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Editor: assoc. Prof. Dr. Thomas Müller, LL.M.
(t.mueller@uibk.ac.at)

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ACCESS TO EVIDENCE IN ANTITRUST DAMAGE ACTIONS IN LIGHT OF RECENT CASE LAW AND THE DRAFT DIRECTIVE

Stefan Michael Hirner

I. THE ROLE OF ANTITRUST DAMAGE ACTIONS IN EUROPE

In contrast to the USA, public enforcement of competition law through the European Commission ('Commission') as well as through the National Competition Authorities ('NCAs') has played the more important role in Europe than private enforcement, where private claimants bring a competition case to a national court and seek for compensation.[1] However, recent developments show that also in the European Union private enforcement of competition law becomes more frequent and might also affect the enforcement practice of competition law by public authorities.[2] It has to be borne in mind that practically all antitrust damage actions in Europe are so called follow-on damage claims, which means that private claimants seek for compensation after a public authority[3] has already found that there has been an infringement of Article 101 TFEU.[4] The dimension of follow-on damage claims can be significant as it is estimated that unrecovered damages of infringements of EU competition law alone amount to over EUR 20 billion annually.[5]

The European Court of Justice ('ECJ') held in two landmark cases *Courage Ltd v Crehan*[6] and *Manfredi*[7] that any individual – also third parties to a cartel agreement like end consumers – may claim damages, which have been suffered as a result of an infringement of EU competition law. However, it is for domestic law to lay down the formal and the substantive rules for such damage claims as long as these rules are in compliance with the principles of equivalence and effectiveness. This only means that antitrust damage claims based on EU competition law may not be less favourable than such damage claims based on national law and that the rules for antitrust damage claims may not be framed in a way, which would make it impossible or excessively difficult to bring a successful claim.

The Commission, which has no power to award damages to individuals, was determined to foster the right for effective compensation of damages caused by EU competition law infringements. The legislative process started in 2005 and only in June 2013 the Commission adopted its Proposal for a Directive governing actions for damages for infringements of

[1] R. Whish and D. Bailey, *Competition Law*, 7th edn (Oxford University Press, 2012), 295; H. Stakheyeva 'Removing obstacles to a more effective private enforcement of competition law' (2012) 33(9) ECLR 398; Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-06619, Opinion AG Geelhoed, para 29.

[2] D. Geradin and L. Grelier, *Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?*

[3] This does not have to be necessarily an NCA. For instance, the Austrian NCA has only the role of a plaintiff in cartel proceedings and the infringement decision has to be taken by the Cartel Court.

[4] V. Milutinovic, *The 'Right to Damages' under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond* (Kluwer Law, 2010), 244.

[5] J. Almunia, *Common standards for group claims across the EU*, Speech/10/554 (Valladolid, 2010), 4.

[6] Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, para 26-29.

[7] Joined cases C-295/04 to C-298/04 *Manfredi et al v Lloyd Adriatico et al* [2006] ECR I-6619, para 56-64.

competition law ('Draft Directive').[8] The Council approved the Proposal with several amendments in March 2014[9] and in spring 2014 the European Parliament ('EP') will be engaged with it.[10] If the Directive will be adopted then, the Member States will have two years to transpose it into domestic law.[11]

It should also be mentioned that the Commission issued not only the Draft Directive in June 2013, but also additional measures, which shall further enhance antitrust damage actions.[12] These measures consist of a practical guide for national courts on the quantification of harm in private antitrust damages actions[13] and a Recommendation on collective redress mechanisms,[14] which does not only apply to antitrust damages claims, but also to other areas. Both measures are non-binding for national courts, but can function as useful tools to further facilitate antitrust damage actions in practice. Nevertheless, in this paper only the possible impact of the Draft Directive will be addressed.

The focus of this paper will be access to the file of the cartel proceedings both on the European and on the national level for potential claimants in order to prepare or to bring an antitrust damage action. In specific the key question here is how will be dealt with information provided by leniency applicants – can it later be used in follow-on damage actions against this very same leniency applicant or can the competition authorities refuse disclosure?

II. ACCESS TO EVIDENCE OR PRIVATE VERSUS PUBLIC ENFORCEMENT?

Getting access to the file of the Commission or an NCA, which found that certain undertakings infringed EU or domestic competition law, would of course be the best scenario for claimants. Nevertheless, it is crucial for the public enforcement of competition law, that the attractiveness and eventually the effectiveness of leniency programmes are not seriously hampered.[15] An undertaking would be notably deterred to turn into a whistle-blower of a cartel in order to avoid a cartel fine, if it later has to face antitrust damage actions, which are based on disclosed information the undertaking has initially provided by itself as a leniency applicant.[16] How is this issue dealt with at the national as well as on the European level and what will be the likely impact of the Draft Directive?

A. ACCESS TO NCA FILES

Article 28 Regulation 1/2003[17] lays down an obligation for professional secrecy for NCAs, but besides this rule access to NCA files is governed by national procedural rules. However, as there is a right for compensation for infringements of EU competition law by virtue of EU law, the ECJ had to deal with

[8] European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Unio*n, COM(2013) 404 final.

[9] Council of the European Union, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union - Analysis of the final compromise text with a view to agreement*, 2013/0185 (COD).

[10] The vote in the plenary of the EP is scheduled for April 16, 2014.

[11] Article 20(1) Draft Directive.

[12] I. Vandenborre and T. Goetz 'EU Competition Law Procedural Issues' (2013) Vol 4, No 6 Journal of European Competition Law & Practice 507.

[13] European Commission, *Commission Staff Working Document: Practical guide to quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, SWD(2013) 205.

[14] European Commission, *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* [2013] OJ L 201/60.

[15] L. Guttuso 'The enduring question of access to leniency materials in private proceedings: one draft Directive and several court rulings' (2014) Vol 7 No 1 Global Competition Litigation Review 10;
A. Schwab 'Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims' (2014) Vol 5 No 2 Journal of European Competition Law & Practice 65.

[16] U. Böge 'Leniency Programs and the Private Enforcement of European Competition Law' in J. Basedow, *Private Enforcement of EC Competition Law* (Kluwer Law, 2007) 224.

[17] Council 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 [2003] OJ L 1/1–25.

access to NCA files in two landmark cases, namely *Pfleiderer*[18] and *Donau Chemie*.[19]

1. Pfleiderer decision

The background of this case was, that the German NCA, the Bundeskartellamt, imposed an infringement decision over three European manufacturers of decor paper. Subsequently, one of the main purchasers – Pfleiderer AG – submitted an application to the Bundeskartellamt to get full access to the file relating to the imposition of fines in the decor paper sector in order to prepare an antitrust damage claim. The Bundeskartellamt partially rejected that, especially insofar as documents related to the leniency applications. The issue has been brought before a German court, which asked the ECJ for a preliminary ruling whether or not parties adversely affected by a cartel must be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency.

The ECJ recognized that leniency programmes are very important tools to detect hidden cartels and that the effectiveness of these programmes could be jeopardized if documents relating to a leniency procedure will later be disclosed to possible claimants.[20] However, the ECJ also iterated that everyone is entitled to claim compensation for the harm suffered, where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU. In weighing these conflicting interests the ECJ held that the principle of effectiveness for obtaining compensation might not be seriously hampered. Nevertheless, there is no standard answer to all cases.[21] National courts or tribunals have to assess all relevant factors on a case-by-case basis and have to decide on that basis, whether the interest of effective leniency programmes or the interest of an effective right to compensation prevails. In the national procedure the German court on the basis of this ECJ ruling denied Pfleiderer access to the full file.[22]

2. Donau Chemie decision

The background of this case was an infringement decision of the Austrian Cartel court over several undertakings – one of them was Donau Chemie AG – in the market for the wholesale distribution of printing chemicals. Once the decision was final the association of undertakings in the printing sector ('VDMT') submitted an application to the Cartel court to get access to the file of the cartel proceedings in order to prepare antitrust damage claims. Section 39 para 2 of the Austrian Cartel Act provided for access to such files only if all parties to the cartel proceedings give their consent. As this consent was not given, the Cartel court would have had no choice, but to deny access to the file. But the court found in case a third party can demonstrate a legitimate legal interest in getting access to the file it is questionable in light of the ECJ decision in *Pfleiderer* whether this national rule is contrary to an effective right to compensation. The Cartel court therefore referred the matter to the ECJ.

The ECJ took the same approach it adopted in *Pfleiderer* and held that the weighing exercise of the interest of disclosure and the interest of protecting the information can only be done by a national court on a case-by-case basis, where all relevant factors of the case are considered. But the Austrian rule, which ostensibly offered absolute protection of leniency applicants and therefore gave the Cartel court no possibility to weigh the different interests at stake, is not compatible with the effective right to compensation.[23]

3. Implications of Pfleiderer and Donau Chemie

The ECJ left it to the national courts to conduct a difficult balancing test between the interests of a third party, which has a legal interest in the disclosure of the file of the cartel proceedings and of maintaining effective leniency programmes. Apparently this legal situation creates a lot of uncertainty for cartel members, who applied for leniency or were

[18] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.
[19] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECR I-0000.
[20] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, para 25-27.
[21] Ibid, para 31.
[22] G. Goddin 'Access to Documents in Competition Files: Where do we Stand, Two Years after TGI?' (2013) Vol 4, No 2 Journal of European Competition Law & Practice 117.
[23] J. Anweiler 'Country section Austria – Private enforcement: ECJ declares Austrian law on access to court files incompatible with the EU law.'

considering doing so.[24] The Commission as well as Advocate General Mazák argued in essence in *Pfleiderer* that a distinction needs to be made between self-incriminating statements voluntarily provided by leniency applicants and other pre-existing material submitted by leniency applicants. The former category of documents should not be given access to. Nevertheless, the ECJ did not adopt this approach and therefore created a situation of legal uncertainty, which might seriously hamper the effectiveness of leniency applications. It has to be borne in mind that leniency programmes are the most important tool for European competition authorities to detect hidden cartels and virtually all antitrust damage actions in Europe are follow-on damage claims. This means that by dissuading potential leniency applicants from turning to an NCA less cartel infringement decisions will be imposed and in turn less antitrust damage actions will be launched.

The ECJ partially tackled the problem of legal uncertainty in *Donau Chemie* and provided some guidance in how a national court has to conduct this balancing test.[25] Although no distinction between different categories of documents was made, the ECJ held that the national court must also take other possibilities of obtaining access to evidence into account.[26] This means if national civil procedure law provides for discovery from the defendants, the national court must make this part of its assessment. It further clarified that non-disclosure can be justified only with regard to specific documents if the disclosure of these specific documents might undermine the public interest in an effective national leniency programme.[27] But again, this notion gives a wide margin of discretion to the national courts and is very questionable whether national courts will apply it in a uniform way.

4. Impact of the Draft Directive

The Draft Directive in its latest version as amended by the Council lays down in Article 6 that global disclosure requests are not permitted, but these requests have to be formulated in a specific manner. Nevertheless, it is striking that Member States will have to provide for some sort of discovery in antitrust damage claims from the defendants. The Draft Directive makes a distinction between three categories of documents held by an NCA: First, self-incriminatory statements by leniency applicants, namely leniency corporate statements and settlement submissions are granted absolute protection and a national court may not order their disclosure. Second, there are certain documents, which may only be disclosed once a competition authority has closed its proceedings by adopting a decision. Third, any other kind of document, which does not fall under the first two categories, may be disclosed at any time. The Draft Directive would provide for clear rules for getting access to the file of the cartel proceedings held by an NCA. It defines a clear set of categories of documents and the respective levels of confidentiality, and would therefore fill the lack of clear guidance caused by the ECJ in *Pfleiderer* and *Donau Chemie*.[28] Interestingly, this is in essence the approach, which has been proposed by the Commission[29] and by Advocate General Mazák[30] in *Pfleiderer.* However, critical commentators argued that a rigid per se protection of certain documents is incompatible with the ECJ's findings in *Pfleiderer* and *Donau Chemie* as the Court based its decisions on primary law and the EU legislator is prohibited to use secondary legislation to supersede primary law.[31]

B. Access to Commission files

First of all the before mentioned Article 28 Regulation 1/2003 lays down an obligation for professional secrecy for the entire staff of the Commission as well as of the NCAs. Article 16(1) Regulation 773/2004[32]

[24] G. Goddin 'Access to Documents in Competition Files: Where do we Stand, Two Years after TGI?' (2013) Vol 4, No 2 Journal of European Competition Law & Practice 120.
[25] S. Polster 'Aktenzugang im österreichischen Kartellverfahren nach der Entscheidung Donau Chemie' (2013) No 4 Austrian Competition Journal 141.
[26] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECR I-0000, para 44.
[27] Ibid, para 48.
[28] I. Vandenborre and T. Goetz 'EU Competition Law Procedural Issues' 509.
[29] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, Opinion AG Mazák, para 17.
[30] Ibid, para 48.
[31] C. Kersting 'Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants' (2014) Vol 5 No 1 Journal of European Competition Law & Practice 3.
[32] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18-24.

further specifies that information shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information.

However, once a follow-on damage action has been launched, the national court may ask the Commission to transmit any information in its possession.[33] Further details on the duty of the Commission to transmit information to national courts are laid down in the Commission Notice on the cooperation between the Commission and the courts of the EU Member States ('Cooperation Notice').[34] The Cooperation Notice stresses that the Commission may not transmit information, which has ben voluntarily submitted by a leniency applicant, without the consent of that applicant.[35] Furthermore, confidential information and business secrets may not be disclosed, although there is no absolute prohibition. A national court needs to guarantee protection of the information and has to offer such a guarantee in advance, otherwise the Commission will not transmit the required information.[36]

In order to prepare an antitrust damage action a possible claimant may also apply for access to the file held by the Commission. This is governed in Regulation 1049/2001 ('Transparency Regulation'),[37]which has not been designed specifically for competition law matters, but to promote transparency of the decision-making process and public access to documents of the EU institutions.[38] Therefore this Regulation in principle gives every individual a right to access documents held by the EU institutions, unless one of the exceptions in Article 4 applies.[39] With regard to files of cartel proceedings – where a leniency applicant provided information – the Commission can refuse access to the entire file in order to protect the commercial interests of the undertakings of the cartel proceeding or the purpose of investigations according to Article 4(2) or to protect its decision-making process according to Article 4(3) unless there is an overriding public interest in disclosure. The Commission is frequently invoking Article 4(2) and 4(3) in such cases. This practice of the Commission has been approved by the ECJ in the case *EnBW*,[40] which will briefly be analysed.

1. EnBW decision

EnBW is a German energy distribution company and in order to prepare a damage action against certain cartelist EnBW requested access to the entire file of the Commission's Gas Insulated Switchgear case. The Commission refused access to the file and argued that the justification for a refusal of disclosure according to Article 4(2) applied and that no overriding public interest existed. On appeal the General Court ('GC') annulled the Commission decision as the Commission failed to conduct a specific analysis whether each requested document was covered by the exception in Article 4(2). However, the ECJ overruled the GC and held that the Commission is entitled to presume that the disclosure of the file of the cartel proceedings in principle undermines the protection of the commercial interests of the undertakings involved in the cartel proceeding and the protection of the purpose of the investigations relating to the cartel proceeding.[41] Such a general presumption can still be rebutted, if it can be demonstrated that a specific document is not covered by the presumption or that there is an overriding public interest in the disclosure.[42]

This ECJ decision makes it easier for the Commission to refuse access to the file of cartel proceedings in the future and also clarifies that the *Pfleiderer* case law does not apply to the files of the Commission. Therefore, this decision also increases the legal certainty for leniency applicants. Possible claimants preparing an antitrust damage action can still get access to specific documents, but they have to meet a very high threshold to rebut the general presumption. The GC held in its decision *Netherlands v*

[33] On the basis of Article 15(1) Regulation 1/2003.
[34] 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 [2004] OJ C 101/58.
[35] Para 26 Cooperation Notice.
[36] Para 23-25 Cooperation Notice.
[37] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43-48.
[38] Recitals 3 and 4 Regulation 1049/2001.
[39] J. Kloub 'White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement' (2009) Vol 5 No 2 ECJ 538.
[40] Case C-365/12P *European Commission v EnBW Energie Baden-Württemberg AG* [2014] ECR I-0000.
[41] Case C-365/12P *European Commission v EnBW Energie Baden-Württemberg AG* [2014] ECR I-0000, para 93.
[42] Ibid, para 100.

Commission[43] that the interest in seeking for compensation for the damage incurred by a cartel cannot in itself constitute an overriding public interest. It is also hard to think of documents, which are not covered by the presumption that disclosure might undermine the protection of commercial interests or the purpose of investigations and which are still relevant for bringing an antitrust damage action. Therefore it is hard to imagine under what circumstances a potential claimant can successfully rebut the presumption.

2. Impact of the Draft Directive

In the final version of the Draft Directive, as amended by the Council, a subsection has been implemented, which states that Article 6 of the Draft Directive is without prejudice to the rules and practices on public access to documents under Regulation 1049/2001. In my understanding this provision therefore corresponds to the ECJ's ruling in *EnBW* and the practice of the Commission to invoke Article 4(2) and 4(3) Regulation 1049/2001 to refuse disclosure of the files of cartel proceedings can be maintained after the adoption of the Draft Directive. This also means that the distinction between different categories of documents does not apply to cartel files held by the Commission.

III. CONCLUSION

With regard to access to the files of the Commission, the ECJ decision in *EnBW* clarified that the non-disclosure practice of the Commission on the basis of Article 4(2) Regulation 1049/2001 is allowed. As the Draft Directive will not alter the rules with regard to Regulation 1049/2001, legal certainty has been established on the European level as the *Pfleiderer* case law does not apply to the files of the Commission. However, it can be criticized that the distinction between different categories of documents does not apply to the cartel file of the Commission. A stringent application of this approach would have also ensured legal certainty for leniency applicants, but would not operate that much to the detriment of the interest of potential claimants, who have a legitimate legal interest in partial disclosure.

The ECJ decision in *Pfleiderer* caused quite some legal uncertainty for leniency applicants on NCA level, as it is not clear how national courts will balance the diverging interests in question. In *Donau Chemie* the ECJ gave a bit of guidance how national courts have to conduct this balancing test, but this was definitely not a far-reaching clarification. In my opinion the ECJ should have followed Advocate General Mazák and the Commission and draw a distinction between self-incriminatory information voluntarily disclosed by leniency applicants and other documents, while the former category should enjoy protection from disclosure to third parties. The Draft Directive would therefore increase legal certainty as it establishes different categories of documents with the respective level of confidentiality.

Over the last years it seemed as if public and private enforcement contradicted each other, but ideally they should complement each other.[44] Given the fact that antitrust damage actions are usually launched after an infringement decision of a competition authority, hampering the effectiveness of leniency programmes – the most important detection tool of hidden cartels – would also decrease the number of future follow-on actions. Therefore, legal certainty with regard to leniency applications is a welcoming development.

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Contact:
Stefan Michael Hirner
LLM student in EU Competition Law, University of Amsterdam
stefan.hirner@gmail.com