



UNIVERSIDADE  
CATÓLICA  
PORTUGUESA



**UNIVERSIDADE CATÓLICA PORTUGUESA**

**THE CONFIDENTIALITY OF LENIENCY DOCUMENTS  
AND ITS ARTICULATION WITH ACTIONS FOR DAMAGES**

---

**THE NEW PARADIGM BROUGHT BY THE DAMAGES DIRECTIVE**

Dissertation submitted to the Universidade Católica Portuguesa to obtain the  
Master's Degree in Transnational Law (MTL)

Inês Santana Metello

Written under the supervision of Prof. Patrícia Fragoso Martins

Faculdade de Direito, Escola de Lisboa

Católica Global School of Law

April 2018

## **Contents**

Acknowledgements .....	3
Abstract .....	3
Abbreviations .....	4
Introduction: the Articulation between Public and Private Enforcement .....	5
1. Preliminary Remarks .....	5
2. The Question of Access to Leniency Documents in Private Litigation .....	7
I. Access to Leniency Documents Before the Damages Directive.....	13
1. Regulation (EC) no. 1049/2001 .....	13
2. Regulation (EC) no. 1/2003 .....	17
3. The <i>Pfleiderer</i> and <i>Donau Chemie</i> Rulings .....	20
3.1. The <i>Pfleiderer</i> Ruling.....	20
3.2. The <i>Donau Chemie</i> Ruling.....	23
II. The New Paradigm Brought by the Damages Directive.....	26
1. The Novelty of Article 6.....	27
2. The Provisions of Article 5.....	29
3. Access to Leniency Documents under the Portuguese Competition Act .....	32
3.1. The Portuguese Competition Act before the Damages Directive .....	32
3.2. The Portuguese Private Damages Act.....	33
3.3. Future Perspectives on Disclosure of Leniency Documents.....	36
III. Striking the Balance: the Proportionality Test .....	38
1. The Proportionality Test as Envisaged by the Damages Directive .....	38
2. EU Fundamental Rights.....	43
2.1. Right to an Effective Remedy and to a Fair Trial .....	43
2.2. Right to Respect for Private Life.....	45
Conclusive Remarks.....	46
List of Sources.....	48

## **Keywords**

*competition law; EU Damages Directive; private enforcement; cartels; leniency; access to documents; access to file; antitrust litigation.*

## **Acknowledgements**

I would like to express my deep gratitude to Professor Patrícia Fragoso Martins, my supervisor, for her professional guidance, useful critiques and constant availability. Her on-going assistance and support have been a crucial part of this work.

I also acknowledge the help provided by Isabella Barreto, full time friend and part-time English reviser, who helped me stay positive throughout this journey. To my work colleagues, the best team anyone could ask for: thank you for your patience and caring.

I am particularly grateful to my parents, for valuing my education and providing me every opportunity the world has to offer, and to my brother for his genuine sense of humour that always kept me smiling. A special word of thanks is also due to my partner, for providing me with unfailing support and continuous encouragement through the process of researching and writing this thesis. This would not have been possible without them.

I humbly extend my gratitude to all those concerned who cooperated with me in this regard.

## **Abstract**

Private enforcement follow-on actions may discourage cartel members from applying to leniency. To prevent the undermining of this public enforcement tool, it is necessary to find a proper articulation between damages actions and leniency programmes. This paper investigates, in light of the Damages Directive on actions for damages for infringements of competition law, what can be expected from the new framework for the disclosure of evidence and, particularly, from the application of Article's 6(4) proportionality test to decide the disclosure of leniency documents. It starts off by analysing the state of the art before 2015 and continues to assess the novelties in disclosure of evidence brought by the Directive. It will evaluate the changes on access to leniency material under Portuguese Law, by examining the current Portuguese competition law and the Portuguese Private Damages Act, and the effect it can have in this Member State's legal system. This paper further examines the principles which should be considered by national judges when striking the proportionality test, comparing European fundamental rights with the principles found in rulings from the Court of Justice of the European Union. This contribution will result in a suggestion of some criteria to be considered by national civil courts when determining third party access to leniency documents.

## **Abbreviations**

AG: Advocate General

Charter: Charter of Fundamental Rights of the European Union

Commission: European Commission

CJEU: Court of Justice of the European Union

Damages Directive: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 5.12.2014)

ECHR: European Convention on Human Rights

ECN: European Competition Network

EU: European Union

GC: General Court

NCA: National Competition Authority

NCA: National Competition Authorities

PCA: Portuguese Competition Authority

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

## **Introduction: the Articulation between Public and Private Enforcement**

### **1. Preliminary Remarks**

The articulation between public and private enforcement has been prominently discussed. When considered separately, both tools envisage the effective enforcement of competition law. According to the Commission's Green Paper on damages actions for breach of the EC antitrust rules, both policies

*«(...) are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy»<sup>1</sup>.*

One as much as the other, individually considered, aim at increasing compliance with competition rules. Yet, it is undeniable that each policy has different immediate objectives: while public enforcement has the goal of preventing violations and ending on-going practices through deterrence and punishment, private enforcement deals with the consequences of occurred violations, aiming at, through damages actions, obtaining rightful compensation for those who were injured by anti-competitive practices.

It must be recognized, though, that the compensation of cartel victims also has a deterrent effect, as undertakings may be discouraged from forming or maintaining such an infringement if there is a risk of civil liability. The Court of Justice of the European Union (CJEU) was clear when, in *Courage*, it held that:

*«(...) the existence of such a right [right to damages] strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition»<sup>2</sup>.*

As both public and private enforcement serve the same purpose, one could think that they could easily go hand in hand. This idea can, however, be discouraged when we realise that the risk of increasing follow-on damages actions may undermine the effectiveness of cartel

---

<sup>1</sup> Commission's Green Paper on damages actions for breach of the EC antitrust rules, 19 December 2005, COM(2005) 672, 19.12.2005, point 1.1.

<sup>2</sup> Case C-453/99, *Courage Ltd. v. Bernard Crehan*, 20 September 2001 [ECLI:EU:C:2001:465], para. 27.

leniency programmes, one of the most important public enforcement detection and investigation tools.

Under leniency programmes, undertakings confess their participation in an alleged cartel in return for either immunity from a fine or its reduction. As cartels are secret by nature, concealment and destruction of cartel-related evidence is common. Consequently, the cooperation of undertakings with the Commission and the National Competition Authorities (NCAs) is an important instrument in the detection and deterrence of these infringements. The Commission itself has declared that the leniency programme is the most effective tool at its disposal for the detection of secret cartels<sup>3</sup>.

Accordingly, and because a leniency application does not protect the applicant from the civil law consequences of his participation in a cartel, it is understandable how these applications must be protected so that infringers are not discouraged from applying to this programme. This is even more important when we consider that the Damages Directive<sup>4</sup> provides that a final decision of a National Competition Authority (NCA) is deemed to be irrefutably established for the purposes of an action for damages brought before a national court<sup>5</sup>. This means that leniency applicants are, by principle, more vulnerable to damages actions than the remaining co-infringers – at least so far as they will not refute the NCA’s final decision and, thus, will most likely be the first to be sued before the courts.

However, and at the same time, it should not be ignored that, even if the infringement is established, injured parties still have to meet all other civil liability requirements established by law: the existence of material injury and the causal link between the infringement and the alleged injury.

It happens that the relationship between cartel participants and their victims is characterised by an information asymmetry, as relevant information is predominantly secret and, naturally, in the hands of the infringers. Consequently, and as emphasized by the recent judgements *Pfleiderer*<sup>6</sup> and *Donau Chemie*<sup>7</sup>, and embraced by the recent Damages Directive, Member

---

<sup>3</sup> Observations of the European Commission, pursuant to Article 15(3) of Regulation 1/2003, provided in respect of Claim No. HC08C03243 in the High Court of Justice Chancery Division, Royal Courts of Justice, *National Grid*, 03 November 2011, point 12.

<sup>4</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 5.12.2014).

<sup>5</sup> Article 9(1) Damages Directive.

<sup>6</sup> Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 14 June 2011 [ECLI:EU:C:2010:782].

States can no longer blindly deny access to leniency information, in so far as it would result in making it virtually impossible for a third party to exercise his rights to claim damages<sup>8</sup>.

It is undoubtable that access to self-incriminating material, would be an important source of evidence for claimants to, in case of follow-on damages actions, prove causation and quantify the damages that were suffered. However, it should be considered that allowing access to leniency material to cartel victims, «*may discourage cartel participants from applying to leniency, which would significantly impede the discovery and punishment of cartels, which would in turn lead to a lower degree of compensation of cartel damages*»<sup>9</sup>, leading us to a vicious circle.

Taking the above, the discussion that follows shall focus on the articulation between public and private enforcement of competition law and on the confidentiality of leniency materials following the Damages Directive. In this paper, we will concentrate in displaying the issues involved in the following query: what can be expected from the new framework for the disclosure of evidence set out in the Damages Directive and, particularly, from the application of Article's 6(4) proportionality test to decide the disclosure of leniency materials?

## **2. The Question of Access to Leniency Documents in Private Litigation**

Leniency programmes start with a confession of the infringer, namely with the *leniency statement*, where he admits having been involved in a cartel. That statement is then coupled with other documents that provide valuable information regarding both the objective and the activities of the cartel and its length, usually detailing the products and markets that were envisaged, the co-infringers, and methods of contact and meeting amongst them. These latter documents usually exist before, and independently, from the leniency programme and are referred to as “*pre-existing documents*”. On the other hand, the self-incriminating statement that is exclusively drafted and submitted for the purposes of leniency is known as a “*corporate statement*”. These documents are voluntarily submitted by the leniency-applicant to the Commission or to the competent NCA, accordingly, and are kept in their internal file.

---

<sup>7</sup> Case C-536/11, *Bundeswettbewerbshörde v. Donau Chemie AG*, 6 June 2013 [ECLI:EU:C:2013:366].

<sup>8</sup> For further information on the right to an effective remedy of cartel victims see *Courage Ltd. v. Bernard*, (*op. cit.*, nt. 2) and Cases C-295/04 to C.298/04, *Manfredi and others*, July 13, 2006 [ECLI:EU:C:2006:461].

<sup>9</sup> CAUFFMAN, Caroline, (2011) *The Interaction of Leniency Programmes and Actions for Damages*, Maastricht Faculty of Law Working Paper No. 2011/34. Final version published as Cauffman, C., *The Interrelationship between Leniency and Damages Actions*, *Competition Law Review*, p. 183.

Bearing in mind the different nature of the documents that are part of the leniency file and in order to better assess whether they should be disclosed, it is important to distinguish the three main interests to be considered: (i) the interests of the leniency applicants, (ii) the interests of the injured parties and (iii) the public interest of discouraging and punishing cartels.

On the one hand, leniency applicants have a legitimate expectation that the information they have provided remains confidential, expecting that it is only used for the purpose it was given: establish an infringement, without being disclosed to the public. On the other hand, injured parties need the greater access to existing information, since only then can they properly exercise their rights.

As for the latter interest, it is not so simple to ascertain. While it is important to maintain the attractiveness of leniency programmes, it is not possible to ignore the benefits that private enforcement brings to the effectiveness of competition rules by increasing the consequences of engaging in anti-competitive practices<sup>10-11</sup>. The question is what produces a higher deterrence effect: imposing fines or promoting the payment of civil liability compensations? Depending on the answer that the Commission and NCAs give to this question, different significance will be given to the disclosure of leniency documents.

Here is where the interplay between public and private enforcement becomes complex: if undertakings learn that the documents they bring to leniency programmes can be disclosed, their incentive to apply to leniency can be diminished. Although this does not mean that the infringement will continue – the cartel can still come to an end –, it is possible that it will never come to light. This phenomenon was analysed by LAURA GUTTUSO, who concluded that:

*«(...) broadly speaking, an increased probability of a court judgement ordering a defendant to pay private damages increases deterrence in the system and may lead to companies refraining from entering into collusive agreements in the first place. However, once a collusive agreement is firmly in existence, this increased probability of exposure to private damages may in actual effect strengthen the collusive*

---

<sup>10</sup> Commission's Green Paper, point 2.7. (*op. cit.*, nt. 1).

<sup>11</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006), para. 6 and Recital 26 Damages Directive 2014/104/EU (*op. cit.*, nt. 4).

*agreement. Depending on the expected size of any possible damages award, this tend to reduce the attractiveness of defecting and co-operating with the authorities»<sup>12</sup>.*

Being true that leniency programmes bring heavy benefits to its applicants (as they either exempt or reduce the fine to be paid), if and when infringers must add to their calculations the increased likelihood of being targeted for private damages actions, that are based or grounded on the documents they brought to the leniency programme, the benefits of maintaining the cartel activity – or to simply leave quietly – may be greater than those of seeking leniency. In this regard, FREDERIK SILBYE conducted a study where he found that the bigger the potential damages coming from private claims, the less the likelihood of infringers applying to leniency<sup>13</sup>.

FLORIAN WAGNER-VON PAPP also agrees with the authors above, considering that:

*«Where private damages claims are added to the payoff matrix, the pareto-dominant equilibrium of continuing with the cartel instead of applying for leniency becomes relatively more attractive. The reason is that where one or both undertakings apply for leniency, they are nearly certain to be sued for damages. Where, however, both undertakings continue with the cartel (...), they have to pay damages only with the probability that their cartel is detected by means other than leniency applications, such as whistleblowers or investigations following tips from suppliers or customers of the cartel or sector-enquiries (...). (...) This means that from a theoretical perspective any private enforcement regime that does not privilege leniency applicants with regard to damages claims makes leniency programmes less attractive on the margin»<sup>14</sup>.*

Moreover, even where infringers apply to leniency or where cartels are detected by competition authorities, it can be expected that, if undertakings know that they can be compelled to disclose information in future litigation, cartelists will leave no paper-trail, or will leave it as little as possible. This leads us to the paradox mentioned earlier, which is that

---

<sup>12</sup> GUTTUSO, Laura, (2014) *The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings*, Global Competition Litigation Review 2014 Vol 7 Issue 1, p. 16.

<sup>13</sup> SILBYE, Frederik, *A Note on Antitrust Damages and Leniency Programs*, 2012, *apud* GUTUSSO, Laura, *ibidem*.

<sup>14</sup> WAGNER-VON PAPP, Florian, (2016) *Access to Evidence and Leniency Materials*, Chapter B: “Articles 6 and 7: Balancing Private and Public Enforcement”, Section i: “The Tension between Private Enforcement and Leniency Programmes”.

the possibility of disclosure may create an incentive to destroy evidence and, hence, make it less available to the injured parties.

All things considered, to achieve a proper balance between private enforcement and leniency programmes the Law can intervene, essentially, at two alternative levels: (i) by preventing and limiting the disclosure of leniency-related documents or (ii) by limiting or eliminating civil liability of leniency applicants.

Before the Damages Directive – whose solution will be analysed further in Chapter II – and with the purpose of identifying solutions that would retain the attractiveness of leniency programmes, the Commission put forward three options that benefited the leniency applicant, namely: (a) the granting of a conditional rebate on any civil claim, (b) limiting the scope of the leniency applicant's liability and (c) the exclusion of disclosure of the leniency application and of corporate statements<sup>15</sup>.

#### ***a. Rebate on Damages Claim***

This option was designed on the Commission's Green Paper<sup>16</sup>, following the proposal for an application of double damages in civil actions<sup>17</sup>, and consisted on a rebate for the leniency applicant in the form of a de-doubling of damages. The leniency applicant would be liable for single damages, whereas other cartel members would be jointly and severally liable for double damages.

The Commission did not retain this option in its White Paper, nor has it been reflected in the Damages Directive, as it has not been shown that such an incentive is strictly necessary to maintain the attractiveness of the leniency programme.

#### ***b. Limiting the Scope of Liability***

As a rule, colluding undertakings are liable for the entire damage caused by their anticompetitive agreements and the co-infringers are jointly and severally liable for the

---

<sup>15</sup> Commission's Green Paper, options 28-30 (*op. cit.*, nt. 1) and Commission's White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 2.4.2008, section 2.9.

<sup>16</sup> Commission's Green Paper, option 29 (*op. cit.*, nt. 1)

<sup>17</sup> *Idem*, option 16.

damage. This means that a victim is entitled to claim the whole of the compensation from any member of the cartel.

In order to benefit the leniency applicant, the Commission proposed, in its Green Paper, to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant's share in the cartelised market<sup>18</sup>.

This option was reformulated in the White Paper, where the Commission put forward the recommendation of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners. In other words, the immunity recipient should not be held liable either for the damage suffered because of services or products purchased from another cartel member nor for the harm caused to those victims that have not bought, indirectly or directly, cartelized products from him<sup>19</sup>.

This proposal was adopted in Article 11(4) of the Damages Directive, with the addition that immunity recipients shall also be jointly and severally liable to other injured parties where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

### ***c. Exclusion of Disclosure of Leniency Application and of Corporate Statements***

While the Green Paper proposed the exclusion of discoverability of the leniency application<sup>20</sup>, the White Paper restricted the exclusion to the discoverability of corporate statements. The latter option was included in the Damages Directive, where Article 6(6)(a) provides a total ban on the disclosure of leniency statements.

Taking the question outlined above, this paper starts by visiting the available routes for injured parties to obtain access to leniency documents before the Damages Directive, analysing both Regulation (EC) no. 2019/2001 and Regulation (EC) no. 1/2003. Afterwards it will address the ground-breaking judgements of *Pfleiderer* and *Donau Chemie* and their contribution to the change of the European Union (EU) legal framework on private damages.

---

<sup>18</sup> *Idem*, option 30.

<sup>19</sup> Commission's White Paper, section 2.9. (*op. cit.*, nt. 15).

<sup>20</sup> Commission's Green Paper, option 28 (*op. cit.*, nt. 1).

Thereafter the paper examines the changes brought by the Damages Directive, namely by its Articles 5 and 6, attempting to ascertain the choices that have been expressly made by the European legislator and how national courts should assess disclosure requests. The same chapter brings the discussion to Portugal, where it will review the Portuguese Private Damages Act and present some considerations on what can be expected on disclosure of leniency documents and competition law enforcement in this Member State.

The final chapter dives into the proportionality test as envisaged by Article 5(3) and 6(4) Damages Directive, followed by an identification of the EU fundamental rights that should be considered in this balancing exercise, all in an attempt to find some criteria to be considered by national judges when ordering the disclosure of leniency documents.

## **I. Access to Leniency Documents Before the Damages Directive**

Despite the recent Damages Directive, that has provided some rules aimed at establishing a common approach to the issue of disclosure of evidence in private enforcement claims, it is our understanding that, in order to fully comprehend how the Directive should be applied – in particular the proportionality test envisaged in its Article 6(4) – it is both necessary and useful to learn from the past. Henceforth, this chapter will provide an overview of the state of the art on the disclosure of leniency documents before the Damages Directive, tracing the relevant EU Law interests that, should be transposed to the present day.

We will start by analysing the two common routes that damage claimants can use to seek disclosure of cartel evidence: Regulation (EC) no. 1049/2001 and Regulation (EC) no. 1/2003. Thereafter, special attention will be paid to the ground-breaking *Pfleiderer* and *Donau Chemie* rulings.

### **1. Regulation (EC) no. 1049/2001<sup>21</sup>**

The second subparagraph of Article 1 Treaty on European Union (TEU) enshrines the concept of openness, which can also be found in Article 15(1) Treaty on the Functioning of the European Union (TFEU) which provides that «(...) *the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible*». Following that general principle, Article 15(3) TFEU, together with Article 42 Charter of Fundamental Rights of the European Union (Charter), provide for the citizens' right of access to documents of the European Institutions. Regulation (EC) no. 1049/2001, also known as the Transparency Regulation, implements this right<sup>22</sup>.

Despite the general right to have access to the documents held by European institutions, Article 4 Transparency Regulation contains certain exceptions to the principle of transparency and openness. Concerning leniency documents, it is expected that the most common

---

<sup>21</sup> Regulation (EC) No. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001).

<sup>22</sup> On the applicability of the Transparency Regulation to leniency documents, see its Article 2(3): “*This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union*”.

exceptions to be argued are those of Article 4(2), in particular: the protection of commercial interests<sup>23</sup> and the protection of investigations<sup>24</sup>. However, because the exceptions derogate from the principle of the widest possible access to documents, they must be interpreted and applied strictly<sup>25</sup>.

When examining the argument that disclosure would undermine the protection of commercial interests, the General Court (GC) has considered that in order to refuse access to documents on that ground, the Commission needs to verify not only whether the documents in question come within the scope of this exception but also whether it is reasonably foreseeable that its disclosure will specifically and actually – that is, not merely hypothetically – harm the interest protected, as well as verify whether there is no overriding public interest in disclosure<sup>26</sup>.

This argument followed the reasoning of the Court of First Instance in *VFK*, where it was also considered that «*the mere fact that a document concerns an interest protected by an exception [in this case, the protection of investigations] cannot justify the application of that exception (...)*»<sup>27</sup> and, hence, it was considered that «*the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision*»<sup>28</sup>.

As for what can be considered a legitimate commercial interest, the GC has specifically held that «*the fact remains that the interest of a company which took part in a cartel in avoiding such actions cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving of protection*».<sup>29</sup>

---

<sup>23</sup> Article 4(2), first intend Transparency Regulation.

<sup>24</sup> Article 4(2), third intend Transparency Regulation.

<sup>25</sup> Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v. Commission*, 11 January 2000 [ECLI:EU:C:2000:1], para. 27; and Case C-353/99 P, *Council v. Hautala*, 6 December 2001 [ECLI:EU:C:2001:661], para. 25; Case C-64/05 P, *Sweden v. Commission*, 18 December 2007 [ECLI:EU:C:2007:802], para. 66 .

<sup>26</sup> Case T-237/05, *Éditions Odile Jacob v. Commission*, 9 June 2010 [ECLI:EU:T:2010:224], para. 41, C-404/10 P, *Commission v. Éditions Odile Jacob*, 28 June 2012 [ECLI:EU:C:2012:393], para. 116; Case T-111/07, *Agrofert Holding v. Commission*, 7 July 2010 [ECLI:EU:T:2010:285], para. 58, 101, 123, 141, Case C-477/10 P, *Commission v. Agrofert Holding*, 28 June 2012 [ECLI:EU:C:2012:394], para. 79.

<sup>27</sup> Case T-2/03, *VFK v. Commission*, 13 April 2005 [ECLI:EU:T:2005:125], para. 69.

<sup>28</sup> *Ibidem*.

<sup>29</sup> Case T-437/08, *CDC Hydrogene Peroxide v. Commission*, 15 December 2011 [ECLI:EU:T:2011:752], para. 49.

On the other hand, the GC also ruled that, in its turn, a damages action would not constitute an overriding public interest in disclosure, but solely an individual and private one<sup>30</sup>.

In what concerns the protection of investigations, the Commission has argued that the concept of investigations cannot be limited to the proceedings leading to a decision prohibiting the cartel but should be regarded as an integral part of the Commission's task of public enforcement of competition law<sup>31</sup>. The GC, however, has consistently considered that the acceptance of such an interpretation would have the effect of excluding the whole of the Commission's activity from the Transparency Regulation<sup>32</sup>, avoiding its application without any limit in time, to any document in a competition case merely by reference to a possible future adverse impact on the Commission's leniency programme<sup>33</sup>. Hence, and on the contrary, the GC considered that *«the investigation in a given case must be regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts (...)»*<sup>34</sup>. This finding was, however, overruled by the CJEU, where it concluded that *«investigations relating to a proceeding under Article 81 EC may be regarded as completed only when the decision adopted by the Commission in connection with that proceeding is final»*<sup>35</sup>, that is, where no legal proceedings that might lead to the annulment of that decision are pending.

As for general rules regarding the assessment of the request of access to the file, courts have considered that, as a matter of principle, the institutions must carry out a document-by-document examination, undertaking an individual and concrete assessment of the content of the documents before refusing access to the file<sup>36</sup>.

Despite this general rule, which was applied in *EnBW*'s first judgement<sup>37</sup>, the CJEU considered it differently and held that:

*«(...) for the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, the Commission is entitled to*

---

<sup>30</sup> Case T-403/05, *Mytravel v. Commission*, 9 September 2008 [ECLI:EU:T:2008:316], para. 60-68.

<sup>31</sup> Case T-344/08, *EnBW v. Commission*, 22 May 2012 [ECLI:EU:T:2012:242], para. 124.

<sup>32</sup> *Idem*, para. 125.

<sup>33</sup> *CDC*, para. 70 (*op. cit.*, nt. 29).

<sup>34</sup> *VFK*, para. 62 (*op. cit.*, nt. 27).

<sup>35</sup> Case C-365/12 P, *Commission v. EnBW*, 27 February 2014 [ECLI:EU:C:2014:112], para. 99.

<sup>36</sup> *EnBW*, para. 28, (*op. cit.*, nt. 31).

<sup>37</sup> *Ibidem*.

*presume, without carrying out a specific, individual examination of each of the documents in a file relating to a proceeding under Article 81 EC, that disclosure of such documents [documents provided in connection with an immunity or leniency application, including all documents submitted in connection with such application] will, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding».*<sup>38</sup>

In this regard and considering that the interest of a company in avoiding damages actions is not recognized as such, the CJEU explained that there are other commercial interests to bear in mind when deciding the disclosure of information, since the documents provided contain information on «*the commercial strategies of the undertakings concerned, their sales figures, their market shares or their business relations*»<sup>39</sup>. Notwithstanding this general presumption of confidentiality of leniency documents, the CJEU clarified that

*«(...) the general presumption referred to above does not rule out the possibility of demonstrating that a specific document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest in disclosure of the document by virtue of Article 4(2) of Regulation No 1049/2001».*<sup>40</sup>

Under the Court's decision, it seems that the Commission can use a presumption that access by allegedly injured parties to documents submitted by a leniency applicant undermines legitimate interests. However, this presumption is rebuttable, which means that the allegedly injured party is given the right to prove that it must be given access to the requested documents.

As for the relation between the Transparency Regulation and the new Directive, it should be noted that Article 6(2) Damages Directive explicitly provides that Article 6 is «*without prejudice to the rules and practices on public access to documents under Regulation (EC) No. 1049/2011*». This means that, despite the entry into force of the Directive, claimants may request access to the documents of the EU Institutions and, if applicable, argue that there is an overriding public interest in the disclosure.

---

<sup>38</sup> *EnBW*, para. 93 (*op. cit.*, nt. 35).

<sup>39</sup> *Idem*, para. 79.

<sup>40</sup> *Idem*, para. 100.

On the other hand, it is interesting to note that the Commission has publicly stated that «*much of the specific evidence required to corroborate claims for damages, e.g. as regards the exact quantification of individual damage suffered and the causal link to certain victims, will not have been investigated by the authority and therefore often not exist on its file*»<sup>41</sup>. Consequently, the Commission considers that «*rules on public access to documents normally do not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions*»<sup>42</sup>. For this reason, «*litigants in civil proceedings for damages should not rely on that Regulation to obtain access to evidence for their damage claims*»<sup>43</sup>.

## **2. Regulation (EC) no. 1/2003**<sup>44</sup>

Regulation (CE) no. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC Treaty (current Articles 101 and 102 TFEU), made it compulsory for NCAs to apply the competition rules laid down in the EC Treaty where they apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) which may affect trade between Member States, or apply national competition law to any abuse prohibited by Article 82<sup>45</sup>. The aim of establishing this relationship between European and national competition laws was to ensure that the same rules were applied consistently throughout the EU. In addition, it was recognized that a close-cooperation needed to exist between the Commission and the NCAs to develop the enforcement powers of the latter. According to Recital 15 Regulation (CE) no. 1/2003:

*«The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation».*

---

<sup>41</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 02 April 2008, SEC(2008) 404, 2.4.2008, para. 90.

<sup>42</sup> *Idem*, para. 90 and 104.

<sup>43</sup> *Idem*, footnote 50.

<sup>44</sup> Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003).

<sup>45</sup> Article 3 Regulation (CE) no. 1/2003.

It follows from the Regulation, that the Commission and the NCAs, together forming the then established European Commission Network (ECN), have the power to enforce Articles 101 and 102 TFEU. To do so in *close cooperation*<sup>46</sup>, the Regulation foresees certain mechanisms of collaboration between, not only the Commission and the NCAs, but also the Commission and national courts, in accordance with the principle of sincere cooperation, established in Article 4(3) TEU.

Pursuant to Article 15(1) of the Regulation, when applying Articles 101 and 102 national courts may ask the Commission «*to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules*». This transmission of information is however limited by Article 339 TFEU. Indeed, and as CAROLINE CAUFFMAN explains:

*«(...) the duty of loyal cooperation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 339 TFEU. Consequently, before transmitting information covered by professional secrecy to a national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 339 TFEU confers on natural and legal persons and it will ask the court whether it can and will guarantee the protection of confidential information and business secret».*<sup>47</sup>

It follows from the *Postbank*<sup>48</sup> judgement that if the national court cannot offer such a guarantee, the Commission may refuse to transmit the information covered by professional secrecy to the national court. Such refusal may also take place where, in exceptional circumstances, this is required by overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independency, by jeopardizing the accomplishment of the tasks entrusted to it<sup>49</sup>.

---

<sup>46</sup> Recital 15 Regulation (CE) no. 1/2003.

<sup>47</sup> CAUFFMAN, Caroline, p. 191-192 (*op. cit.*, nt. 9).

<sup>48</sup> Case T-353/94, *Postbank NV v Commission*, 18 September 1996 [ECLI:EU:T:1996:119], para. 93.

<sup>49</sup> *Ibidem*.

Another important confidentiality obligation imposed to the Commission, is the one laid out in Article 28(1) and which provides that such information *«shall be used only for the purpose for which it was acquired»*.

In what regards leniency information, the Commission has clearly sustained that *«information voluntarily submitted by a leniency applicant will only be transmitted to another member of the network pursuant to Article 12 of the Council Regulation with the consent of the applicant»*<sup>50</sup>. This rule also applies to *«other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application»*<sup>51</sup>.

It is interesting to see how some Authors, such as ALBERTO SAAVEDRA, argue that this policy should only apply to the immunity applicant, and not in relation to the remaining cartelists, as he considers it necessary *«in order not to endanger the accomplishment of the Commission's task of enforcing competition law»*<sup>52</sup>. As for the other leniency applicants, said author considers that *«access to leniency documents provided in the context of the leniency programme should be left open, provided the Postbank guidelines on protection of confidential information are respected»*<sup>53</sup>.

One important guideline is the protection of business secrets that were generally defined by the CJEU as *«information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests»*<sup>54</sup>. In the Commission Notice on the rules for access to the Commission file, we can find a non-exhaustive list of information that qualifies as business secrets, and from which Member States can draw inspiration from, namely: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.<sup>55</sup>

---

<sup>50</sup> Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, para. 40.

<sup>51</sup> *Ibidem*.

<sup>52</sup> SAAVEDRA, Alberto, (2010) *The Relationship between the Leniency Programme and Private Actions for Damages at EU Level*, Revista de Concorrência e Regulação, Ano I, Número 4, outubro-dezembro 2010, p. 10.

<sup>53</sup> *Ibidem*.

<sup>54</sup> *Postbank*, para. 87 (*op. cit.*, nt. 48).

<sup>55</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004 (OJ C 325, 22.12.2005), para. 18.

### **3. The *Pfleiderer* and *Donau Chemie* Rulings**

In the absence of harmonization on the access to NCA's files, it is for each Member State to decide on this subject, based on their own national procedural rules. Notwithstanding, since the recognition of a right for compensation for infringements of EU competition law, the CJEU had to deal with this issue in two landmark cases: *Pfleiderer*<sup>56</sup> and *Donau Chemie*<sup>57</sup>.

#### **3.1. The *Pfleiderer* Ruling**

*Pfleiderer*, a worldwide producer of laminate flooring, sought access to the file of the German *Bundeskartellamt* to prepare its follow-on action for overcharge from a cartel in the decor paper sector. Although *Pfleiderer* had expressly requested access to all the material in the file, including leniency applications voluntarily submitted, the *Bundeskartellamt* rejected the application and restricted access to the file by supplying a version from which confidential business information, internal documents and leniency material had been removed. Following this decision of partial rejection, *Pfleiderer* brought an action before the Local Court of Bonn. The national court, being inclined to adopt a decision where it would grant access to leniency documents – albeit with the protection of confidential business information, and recognizing that it might prove necessary to deny such access, pursuant to the effective enforcement of Articles 101 and 103 TFUE – stayed the proceedings and referred the following question to the CJEU for a preliminary ruling:

*«Are the provisions of Community competition law (...) to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme(...)?»*.<sup>58</sup>

Looking at the Opinion of Advocate General (AG) MAZÁK, he started his assessment by stating that *«the disclosure by a national competition authority of information voluntarily*

---

<sup>56</sup> *Pfleiderer* (op. cit, nt. 6).

<sup>57</sup> *Donau Chemie* (op. cit, nt. 7).

<sup>58</sup> *Pfleiderer*, para. 18 (op. cit, nt. 6).

*communicated to it by members of a cartel pursuant to the authority's leniency programme to an aggrieved third party could, in principle assist the latter in the preparation of an action for damages for infringement of Article 101 TFUE before the national courts in respect of alleged injury caused by the cartel»<sup>59</sup>. Hence, and in his view, NCAs «should not, in the absence of overriding legitimate reasons of public or private necessity, deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim»<sup>60</sup>. With this mind-set, the AG proceeded with the distinction of those situations where an NCA can legitimately refuse to disclose information submitted by a leniency applicant.*

Firstly, the AG recognized that the disclosure by an NCA of all the information and documents submitted by a leniency applicant could seriously undermine both the attractiveness and effectiveness of that authority's leniency programme, since leniency applicants would find themselves in a less favourable position than other cartel members in actions for civil damages, due to the self-incriminating statements and the evidence they had presented to the NCA<sup>61</sup>. Hence, the benefit of receiving immunity or fine reduction could be perceived as being outweighed by an increased risk of liability for damages, which could lead cartel members from abstaining from applying to leniency<sup>62</sup>.

Taking the aforementioned into consideration, the AG thought it necessary to preserve as much as possible the attractiveness of leniency programmes, without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy<sup>63</sup>. To do so the AG, albeit limiting his examination to the question of access to information that does not contain any confidential business information or constitute internal documents<sup>64</sup>, distinguished in his Opinion between corporate statements and pre-existing documents.

In what regards corporate statements, the AG found that their disclosure to civil litigants could substantially reduce the attractiveness and effectiveness of leniency programmes, and

---

<sup>59</sup>Opinion of Advocate General Mazák on Case C-360/09, *Pfleiderer*, 16 December 2010, [ECLI:EU:C:2010:782], para. 37.

<sup>60</sup> *Ibidem*.

<sup>61</sup> *Idem*, para. 28.

<sup>62</sup> *Ibidem*.

<sup>63</sup> *Idem*, para. 42.

<sup>64</sup> *Idem*, para. 21.

thus, undermine effective enforcement<sup>65</sup>. Although this restriction could hinder the injured party's fundamental right to an effective remedy, the AG considered that this interference is justified by the legitimate aim of ensuring the effective enforcement of Article 101 and private interests in detecting and punishing cartels<sup>66</sup>.

On the other hand, the AG considered that the denial of other pre-existing documents would run counter the fundamental rights of the injured parties, since such restriction is no longer justified by the protection of leniency programmes. This is so, he argues, because unlike corporate statements, pre-existing documents exist independently of the leniency procedure and, as such, could, at least in theory, be discovered elsewhere<sup>67</sup>.

The CJEU, however, and despite recognizing that the effectiveness of leniency programmes could be compromised if documents relating to a leniency procedure were disclosed to private claimants<sup>68</sup>, reasoned his *dictum* under the assertion that it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition<sup>69</sup>. Consequently, instead of providing for a distinction between corporate statements and pre-existing documents, as proposed by the AG, the CJEU held that:

*«(...) the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law»<sup>70</sup>.*

First conclusion to be drawn from the *Pfleiderer* decision is that the CJEU left considerable leeway to national courts to decide whether to grant access to leniency material. Second is that national courts must conduct their weighing exercise in compliance with the principles of effectiveness and of equivalence, balancing the interests in favour of disclosure of

---

<sup>65</sup> *Idem*, para. 44.

<sup>66</sup> *Ibidem*.

<sup>67</sup> *Idem*, para. 47.

<sup>68</sup> *Pfleiderer*, para. 26 (*op. cit.*, nt. 6).

<sup>69</sup> *Idem*, para. 28.

<sup>70</sup> *Idem*, para. 32.

information and those in favour of its protection<sup>71</sup>. Third, and most important, is that while confirming the procedural autonomy of Member States, the *Pfleiderer* decision did not provide the national courts any guidance on how to draw the balance between such interests of access versus confidentiality of leniency materials.

In this case, it is interesting to see how the Local Court of Bonn, following the *Pfleiderer* decision, considered that the attractiveness of leniency programmes would suffer considerably if potential applicants had to fear the disclosure of documents submitted voluntarily. Of particular interest is the statement made by ANDREAS MUNDT, the President of the *Bundeskartellamt*, who publicly said that:

*«Attractive leniency programmes are of the utmost importance for effective cartel prosecution. Leniency applicants often play a decisive role in detecting and proving cartel agreements. If we were not able to guarantee them confidentiality, they would think twice before cooperating with us».*<sup>72</sup>

### **3.2. The *Donau Chemie* Ruling**

In *Donau Chemie*, the trade association VDMT, following a decision of the *Oberlandesgericht Wien* imposing fines on *Donau Chemie* and others for infringement of Article 101 TFEU on the market in the wholesale distribution of printing chemicals, asked the national court for access to the file relating to the correspondent judicial proceedings, in order to gather evidence to use in follow-on damages actions.

The *Oberlandesgericht Wien* considered that Austrian provisions protected information submitted in cartel cases in so far as such information could only be disclosed to third parties if all the parties consented to this waiver. As, moreover, parties could refuse to provide access without providing any reason, this blanket restriction did not leave any room for the consideration of the interests of that third party. Because the parties had not allowed access, the Austrian Court was bound not to allow third parties access to the file.

However, and following *Pfleiderer*, the *Oberlandesgericht Wien* observed that the CJEU stated that national rules could not operate in such a way as to make it practically impossible or excessively difficult to obtain damages and that national courts should conduct a weighing

---

<sup>71</sup> *Idem*, para. 30.

<sup>72</sup> Press release of the *Bundeskartellamt*, January 30, 2012, *Decision of Local Court of Bonn strengthens leniency programme*.

exercise. Taking this ruling, the *Oberlandesgericht Wien* wondered whether the Austrian provision was compatible with that interpretation of EU Law, given that it precluded national courts from any balancing exercise. As such, the Austrian Court referred a question to the CJEU, asking whether, in light of *Pfleiderer*, EU law precludes a national antitrust law which

*«(...) makes the grant of access to documents before the cartel court to third persons who are not parties to the proceedings, (...) subject, without exception, to the condition that all the parties to the proceedings must give their consent, and which does not allow the court to weigh on a case-by-case basis the interests protected by European Union law with a view to determining the conditions under which access to the file is to be permitted or refused?»<sup>73</sup>.*

Once again, the CJEU reiterated that a balancing exercise must be performed to weigh, on the one hand, the interests of the third party who requests access to the file and, on the other hand, the right to protect the information contained in the leniency application<sup>74</sup>. The CJEU considered this to be necessary because *«any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals»<sup>75</sup>*. Consequently, the CJEU concluded that national law must not be developed in such a way as to preclude any possibility for the national courts to conduct that weighing-up on a case by case basis<sup>76</sup>.

As for how to conduct this balancing exercise, the CJEU put forward that *«the argument that there is a risk that access to evidence contained in a file in competition proceedings which is necessary as a basis for those [damages] actions may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a refusal to grant access to that evidence»<sup>77</sup>*. On the contrary, the

---

<sup>73</sup> *Donau Chemie*, para. 13 (*op. cit.*, nt. 7).

<sup>74</sup> *Idem*, para. 30 and 34.

<sup>75</sup> *Idem*, para. 31.

<sup>76</sup> *Idem*, para. 35.

<sup>77</sup> *Idem*, para. 46.

refusal must be based on overriding reasons relating to the protection of the interests relied on and applicable to each document to which access is refused<sup>78</sup>.

---

<sup>78</sup> *Idem*, para. 47.

## **II. The New Paradigm Brought by the Damages Directive**

It follows from both *Pfleiderer* and *Donau Chemie* that, when deciding whether to grant access to the file, in particular where it entails access to leniency material, national courts must conduct a balancing, case-by-case, exercise. These rulings lead to a situation of legal uncertainty in so far as cartel members, when applying to leniency, were unaware if their documents would ever be made accessible to private litigants, especially because both judgements allowed a wide-margin of discretion to national courts.

This uncertainty, however, has been mitigated with the adoption of the Damages Directive, intended to ensure a level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise their rights<sup>79</sup>. Accordingly, the Directive reaffirms the right to compensation for harm caused by infringements of European competition law, while envisaging the effectiveness and consistency of the application of Articles 101 and 102 TFEU throughout the Union. It follows from Recital 6 Damages Directive that consistency is particularly necessary in what regards the arrangements for access to documents held by NCAs, since these rules are particularly relevant in the proper coordination of public and private enforcement tools. The rules concerning the disclosure of evidence are arguably the most significant aspect of the Directive as they can have a substantial impact on the availability of evidence throughout the Member States.

The most relevant provisions on disclosure are laid out in Articles 5 and 6 Damages Directive, from which it follows that the Directive places national courts in the position of gatekeepers. It is particularly interesting to see how the Directive, contrary to the 2013 Commission's Proposal, no longer establishes any explicit duty on national courts to order disclosure<sup>80</sup>, but rather fosters the possibility for national courts to, under their control and discretion, order it. This possibility is the minimum standard that must be met by Member States, who are required to ensure that courts are able to order defendants, claimants or other third parties to disclose relevant evidence upon request.

---

<sup>79</sup> Recital 9 Damages Directive .

<sup>80</sup> Article 5(2) EC's Proposal read that «*Member States shall ensure that national courts order the disclosure*», whereas the Directive's Article 5(2) merely prescribes that «*Member States shall ensure that national courts are able to order the disclosure*».

As will be seen, and as so clearly identified by NUNO LOURENÇO<sup>81</sup>, these provisions have a two-fold goal: on one hand to address the issue of information asymmetry in damages actions where much of the evidence required by the claimant to prove his case can be in the possession of the defendant; and, on the other hand, to avoid reducing the incentives of undertakings to apply for leniency.

### **1. The Novelty of Article 6**

When the evidence which disclosure is sought is included in the file of a competition authority, Article 6 establishes special rules in view of finding a balance between the effective right to damages and the protection of effective public enforcement<sup>82</sup>.

It is argued that, on the one end, an effective right to damages requires an extensive right to disclosure. On the other end, however, it is necessary to avoid any reduction in the effectiveness of public enforcement, namely leniency programmes. The double importance of these programmes is expressly recognized in Recital 26 Damages Directive, which reads that «(...) as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases usually follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases».

In order to find that balance, Article 6 provides a distinction between different categories of evidence, finding those categories to be (i) absolutely banned from disclosure, (ii) temporarily banned from disclosure and (iii) subject to disclosure.

Firstly, and bearing in mind the concern of protecting ongoing investigations<sup>83</sup>, Article 6(5) limits the disclosure of the documents therein identified to the moment where a competition authority has adopted a decision or has, otherwise, closed its proceedings. From our perspective, it's particularly relevant to look at intends a and b of Article 6(5), where we can see that the «*information that was prepared by a natural or legal person specifically for the proceedings of a competition authority*» and the «*information that the competition authority*

---

<sup>81</sup> LOURENÇO, Nuno Calaim, (2014) *The European commission's directive on antitrust damages actions*, Revista de Concorrência e Regulação, Coimbra, a.5 n.18, abril-junho 2014, p. 71.

<sup>82</sup> Article 6(4), indent c) Damages Directive.

<sup>83</sup> See Chapter II, Section 1, above.

*has drawn up and sent to the parties in the course of its proceedings»* were included in this temporary blacklist.

This special scheme was created by the legislator to relieve national judges from the concern of having to deal with requests for the disclosure of documents that were prepared or result from pending proceedings. Hence, and exemplifying, in case of a leniency application that has not yet resulted in a final decision from the NCA, the documents drafted by the leniency-applicant, specifically for that proceeding, as well as the documents drawn up by the NCA for that purpose, cannot be disclosed.

However, and contrary to what was held by the CJEU in *EnBW*<sup>84</sup>, the Directive clarifies that the exception of non-disclosure of those documents only applies until the proceedings of the NCA have been closed<sup>85</sup>, without having regard to whether the final decision might subsequently be annulled by the courts.

Also contrary to the CJEU's decisions, is the provision of Article 6(6), which provides a blacklist of documents that *«cannot at any time»* be ordered to be disclosed. As we have seen in both *Pfleiderer* and *Donau Chemie*<sup>86</sup>, the CJEU has considered that the right to claim damages cannot be precluded by blanket provisions that exclude certain documents from being brought to civil courts. To the contrary, the CJEU considered that national courts should be able to decide the disclosure of documents on a case by case basis. This reasoning was, however, set aside by the legislator who, following AG MAZÁK's Opinion in *Pfleiderer*, considered that leniency statements should benefit from immunity from disclosure.

To ensure that private damages claims have no detrimental effect on leniency programmes, the Damages Directive shelters leniency applicants from the fear that their leniency statements could be disclosed to claimants. According to Article 6(6) indent *a*), national courts may never order the disclosure of corporate leniency statements, which are defined in Article 2(16) as being:

*«an oral or written presentation voluntarily provided by, or on behalf of an undertaking or natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for*

---

<sup>84</sup> *EnBW* (*op. cit.*, nt. 35).

<sup>85</sup> Article 6(5) Damages Directive.

<sup>86</sup> See Chapter II, Section 3, above.

*submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information».*

Regarding the latter (*pre-existing information*), the prohibition on disclosure no longer applies. Instead, according to Article 6(9), national courts should be able, at any time, to order the disclosure of evidence that exists independently of the proceedings of a competition authority<sup>87</sup>.

## **2. The Provisions of Article 5**

Article 6(1) states that it applies «*in addition to Article 5*», which provides the standard rules for disclosure, listing the conditions deemed necessary for such a request to be accepted by national courts (and which requirements cannot be derogated from<sup>88</sup>).

The first condition set out in Article 5(1) for a disclosure order is that the request is accompanied by a *reasoned justification*<sup>89</sup>. Such justification should contain the «*reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*»<sup>90</sup>. This wording is explained in the Commission Staff Working Paper accompanying the White Paper where it was illustrated that:

*«(...) a claimant may produce an infringement decision showing that the defendant participated in a cartel for product X covering territory Y and for period Z. He may also be able to produce purchase receipts for the same product from the defendant on the same territory and covering the period of the cartel. This makes his claim a plausible one and should be sufficient to allow the claimant to access the evidence necessary to meet the applicable standard of proof required for ultimately winning the case»<sup>91</sup>.*

---

<sup>87</sup> Recital 28 Damages Directive.

<sup>88</sup> Article 5(8) Damages Directive.

<sup>89</sup> Article 5(1) Damages Directive.

<sup>90</sup> *Ibidem*.

<sup>91</sup> Commission Staff Working Paper accompanying the White Paper, para. 102 (*op. cit*, nt. 41).

It follows from this Article that national courts should be able to order the defendant or a third party the *«disclosure of relevant evidence which lies in their control»*.

The abovementioned Commission Staff Working Paper clarified that being relevant *«means that the court would therefore have to assess whether the information or evidence to be disclosed is suitable to support the allegations in the initial fact pleading by the claimant»*<sup>92</sup>. This indicates that *relevance* is to be assessed with regards to the claim or defence. Since the Directive provides no guidance as to what is to be considered relevant or how to determine whether disclosure is suitable to support the allegations, this criterion allows for a great margin of discretion.

Although the necessary content of the *reasoned justification* of Article 5(1) is left unspecified, Article 5(2) adds that the request has to circumscribe the *«specified items of evidence or relevant categories of evidence (...) as precisely and narrowly as possible»*.

Looking at Recital 16 to the Directive, we can find some criteria as to what can be considered a “category of evidence”, as it explains that categories should be:

*«(...) identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive»*.

The Recital further explains that *«such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts»*. It seems to follow from this writing that only the categories of evidence should be specified as precisely and narrowly as possible. However, and at the same time, Recital 23 refers to *«the requesting party’s duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible»*.

Despite this arguable ambiguity, the wording is, as mentioned by FLORIAN WAGNER-VON PAPP<sup>93</sup>, of little consequence. On the one hand, if one refers to a specific piece of evidence, then there is no need for any further precise and narrow circumscription. If, however, such piece of evidence is not sufficiently specified, it is still possible to examine whether it consists

---

<sup>92</sup> *Idem*, para. 108.

<sup>93</sup> WAGNER-VON PAPP, Florian, Chapter A: *Article 5: Discretionary Disclosure as the Basic Rule*, Section iv.: *Specification of Pieces of Evidence and Circumscription of Categories* (*op. cit.*, nt. 14).

on a sufficiently circumscribed category of evidence. Because every piece of evidence is part of a broader category, the final question – in case such piece of evidence is not precisely and narrowly specified – will be whether its category is well circumscribed.

What happens, however, if the claimant possesses no or hardly any knowledge of facts that would allow a precise and narrow circumscription but, at the same time, it is not reasonably expected that he possesses such knowledge?

One interpretation of the requirements of Article 5(2) is that such a request is bound to be rejected. This restrictive interpretation is justified by the concern against the so-called fishing-expeditions, identified in Recital 23 Damages Directive as *«non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings»*. As explained in that Recital, the generic disclosure of documents in the file of a competition authority relating to a certain case (including those documents submitted by a party in the context of a particular case), is to be considered disproportionate, as it would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.

Alternatively, if it is not reasonably expected that the claimant possesses knowledge of facts that would allow a precise and narrow circumscription, it could be argued that the request for disclosure is to be considered sufficient. As FLORIAN WAGNER-VON PAP explained<sup>94</sup>, *«where nothing is reasonably possible, “as precise and narrow as possible”, is not precise and narrow at all»*. This interpretation was also followed in the Commission Staff Working Paper accompanying the White Paper where, referring to the specification of categories of evidence, it was explained that:

*«In the above example of a cartel relating to product X covering territory Y during period Z, the claimant in the system proposed above may well seek disclosure of documents about the price discussions between the cartelists for the clearly described product, period and territory to the extent that they may concern him. Disclosure could also be requested, for the specified product, period and territory, of facts to enable the claimant to determine what the pricing structure on the market would have been in the absence of the cartel»*<sup>95</sup>.

---

<sup>94</sup> *Ibidem*.

<sup>95</sup> Commission Staff Working Paper, para. 106 (*op. cit.*, nt. 41).

Consequently, a specification such as “price discussions between the cartelists” is deemed as sufficiently precise, while the specification “documents in the file of a competition authority relating to [a certain case]” is not<sup>96</sup>.

Article 5(3) is – at least from our perspective and for the purposes of this work – the greater troublesome provision of the Directive, establishing that disclosure should be limited to what is proportionate. This provision and its consequences will be further analysed in Chapter III.

Article 5(4) adds that Member States shall ensure that, when disclosing evidence containing confidential information, national courts shall have at their disposal effective measures to protect them. Some measures of protection are listed in Recital 18 to the Directive, which gives example as *«the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form»*.

A restriction on disclosure also exists for evidence covered by legal professional privilege<sup>97</sup>.

Finally, Article 5(7) provides the right to be heard for the person from whom disclosure is being sought, before it is ordered.

### **3. Access to Leniency Documents under the Portuguese Competition Act**

#### **3.1. The Portuguese Competition Act before the Damages Directive**

Under Article 81 of the current Portuguese Competition Act<sup>98</sup>, it is classified as confidential not only leniency statements but also all the documents that are submitted for purposes of obtaining immunity or reduction of a fine.

Access to these documents is only permitted under two circumstances:

- (i) To those concerned by an administrative proceeding (i.e. those concerned by a statement of objections of the Portuguese Competition Authority [PCA]),

---

<sup>96</sup> Recital 23 Damages Directive.

<sup>97</sup> Article 5(6) Damages Directive.

<sup>98</sup> Law no. 19/2012, 8<sup>th</sup> May.

consultation of the statement and related documents is permitted, but any form of reproduction is expressly prohibited, unless otherwise authorized by the leniency applicant;

(ii) To third parties, if the leniency applicant so consents.

This legislative option leaves no room for doubts or dissenting interpretations on whether the documents submitted by a leniency applicant are at danger of being disclosed. On the contrary, the Portuguese legislator made it clear that the application for leniency, as well as all the documents and information submitted for those purposes, are to be considered confidential. This wording reveals a clear concern of the legislator in maintaining the secrecy of such documents, thus reinforcing legal certainty and maintaining both the attractiveness and effectiveness of leniency programmes.

In other words, faced with the tension between public and private enforcement, the Portuguese legislator, recognizing that the success of public enforcement is largely dependent on the existence of leniency programmes, decided to stimulate and reward cooperation.

However, considering that, the Damages Directive no longer admits blanket restrictions on the disclosure of leniency-related documents, this provision has inevitably been amended.

### **3.2. The Portuguese Private Damages Act**

Following the Damages Directive, the rules on the disclosure of leniency material come in two forms: the absolute confidentiality of leniency statements<sup>99</sup> and the possibility of, subject to a proportionality assessment, disclosure of leniency-related documents<sup>100</sup>. Accordingly, Member States whose legislation governs this matter differently are forced to readjust. As seen above, this is the case of Portugal as the current leniency regime grants a broader protection to leniency documents than that provided for in the Damages Directive.

Therefore, and considering that the Portuguese Parliament has recently approved the transposition of the Damages Directive, we shall now analyse the proposal that was put forward by the *Comissão de Economia, Inovação e Obras Públicas* (hereinafter referred to as *Private Damages Act*) and approved last 20<sup>th</sup> of April.

---

<sup>99</sup> Article 6(6)(a) Damages Directive.

<sup>100</sup> Recital 18 Damages Directive (pre-existing information); Article 6(5), intend a (information prepared specifically for the proceedings of a competition authority).

### **3.2.1 Going beyond the Damages Directive**

Before addressing the rules on the disclosure of evidence, and because it might influence how private litigation will evolve in Portugal, it is interesting to analyse where the Portuguese legislator developed his creativity and see what options were exercised and where the Law goes beyond the minimum standard imposed by the Directive.

First, although the Damages Directive only envisages the harmonization of rules regarding private enforcement actions resulting from infringements that, within the meaning of Articles 101 and 102 TFEU, affect trade between Member States<sup>101</sup>, the Portuguese Private Damages Act extended its scope to cover infringements that are purely domestic in nature<sup>102</sup>. This innovation was first proposed by the PCA who justified it in considering that «*the Damages Directive's main objectives are equally valid for damages actions resulting from purely domestic infringements (...) i.e., to ensure the victims' right to compensation and, as a result, to reinforce the level of deterrence in Portugal*»<sup>103</sup>. It was also considered that this was more suitable to ensure the overall coherence and certainty of the Portuguese legal system, as it guarantees equal treatment between infringers and between victims, regardless of the infringement's potential to cause effects on trade (thus allowing an automatic compliance with the principles of effectiveness and equivalence, as envisaged in Article 4 Damages Directive).

Second, the Private Damages Act goes beyond the minimum required by the Damages Directive in what concerns the binding effect of decisions of competition authorities and courts of other Member States. While the Directive explains that infringement decisions by competition authorities and review courts of other Member States are taken at least as *prima facie* evidence that the infringement occurred<sup>104</sup>, the Private Damages Act considers such decisions as rebuttable proof of the existence of the infringement, regarding the nature of the

---

<sup>101</sup> Recital 10 Damages Directive clarified that «*This Directive should not affect actions for damages in respect of infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU*».

<sup>102</sup> Article 1(1) and 2(1) Private Damages Act.

<sup>103</sup> MELÍCIAS, Maria João, (2016) *The Art of Consistency Between Public and Private Antitrust Enforcement: Practical Challenges in Implementing the Damages Directive in Portugal*, Revista de Concorrência e Regulação, Ano VII, Número 26, abril-junho 2016, p. 4.

<sup>104</sup> Article 9(2) Damages Directive.

infringement, as well as its material, personal, temporal and territorial scopes<sup>105</sup>. The reason underlying this option was the interest in avoiding the duplication of administrative costs and in preventing contradictory decisions, thus facilitating the victims' right to compensation.

Another novelty in relation to the Damages Directive are the rules on pre-trial discovery of evidence<sup>106</sup>. These rules anticipate the temporal scope when access to evidence can be obtained, enabling a potential plaintiff to ascertain whether to bring an action for damages.

In particular, those who, pursuant to Articles 573 to 576<sup>107</sup> of the Portuguese Civil Code, seek information or the submission of evidence may request the competent court to notify its holder, ordering the presentation of such information or evidence. This disclosure, albeit prior to a private damages action, follows the same rules and principles as the disclosure that is ordered during such a proceeding<sup>108</sup>.

Additionally, some interim measures have been envisaged in so far as an alleged injured party may request the court to order immediate and effective provisional measures to preserve evidence of the infringement, when there are strong indications that it has taken place<sup>109</sup>.

### **3.2.2 Access to Evidence**

In what regards access to evidence, Article 12 Portuguese Private Damages Act mimics the rules that are contained in Article 5 Damages Directive and Article 14 of that same Act replicates the rules contained in Article 6 Damages Directive. Article 12(7), however, takes a step further as, in what concerns the protection of confidential information<sup>110</sup>, and similarly to Recital 18 Damages Directive, it presents an illustrative set of measures that can be taken by national courts, namely: redaction of sensitive passages in documents; conduct hearings in camera; restrict the number of persons authorised to have access to the evidence, in particular by limiting access to the legal representatives of the parties or to experts subject to a confidentiality obligation; ask experts to provide summaries of the information.

---

<sup>105</sup> Article 7(2) Private Damages Act.

<sup>106</sup> Article 13 Private Damages Act.

<sup>107</sup> Rules on the obligation to provide information or submit documents when the *«holder of a certain right has a reasonable doubt about the existence or content of that right»* (Article 573 of the Portuguese Civil Code).

<sup>108</sup> Articles 5 and 6 Damages Directive and correspondent Articles 12 and 14 Private Damages Act.

<sup>109</sup> Article 17 Private Damages Act.

<sup>110</sup> Article 5(4) Damages Directive.

As for the proportionality test contained in Article 14(3) Private Damages Act, the PCA added a further requirement as, following Article 6(11) of the Directive, it orders national courts to notify the PCA of any request for disclosure of evidence included in its files, to enable it to submit observations for the assessment of the proportionality of the request<sup>111</sup>.

Besides the novelties mentioned above, the rules on disclosure of leniency material brought by the Directive lead to an amendment of Article 81 of the Portuguese Competition Act.

However, and because the Directive and, hence, the Private Damages Act, only regulate the disclosure of leniency evidence for the purposes of private damages actions (while Article 81 of the Portuguese Competition Act has a broader scope<sup>112</sup>), the legislator found that it was not necessary to fully amend Article 81. On the contrary, it opted to add a new paragraph where it conciliates the Competition Act with the Private Damages Act by referring the disclosure of leniency material under a private damages action to the rules contained in Article 14 of the Private Damages Act (the equivalent to Article 6 of the Damages Directive).

### **3.3.Future Perspectives on Disclosure of Leniency Documents**

As the immunity or reduction of the fine does not preclude undertakings from their civil liability, and because there is a newly increased risk that self-incriminatory documents brought by leniency applicants may be disclosed in private enforcement actions, it is possible that a potential applicant may be deterred from applying to leniency. Even if he is not, it is more than likely that we will witness some changes on how leniency applications are made.

The Portuguese procedure concerning the functioning of the national leniency programme is set out in the PCA's Regulation no. 1/2013. According with this Regulation, a leniency application must contain precise and detailed information about the cartel<sup>113</sup>. Article 2(3) of said Regulation establishes, in turn, that the leniency applicant «*shall submit, with the application, evidence relating to the alleged cartel that is in its possession or under its control, (...) enclosing a list*». Although this wording seems to imply an obligation to enclose the actual documents, it does not seem to preclude an interpretation where leniency applicants

---

<sup>111</sup> Article 15(2) Private Damages Act.

<sup>112</sup> Article 81 Portuguese Competition Act, under the heading “*Confidential Information*”, concerns the access to leniency material under any context.

<sup>113</sup> Including, *inter alia*, its objectives, activity, functioning, product or service at issue, geographic scope, length, as well as dates, places, content and participants of meetings concerning the cartel (Article 2(2) of PCA's Regulation no. 1/2013).

simply submit the identification of the documents, providing its list, without attaching them to the application. On the contrary, applicants may, from this interpretation, simply identify the evidence that supports their application (by listing it) and make it available to consultation by the PCA on the applicants' premises.

By doing this, and albeit such documents are still subject to disclosure under the general rules provided in Article 5 Damages Directive and Article 12 Private Damages Act, there would be no disincentive in applying to leniency since the self-incriminating evidence would not be part of the PCA's file.

Hence, and considering the increased risk on disclosure, it is possible that leniency applicants will start resorting to this redirection of leniency evidence.

Even if such interpretation is not possible and, consequently, leniency applicants must, or otherwise do, enclose evidence to the PCA's file, it would be natural for applicants to choose the submitted evidence more carefully, providing only the minimum required to prove the infringement. In other words, it is not only possible but likely that infringers will be less diligent and exhaustive when submitting documents to the leniency programme, particularly in what regards evidence that can be used to quantify damages.

### **III. Striking the Balance: the Proportionality Test**

Despite the rules laid down in the Damages Directive and the guidance that is provided in its Articles 5 and 6, there is still a margin of discretion that is given to national courts when deciding whether to order the disclosure of certain evidence. The question is then, how wide is this margin and what interests and criteria can and/or should be considered by national judges in their assessment.

#### **1. The Proportionality Test as Envisaged by the Damages Directive**

Article 5(3) Damages Directive provides that the disclosure of evidence is limited to what is «*proportionate*». It is for the national judge in question to evaluate the claimant's request by way of applying a proportionality test while considering «*the legitimate interests of all parties and third parties concerned*»<sup>114</sup>. The range of interests is largely open-ended, allowing a great leeway for national courts to apply different standards. Consequently, it is possible that national courts from either traditionally restrictive or liberal Member States will use this requirement to either deny or grant disclosure, respectively, by simply applying a different weigh on the interests involved.

In any event, we should consider that the openness of the proportionality judgement is partially limited by the indents of Article 5(3), where the Directive indicates that national courts should consider (i) the extent to which the claim or defence is supported by available facts and evidence, (ii) the scope and cost of disclosure and (iii) whether the evidence at issue contains confidential information.

Although the value of the damages claim is not explicitly indicated as a requirement to be taken into account, it is likely that it will still be considered as a factor when assessing whether the cost of disclosure is proportionate. As explained by FLORIAN WAGNER-VON PAP, proportionality requires considering the *ratio*:

*«(...) between the cost of disclosure and the marginal increase in expected value of the claim where disclosure is granted. (...) the marginal benefit of disclosure will usually be expressed in a percentage increase in the probability of succeeding with the claim*

---

<sup>114</sup> Article 5(3) Damages Directive.

– and so the absolute marginal benefit of disclosure is likely to be higher where the total value of the claim is higher». <sup>115</sup>

In what concerns leniency-related documents, we need to add the list of considerations that is provided in Article 6(4) Damages Directive. According to this provision, national courts should consider (a) whether the request has been formulated by specifying the nature, matter or contents of the documents submitted (vs. a non-specific application), (b) whether the party requested disclosure is doing so in relation to an action for damages before a national court, and (c) the need to safeguard the effectiveness of the public enforcement of competition law.

Taking the above, as well as the observations articulated in Chapter II, Sections 1 and 2, it is possible to understand that the leeway that is granted to national judges is not as wide as it could be expected. On the contrary, and although the lists of Articles 5(3) and 6(4) are non-exhaustive, national judges have been given some criteria to be guided by and, apparently, may not decide a disclosure request on a completely arbitrary basis.

Moreover, and in comparison to the principles enshrined in Regulation (EC) no. 1049/2001 – that is, the concern with the protection of commercial interests and the protection of investigations – the judges’ discretion has also been restricted insofar as the legislator has already undertaken the necessary balance and provided strict rules on the subject. Indeed, Article 5(5) of the Damages Directive starts by reiterating that *«the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection»*. As for the other commercial interests that have been mentioned by CJEU in *EnBW*<sup>116</sup>, the issue of their disclosure was also tackled by the legislator when he provided, in Article 5(4) of the Directive, that the disclosure of confidential information (where business secrets and, hence, commercially sensitive information is included) is subject to the availability of effective measures to ensure its protection.

Regarding the protection of investigations, we have already seen<sup>117</sup> that the legislator has provided a solution on how long that protection is necessary, limiting it to the adoption of a decision or otherwise closing of the proceedings by the NCA.

---

<sup>115</sup> WAGNER-VON PAPP, Florian, Chapter A: *Article 5: Discretionary Disclosure as the Basic Rule*, Section v.: *Proportionality* (op. cit., nt. 14).

<sup>116</sup> *EnBW* (op. cit., nt. 35).

<sup>117</sup> See Chapter II, Section 1.

Additionally, and from a different perspective, it can be argued that the principle of effectiveness, mentioned on Article 4 of the Damages Directive, and as applied in *Laboratoires Boiron*<sup>118</sup>, imposes an obligation on national courts to, pursuant to Article 5 Damages Directive, order disclosure. This obligation would apply in all cases where claimants' rights to damages for harm caused by an infringement of competition law would otherwise become impossible or excessively difficult to enforce. Yet, and in this regard, we must not forget that Article 9(1) Damages Directive finds an infringement of competition law found by final decisions of a NCA or by a review court to be «*irrefutably established for the purposes of an action for damages brought before their national courts*». This irrebuttable presumption reverts the burden of proof and puts the onus on the party that is more likely to have information: the infringer. In this regard, FLORIAN WAGNER-VON PAPP<sup>119</sup> argues that a change in the burden of proof influences the urgency of any need for disclosure, affecting the interest balancing exercise that determines whether disclosure must be ordered. This Author goes even further, arguing that shifting the burden of proof is a functional equivalent to disclosure.

Notwithstanding, even if the breach of competition law is to be considered proven, there is still an evidential problem in quantifying the suffered damages and establishing the causal link between the infringement and the loss. For these purposes, the pre-existing information, such as minutes of meetings or other internal documents of the cartel, may prove useful. The question is then whether the refusal of access to these documents make it impossible or excessively difficult to enforce the right to compensation. (i.e. whether access to leniency material is crucial to support a civil damages' claim).

To answer this question, national courts must offset the need for access to leniency material with the possibility to obtain sufficient evidence from other sources. In what regards pre-existing information, since they exist independently from the leniency application, it can be argued that cartel victims may seek access to them through the general rules of Article 5, asking the court to order disclosure from the leniency applicant himself and not from the NCA. Although the practical effect would be virtually the same, this solution seems to be more in line with the concern of maintaining the attractiveness of leniency programmes. Therefore, it could be considered that access to leniency documents included in the file of a

---

<sup>118</sup> Case C-526/04, *Laboratoires Boiron*, 7 September 2006 [ECLI:EU:C:2006:528], para. 57.

<sup>119</sup> WAGNER-VON PAPP, Florian, Chapter VI: *What Does the Future of Disclosure in the EU Look Like?* (op. cit., nt. 14).

competition authority can only be granted where access to those same documents through other sources is not possible.

Moreover, still with respect to the quantification of damages, it should be noted that Article 17(1) Damages Directive imposes on Member States the obligation to ensure that national courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to quantify precisely the harm suffered on the basis of the evidence available. Moreover, Article 17(2) establishes a rebuttable presumption that cartel infringements cause harm.

The presumption that cartel infringements cause harm means that, unless that presumption is rebutted, it is established, for the purposes of Article 17(1), that the claimant suffered harm. Consequently, even if the refusal to disclose leniency documents renders it practically impossible or excessively difficult for the claimant to quantify the damages, it still does not make it impossible or excessively difficult for him to exercise his right to compensation, because national courts will be empowered to estimate damages on their own. To do so, and according to Article 17(3), national courts may request NCAs to assist them, where the NCA considers such assistance to be appropriate. The intention of this norm is to have experts assist the courts in in the determination of the quantum of damages.

Other factors to take into consideration when carrying out the balancing test imposed by the Directive were laid out in *National Grid*<sup>120</sup>, a case involving a request of documents of the Commission for purposes of preparing a follow-on damage claim.

Because of the uncertainties left by *Pfleiderer*, the national judge, HONOURABLE MR. JUSTICE PETER ROTH, decided to adjourn the part of the application that related to leniency documents and invited the Commission to make an *amicus curiae* submission. The Commission provided two specific tasks to be carried out by the court: (i) to assess whether, in the circumstances of the case, disclosure of leniency documents would expose the leniency applicants to a greater liability than those parties that did not cooperate with the Commission<sup>121</sup>; (ii) to consider whether disclosure would be proportionate in light of its possible interference with the

---

<sup>120</sup> EWHC 869 (Ch), Case No. HC08C03243 in the High Court of Justice Chancery Division, Royal Courts of Justice, *National Grid*, 04 April 2012.

<sup>121</sup> Observations of the European Commission, *National Grid*, para. 18 (*op. cit.*, nt. 3.).

leniency programmes by considering if the document is at all relevant for the claim, and whether there are other available sources of evidence that are equally effective<sup>122</sup>.

In Mr. Justice ROTH's application of the proportionality test, he considered that disclosure would not increase the leniency applicant's exposure to liability compared to the liability of parties who did not cooperate, because all parties to the cartel are equally liable for the wrongdoing<sup>123</sup>. This reasoning remains true since the Damages Directive considers that *«where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement»*<sup>124</sup>. Moreover, the immunity recipient is, in principle, relieved from joint and several liability for the entire harm, limiting his contribution to the harm caused to his own direct or indirect purchasers or his direct or indirect providers<sup>125</sup>. The liability of the immunity recipient is only extended in those cases where, in what regards other injured parties, full compensation cannot be obtained from the other undertakings<sup>126</sup>. As the case may be, the contribution of the immunity recipient should not exceed its relative responsibility for the harm caused by the cartel<sup>127</sup>.

As for the second guidance given by the Commission, HONOURABLE MR. JUSTICE PETER ROTH agreed that *«proportionality should be considered in terms of (a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case»*<sup>128</sup>.

However, and curiously, Article 6(4), intend *c*) Damages Directive, as seen above, provides that, when assessing the proportionality of an order to disclose information that is included in the file of an NCA, national courts shall consider *«the need to safeguard the effectiveness of the public enforcement of competition law»*. Contrary to expectations, it seems that the legislator did not want to take a rigid position on what is the risk of disclosure of evidence included in the file of a competition authority and its consequences on the effectiveness of public enforcement. Conversely, the Directive gives what appears to be a blank cheque to

---

<sup>122</sup> *Idem*, para. 21.

<sup>123</sup> *National Grid*, para. 35 (*op. cit.* nt. 120).

<sup>124</sup> Recital 37 Damages Directive.

<sup>125</sup> Article 11(4) intend a, Damages Directive.

<sup>126</sup> Article 11(4) intend b, Damages Directive.

<sup>127</sup> Article 11(5) Damages Directive.

<sup>128</sup> *National Grid*, para. 39 (*op. cit.* nt. 120).

national courts to, sustained by one general principle, refuse the request of disclosure and decide a systemic issue on a case-by-case basis.

## **2. EU Fundamental Rights**

Without prejudice to the above, it is important to consider the different interests which should be weighed against each other when assessing the proportionality of an order to disclose information and examine which rights the opposing parties are entitled to.

According to the Preamble of Regulation (EC) no. 1/2003, NCAs and national courts must enforce European competition law on their territories in accordance with EU fundamental rights, notably observing the principles recognised by the Charter.

As for whether the Charter applies to purely national cartels, the CJEU has confirmed that it has jurisdiction where an EU Directive does not apply, but where the national legislature intended to treat purely internal situations in the same way as where the Directive would apply<sup>129</sup>. Since this is the case in some jurisdictions applying EU competition law<sup>130</sup>, it is of even greater importance to consider the rights which are enshrined in both the Charter and the European Convention on Human Rights (ECHR).

### **2.1. Right to an Effective Remedy and to a Fair Trial**

Article 47 of the Charter provides for the right to an effective remedy before a tribunal and the right to a fair trial to everyone whose rights and freedoms guaranteed by the law of the Union are violated. The first part of Article 47 of the Charter – right to an effective remedy – corresponds to Article 13 ECHR, while the second paragraph – right to a fair trial – equates Article 6(1).

The right to an effective remedy of cartel victims was specifically recognized in the already mentioned judgements *Courage*<sup>131</sup> and *Manfredi*<sup>132</sup>. In particular, the CJEU considered that

---

<sup>129</sup> Case C-482/10, *Cicala*, 21 December 2011 [ECLI:EU:C:2011:868], para. 19.

<sup>130</sup> See Chapter II, Section 3.2, above.

<sup>131</sup> *Courage*, para. 25-26 (*op. cit.*, nt. 2).

<sup>132</sup> *Manfredi*, para. 60-63 (*op. cit.*, nt. 8).

an effective remedy of cartel victims should entail the compensation «*not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest*»<sup>133</sup>.

The notion of fair trial, which should be considered together with the right of access to documents<sup>134</sup>, is granted to both cartel victims and infringers. In what regards injured parties, the AG MAZÁK has argued that a NCA should not, in the absence of an overriding legitimate reason of public or private necessity, deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim against a member of a cartel, «*as this could de facto interfere with and diminish that party's fundamental right to an effective remedy*».<sup>135</sup> However, and recognising the tension between public and private enforcement, the AG considered that:

*«(...) the disclosure to civil litigants of the contents of voluntary self-incriminating statements made by leniency applicants, in the course of a leniency procedure and for the purpose of that procedure, in which the applicants effectively admit and describe to a competition authority their participation in an infringement of Article 101 TFEU, could substantially reduce the attractiveness and thus the effectiveness of a national competition authority's leniency programme. This in turn could undermine the effective enforcement by the national competition authority of Article 101 TFEU and ultimately private litigants' possibility of obtaining an effective remedy. Thus, while the denial of such access may create obstacles to or hinder to some extent an allegedly injured party's fundamental right to an effective remedy, I consider that the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and indeed private interests in detecting and punishing cartels»*<sup>136</sup>.

On the other hand, the AG claimed to find no reason to refuse the disclosure of documents which were submitted with the leniency application, in order to assist in an action for damages.<sup>137</sup>

---

<sup>133</sup> *Idem*, para. 95.

<sup>134</sup> See Chapter I, Section 1, above, and Article 42 Charter.

<sup>135</sup> Opinion of AG Mazák on *Pleiferer*, para. 38 (*op. cit.*, nt. 59).

<sup>136</sup> *Idem*, para. 44.

<sup>137</sup> *Idem*, para. 47.

## **2.2. Right to Respect for Private Life**

Article 7 of the Charter provides that «*everyone has the right to respect for his or her private and family life, home and communications*», corresponding to Article 8 ECHR. The question is whether this right confers a confidential status to certain leniency material.

The only reason why a leniency applicant confesses his participation in a cartel and provides evidences of the cartel's activity, is to obtain fine immunity or its reduction. Thus, it is only natural to conclude that these self-incriminating and naturally confidential statements and documents are given under the expectation that they will not be generally disclosed to the public<sup>138</sup>.

In any case, the weigh to be given to EU fundamental rights is merely subsidiary, as they appeal to general principles of Law that were already considered by the legislator when drafting the Damages Directive and the choices entailed therein. That said, we can expect that these and other fundamental rights will only be considered by national judges on a secondary basis, as a way to enrich a decision that will be taken on the basis of other legal grounds.

---

<sup>138</sup> *Idem*, para. 45

## **Conclusive Remarks**

The Damages Directive changed the paradigm of access to leniency documents in private litigation, aiming to bring to an end the inconsistency and uncertainty that characterized the disclosure of evidence in damages actions.

This Directive, however, left to national courts the difficult task of conducting a proportionality test where they must weigh the interests of injured parties and those of leniency applicants. This is particularly challenging since these interests must, in turn, be balanced together with the recognized right to compensation and the public interest in maintaining leniency programmes as attractive and effective as possible.

However, and simultaneously, while it is true that leniency statements are now unconditionally protected from disclosure, it should be noted that the mere introduction of an abstract proportionality test does not necessarily entail any changes in how the disclosure of other leniency documents (namely pre-existing information) takes place in the different Member States. Without more, the proportionality test, and opposite to what was intended, can be used by both liberal and conservative disclosure legal systems to maintain their traditions, simply by putting different emphasis on the opposing interests. This is even more evident where the Damages Directive expressly provides that national courts should, when assessing the proportionality of an order to disclose information included in the file of a competition authority, consider the need to safeguard the effectiveness of the public enforcement of competition law.

As a result of the considerations above, the Damages Directive seems to fall short of its objectives, adopting a schizophrenic policy with regard to the disclosure of leniency-related evidence. While, on the one hand, the Directive seems to restrict the grounds of refusal of disclosure (limiting the margin of discretion that is allowed to national judges), it proceeds to grant a “get out of jail, free card”, by, through the invocation of a general public policy principle, blankly dethrone all the other rules and refuse to order disclosure.

All this combined creates – or maintains – an environment of doubt on how national judges will apply the rules on disclosure of evidence that are provided in the Directive, especially its proportionality test. Hence, and although there is not enough experience in practice yet to allow us to anticipate the result – and, thus, the merit – of the Damages Directive, we believe that, at least until such practice is reached, leniency-applicants will be particularly careful and

adopt a preventive behaviour, when submitting their applications and choosing its accompanying documents.

Weighting everything up, although the Damages Directive is intended to be seen as progress (and without denying that it does provide important standardization on the confidentiality of leniency statements and that it contributes with some enlightenment on the rules to be followed by national judges), it is too early to say whether it will achieve its intended aims; only history will tell.

## List of Sources

### 1. Articles

BUCCIROSSI, Paolo, MARVÃO, Catarina and SPAGNOLO, Giancarlo, (2015) *Leniency and Damages*. Available at SSRN: <https://ssrn.com/abstract=2566774>;

BUTORAC MALNAR, Vlatka, (2015) *Access to Documents in Antitrust Litigation – EU and Croatian Perspective*, Yearbook of Antitrust and Regulatory Studies vol. 2015, 8(12), p. 127-160. Available at SSRN: <https://ssrn.com/abstract=2866272>;

CATÓN, Pablo González de Zárate, (2013) *Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law*, College of Europe, Department of European Legal Studies, Research Paper in Law 08/2013. Available at: <https://www.coleurope.eu/research-paper/disclosure-leniency-materials-bridge-between-public-and-private-enforcement-antitrust>;

CAUFFMAN, Caroline, (2011) *The Interaction of Leniency Programmes and Actions for Damages*, Maastricht Faculty of Law Working Paper No. 2011/34. Final version published as Cauffman, C.. The Interrelationship between Leniency and Damages Actions. Competition Law Review, 181-220. Available at SSRN: <https://ssrn.com/abstract=1941692>;

CAUFFMAN, Caroline, (2012) *Access to Leniency Related Documents after Pfleiderer*, Maastricht Faculty of Law Working Paper No. 2012/3; Final version published as Cauffman, C. (2011). Access to Leniency-Related Documents after Pfleiderer. World Competition, 34(4), 597-615. Available at SSRN: <https://ssrn.com/abstract=2004958>;

FAVART, MARTIN, *Hungary: Substantial Changes To The Hungarian Competition Act*, retrieved 02 January 2018 from <http://www.mondaq.com/x/562346/Cartels+Monopolies/Substantial+Changes+To+The+Hungarian+Competition+Act>;

GUTTUSO, Laura, (2014) *The Enduring Question of Access to Leniency Materials in Private Proceedings: One Draft Directive and Several Court Rulings*, Global Competition Litigation Review 2014 Vol 7 Issue 1 pp 10-22. Available at SSRN: <https://ssrn.com/abstract=2586409>;

GROUSSOT, Xavier and PIERCE, Justin, (2015) *Transparency and Liability in Leniency Programmes: a Question of Balancing?*, Lund University Legal Research Paper Series, Paper No. 01/2015. Available at SSRN: <https://ssrn.com/abstract=2545011>;

HIRNER, Stefan Michel, (2014) *Access to Evidence in Antitrust Damage Actions in Light of Recent Case Law and the Draft Directive*, p. 9-15. Available at: [http://www.publiclaw.at/pl/index.php?option=com\\_content&task=view&id=217&Itemid=74](http://www.publiclaw.at/pl/index.php?option=com_content&task=view&id=217&Itemid=74);

KNIGHT, Thomas and CLAIRE, Casey Ste., (under review) *Reconciling the Conflict: Antitrust Leniency Programs and Private Enforcement*, University of Florida, Department of Economics. Available at:

[https://people.clas.ufl.edu/thomasknight/files/KnightSteClaire\\_JLE.pdf](https://people.clas.ufl.edu/thomasknight/files/KnightSteClaire_JLE.pdf);

LOURENÇO, Nuno Calaim, (2014) *The European commission's directive on antitrust damages actions*, Revista de Concorrência e Regulação, Coimbra, a.5 n.18, abril-junho 2014, p. 65-87;

MAURICIO, Ana Júlia, (2012) *Access of Damages Claimants to Leniency Material Held by National Competition Authorities or by the European Commission*, Common Law Review. Available at SSRN: <https://ssrn.com/abstract=2159946>;

MELÍCIAS, Maria João, (2016) *The Art of Consistency Between Public and Private Antitrust Enforcement: Practical Challenges in Implementing the Damages Directive in Portugal*, Revista de Concorrência e Regulação, Ano VII, Número 26, abril-junho 2016;

MOODALIYAR, Kasturi, (2014) *Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?*, Yearbook of Antitrust and Regulatory Studies, Vol. 7, No. 10. Available at SSRN: <https://ssrn.com/abstract=2741615>;

ROSSI, Leonor and FERRO, Miguel Sousa, (2013) *Private Enforcement of Competition Law in Portugal (II): Actio Popularis – Facts, Fictions and Dreams*, Revista Concorrência e Regulação, Ano IV, Número 13, janeiro-março 2013;

SAAVEDRA, Alberto, (2010) *The Relationship between the Leniency Programme and Private Actions for Damages at EU Level*, Revista de Concorrência e Regulação, Ano I, Número 4, outubro-dezembro 2010;

SAAVEDRA, Alberto, (2013) *Access by National Courts and Private Plaintiffs to Leniency Documents Held by the Commission*. Available at SSRN: <https://ssrn.com/abstract=2292505>;

STEFANO, Gianni De, (2012) *Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario*, Global Competition Litigation Review, Issue 3, Sweet & Maxwell. Available at: <http://awa2013.concurrences.com/academic-articles-awards/article/access-of-damage-claimants-to>;

WAGNER-VON PAPP, Florian, (2016) *Access to Evidence and Leniency Materials*. Available at SSRN: <https://ssrn.com/abstract=2733973>;

WILS, Woulter P. J., (2006) *Leniency in Antitrust Enforcement: Theory and Practice*. Available at SSRN: <https://ssrn.com/abstract=939399>.

## **2. Books**

FAULL, J., NIKPAY, A., *The EU Law of Competition*, Oxford University Press, Third Edition, ISBN: 9780199665099, p. 154-161, 1072-1087, 1118-1131, 1154-1157, 1236-1241, 1140-1147;

MONIZ, Carlos, et. al., (2016) *Lei da Concorrência Anotada*, Almedina, ISBN 9789724059907, p. 723-732.

## **3. Case Law and related documents**

Case C-374/87, *Orkem v. Commission*, 18 October 1989 [ECLI:EU:C:1989:387];

Case T-353/94, *Postbank NV v Commission*, 18 September 1996 [ECLI:EU:T:1996:119];

Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v. Commission*, 11 January 2000 [ECLI:EU:C:2000:1];

Case C-453/99, *Courage Ltd. v. Bernard Crehan*, 20 September 2001 [ECLI:EU:C:2001:465];

Case C-353/99 P, *Council v. Hautala*, 6 December 2001 [ECLI:EU:C:2001:661];

Case T-2/03, *VFK v. Commission*, 13 April 2005 [ECLI:EU:T:2005:125];

Cases C-295/04 to C.298/04, *Manfredi and others*, July 13, 2006 [ECLI:EU:C:2006:461];

Case C-526/04, *Laboratoires Boiron*, 7 September 2006 [ECLI:EU:C:2006:528];

Case C-64/05 P, *Sweden v. Commission*, 18 December 2007 [ECLI:EU:C:2007:802];

Case T-403/05, *Mytravel v. Commission*, 9 September 2008 [ECLI:EU:T:2008:316];

Case T-237/05, *Éditions Odile Jacob v. Commission*, 9 June 2010 [ECLI:EU:T:2010:224];

Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau GmbH V. Mc*, 29 June 2010 [ECLI:EU:C:2010:376];

Case T-111/07, *Agrofert Holding v. Commission*, 7 July 2010 [ECLI:EU:T:2010:285];

Opinion of Advocate General Mazák on Case C-360/09, *Pfleiderer*, 16 December 2010, [ECLI:EU:C:2010:782];

Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 14 June 2011 [ECLI:EU:C:2010:782];

Observations of the European Commission, pursuant to Article 15(3) of Regulation 1/2003, provided in respect of Claim No. HC08C03243 in the High Court of Justice Chancery Division, Royal Courts of Justice, *National Grid*, 03 November 2011;

Case T-437/08, *CDC Hydrogene Peroxide v. Commission*, 15 December 2011 [ECLI:EU:T:2011:752];

Case C-482/10, *Cicala*, 21 December 2011 [ECLI:EU:C:2011:868];

EWHC 869 (Ch), Case No. HC08C03243 in the High Court of Justice Chancery Division, Royal Courts of Justice, *National Grid*, 04 April 2012;  
Case T-344/08, *EnBW AG v. Commission*, 22 May 2012 [ECLI:EU:T:2012:242];  
C-404/10 P, *Commission v. Éditions Odile Jacob*, 28 June 2012 [ECLI:EU:C:2012:393];  
Case C-477/10 P, *Commission v. Agrofert Holding*, 28 June 2012 [ECLI:EU:C:2012:394];  
Case C-536/11, *Bundeswettbewerbsbehörde v. Donau Chemie AG*, 6 June 2013 [ECLI:EU:C:2013:366];  
Case C-365/12 P, *Commission v. EnBW*, 27 February 2014 [ECLI:EU:C:2014:112].

#### **4. Legislation**

Charter of Fundamental Rights of the European Union (2000/C 364/01);  
Consolidated version of the Treaty on the European Union (2012/C 326/01);  
Consolidated version of the Treaty on the Functioning of the European Union (2012/C 326/01);  
Constitution of the Portuguese Republic (Diário da República n.º 86/1976, Série I de 1976-04-10);  
Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 5.12.2014);  
European Convention of Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, 04 November 1950;  
Law No. 19/2012, 08 May 2012 (Portuguese Competition Act - Diário da República n.º 89/2012, Série I de 2012-05-08);  
Regulation (EC) No. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001);  
Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003);  
Regulation No. 1/2013 of the Portuguese Competition Authority, 29<sup>th</sup> November 2012 (Diário da República, n.º 2/2013, Série II de 3 de janeiro de 2013).

## **5. Other**

Bundeskartellamt Press Release, *Decision of Local Court of Bonn strengthens leniency programme*, 30 January 2012. Available at: [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/30\\_01\\_2012\\_Pfleiderer.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/30_01_2012_Pfleiderer.html);

Draft Proposal for a Law Transposing the Private Enforcement Directive, Portuguese Competition Authority, 22 June 2016;

Draft Proposal for a Law Transposing the Private Enforcement Directive, *Comissão de Economia, Inovação e Obras Públicas*, 11 April 2018;

European Commission Press Release, *Commission adopts new leniency policy for companies which give information on cartels*, 13 February 2002, Available at: [http://europa.eu/rapid/press-release\\_IP-02-247\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-02-247_en.htm?locale=en);

Exposição de Motivos sobre a Proposta de Anteprojeto de Transposição da Diretiva Private Enforcement, Autoridade da Concorrência, 22 June 2016;

International Competition Network, Cartels Working Group, Subgroup 1 – General Framework; Interaction of Public and Private Enforcement in Cartel Cases, Report to the ICN annual conference, Moscow, May 2007;

Nota Informativa sobre o Regime de dispensa ou redução da coima em processos de contraordenação por infração às regras de concorrência, Autoridade da Concorrência, 2012;

Notice No. 2/2016 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, 7 June 2016. Available at: [http://www.gvh.hu/en/data/cms1034640/szakmai\\_felhasznaloknak\\_kozlomenyek\\_2\\_2016\\_a.pdf](http://www.gvh.hu/en/data/cms1034640/szakmai_felhasznaloknak_kozlomenyek_2_2016_a.pdf).

## **6. Soft Law**

Communication from the Commission – Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 256, 5.8.2015);

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 (OJ C 167, 13.6.2013);

Commission Green Paper on Damages actions for breach of the EC antitrust rules, 19 December 2005, COM(2005) 672, 19.12.2005;

Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004);

Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006);

Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 127, 9.4.2016);

Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004 (OJ C 325, 22.12.2005);

Commission Staff Working Document - Practical Guide - Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – Accompanying the 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;

Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 02 April 2008, SEC(2008) 404, 2.4.2008;

Commission White Paper on Damages actions for breach of the EC antitrust rules, 02 April 2008, COM(2008) 165, 2.4.2008;

European Competition Network Model Leniency Programme, as revised in November 2012.

## **7. Thesis**

NIELEN, M.G., (2013) *Leniency material unveiled? Access by cartel victims to Commission an NMa files from a perspective of EU fundamental rights and cartel enforcement*, Utrech University;

MOURA, Sólón Emanuel Salgado, (2014) *Os Acordos de Colusão: O Direito à Informação nas Acções de Indemnização*, dissertação apresentada no âmbito do 2º Ciclo de Estudos em Direito da Faculdade de Direito da Universidade de Coimbra;

QUEIROZ, Ricardo Fernandes, (2015) *A Indemnização dos Consumidores por Violação das Regras do Direito da Concorrência*, dissertação apresentada no âmbito do Mestrado em Direito da Empresa e dos Negócios, Escola de Direito do Centro Regional do Porto da Universidade Católica Portuguesa.