of leniency material and discuss the combined effect of Articles 6(1) and 11(2) on the claimants' right to be fully compensated for the damage suffered as a consequence of an infringement of Article 101 TFEU and (iv) part four will conclude on the arguments adduced thus far.

1. The legal context surrounding the adoption of Article 6(1) of the Directive

In order to assess the potential impact of Article 6(1) of the Directive and understand the rationale behind the imposition of a blanket prohibition against the disclosure of corporate statements in actions for antitrust damages, it is appropriate to survey the legal climate surrounding its adoption.

[13] In the present work 'Private Enforcement of EU Competition rules' will refer exclusively to actions for damages. However, it must be underlined that, strictly speaking, private enforcement also encompasses actions for nullity or actions for injunctive relief. These actions will not be discussed.

1.1. Preponderance of Public enforcement of Competition law in the EU

In contrast with the United States, where approximately 90% of antitrust damages cases are filed by private attorneys,[14] the enforcement of Competition law in Europe has traditionally relied heavily on public authorities.[15] Indeed, public enforcement has long been defended as the superior method for fulfilling the main functions of competition law by many authoritative European commentators such as Wouter Wils and Wernhard Moeschel, who have mostly focused on the aspects of deterrence, punishment,[16] clarification and development[17] of antitrust prohibitions.[18] However, the understanding of these

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[14] A. Renda, J. Peysner, A. J. Riley, B. J. Rodger, J. Van Den Bergh, S. Keske, R. Pardolesi, E. L. Camilli, P. Caprile, 'Making antitrust damages actions more effective in the EU: Welfare impact and potential scenarios', (2007) Report for the European Commission DG COMP/2006/A3/012. Hereinafter 'CEPS report', p. 67.

[15] Alberto Saavedra, 'The relationship between the leniency programme and private actions for damages at EU level' (2010), *Revista de Concorrencia e Regulacao*, 2010. Available at: *http://www.ssrn.com/abstract=2292575*; In fact, the role of civil actions for damages in European antitrust enforcement has been so negligible that the Ashurst report (Study on the conditions of claims for damages in case of infringement of EC competition rules, 2004, available at *http://www.ec.europa.eu*) described them as 'painting a picture of complete underdevelopment and astonishing diversity'. Admittedly, the situation has changed considerably in the ten years since that report was published, although to this day private enforcement remains far from equal to its public counterpart. To this end, see para. 41 of the opinion of Advocate General ('AG') Mazak in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2010].

[16] It has been argued that public enforcement is more suited for punishing infringers as it strives to impose optimum fines, in contrast with private actions for damages. See Wils at n. 21.

[17] Their content is clarified through decisions and judgments as well as through guidelines, see for example Decision 98/531 EC of the European Commission of 11 March 1998 in Case IV/34.073 *Van den Bergh Foods v Commission,* [1998] OJ L246/1 and Judgment of the EC Court of First Instance (now General Court) of 23 October 2003 in Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II- 4653, and Decision of the European Commission of 26 August 1999 in Case IV/36.384 FENIN and judgment of the Court of Justice of 11 July 2006 in Case C-205/03 P *FENIN v Commission* [2006] ECR I- 6295; see also Article 10 of Regulation 1/2003 as well as the European Commission's Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, [2004] OJ C101/78; See also for instance the European Commission's Guidelines on vertical restraints, [2000] OJ C291/1, and Guidelines on the applicability of Article 81 EC to horizontal co-operation agreements, [2001] OJ C3/2. As cited by Wouter Wils in 'The Relationship Between Public Antitrust Enforcement and Private Actions For Damages' (2008), *World Competition*, Vol. 32, No. 1. Available at: *http://www.ssrn.com/abstract=1296458*.

[18] See, for instance, Wernhard Moeschel, 'Should Private Enforcement of Competition Law Be Strengthened?'. Available at: *http://www.unisaarland.de/fak1/fr12/csle/activities/cnpe06/abstracts/Moeschel-private_abs.pdf*. 'The Public enforcement by competition authorities has three advantages (reliance on state power,

functions has gradually shifted as a result of the Commission's modernisation of competition law initiative[19] and, most importantly, the ECJ's growing line of jurisprudence calling for the enhancement of actions for antitrust damages initiated with the landmark *Courage and Crehan* ruling. As a consequence of the establishment therein of compensation as a necessary element for the attainment of the *effet utile* of Articles 101 and 102 TFEU, the aforementioned views have become somewhat outdated. Nevertheless and as shall hopefully be made clear throughout this contribution, these opinions continue to permeate the European antitrust debate to a significant extent and more importantly, serve as a basis for many of the arguments supporting Article 6(1) of the Directive as it stands at the time of writing. In any event, no public enforcement tool has been nearly as successful in fighting cartels as the leniency programmes.

1.2. Leniency programmes as essential public enforcement tools in the fight against cartels

Since their introduction in the EU in 1996, leniency programmes[20] have become an essential tool in the fight against hard-core cartels[21] across the Union.[22] In fact, almost 90% of cartel infringements are discovered through leniency applications.[23] Today, leniency programmes constitute the hallmark of public enforcement and are considered essential in terms of deterrence[24] and

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lower costs and less danger of abuse). (…) Private enforcement of competition law can claim a few, rather weak, advantages.'; also, Wouter Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2008), *World Competition: Law and Economics Review*, Vol. 26, No. 3, 2003.

[19] See, in general, Jules Stuyck, 'Modernisation of European competition law: the commission's proposal for a new regulation implementing articles 81 and 82 EC; proceedings of the 2001 Competition Law Conference of the Leuven Centre for a Common Law of Europe' (2002), Antwerp, Intersentia.

[20] For a definition of 'leniency' see paragraph 1 of the ECN Model Leniency Programme. See also paragraph 37 of the Commission Notice on cooperation within the Network of Competition Authorities.

[21] 'Hard-Core' cartel conduct has been defined by the organization for Economic Cooperation and Development (OECD) as: '[A]n anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.' (OECD, 1998).

[22] See, in general, CEPS Report, p. 499.

[23] Tine Carmeliet, 'How lenient is the European leniency system? An overview of current (disincentives) to blow the whistle' (2012), *Jura Falconis* Jg. 48, 2011 - 2012, nummer 3.

[24] See n. 15.

destabilization of cartels.[25] As stated clearly and concisely in the note by the United Nations Conference on Trade and Development ('UNCTAD') secretariat: '*[Hard-core] cartels are considered by many to be the most egregious competition law offence. Leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects.*'[26] It is also important to highlight that, while strictly speaking a public enforcement device, the benefits generated by leniency programmes are also reaped by antitrust victims.[27] Indeed, considering the fact that the vast majority of actions for antitrust damages are brought following a finding of infringement by a competition authority, effective public enforcement is essential for the successful compensation of competition law infringement victims. This holds especially true in light of the rule contained in Article 9 of the Directive, which establishes that the findings of infringements by competition authorities constitute irrefutable proof of an infringement in subsequent civil actions for damages, thereby significantly lightening the burden of proof of claimants.[28]

It follows from the above that any enfeeblement of the leniency programme(s), whether real or imagined, is likely to be met with strong opposition from the Commission, the NCAs and authoritative commentators from academia, legal practice and industry alike.[29] In this sense, the rise of private enforcement of

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[25] Jeroen Hinloopen, Adriaan R. Soetevent, 'Laboratory evidence on the effectiveness of corporate leniency programs' (2008), *RAND Journal of Economics*, vol. 39, No. 2, Summer 2008, pp. 607-616.

[26] United Nations Conference on Trade and Development, 'The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries', Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva 8-12 November 2010, Item 6(a) of the provisional agenda.

[27] See, for instance, the statement of Andreas Mundt, President of the Bundeskartellamt: 'If the leniency programme does not function properly, significantly fewer cartels will be uncovered. This would not only hamper the punishment of the perpetrators, but also the compensation of the victims'.

[28] Whereas an infringement found by a final decision of the court's domestic competition authority (or review court) is deemed to be irrefutably established, a final decision of a competition authority in one member State is not fully binding on the court in another member State but constitutes *prima facie* evidence of an infringement. See Skadden, 'European Parliament approves proposed Directive on private antitrust damages actions', available at: *http://www.skadden.com/sites/default/files/publications/European_Parliament_Approves_Proposed_Directive_on_Private_Antitrust_Damages_Actions.pdf*.

[29] See, for instance, the comments to the Commission's Green Paper and White Paper on actions for damages for antitrust infringements, which shall be discussed in more detail in section two.

Competition law in the EU, and especially the culmination of the ECJ's pro-compensation line of jurisprudence in *Pfeilderer*[30] has had mixed responses.

1.3. The rise of private enforcement of Competition law in the EU

The Commission's interest in bolstering the private enforcement of EU Competition law was sparked by a line of jurisprudence initiated by the seminal *Courage and Crehan* ruling, where the ECJ famously held that compensation of cartel victims is essential in ensuring the *effet utile* of Article 101(1) TFEU.[31] The Court's reasoning was subsequently acknowledged by the Commission, as is evidenced by the 2005 Green Paper[32] which sought to open up a discussion on the removal of practical obstacles for the bringing of more (successful) actions for antitrust damages.[33] The Green Paper, published together with a Staff working paper (jointly referred to henceforth as 'the Green Paper', unless otherwise specified), underlined the importance of facilitating antitrust damages claims both for ensuring the full effectiveness of Article 101(1) TFEU as well as for strengthening competition law enforcement across the Union.

Manfredi and others, rendered in 2006 by the ECJ, came as a confirmation of *Courage and Crehan* as well as a nod to the themes raised in the Green Paper. Two years after the ECJ delivered its judgment in *Manfredi*, the Commission published its White Paper on actions for damages[34] with a double purpose: ensuring the full compensation of antitrust victims while at the same time preserving strong public enforcement.[35] In 2013 and after almost a decade of deliberations, a directive on actions for antitrust damages - which echoed the majority of the proposals put forward in the White Paper - was finally published. On April 17, 2014, the European Parliament overwhelmingly approved it, albeit amending Articles 6 and 11.[36] In the same way as its predecessor, the Directive aims at

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[30] C-360/09 *Pfleiderer AG v. Bundeskartellamt* [2010].

[31] Para. 26.

[32] Commission Green Paper – Damages actions for breach of EC antitrust rules. COM (2005) 672, 19.12.2005.

[33] Eddy De Smijter, Constanza Stropp, Donnacadh Woods, 'Green Paper on damages for actions for breach of the EC antitrust rules' (2006), *Competition Policy Newsletter*, n. 1, spring 2006; See also recital seven of the Staff Working Paper.

[34] Commission White Paper on Damages Actions for Breach of the EC antitrust rules. COM (2008) 165, 2.4.2008.

[35] See Section 1.2 of the Explanatory Memorandum of the White Paper.

[36] See Press Release, FAQ and Memo at: *http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html*.

optimising the interaction between the public and private enforcement of competition law and ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered.[37] Recent ECJ rulings, such as *Pfleiderer* and *Donau Chemie*,[38] together with a number of judgments rendered by national courts[39] have further emphasised the importance of ensuring the effective exercise of actions for damages of antitrust infringements. In *Pfleiderer*, the ECJ held that national courts should weigh the respective interests in favour of disclosure of the information and in favour of the protection of the information provided voluntarily by the applicant for leniency,[40] which was later confirmed in *Donau Chemie*.[41] The Court thus rejected any *per se* ruling regarding the disclosure of corporate statements, contending that any rigid rule in this respect would be liable to undermine the effective application of Article 101 TFEU.[42] This case-law has in turn been coupled with a growing support and wide-spread awareness of the benefits of actions for damages for Competition law enforcement. In this respect, Lande and Davis have posited that private enforcement may be capable of correcting some of the shortcomings of public enforcement, such as budgetary constraints, lack of awareness of industry conditions and the political motivation behind administrative (non) enforcement.[43] Further, follow-on actions have been found to contribute to more effective deterrence by increasing the probability of detection and adding (or substituting, in the case of immunity recipients) damages awards to the potential fines imposed by public enforcers.[44] However,

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[37] See section 1.2 of the Explanatory Memorandum thereof.

[38] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, ECLI:EU:C:2013:366.

[39] *National Grid v ABB & Others* [2012] EWHC 869. Case No: HC08C03243.

[40] Para. 30 of the judgment.

[41] Para. 31 of the judgment.

[42] *Ibid*.

[43] Lande and Davis, *Interim Report* (2006); In this respect, see also the CEPS report, p. 57: '[T]he imperfect information and limited resources available to public authorities are the main grounds for envisaging a role for private Attorney Generals in enforcing antitrust rules.'; Other authors, such as Priest and Klein, have also held that advantages of private enforcement over public enforcement include informational advantages, proximity to the violation and also increased legal certainty over the intricacies of antitrust law. George L. Priest, Benjamin Klein, 'The Selection of Disputes for Litigation' (1984), *The Journal of Legal Studies*, Vol. 13, n. 1 (Jan., 1984), pp. 1-55.

[44] CEPS Report, p. 63; See also the consultation document published by the OFT, '[a] more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or claimant will increase. As these financial risks increase, so does (or should)

far from adopting a private v. public approach, the majority of authors agree that the most effective way to enforce Competition law is through a system effectively integrating private and public enforcement. In this sense, Martini and Rovesti found that social welfare increases if both private and public agents can start an investigation,[45] while McAfee suggested that mixed public and private enforcement yield a superior result to either functioning in isolation.[46] Based on *inter alia* the work of McAfee, H.P Mialon and S.H Mialon,[47] the CEPS report concluded that as a result of the improvement in the possibility of detection of illegal conduct, the accuracy of fact-finding and deterrence, effective (not simply 'enhanced') private enforcement is likely to lead to an increase in the competitiveness of markets, a reduction in the potential for strategic abuse of antitrust laws and to greater compensation.[48] In this respect and according to the same report, enhanced private enforcement is expected to lead to a yearly recovery by claimants ranging between €5.7 billion and €23.3 billion,[49] while at the same time bringing about yearly social benefits as high as 1% GDP or €117 billion.[50]

In light of all the above, it is safe to say that the private enforcement of competition law has enjoyed a (re)birth in the past decade. However, such a revitalisation has come at a time when the effectiveness of the leniency programmes, and therefore also public enforcement, appears almost undisputed. Against this backdrop, many authoritative commentators, stakeholders and perhaps most importantly, the Commission itself, are extremely wary of any potential negative spill-over effects arising from a surge in actions for antitrust damages. One of the focal points of discussion in this sense has been the question of the (non) discoverability of leniency material to the claimants in actions for

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the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary.' As cited in the CEPS report.

[45] Gianmaria Martini, Cinzia Rovesti, 'Antitrust Policy and Price Collusion: Public Agencies vs Delegation' (2004), *Recherches Économiques de Louvain - Louvain Economic Review*, 70(2), 2004.

[46] R. Preston McAfee, Hugo M. Mialon, Sue H. Mialon, 'Private Antitrust Litigation: Procompetitive or Anticompetitive' (2005), available at: *www.justice.gov/atr/public/hearings/single_firm/docs/220040.pdf*.

[47] R. Preston McAfee, H. P. Mialon, S. H. Mialon, 'Private v. Public Antitrust Enforcement: a Strategic Analysis', *Emory Law and Economics*, Research Paper No. 05-20.

[48] CEPS Report, pp. 67 and 70.

[49] *Ibid*., p. 168.

[50] *Ibid*., p. 165.

antitrust damages. The following section will attempt to shed some light on this increasingly contentious question.

2. Article 6(1): Proportional safeguard of public enforcement or insurmountable burden for claimants?

Article 6(1) of the Directive imposes an obligation on Member States to ensure that national courts cannot order the disclosure of leniency corporate statements during an action for antitrust damages. While some commentators have received this blanket-prohibition with open arms, claiming that it is necessary for the safekeeping of the effectiveness of leniency programmes in the EU, others have wondered whether such a hard-and-fast rule will ultimately defeat the purpose of the Directive by denying claimants access to evidence that is essential for building a viable antitrust damages case. Within the context of this debate, the present segment will attempt to assess (a) what the real evidentiary value of the information contained in the leniency application is for plaintiffs and to what extent such information can be obtained through other, non-confidential, means, (b) whether the disclosure of the aforementioned documents truly jeopardises the effectiveness of leniency programmes in the EU by acting as a disincentive to potential leniency applicants (c) and finally, whether a blanket prohibition on the disclosure of corporate statements such as the one contained in Article 6(1) of the Directive is in line of the right to effective redress enshrined in Article 47 of the Charter, the principle of proportionality contained in Article 5 TEU and the principle of effectiveness contemplated in Article 19 TEU.

2.1. Disclosure of leniency applications: dire necessity or capricious whim?

Informational asymmetries *inter partes* in actions for antitrust damages and the evidential hurdles faced by claimants therein were already identified by the Commission as primary obstacles for bringing successful actions for antitrust damages in its Green Paper.[51] The present segment will aim to ascertain whether the blanket prohibition against the discoverability of leniency material contained in Article 6(1) of the Directive can potentially be too burdensome for claimants - to the extent that it bars them from obtaining full compensation-, or if on the other hand it can be overcome through the use of other, non confidential,

[51] Concerning the Green Paper, see section 2.1 thereof; with regards to the Commission's most recent admission of the aforementioned obstacles, see the explanatory memorandum of the directive, n. 6. In this sense: '[T]he Commission identified, in its Green Paper on damages actions for breach of the EC antitrust rules (…), the main obstacles to a more effective system of antitrust damages actions. Today those same obstacles continue to exist in a large majority of Member States. They relate to (i) obtaining the evidence to prove a case'.

evidential means without representing a disproportionate cost that would discourage injured parties from seeking redress for the harm suffered.

Within the context of the Directive and in light of Articles 9[52] and 16(1)[53] thereof, a claimant in an antitrust damages case is obliged to prove two elements: causation and quantification of damages. Causation requires that the causal link between the collusive behavior of the defendant(s) and the harm suffered by the claimant be uninterrupted. However, as Woods, Sinclair and Ashton point out, it can be complicated to attribute loss to the defendant's behavior rather than to other factors such as the claimant's own business strategy, as illustrated in *Hendry*.[54] In stark contrast with many 'classical' private damages cases, one of the main problems faced by claimants in attempting to establish causation is the typically complex, and highly variable, environment of many private antitrust cases.[55] In addition, while legal standards for proving quantification are generally lower[56] and allow for crude approximations, causation is scrutinized thoroughly, to the extent that in most jurisdictions it must be established with a 99.9% probability.[57] Proving causation can therefore constitute an important barrier for claimants in actions for antitrust damages, especially taking into account the fact that cartelists typically hold much more information about the infringement.[58] Furthermore, even if causality is proven, evidence of the actual loss is required in order to bring a successful antitrust damages case. This hypothetical assessment, which is very fact sensitive and invokes complex and specific economic and competition law issues, has been recognised by the Commission as a major difficulty for claimants in antitrust damages actions.[59] The question is whether

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[52] Article 9 of the Directive establishes that where there is already a final infringement decision by a national competition authority or by a review court, national courts ruling in actions for damages under Article 101 or 102 TFEU cannot take decisions running counter to such finding of infringement.

[53] Article 16(1) establishes a presumption of harm operates in the case of a cartel infringement.

[54] D. Woods, A. Sinclair, D. Ashton, 'Private enforcement of Community competition law: modernisation and the road ahead' (2004), *Competition Policy Newsletter*, n. 2.

[55] Hans A. Abele, George E. Kodek, Guido K. Schaefer, 'Proving causation in private antitrust cases' (2011), *Journal of Competition Law & Economics*, 7(4), 847-869.

[56] *Ibid*., p. 2.

[57] *Ibid*., pp. 1-3.

[58] *Ibid*., p. 5.

[59] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. 2013/C 167/07. Para. 3.

access to corporate statements can aid claimants in overcoming these evidential obstacles.

In contrast to pre-existing documents, corporate statements are created with the sole purpose of applying for leniency. In this respect, they can often be very valuable as they must generally contain a detailed description of the cartel conduct; including its aims, activities and functioning, the product involved, geographic coverage, duration, volumes affected by the cartel, dates, locations, participants and all other relevant explanations in connection with the evidence provided.[60] Certain passages from such documents can prove invaluable in determining what the price would have been in a hypothetical competitive market had the cartel not taken place (the 'but-for' test),[61] a necessary step in establishing the extent of the harm suffered by the injured parties. In this respect, the ECJ contended in *Donau Chemie* that access to leniency material could be 'the only opportunity [injured parties] have to obtain the evidence on which to base their claim for compensation'.[62] It is, however, complicated to make a far reaching claim concerning the evidential value of corporate statements, especially considering the fact that the information contained in non-confidential documents may overlap with that held in corporate statements. Indeed, the post-*Pfleiderer* case-law of national courts suggests that the extent to which corporate statements are necessary to substantiate an antitrust damages case largely depends on the facts of the case, the type of cartel[63] as well as on the existence, or lack thereof, of non-confidential documents, their quality and availability.

There are admittedly other elements which can prove useful in building a successful damages claim. For instance, the Directive allows for the disclosure of the evidence and statements collected during the course of the investigation as well as any documents specifically prepared for the purpose of public enforcement proceedings, such as the statement of objections and responses or requests for information and their corresponding responses.[64] However, these other documents may prove difficult to identify without the indications of their existence in corporate statements.[65] This is especially relevant taking into consideration the fact that the parties seeking disclosure must motivate their

[60] ECN Model Leniency Programme, para. 20.

[61] *Donau Chemie*, paras 48-49.

[62] *Ibid*., para. 39.

[63] Kuijper, Pfleiderer AG/Bundeskartellamt, *Markt & Mededinging*, 2011 (5).

[64] Article 6(2) and (3) of the Directive. See also Article 5 *Ibid*.

[65] M. G. Nielen, 'Leniency material…', pp. 13-14.

requests and be specific in identifying the files in question, as national judges may deny disclosure when they believe the request is too broad.[66] In this regard, leniency material can help bridge the gap between the missing evidence, which may prove critical in substantiating a successful civil claim for antitrust damages.[67] For instance, where the leniency applicant is also the defendant cartelist in a follow on claim, corporate statements could shed light on the link between the breach and the damage.[68] Moreover, while the contents of a corporate statement are relatively predictable considering that they have to abide by the minimum standards set in the Commission's Leniency Notice, the extent to which the other, discoverable categories of documents may prove useful in substantiating an antitrust damages claim varies enormously depending on the their length, level of detail, type of evidence and even format.[69]

Consequently, the irregularity in the relative evidential value of the different categories of evidence means that several scenarios are possible. On the one hand, it might well be that the information contained in the white/grey-listed documents is enough to substantiate an antitrust damages case.[70] For example, the Amtsgericht Bonn, the requesting Court in *Pfleiderer*, reversed its initial ruling and denied Pfleiderer access to leniency materials arguing, *inter alia*, that the claimants could use the findings of the competition authority as well as other elements in the investigation file to demonstrate that they had suffered harm as a consequence of a civil wrong.[71] In such a case, the disclosure of corporate statements would admittedly not be necessary. On the other, however, there have been situations in which corporate leniency statements - or at least some of its parts - have been deemed to constitute the *only* viable means of proof of the causality and extent of the harm caused by a cartel, either because alternative sources did not exist or because they were disproportionately difficult to obtain. For instance, in *National Grid*, the English High Court considered that the claimant did not have other reasonable means available to obtain the information it needed to make its case given that there was limited documentary evidence of the cartel, and that that which was available was often unclear and opaque (e.g.

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[66] See Recitals 14 and 15 of the Directive. See Article 2 (b) and 3 (d) of the Directive.

[67] *Ibid*., p. 11.

[68] M. G. Nielen, 'Leniency material...', p. 16.

[69] Kristina Nordlander, Marc Abenhaïm, 'The discoverability…', p. 7.

[70] Asimakis Komninos, 'Relationship between public…'.

[71] Similarly, in the *Rubber Chemicals* litigation, the US court concluded that the withheld documents (corporate leniency statement) were not relevant to the litigation and that they could easily be obtained by other means. Paras 1082-83.

employee statements).[72] It therefore ordered the disclosure of certain relevant passages of the confidential version of the Decision to be disclosed.[73] In such cases, a blanket ban on the disclosure of leniency material may effectively frustrate the right of victims of anticompetitive conduct to obtain redress for the harm suffered. Conversely, a case-by-case approach allows for a proportionality test in determining whether or not to order disclosure which can accommodate both the right to full compensation of the injured parties and the necessity to safeguard the effectiveness of the leniency programmes. As argued by Roth J. in *National Grid*, this test could take into account two factors, namely (i) the availability of information from other sources; and (ii) the relevance of the leniency materials to the dispute.[74] However, does disclosure of corporate statements jeopardise the effectiveness of leniency programmes by discouraging cartelists from blowing the whistle?

2.2. Disclosure as a disincentive to potential leniency applicants

The Commission and the NCAs have consistently maintained that full-blown disclosure of leniency material in civil actions for antitrust damages may discourage potential leniency applicants from coming forward with information on an ongoing cartel.[75] In the Commission's view, the uncertainty arising from the possibility of disclosure of leniency submissions will purportedly make the prospect of collaboration less enticing for potential applicants and thus significantly undermine the effectiveness of the leniency programmes, which would in turn have dire consequences for the enforcement of competition law across the EU.[76] Accordingly, the Commission has intervened through *amicus curiae* briefs stating its policy on the non-discoverability of corporate leniency statements on several occasions, such as in the *Vitamins* case,[77] the *Methionine*[78] litigation and before the Supreme Court in the *Intel v. AMD* case.[79] Furthermore,

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[72] Para. 50 of the judgment.

[73] Para. 58 of the judgment.

[74] *National Grid*, para. 39.

[75] See, for instance, the Resolution of the European Competition Network (23 May 2012): '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'.

[76] See Section 1.2 of the Explanatory Memorandum of the Directive.

[77] No. 99-197 (TFH) MDL No. 1285 (April 4, 2002).

[78] No. C-99-3491 CRB (JCS) DL No. 1311.

[79] *IntelCorp v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466 (2004).

the Commission also made its stance abundantly clear in its Green Paper,[80] White Paper[81] and Explanatory Memorandum of the Directive.[82]

It is indeed fathomable *prima facie* that faced with the possibility of the self-incriminating information submitted in a leniency application being used against them in subsequent actions for antitrust damages, potential whistleblowers hesitate to collaborate with the competition authorities given that the evidence produced may make them an easy target for claimants and ultimately expose them to a higher civil liability than their co-conspirators.[83] This would narrow the distance between the collaborative and the non-collaborative or collusive payoff, thereby weakening the allure of seeking leniency. This argument has enjoyed widespread support. For instance, in an opinion submitted as a response to the Commission's Green Paper the American Bar Association ('ABA') held that given the importance of leniency programmes in uncovering and efficiently investigating cartel activity, the burden of disclosure clearly outweighs the benefits.[84] Likewise, in the *Methionine Antitrust Litigation*, disclosure was denied to prevent the 'chilling effect'[85] on participation in the (then) EC leniency programme.[86] Other - if not the majority - submissions to the Green paper and White paper followed a similar logic. For instance, Clifford Chance,[87] the Council of Bars and Law Societies of Europe ('CCBE'),[88] the Dutch Bar Association,[89]

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[80] See Section 2.7 of the Green Paper.

[81] See Section 2.9 of the White Paper. For the underlying reasons see Chapter 10, section B. 1 of the Staff Working Paper.

[82] See Section 1.2 of the Explanatory Memorandum. 'In the absence of legally binding action at the EU level, the effectiveness of the leniency programmes - which constitute a very important instrument in the public enforcement of the EU competition rules - could thus be seriously undermined by the risk of disclosure of certain documents in damages actions before national courts.'

[83] See para. 38 of the opinion of AG Mazák.

[84] P. 39 of the Opinion. Similarly, Allen & Overy posited in its opinion that 'The harm that may be caused to the leniency programme by permitting voluntary disclosure of corporate leniency statements outweighs the evidential benefits that may be gained in litigation before national courts'.

[85] The 'chilling effect' refers to the possibility that leniency applicants will include.

[86] *Methionine Antitrust Litigation*, Master File No. C99-3491. Report of Spacial Master (N. D. Cal. June 17, 2002).

[87] P. 5 of the comment to the Green Paper. 'We agree […] that the leniency application should be protected.'

[88] P. 6 of the comment to the White Paper. 'The CCBE is in agreement with the wish to protect the leniency applicant's statements as expressed in the White Paper.'

EuroCommerce,[90] Freshfields Bruckhaus Deringer[91] and a myriad others[92] supported the Commission's proposal of an outright ban on the disclosure of corporate statements and settlement submissions for the aforementioned reasons.

The possibility that disclosure of leniency material to claimants in antitrust damages cases would act as a disincentive to potential leniency applicants was also recognised by the ECJ, thereby adding to its credibility - and resonance. Hence, in *Pfleiderer* the Court argued that even if the national competition authorities were to grant the leniency applicant exemption in whole or in part from fines, the view could reasonably be taken 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 the leniency programmes.[93] Likewise, Advocate General ('AG') Mazák emphasised in his opinion to *Pfleiderer* that it is not necessary that disclosure be definite for such a negative spill-over effect to materialize. On the contrary, the mere possibility of discoverability is enough for the infringers to think twice before coming forward with information on a cartel. In addition, the AG held that disclosure of corporate statements and/or settlement submissions entails the risk that the applicant(s) would be put in a worse position than those cartel members which have not cooperated with the competition authorities, thereby undermining the effectiveness of the leniency programmes.[94] On a different note, the AG argued that an undertaking which cooperates with the Commission in accordance with the terms of the Leniency notice derives a legitimate expectation that the information contained in its corporate statement will not be disclosed to third

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[89] P. 5 of the comment to the White Paper. 'The Committees agree that adequate protection against disclosure in private actions for damages must be ensured for corporate statements submmited by a leniency applicant in order to avoid placing the applicant in a less favourable situation than its co-infringers. Such protection should indeed apply to all corporate statements submitted by all applicants for leniency, regardless of whether an application for leniency is accepted, is rejected or leads to no decision by the competition authority.'

[90] P. 6 of the comment on the White Paper. 'In order to avoid undermining [leniency] programmes, we support the suggestion of the Commission to apply the same level of protection to all corporate statements by all applicants, regardless of whether the application for leniency is accepted, rejected or leads to no decision by the competition authority.'

[91] P. 10 of the comment on the White Paper. 'We fully support the Commission's proposals to ensure that leniency programmes remain attractive in the face of private actions and to ensure that leniency applications, whether successful or not, are protected from disclosure.'

[92] See, for example, the submissions of Linklaters (Green Paper) and Hogan Lovells (Green Paper).

[93] Paras 26 and 27 of the judgment.

[94] Paras 12 and 17 of the opinion of AG Mazák.

parties.[95] However, this argument doesn't appear to hold water given that the Commission's Leniency notice is a non-binding instrument[96] and that it clearly states that the grant of leniency cannot protect an undertaking from the civil law consequences of its infringement.[97] In any event, the AG's view on the importance of transparency in the context of a successful antitrust enforcement system is supported by the International Competition Network ('ICN'), which found that the key elements of an effective leniency programme are significant sanctions, a high risk of detection and *certainty*.[98] Indeed, undertakings generally ask their lawyers to evaluate the net benefits of cooperation, a task which thrives from predictability.[99] Furthermore, the Court confirmed its reasoning concerning the danger posed by excessively liberal disclosure rules in *Pfleiderer* in the recent

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[95] Para 32 of the opinion of AG Mazák. See also points 6, 7 and 33 of the Leniency Notice. See also point 29 of the ECN Model Leniency Programme. See also point 29 of the ECN Model Leniency Programme (cited in footnote 8). According to point 6 of the Leniency Notice, these voluntary presentations which are known as corporate statements 'have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article [101 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement.' See also point 47 of the Explanatory Notes to the ECN Model Leniency Programme which provides that '[t]he ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a [competition authority 'CA'] in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs' leniency programmes, could undermine the effectiveness of the CAs' fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated …'. As cited by AG Mazák in n. 41.

[96] Para 26 of the opinion of AG Mazák. See also the reasoning of Roth J. in *National Grid*, where he denied that undertakings had a legitimate expectation that their leniency submissions would not be disclosed.

[97] Recital 39 of the Leniency Notice.

[98] International Competition Network, 'Anti-Cartel enforcement manual' (2009), Chapter 2, Drafting and implementing an effective leniency policy. Section 2.3. Available at: *internationalcompetitionnetwork.org*.

[99] Marc Hansen, Gary Spratling, Ayman Guirguis, 'Leniency Programmes and Incentives: Is there room for improvement?', *ICN Cartel Workshop: Bruges*, October 2011, p. 24.

Donau Chemie judgment.[100] Nonetheless and as shall be shown below, such a danger was not conceived as being absolute, nor necessarily overriding the claimant's right to obtain full compensation. Finally, it should be added that the arguments adduced hitherto have also been embraced by many authoritative commentators, who have considered that only an absolute protection for corporate statements and settlement submissions is capable of striking an adequate balance between the need to preserve the attractiveness of leniency programmes and the right to obtain full compensation of the victims of anticompetitive conduct.[101]

While it is clear that leniency programmes are an essential tool in the fight against hard-core cartels, and that neither consumers, competitors nor victims[102] of competition law infringements would benefit from their enfeeblement, it is less clear that the possibility of disclosure of the information contained in leniency applications would necessarily lead to such an outcome. Indeed, much of the criticism levied in this respect is grounded on the assumption that the discoverability of leniency applications to claimants would invariably discourage leniency applications. Nonetheless, there is room for skepticism.[103] The fact that leniency applicants are eligible for immunity or a significant reduction of administrative fines cannot be overlooked, and should be computed into the assessment of the risk-reward equation faced by prospective collaborators (the so-called 'net benefit analysis'). In this respect, a successful leniency applicant already benefits from reduced fines from the regulator.[104] Consequently, the exposure to actions for damages should not be seen in isolation of the other, very substantial, advantages borne of co-operation. Hence, while in *National Grid* the English High Court admitted that disclosure of leniency material may have some

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[100] Para. 42 of the judgment.

[101] See, for instance, Stephen Mavroghenis, Elvira Aliende Rodriguez, 'Cartels and Leniency' (2014), *European Antitrust Review*.

[102] In this respect, see Joaquin Almunia, 'New challenges in merger and antitrust', speech of September 2011, SPEECH 11/581. 'The Commission is determined to defend its leniency programme and those of its ECN partners… [L]et us not forget that damage claims often follow the decision of a competition authority; as a consequence, if the authority has an effective leniency programme, it will be easier for a victim of a cartel to obtain reparation.'

[103] For example, Pablo González de Zárate Catón claims to be 'skeptical about the official truth regarding the deterrent effect arising from the disclosure of leniency materials'. Further, he adds that while these arguments may be true, they needn't be true *per se*. See 'Disclosure of Leniency Materials: Building…', p. 13.

[104] See the opinion of Allen & Overy to the White Paper. 'We do not believe that a successful leniency applicant should have its obligation for disclosure (…) restricted. Such an applicant has already benefited from its action through reduced fines from the regulator.'

deterrent effect on potential leniency applicants, it ultimately did not accept that, in the case of a serious, long-running cartel with potential exposure to high fines, a concern about later disclosure of leniency material would be sufficient to influence the immunity applicant in not blowing the whistle.[105] In line with this, according to the ICN report on the Interaction of Public and Private Enforcement in Cartel Cases, most non-governmental advisors ('NGAs') experienced that, while the risk of potential follow-on claims may be seen as a disincentive in applying for leniency, the benefits of a leniency application outweigh the potential risk of a follow-on damage claim.[106] Likewise, some commentators have suggested that the lack of US-style treble damages combined with the level of fines imposed on infringers points to the possibility that cartelists might be more afraid of fines than of damages claims.[107] In similar fashion, Allen & Overy argued in the comment to the Green Paper that the impact of the facilitation of damages actions on the willingness to apply for leniency should not be exaggerated. In this sense, they remarkably pointed out that the rules favouring disclosure of leniency statements may discourage undertakings from coming out first in cases where there is no reason to expect that a procedure that eventually results in the establishment of an infringement will be opened. Nevertheless, in those cases in which a procedure is either imminent or has already been initiated, individual cartelists still stand to gain a lot from whistle blowing as they are likely to face a reduced fine, or none at all. In addition to eschewing considerable monetary fines, in some jurisdictions successful leniency applicants enjoy criminal immunity, which may even comprise the threat of jail.[108] Not surprisingly, this was identified by NGAs as a key incentive in seeking leniency.[109] In addition, undertakings may derive other, less tangible, advantages

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[105] See also the Freshfield Bruckhaus Deringer briefing 'English High Court orders disclosure of leniency materials' (2012), available at: *http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/32945.pdf*.

[106] P. 43 of the report.

[107] Pablo González de Zárate Catón, 'Disclosure of Leniency Materials: A Bridge Between Public and Private Enforcement of Antitrust Law' (2013), available at: *coleurope.eu*.

[108] *Ibid*. For example, in the Marine Hose cartel three businessmen were sentenced to imprisonment and disqualified as directors in the UK. See United Kingdom Office of Fair Trading press release 72/08 of 11 June 2008, and European Commission press release IP/09/137 of 28 January 2009. With regards to the possibility of criminal immunity, see section 1.8 of the OFT's detailed guidance on the principle and process of applications for leniency and no-action in cartel cases. July 2013. OFT1495. '[The UK leniency system guarantees […] criminal immunity for all cooperating current and former employees and directors in cases where the applicant informs the OFT of cartel activity that it was not previously investigating.'

[109] See, in general, part III of the ICN Report.

from applying for leniency such as moral rewards.[110] In this regard, Wils argues that corporate managers are not necessarily just maximisers of profit and that they may feel a moral responsibility to act within the law, something which could trump their interest calculus.[111]

In light of the foregoing, it is difficult to say whether the possibility of disclosure of leniency material is indeed a powerful enough counter-incentive for seeking to co-operate with competition authorities to undermine the efficiency of the enforcement of competition law. On the one hand, it is undeniable that undertakings weigh the benefits and the drawbacks of collaboration carefully, an assessment wherein the possibility of follow-on damages claims clearly belongs to the latter category. On the other however, leniency applicants - especially first movers - stand to gain generous advantages from coming forward; this includes both immunity (or reduction) from administrative fines as well as the possibility of avoiding criminal sanctions, which also encompasses prison sentences in the (still few) jurisdictions that allow for the imposition of such remedies in the case of competition law infringements.[112] Apart from avoiding substantial financial setbacks, leniency recipients can expect to gain an immediate and generous cash-flow advantage *vis-à-vis* their co-conspirators, who we mustn't forget do not cease to be competitors. In this respect, some authors have gone one step further and contended that undertakings may blow the whistle to cause a financial loss to its competitors.[113] Other frequent arguments claiming that the possibility of disclosure of corporate statements will act as a disincentive to potential collaborators should also be taken with a pinch of salt. In this sense, in regard to the often invoked question of uncertainty,[114] it should be highlighted that doubt

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[110] See Wouter Wils, 'Relationship between…'. See also C.D Stone, 'Sentencing the corporation', *Boston University Law Review* 71 (1991): 383 at 389. As Wils observes, psychological research suggests that normative commitment is generally an important factor explaining compliance with the law; see T.R Tyler, 'Why People Obey the Law' (Yale University Press, 1990).

[111] *Ibid*. (Wils), p. 7. 'The public punishment of those who violate the antitrust rules also has moral effects, in that it sends a message to the spontaneously law-abiding, reinforcing their commitment to respect the antitrust rules.'

[112] For instance, the UK, see Enterprise Act 2002. In this respect, while it is true that the ECN Model Leniency Programme only concerns corporate leniency, it strongly encourages the protection of directors and employees from individual sanctions. See para. 15 of the ECN Model Leniency Programme.

[113] Pablo González de Zárate Catón, 'Disclosure of Leniency Materials: A Bridge Between Public and Private Enforcement of Antitrust Law' (2013), available at: *coleurope.eu*.

[114] See the opinion of AG Mazák in *Pfleiderer*, para. 38; See also Bonn Local Court Decision of 18 January 2012 in Case No. 51 Gs53/09 (*Pfleiderer*). The main argument is that cartelists will be deterred from applying for leniency as they will not be sure whether the information they put

regarding the possibility of disclosure of leniency material existed even prior to *Pfleiderer*, but that did not stop undertakings from blowing the whistle.[115] Moreover, it should be observed that there has not been a decline in leniency applications since that judgment, which would suggest that the possibility of leniency material being disclosed to claimants in antitrust damages cases is not perceived by undertakings as being such a powerful counter-incentive for applying for leniency after all.[116] Similarly and concerning the possibility of the leniency recipient facing higher damages claims than his co-infringers, the allocation of civil liability amongst the tortfeasors may also play an important – if not decisive - role in undertakings' willingness to apply for leniency.[117] In this respect, Article 11(2) of the Directive establishes that leniency recipients shall be liable to injured parties other than their direct and indirect purchasers only when such injured parties show that they are unable to obtain full compensation from the other infringers. This provision, which acts as a safeguard against the threat of the cooperating undertaking - whose information allowed the follow-on claim to be brought in the first place - bearing the brunt of the damages action, may be key in maintaining the allure of the leniency programmes by dissipating what may perhaps be the chief concern of potential leniency applicants: being targeted by claimants for the totality of the damage caused by the cartel (*See Section 3*).[118]

All things considered, whether the potential benefits of applying for leniency outweigh the drawbacks, thereby making collaboration the rational choice, will ultimately depend on a set of highly variable factors. As stated by the General Court in *ENBW*, the deterrent effect of disclosure depends on a number of elements, such as *inter alia* the amount of damages that cartel victims will obtain before a national court.[119] For instance, as outlined by the English High Court in *National Grid*, in the case of long-running hard-core cartels, seeking leniency remains enticing as it is unlikely that civil damages claims will dwarf the exposure to high fines. It follows from this that the opposite may be true in those cases in which by co-operating undertakings expose themselves to more substantial damages claims than fines. Nonetheless, even under such circumstances, filing a leniency application is still an attractive option where

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forth to the competition authorities shall be subsequently disclosed to claimants in actions for antitrust damages, exposing them to civil damages.

[115] Pablo González de Zárate Catón, 'Disclosure of leniency material…', p. 17.

[116] *Ibid*.

[117] M. G. Nielen, 'Leniency material unveiled…', p. 21.

[118] However, there might be a better solution in this regard. See section 3.1.

[119] Case T-344/08 *EnBW*, para. 125.

there is sufficient reason to believe that a public investigation is imminent, or where there is suspicion that a co-conspirator might approach a competition authority first - a well-founded doubt considering the destabilizing effect of leniency programmes.[120] It is likely that a cartelist would then choose to, as Roth J. put it in *National Grid*, mitigate their exposure to Commission fines through participation in the leniency programme.[121] Consequently, the possibility of disclosure of leniency material to claimants in actions for antitrust damages is only one of a number of elements which are decisive in an undertakings risk-reward assessment when deciding whether to apply for leniency. Moreover, there is no conclusive proof suggesting that it is the most important one either. It would therefore appear that the Commission might have overreacted in imposing a hard-and-fast rule against disclosure of corporate statements in actions for antitrust damages, especially taking into account the fact that there are alternative means for safekeeping the attractiveness of the leniency programmes without unduly harming the right of innocent victims to obtain full compensation for the injury suffered (*see Section 3*). Further, such a hard-and-fast rule may very well run counter to primary EU law.

2.3. Questions of substantive law: Is Article 6(1) of the Directive contrary to primary EU law?

Article 6(1) of the Directive raises some concerns with regards to its (in) compatibility with Article 47(1) of the Charter of Fundamental Rights and Article 19 TEU. In addition, the blanket prohibition against the disclosure of corporate statements contained therein may be disproportionate in pursuing its purpose.

2.3.1. Article 47(1) of the Charter of Fundamental Rights of the EU and the principle of proportionality

Article 47(1) of the Charter has the same legal value as the EU Treaties pursuant to Article 6(1) TEU.[122] In *DEB* the ECJ interpreted the words 'everyone has the right to an effective remedy' in Article 47(1) as not excluding undertakings.[123]

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[120] Jeroen Hinloopen, Adriaan R. Soetevent, 'Laboratory evidence on the effectiveness of corporate leniency programs' (2008), *RAND Journal of Economics*, vol. 39, no. 2, pp. 607-616.

[121] *National Grid*, para. 37.

[122] 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

[123] Case C-279/09 *DEB Deutsche Energiehandels - und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, paras 37-40 and 52.

Hence, claimants in antitrust actions for damages, whether individuals or undertakings, fall within the scope of the protection of Article 47(1) of the Charter. In light of this, it has been argued that the strict prohibition of disclosure of corporate statements falls foul of the right to a fair trial and an effective remedy enshrined in Article 47(1) as interpreted in conjunction with Article 51(1) of the Charter on Fundamental Rights of the EU and in light of Article 6(1) of the European Convention on Human Rights, insofar as it makes the right to compensation excessively difficult or practically impossible.[124] As has been contended in *Section 2.1*, denial of disclosure of corporate statements could, in certain circumstances, frustrate the right to full compensation. Furthermore, AG Mazák has stated in *Pfleiderer* that the denial of access to leniency material in the absence of an overriding legitimate reason could amount to a breach of the right to an effective remedy and a violation of Article 101 TFEU itself[125] seeing as how (i) Article 101 TFEU contains the right of cartel victims to compensation of their damages as a consequence of the cartel; (ii) this right is guaranteed by primary EU law within the meaning of Article 47(1); (iii) a denial of access to leniency material - in the absence of overriding reasons - violates the right to compensation; (iv) and frustrates the right of effective access to justice of the follow-on litigant.[126] This begs the question of what constitutes an overriding reason that could countervail the claimant's right to an effective remedy and a fair trial.

Article 52 of the Charter establishes that limitations to the right to a fair trial and an effective remedy may be made subject to the principle of proportionality only if they are necessary and genuinely meet objectives of general interest recognised by the Union. While the preservation of the attractiveness and effectiveness of the leniency programmes may well constitute such an overriding reason of general interest, as contended by AG Mazak,[127] that does not exempt it from having to respect the principle of proportionality. This principle, which is laid down in Article 5 TEU, requires that measures taken by the Union be suitable and necessary to attain the aim pursued. In this regard, it is highly doubtful whether Article 6(1) of the Directive fulfills such requirements. Firstly, it is not at all clear that a blanket prohibition against disclosure of corporate leniency statements is

[124] The right to an effective remedy before a tribunal and a fair trial to everybody whose rights and freedoms guaranteed by the law of the Union are violated provided for in Article 47 of the Chater corresponds to Articles 13 and 6(1) of the Convention.

[125] See para. 3 of the opinion of AG Mazák in *Pfleiderer*.

[126] M. G. Nielen (2013).

[127] Para. 38 of the opinion of AG Mazák.

suitable for maintaining the attractiveness of the leniency programmes, as there is no evidence that the possibility of disclosure of such documents will lead to a pitfall in leniency applications. In fact and despite the Commission's insistence to the contrary, no such thing has happened since the ECJ specifically ruled on the possibility of disclosure in *Pfleiderer*. Secondly, even if it were proven that disclosure of corporate statements to claimants in civil proceedings is likely to hamper the enforcement of competition law in the EU, the precept is not necessary in light of there being less restrictive means of safekeeping the effectiveness of the leniency programmes without unduly compromising the well-established right of injured parties to obtain full compensation for the harm suffered as a consequence of an infringement of Article 101 TFEU (*See section 3*). According to Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality,[128] the Commission is under the obligation to justify its draft legislative acts with regards to proportionality. However, no such justification is to be found in the Commission's Directive. Instead, the Commission simply assumes that undertakings may be deterred from co-operating in the context of a leniency programme if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities.[129] This argumentation falls short of the Commission's duty to justify the proportionality of its legislative proposal for at least two reasons. Firstly, it ignores the wide range of factors undertakings take into account when weighing the benefits and drawbacks of applying for leniency. In this regard, even if an immunity recipient were exposed to higher damages than his co-conspirators, he may ultimately be left in a better position by virtue of the administrative fines eschewed by coming forward. Secondly, and very importantly, as already discussed Article 11(2) of the Directive limits the immunity recipient's liability for the damage caused by the cartel significantly, making him less likely to be left in a worse position than his non collaborating co-cartelists.

In light of the above, Article 6(1) of the Directive appears to be contrary to Article 47(1) of the Charter as it curtails the right of victims of competition law infringements to obtain full compensation for the harm[130] suffered by absolutely denying them access to documents which may be necessary to successfully bring

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[128] Protocol (No 2) on the application of the principles of subsidiarity and proportionality. Annex to the Treaty on the European Union.

[129] Recital 19 of the Directive.

[130] Following the reasoning of AG Jääskinen leniency material can be understood as being crucial where (adequate) proof of the infringement and loss cannot be obtained other than by accessing the leniency file. See Opinion of AG Jääskinen in *Donau Chemie*, para. 50.

an antitrust damages case. Furthermore, the outright ban on the disclosure of corporate statements is not proportionate, as it is neither suitable to achieve the aim pursued nor necessary.

2.3.2. Article 19 TEU: The Principle of Effectiveness

The ECJ held in *Donau Chemie* that an absolute protection of certain documents in civil proceedings of antitrust damages is incompatible with the principle of effectiveness contained in Article 19 TEU, as injured parties may need to be given access to documents in the possession of cartelists or competition authorities in order to be able to effectively claim compensation.[131] Taking a step further, the Court stated that any rigid *per se* rule concerning the (non) discoverability of leniency material would violate the principle of effectiveness.[132] Similarly, the European Parliament opined that absolute protection of leniency material would run counter to the main judgments in *Pfleiderer* and *Donau Chemie*, 'as it would violate the principle of effectiveness regarding the right to compensation'.[133] This is further exacerbated by the fact that the prohibition laid down in Article 6(1) of the Directive does not provide for any exceptions.[134]

In reply to the above, proponents of the confidentiality of corporate statements and settlement submissions have argued that in *Donau Chemie* the ECJ ruled against the background of the absence of EU rules governing the disclosure of leniency material in civil actions for antitrust damages.[135] Consequently, the judgment is purportedly authoritative only insofar as there are no EU rules on that issue, a situation that would change with the passing of the Directive. Nonetheless, this argument is unconvincing given the fact that the primary law principle of effectiveness binds not only the EU judiciary, but also the EU

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[131] Para. 32.

[132] Para. 33.

[133] 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. 23.

[134] Kapp, 'Grundsatz der Einzelabwägung sticht Gesetzgebungskompetenz aus' BB 2013, 1556, 1556; Kersting, 'Anmerkung zu EuGH, Urteil vom 6.6.2013 - C-536/11 Donau Chemie JZ 2013, 737, 738. As cited in Christian Kersting.

[135] See, for instance, Kristina Nordlander, Marc Abenhaïm, 'The 'Discoverability' of Leniency Documents and the Directive on Damages Actions for Antitrust infringements'.

legislator.[136] On a different note, it has also been posited that whereas *Donau Chemie* concerned a prohibition under national legislation referred to all documents held on a competition authority's file, Article 6(1) is not preventing access to the *entire* file, but only to certain documents contained therein (the so-called 'black list').[137] In this respect, it should be noted that the distinction between leniency statements and pre-existing documents made in the Directive - which was originally suggested by AG Mazák in *Pfleiderer* - has not been taken up by the ECJ.[138] *A contrario*, in both *Pfleiderer* and *Donau Chemie* the ECJ addressed all leniency documents, without any differentiation.[139]

In consequence, Article 6(1) of the Directive runs counter to the principle of effectiveness laid down in Article 19 of the TEU as it makes the right to compensation practically impossible or excessively difficult in those cases in which the information contained in the leniency material is essential to substantiate a claim for antitrust damages and cannot be obtained through other means without incurring in disproportionate costs.[140]

2.3.3. The Transparency Regulation: leaving the door open for disclosure

Where the plaintiffs in actions for antitrust damages have sought to obtain access to corporate statements through Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents ('Transparency

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[136] Christian Kersting, 'Removing the tension between public and private enforcement: Disclosure and privileges for successful leniency applicants' (2014), *Journal of European Competition Law & Practice*, 2014, Vol. 5, No. 1.

[137] The so-called black list refers to the material that cannot be disclosed under the Directive. Namely, corporate statements and leniency submissions. However, for the purpose of this work, only the former are relevant. See Article 6(1) of the Directive.

[138] Christian Kersting, 'Removing the tension...', p. 2.

[139] *Pfleiderer*, para. 32; *Donau Chemie*, para. 49.

[140] Christian Kersting reaches the same solution. 'The Member States cannot be forced by secondary law to introduce the very measures which primary law forbids them to introduce.' For an opposing view, see Kristina Nordlander and Marc Abenhaïm. '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 (…). The sole function of the principle of effectiveness, which the Court recalled [in *Pfleiderer*, para. 30], 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.'

Regulation'),[141] the General Court ('GC') has mostly not been impressed by the Commission's argument that the disclosure of those documents would deter undertakings from seeking leniency in the future. On the contrary, the GC has consistently required the Commission to undertake a 'concrete, individual assessment' of the requested documents to ascertain whether access would 'specifically and actually undermine the protected interest', and has accordingly overturned its decisions denying access when it has failed to do so.[142] The case-law of the GC relating to the Transparency Regulation is relevant for two reasons. Firstly, it leaves a door open for claimants in actions for antitrust damages to seek access to corporate statements in spite of Article 6(1) of the Directive.[143] Secondly, it puts forward good arguments that can be transposed by analogy to the context of Article 6(1) of the Directive. In this regard and notwithstanding legal differences between the right of access to the file in a proceeding under the Transparency Regulation and access under Article 101 TFEU or national legislation, both channels lead to a comparable situation from a functional point of view as they allow the interested parties to obtain documents submitted to the Commission by the undertaking concerned.[144] Hence, the GC has ruled that the Commission cannot merely invoke hypothetical negative spill-over effects to justify the non-disclosure of leniency material to third parties; In the Court's view, such an approach would allow the Commission to circumvent the Transparency Regulation by invoking a hypothetical future result.[145] Similarly, Article 6(1) of the Directive lets the Commission deny the disclosure of leniency corporate statements through the same unfounded supposition. However, as stated in *section 2.3*, such a far reaching measure appears disproportionate unless justified with regards to its suitability and necessity. On a different note, the GC has also put forth reasonable arguments that, while also not binding on the legislator, may be useful in resolving the tension between the

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[141] 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.

[142] See *Verein fus Konsumentinformation v Commission of the European Communities* (T-2/03) [2005] E.C.R II-1121; 4 C.M.L.R.21; See also Ingrid Vandenborre, 'The Confidentiality of EU Commission Cartel Records in Civil Litigation: The ball is in the EU Court' (2011), *European Competition Law Review*, available at: *http://www.skadden.com/sites/default/files/publications/Publications2384_0.pdf*.

[143] This is due to the fact that the Transparency Regulation implements Article 15(3) TFEU and Article 42 of the Charter which provide for the citizens' right of access to documents of EU institutions. Hence, applicants may seek the annulment of the Commission's rejection of a transparency request under Article 263 TFEU.

[144] *ENBW*, para. 89.

[145] Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims*, para. 44.

injured parties' right to obtain full compensation and the necessity to safeguard the effectiveness of the leniency programmes. In this respect, the GC held that the interest of a company which took part in a cartel in avoiding actions for damages does not constitute an interest deserving protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused by a cartel.[146] Additionally, the GC also outlined the importance of private enforcement, stating that leniency programmes are not the only means of ensuring compliance with EU competition law and that actions for damages can also make a significant contribution in this respect.[147]

3. Alternatives to Article 6(1) of the Directive

The main argument for the introduction of a blanket prohibition against the disclosure of corporate leniency statements to claimants in actions for antitrust damages is that (only) such a provision safeguards the attractiveness and effectiveness of the leniency programmes. In this sense, Article 6(1) of the Directive is a solution to the conundrum concerning the tension between the injured parties' right to obtain full compensation and the interest of preserving the attractiveness of the leniency programmes, albeit a disproportionate one. Indeed, Article 6(1) doesn't stand neither the suitability nor the necessity test. The purpose of this section is to demonstrate that, even if the Commission proved the pernicious effect of disclosure on cartelists' willingness to apply for leniency (which it has not at the time of writing), there are other mechanisms that are capable of protecting the attractiveness and effectiveness of the leniency programmes without unduly restricting the injured parties' right to obtain full compensation for the harm suffered as a consequence of an infringement of Article 101 TFEU.

3.1. The Hungarian solution

One of the chief concerns regarding the disclosure of leniency materials to claimants in actions for antitrust damages is the possibility that leniency recipients may be put in a worse position than their co-infringers.[148] Indeed, collaborators cannot deny their involvement in the cartel and are furthermore unlikely to challenge the Commission's infringement decision, which makes

[146] *Ibid*., para. 49.

[147] *Ibid*., para. 77.

[148] See, *inter alia*, CEPS report, p. 500.

them ideal targets for the allegedly injured parties in subsequent civil claims.[149] One way to alleviate this tension is by adjusting the allocation of civil liability amongst the co-infringers.[150] In this sense, the Hungarian Competition act completely excludes liability of the immunity recipient, even for claims by his direct and indirect purchasers (in contrast with Article 11(2) of the Directive).[151] This does not dramatically affect the right to damages by injured parties, since they can still claim compensation for the whole of the damage against the other cartel members, who would remain jointly and severally liable.[152] However, in order to guarantee full compensation of the victims, the total exclusion of liability would not apply in the (exceptional) case of insolvency of one or more of the cartel members.[153] While this proposition has its drawbacks, such as the danger of under-deterrence as competition law infringers are let 'off the hook' from both administrative sanctions and civil damages,[154] it has the important advantage of effectively eliminating the disincentive of potential leniency applicants to seek to collaborate with competition authorities by extending some benefits of the leniency programmes to civil actions while at the same time safeguarding the *effet utile* or Article 101(1) TFEU, as claimants in actions for antitrust damages are not denied potentially essential evidence for building their case. As an added benefit, it increases the retributive gap between the immunity recipient and the other cartel members, thus contributing to destabilising cartels.[155] However, it should

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[149] F. Bulst, 'Of arms and Armour - The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', *Bucerius Law Journal*, 2008, vol. 2, available at: *http://ssrn.com/abstract=1162811*; See also Assimakis P. Komninos, (2011) 'Successful leniency applicants deserve extra protection because of the likelihood of being sued in follow-on actions, due to the general practice of not appealing against the Commission's infringement decisions'.

[150] Alberto Saavedra, 'The Relationship Between The Leniency Programme and Private Actions For Damages At The EU Level' (2010), *Revista de Concorrência e Regulação*, 2010. Available at SSRN: *http://ssrn.com/abstract=2292575.*

[151] See Hungarian Competition Authority, The Competition Act, consolidated version effective as of 1 June 2009, available at: *http://www.gvh.hu/domain2/files/modules/module25/104249F32220B9.pdf.*

[152] Assimakis Komninos, 'Relationship between public…'.

[153] *Ibid*. As Komninos points out, 'In such a case, the claimants would have to sue first the other cartel members and, in case of insolvency, they could bring a new actions against the immunity recipient for the part of the harm that is attributable to him'.

[154] Anna Piechota, 'Private enforcement of EU competition law: recent development, problems and prospects' (2011), available at: *http://www.ipwi.uj.edu.pl/pliki/prace/Praca%20magisterska%20-%20Anna%20Piechota_1317147471.pdf*. The author wonders whether it is too generous to limit the civil liability of immunity recipients. P. 65.

[155] A. E. Beumer, A. Karpetas, 'The disclosure of files and documents in EU cartel cases: Fairytale or reality?', *European Competition Journal*, 2012, April 2012, Vol. 8, Issue 1, p 123.

be mentioned that a proposal such as this is subject to the national procedural autonomy of the member States, as civil procedure rules are still their competence.

3.2. Article 11(2) of the Directive: A problematic privilege

As has already been stated, Article 11(2) of the Directive acts as a safety mechanism to ensure that successful leniency applicants are not made the prime targets of claimants in actions for antitrust damages by limiting their liability to the harm caused to their direct and indirect purchasers or providers, unless victims cannot obtain compensation from the other defendants. As Christian Kersting points out, while it does make sense to privilege successful leniency applicants with regard to their civil liability, it is problematic to do so at the expense of injured parties.[156] The main issue with Article 11(2) is that it imposes a hefty burden on claimants to prove that they cannot obtain compensation from the other cartelists, rendering their right to full compensation less effective.[157] The solution, however, might be relatively straight-forward. Instead of privileging immunity recipients in relation to the injured parties, they should be privileged in relation to their co-infringers.[158] Cartelists who receive immunity should therefore be jointly and severally liable for all the damage caused by the cartel but they should be allowed to claim full compensation for damages paid to injured parties from the other cartel members.[159] In the case of leniency recipients, the rule could be tailored to provide for a partial reduction, in relation to their co-infringers, of the damages to be paid to the victims in accordance with the leniency received.[160]

This proposal has several benefits. Firstly, the possibility of disclosure of corporate statements would not be a deterrent to potential leniency applicants, since they would ultimately be immune from civil liability.[161] Consequently, the decision of whether to order disclosure or not could be 'safely' left to national courts, in conformity with the judgments of the ECJ in *Pfleiderer* and *Donau Chemie*, Article 47 of the Charter and Article 19 TEU. Secondly, private enforcement would not run the risk of dying an early death as victims would

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156 Christian Kersting, 'Removing the tension...'.

157 *Ibid*., p. 3.

158 *Ibid*.

159 *Ibid*.

160 See, in general, Christian Kersting, 'Perspektiven der privaten Rechtsdurchsetzung im kartellrecht', *ZWeR* 2008, 252, 266 *et seq*.

161 *Ibid*.

receive the information necessary to claim damages. Thirdly, claimants would not need to struggle to prove that they cannot obtain compensation from the non-collaborating defendants.

3.3. Corporate statements as an obligation of (all) infringing undertakings

If the disclosure of corporate statements is permitted, claimants in actions for antitrust damages may rationally choose to seek the totality of damages from immunity recipients using the self-incriminating information contained therein to substantiate their case. In this respect, the leniency applicant risks becoming a 'sitting duck' for any damages claims and could, in theory, bear liability for the whole amount of the loss suffered by a whole range of purchasers. Nonetheless, if *all* infringing undertakings were legally obliged to produce corporate statements, claimants would cease to have an incentive to specifically target the immunity recipient, and would instead go against the cartelist with the 'deepest pockets'. This would effectively eliminate the 'first mover disadvantage', allowing the safe disclosure of corporate leniency statements in civil proceedings.

3.4. Own proposal: Increasing the collaborative pay-off by hardening sanctions

As has already been stated in section 2.2, in deciding whether to apply for leniency undertakings carefully weigh the costs and the benefits of collaboration. One way to improve the collaborative pay-off is to enhance the benefits gained through seeking leniency by, for instance, allowing for the possibility of contribution in the terms of Article 11(2) of the Directive or by creating a 'pecking order' similar to the one provided for by the Hungarian Competition Act. In contrast, hardening the metaphorical 'stick' by increasing the fines imposed for infringements of competition law can yield similar results. Such a solution is not only legally viable within the frame of the EU, it moreover enjoys widespread support amongst authoritative commentators.[162]

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[162] See, among others, Wils, 'Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties, in particular imprisonment?', paper presented in Florence, 1-2 June 2001, later published in Ehlermann C. -D., Atanasiu I. (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford and Portland, Oregon, 411-452; William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience'. Available at <*https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf*>; Gregory C. Shaffer, Nathaniel H. Nesbitt, Spencer Weber Waller, 'Criminalizing Cartels: A Global Trend' (2011), *Sedona Conference Journal*, Vol. 12, 2011.

In this sense, Wils has posited that taking into account average cartel duration, the probability of being caught[163] and average cartel-induced price increases, the minimum fine required to effectively deter undertakings from engaging in collusive behavior would be around 150% of the annual turnover in the products concerned by the violation.[164] However, Article 23(2) of Regulation 1/2003 caps fines on undertakings at 10% of their total turnover in the preceding business year. Even so, the vast majority of fines levied are in the range of 0-0.99% of annual turnover (60.92%), with only roughly 10% near the 10% mark.[165] Consequently, it comes as no surprise that in 67% of price-fixing cases in the EU, the gain from the anti-competitive behavior outweighs the expected punishment.[166] In this context, two possibilities arise: (i) Increasing administrative fines imposed on competition law infringers or (ii) providing for criminal sanctions, including custodial sentences.

Adjusting the fines to the levels required for optimal deterrence may have detrimental spill-over effects; it may cause most undertakings to go bankrupt, or incur crippling losses, due to an inability to pay.[167] In light of this and as I have argued elsewhere,[168] criminal sanctions including prison sentences may be the

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[163] John Connor's 'guesstimate' is that the probability of a cartel being discovered is only between 10 and 20%. John Connor, 'Optimal deterrence and private international cartels' (2007), available at <*http://www. ssrn.com/abstract=1103598*>. Wils agrees with these numbers. Other findings have deemed Wils' estimation too conservative. For instance, Senior Economic Counsel of the US Department of Justice Antitrust Division, Gregory J. Werden holds that the fine would need to be slightly above twice the participants' annual turnover within the relevant market. See Gregory Werden, 'Sanctioning Cartel Activity: Let the Punishment Fit the Crime', (2009) available at: *http://www.justice.gov/atr/public/articles/240611.htm*.

[164] See Wils, n. 165.

[165] Yuliya Bolotova, John M. Connor, 'Cartel Sanctions: An Empirical Analysis' (April 2008). Available at SSRN: *http://ssrn.com/abstract=1116421* or *http://dx.doi.org/10.2139/ssrn.1116421*. The study focused on the relationship between fines and overcharges, finding that the former were in general not enough to even compensate for damage caused by cartels through overcharging.

[166] Florian Simuda, 'Cartel Overcharges and the deterrent effect of EU competition law' (2010). '[T]he current existing EU guidelines on the method of setting fines are insufficient for effective cartel deterrence.' Available at: *http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf*.

[167] See *inter alia* Douglas H. Ginsburg, Joshua D. Wright, *Competition Policy International*, Vol. 6, No. 2, pp. 3-39, Autumn 2010, George Mason University Law and Economics Research Paper Series. Wils also claims that even liquidating the assets of the firms concerned would often be unlikely to generate enough revenue to pay the optimally deterrent fine(s).

[168] L. Radic, 'The wolf must die in his own skin: A case for custodial sentences against individuals in cartel cases in the EU' (2014). *https://www.academia.edu/8301783/The_Wolfe_must_die_in_his_own_skin_A_case_for_custodial_sentences_against_individuals_in_cartel_cases_in_the_EU*.

way forward in competition law enforcement. For the purpose of the present work, it is important to underline the high deterrent effect of custodial sentences *vis-à-vis* pecuniary fines. In this respect and as William Kolasky has famously remarked, nothing catches a corporate executive's attention quite as effectively as the threat that he might have to serve jail time.[169] As pointed out by Gurgen Hakopian, the institution of a criminal law framework at the level of EU institutions would require a Treaty amendment of either Article 83 TFEU or Article 103(2) (a) TFEU.[170] Alternatively, the harmonization of criminal competition law enforcement in the Member States could be achieved though Article 83(2) TFEU.[171]

It follows from the foregoing that the imposition of heftier fines on colluding undertakings or the introduction of custodial sentences on individual cartelists would significantly improve the incentives to seek leniency by increasing the distance between the collaborative and non-collaborative payoffs. Under such circumstances, the exposure to civil liability would almost certainly never outweigh the benefit gained from whistle blowing, thus making the discoverability of leniency material practically a non-issue for undertakings faced with the choice of whether to approach a competition authority. In addition, apart from respecting the principle of effectiveness and the right to a fair trial, thereby avoiding the risk of undermining the private enforcement of competition law, this proposal has the distinct benefit of increasing deterrence; a most welcome outcome for both public and private enforcement of EU competition law.

Conclusion

While the safekeeping of the effectiveness of leniency programmes may well be a good reason to restrict injured parties' right to obtain full compensation as a consequence of an infringement of Article 101 TFEU, Article 6(1) in tandem with Article 11(2) of the Directive puts forward far reaching solutions to unproven problems. Indeed, the Commission has failed to produce any evidence of the alleged detrimental effect of the disclosure of corporate statements to claimants in actions for antitrust damages on the effectiveness of leniency programmes, and

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[169] William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience'. available at <*https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf*>.

[170] Gurgen Hakopian, 'Criminalization of EU Competition Law enforcement - A possibility after Lisbon?' 2010, *CLR*, Vol. 7, issue 1, pp. 157-173.

[171] *Ibid*.

has instead relied almost exclusively on suppositions and (pessimistic) hypothetical would-be scenarios. It would appear that these arguments are grounded on the traditional notion of preponderance of public over private enforcement and a looming sense of panic that the disclosure of such documents would jeopardise the hitherto successful public enforcement of competition law, rather than on their respective merits. On the other side of the fence, the exact evidential value of corporate statements for claimants in the midst of actions for antitrust damages remains an elusive question, and appears highly dependent on a number of variable factors. However, there are reasonable grounds to contend that the information contained therein may be essential in substantiating an action for antitrust damages in certain circumstances. In this respect, by stating that a hard-and-fast rule against disclosure of corporate statements is contrary to the principle of effectiveness, the ECJ has at least recognized the possibility that such documents may be necessary in obtaining full compensation, something which was subsequently confirmed in practice by the English High Court. Furthermore, the Directive imposes a stringent requirement on claimants to specify the documents sought for disclosure, which may prove problematic on account of them not being aware of the existence of such files. Corporate statements can bridge this gap, as they generally contain an explanation of the evidence submitted. Additionally, the insistence of the Commission – and that of the array of stakeholders adopting similar positions - on prohibiting disclosure suggests that such documents can indeed be very useful in substantiating actions for antitrust damages. Consequently, for the time being and until the Commission produces concrete evidence of the pernicious effect of disclosure on the attractiveness and effectiveness of leniency programmes, a balancing test such as the one envisioned by the ECJ in *Pfleiderer* is a more appropriate approach to the much feared, yet still unproven, tension between disclosure of corporate statements and effective public enforcement.

Otherwise, there is no reason to further complicate the claimants' already burdensome task of proving causation and quantification and impose unnecessary obstacles on the well established right to obtain full compensation for the damage suffered as a consequence of an infringement of Article 101 TFEU. Indeed, too much is at stake to adopt far reaching solutions to unproven problems.

Lazar Radić Bošković*

REZIME

BLANKETNA ZABRANA OBJAVLJIVANJA KORPORATIVNIH IZJAVA IZ ČLANA 6(1) DIREKTIVE O TUŽBAMA ZA KARTELNU ŠTETU

U radu je analizirano pitanje da li je opšta zabrana objavljivanja korporativnih izveštaja sadržana u članu 6(1) Direktive 2014/104 o određenim pravilima koja regulišu tužbe za naknadu štete prema nacionalnom zakonodavstvu zbog kršenja odredbi prava konkurencije u državama članicama Evropske unije neophodna za zaštitu privlačnosti programa Komisije za kažnjavanje ili predstavlja nepremostivi teret za podnosioce zahteva koji će dugoročno ozbiljno ometati privatno sprovođenje EU prava konkurencije (što je najnesrećniji ishod s obzirom da je osnovni cilj Direktive upravo suprotno). S jedne strane, preterana zaštita zahteva za pomilovanje podnosilaca prijava za izuzeće može dovesti do beskorisnih parnica i na kraju dovesti do besmislene privatne primene EU prava konkurencije, jer se podnosiocima zahteva (navodno) uskraćuju bitni dokazi za izgradnju čvrstih slučajeva odštete. S druge strane, dopušteniji pristup objavljivanju takvih informacija može osakatiti javnu primenu prava konkurencije tako što će odvratiti karteliste da se prvi predstave. Uzimajući u obzir činjenicu da naknadni zahtevi predstavljaju lavovski deo trenutnih tužbi za kartelnu štetu u EU, takav rezultat bi skoro sigurno imao katastrofalne posledice za pravo pojedinaca na nadoknadu štete nastale povredom člana 101 Ugovora o funkcionisanju Evropske unije, kako je priznao Evropski sud u presudama *Courage*, *Crehan i Manfredi* i drugim. Čini se da Komisija daje prednost imunitetu na račun interesa oštećenih lica nametanjem pravnih lekova koji su suviše daleko od zaštite delotvornosti programa oslobađanja od kazne, posebno uzimajući u obzir nedostatak konačnih dokaza da bi obelodanjivanje korporativnih izjava obeshrabrilo potencijalne podnosioce zahteva za izuzeće od saradnje sa organima za konkurenciju. U svetlu ovoga, tvrdimo da, za postizanje ravnoteže između prava oštećenih na naknadu štete i efikasnosti programa za smanjenje kazne, svaki slučaj treba posmatrati posebno, kao u predmetu *Pfleiderer* - bar za sada. Ova tema je danas posebno relevantna, imajući u vidu obavezu Komisije da preispita Direktivu do 27. decembra 2020. godine, kao što sledi iz člana 20. Direktive.

Ključne reči: EU, kartelna šteta, privatna primena, pravo na naknadu štete, otkrivanje podataka.

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