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I. INTRODUCTION

An issue of growing importance in global competition law is the risk that materials produced pursuant to one foreign sovereign's confidential investigations or proceedings will later be subject to civil discovery in the United States. In many jurisdictions, in particular in the European Union ("EU") and United States, aggressive cartel enforcement has been significantly aided by programs offering leniency to cartel participants. Key to these programs are promises by antitrust enforcers that potentially incriminating documents or oral statements submitted to them by cartel participants will be protected from disclosure in other jurisdictions or proceedings. Indeed, the globalized nature of many modern cartels had made such leniency and confidentiality programs critical—and arguably indispensable—to anti-cartel prosecution.

However, news that the European Commission ("Commission") or the U.S. Department of Justice's Antitrust Division ("DOJ") is conducting an investigation often prompts the filing of civil class action suits in the United States. Counsel for plaintiffs in these private antitrust actions often seek discovery of materials submitted by defendants to the EU or other foreign jurisdictions. Accordingly, U.S. courts are increasingly faced with resolving a fundamental conflict between the liberal scope of U.S. discovery and sovereign promises that certain information or evidence would remain confidential. Because resolving this conflict requires a case-by-case analysis under doctrines such as international comity, litigants and sovereigns alike are faced with uncertainty. Nevertheless, the outcome of recent proceedings has generally favored the preservation of confidentiality against U.S. civil discovery demands. This article will summarize recent case developments and court rulings addressing the issue of whether documents provided in confidence to the Commission or DOJ will be subject to discovery in private antitrust actions in the United States.

II. THE IMPORTANCE OF CONFIDENTIALITY IN GOVERNMENT CARTEL INVESTIGATIONS

In many ways, the sovereign promise of confidentiality lies at the core of modern anti-cartel efforts.[2] Cartels are uniquely difficult to probe when the participants present a united front—and

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uniquely vulnerable to cheaters and informants when unity breaks down. For this reason, many sovereigns have programs in place that encourage cartel participants to confess and cooperate with government enforcers, in exchange for amnesty or at least a reduced fine. Such leniency programs have proven remarkably successful and are now widely considered critical to public anti-cartel efforts.

A. The DOJ Leniency Program

The U.S. Justice Department administers a corporate leniency program that offers significant leniency to cartel participants who first inform on their fellow cartel participants and then continue cooperating with the subsequent investigation.[3] "The leniency program is clearly the [Antitrust] Division's most effective generator of international cartel cases" because it "has led to the detection and prosecution of more international cartels than all of the Division's search warrants, consensual monitoring, and FBI interrogations combined."[4] The amnesty program's success depends on obtaining the cooperation of would-be informants by "offer[ing] incentives to cartel members who voluntarily disclose their criminal conduct and cooperate with prosecutors,"[5] "[b]ecause cartels operate in secret, [and] obtaining the cooperation of insiders is the best and frequently the only way to break open a cartel."[6]

The DOJ believes ongoing confidentiality is a critical element of leniency or amnesty programs around the globe:

> Confidentiality is one of the hallmarks of leniency programs, and a lack of confidentiality is a major disincentive for leniency applications. . . . Many leading members of the private antitrust bar who represent leniency applicants have advised . . . that the Division's promise of confidentiality is a critical, and in some cases determinative, factor that companies rely upon in making the decision to self-report pursuant to the Division's leniency program.[7]

Therefore, the DOJ "holds the identity of amnesty applicants in strict confidence" based on "the common-sense understanding that corporations or individuals will be unwilling to step forward unilaterally to admit their guilt if their request and the information they supply is made public."[8] "[T]he Division will not publicly disclose the identity of an amnesty applicant" because "both the Division and any applicant for amnesty rely on and expect their discussions to remain confidential."[9] For that reason, the Justice Department seeks to protect from discovery materials "that may have been specially created—or statements that may have been specifically made—in connection with an amnesty application."[10]

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[2] *See generally*, R. Grasso, The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight? 29 MICH. J. INT'L L. 565 (2007-08).

[3] *See* U.S. Dep't of Justice, Antitrust Division Manual, at III-102-09 (4th Ed. 2008). This program is "the primary engine of the government's anti-cartel enforcement." Br. of United States, Empagran, S.A. v. F. Hoffman-Laroche, Ltd., No. 01-7115, 2005 WL 388672, at *19 (D.C. Cir. Feb. 16, 2005).

[4] Letter of S. Hammond, Deputy Assist. Att'y Gen. for Crim. Enf., Antitrust Div., Dep't of Justice, In re Flat Glass Antitrust Litig., No. 08-180 (Doc. No. 200-6), at 2 (Oct. 6, 2009) (hereinafter "DOJ Flat Glass Letter").

[5] Empagran Br. at *19.

[6] DOJ Flat Glass Letter at 2.

[7] *Id.* at 3.

[8] Br. of United States as amicus curiae, In re Flat Glass Antitrust Litig. (Flat Glass I), MDL No. 1200, Misc. No. 97-550, at 5-6 (W.D. Pa. Mar. 26, 1998).

[9] *Id.* at 6.

[10] *Id.* at 7. *See* Br. of United States, Nelson v. Pilkington, No. 98-3498, at 13-14 (3d Cir. Dec. 7, 1998).

B. The Importance of Confidentiality in EU Cartel Investigations

The European Commission operates a leniency program that closely approximates the U.S. model. Similar to the DOJ's view, the Commission believes that strict confidentiality is essential to the program's viability and success. Indeed, as the former Director-General of DG-Competition explained in a recent public submission to a U.S. court:

> The disclosure of such information submitted on a voluntary basis during the European Commission's investigation could seriously undermine the effectiveness of the Commission's and other authorities' antitrust enforcement actions. In particular, entities that voluntarily cooperate with the European Commission in revealing cartels cannot be put in a worse position in respect of civil claims than other cartel members which refuse cooperation. The ordered production, or uncertainty in this regard, of submissions that a company has prepared and produced exclusively for the European Commission's antitrust proceedings in civil proceedings for damages could seriously undermine the effectiveness of the Leniency Programme and jeopardise the European Commission's investigation of cartels.[11]

For these reasons, EU law accords strict confidentiality to materials submitted by leniency applicants, and to protect this confidentiality against unwarranted trespass—such as by U.S. civil litigants seeking discovery—the Commission instituted an oral procedure that minimizes the quantity of discoverable leniency application materials.[12]

C. The DOJ Recognizes the Importance of Foreign Confidentiality in Global Enforcement Efforts

The DOJ recognizes that the interconnected nature of modern cartels is such that the viability of foreign leniency programs is also critical to U.S. anti-cartel enforcement efforts:

> [t]he [Antitrust] Division has advised a number of foreign governments in the drafting and implementation of effective leniency policies [because t]he emergence of leniency polices of different governments with similar requirements has made it much easier and far more attractive for companies to develop a global strategy for reporting international cartel offenses and had led leniency applicants to report their conduct to multiple jurisdictions simultaneously.[13]

For instance, "the European Commission has been one of the Division's closest partners in the fight against international cartels" and "[o]ver ninety percent of the international cartels that have been prosecuted by the Division were active in Europe as well as in the United States."[14] Therefore, the U.S. government has argued, enhancing anti-cartel enforcement in the United States requires U.S. courts to respect foreign sovereign guarantees of confidentiality across international borders. "If companies that have dual exposure in the United States and the European Union are dissuaded from applying for leniency with the European Commission, then they may also choose not to apply for leniency in the United States."[15] Such a state of affairs, the U.S. government believes, would have serious ramifications for domestic enforcement efforts: "Due to the critical role of the Division's leniency program in its international anti-cartel enforcement program as described above, harm to the EC leniency program could result in harm

[11] Declaration of P. Lowe, In re Flat Glass Antitrust Litig. (Flat Glass II), No. 08-180 (Doc. No. 200-3), at 5 (Oct. 7, 2009) (hereinafter Lowe Decl.).

[12] *Id.* at 4.

[13] DOJ Flat Glass Letter at 3.

[14] *Id.* at 4.

[15] *Id.*

to the Division's ability to detect and successfully prosecute international cartels that target U.S. businesses and consumers."[16]

D. Confidentiality Extends to All Submissions in the EU Investigation File

In Europe, once a Statement of Objections ("SO") is issued, cartel co-defendants named in the SO are provided with equal access to the Commission's Administrative File, which contains documents seized from and other submissions by or about each of the co-defendants in a particular prosecution. The creation and exchange of such investigatory material is central to European legal procedures and depends on cooperation from private parties, which in turn arises from the Commission's assurances that the information will be accorded strict confidentiality under EU law. Consequently, none of the parties to any given investigation—including the Commission itself—may use the confidential material in any matter or for any purpose other than the investigation itself.[17]

Thus, EU investigation procedures are designed to encourage private parties to provide sensitive material in detrimental reliance on the Commission's legally binding assurance of confidentiality. This guarantee of confidentiality lies at the heart of the Commission's ability to detect and punish unlawful cartels, and anything that damages that guarantee would undermine the EU's sovereign interest in preventing cartels and risk serious economic harm to consumers in the European Union. Moreover, according to DOJ, such a result would harm the EU as well as the United States: "the disclosure of such documents will harm the EC's leniency program and its investigative abilities and could have a corresponding negative impact on the Antitrust Division's leniency program and its international anti-cartel enforcement program."[18]

II. THE U.S. LEGAL FRAMEWORK GOVERNING DISCOVERY

Despite the broad sovereign interest in preserving confidentiality to promote the viability of anti-cartel efforts, the present state of U.S. law creates significant uncertainty with regard to the ability of the United States or of a foreign government to protect such highly sensitive materials from discovery in U.S. civil litigation. In particular, Rule 26(b) of the Federal Rules of Civil Procedure appears to create a general presumption in favor of broad discoverability, and there is no explicit countervailing statute or procedural rule that would clearly protect information provided by leniency applicants, or co-defendants in Europe, under the aegis of confidentiality. Accordingly, defendants and governments looking to protect such materials from discovery in U.S. civil proceedings must rely on ambiguous doctrines, such as comity, the doctrine of foreign or investigatory privilege, and possibly even the act of state doctrine. The uncertain or contextual nature of these doctrines deprives parties of pre-litigation certainty, and the concomitant risk that such materials will be discoverable by U.S. civil plaintiffs may undermine the expectation of confidentiality on which modern anti-cartel efforts depend.

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[16] *Id.*

[17] *See* Antitrust Modernization Commission, Submission by Directorate General of the European Commission, § 2.4; EC Treaty art. 287, 2002 O.J. (C 325) 1; EC Council Regulation of 16 December 2002, no. 1/2003 art. 28, 2003 O.J. (L1) 1; EC, Staff Regulations of Officials of the European Communities, art. 17 (Jan. 5, 2004); EC Commission Regulation of 7 April 2004, no. 773/2004 art. 15(4), 2004 O.J. (L 128) 18 ("Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty [arts. 101-102 TFEU]")

[18] DOJ Flat Glass Letter at 1.

A. Comity as a Basis of Protecting Confidential EU Materials

International comity is a doctrine of U.S. law that encompasses "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[19] It is "more than mere courtesy and accommodation," and represents "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws."[20] "Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect."[21]

International discovery is one of the core conflicts that comity addresses. Courts must "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position," and "[j]udicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests."[22] "When it is necessary to seek evidence abroad, . . . the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses."[23]

Comity requires U.S. courts to balance competing interests in a manner akin to a conflict of law analysis. U.S. courts do not apply a single, unified set of factors when assessing comity. Instead, different courts apply slightly different factors. One approach, favored by the U.S. Supreme Court in one case, follows the Restatement (Third) of Foreign Relations Law in considering:

- the importance to the investigation or litigation of the documents or other information requested;
- the degree of specificity of the request;
- whether the information originated in the United States;
- the availability of alternative means of securing the information; and
- the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[24]

The last factor is considered "the most important."[25] A slightly different test, applied by prominent courts such as the Second Circuit, applies four principal factors derived from the Restatement (Second) of Foreign Relations Law:[26]

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[19] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[20] Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

[21] *Id.*

[22] Societe Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 546 (1987) ("Aérospatiale").

[23] *Id.*

[24] Restatement (Third) of Foreign Relations Law, § 442(1)(c) (1987); Aérospatiale, 482 U.S. at 544 n.28.

[25] Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1476 (9th Cir. 1992).

[26] The Restatement (Second) provides in full:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction in

- The vital national interests of each of the states;
- The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person from whom discovery is sought;
- The importance to the litigation of the information and documents requested; and
- The good faith of the party resisting discovery.[27]

Despite the differences between the two sets of factors, both tests share a focus on the competing interests of the sovereigns involved. That is, courts can and should place great weight on how the application *vel non* of comity will affect important sovereign interests in the United States and abroad. This assessment creates an opportunity for foreign (and U.S.) sovereigns to educate U.S. courts about their law and the likely effect of an adverse ruling on foreign and U.S. interests and public policies. And, as will be seen, sovereigns that have intervened in this manner have largely obtained favorable results.

B. Other Doctrines Protecting Confidentiality of U.S. and EU Materials

There are other, albeit somewhat less compelling, doctrines that sovereigns and defendants seek to apply in order to preserve the confidentiality of sensitive materials produced to governments in the course of cartel investigations.

Privilege law provides one critical basis for protecting leniency materials from U.S. discovery. Where parties were encouraged to provide statements or information in reliance on the sovereign guarantees of confidentiality—particularly if the assurances were backed by law—those statements might be treated as privileged from discovery. One such privilege may include the so-called law enforcement investigatory privilege, which requires courts to balance the public interest in non-disclosure with the needs of particular litigants.[28] Documents thus privileged from discovery should be entitled to the highest level of protection.[29] Privileged documents are also excluded from the ambit of 28 U.S.C. § 1782(a), which authorizes (but does not require) a federal court to order the production of non-privileged materials to foreign litigants.[30] Moreover, discovery privileges are not limited to those specifically established within the United States. Indeed, the Restatement (Third) explains that "a communication privileged where made—for instance, confidential testimony given to a foreign government investigation under assurance of privilege—is not subject to

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the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) of Foreign Relations Law, § 40 (1965).

[27] Minpeco, S.A. v. Conticommodity Services, Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987); *see* First American Corp. v. Price Waterhouse LLP, 154 F.3d 16, 22 (2d Cir. 1998).

[28] *See* In re Sealed Case, 856 F.2d 268, 271-72 (D.C. Cir. 1988).

[29] *See* Fed. R. Civ. P. 26(b)(1) (discovery extends only to matters that are "nonprivileged"); Fed. R. Ev *Id.* 501 ("the privilege of a witness, person, government, State, or political subdivision thereof, shall be governed by the principles of the common law").

[30] *See* Intel Corp. v. Adv. Micro Devices, Inc., 542 U.S. 241, 260-63 (2004).

discovery in a United States court."[31] Yet the resort to privilege should be, at best, a fallback position because sovereigns seeking to apply these exceptions have obtained mixed results.

A more untested argument in favor of preserving sovereign-guaranteed confidentiality in U.S. courts arises under the act of state doctrine. This doctrine does not allow courts to "inquir[e] into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[32] "In every case in which [the Supreme Court has] held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."[33] Under this analysis, a party would likely argue that judicial orders countermanding legally-mandated confidentiality—for instance, the confidentiality mandated by EU law—would call into question the validity of public acts by a sovereign authority within its own borders. In such a case, courts cannot compel the discovery of documents protected under foreign law without simultaneously declaring invalid and ineffective the official acts of a foreign sovereign that extended the confidential status to the documents. Nevertheless, no court has yet ruled on the propriety of applying the act of state doctrine to foreign privileges.

III. APPLICATION OF GENERAL PRINCIPLES IN RECENT ANTITRUST CASES

U.S. courts have not reached consistent conclusions in cases where antitrust plaintiffs seek to discover U.S. leniency application materials or materials produced for or generated in an EU cartel proceeding. However, the general trend in cases over the past decade suggests that sovereigns are more aggressively pursuing their interests in protecting confidentiality, and courts may be growing more sensitive to the risk to enforcement efforts posed by such discovery demands. This is reflected in four cases since 2002: the Commission's unsuccessful amicus filing in the Vitamins class action; the Commission's successful amicus filings in the Methionine and Rubber Chemicals class actions; and the Commission's recent—and rare—intervention in the second Flat Glass action seeking reconsideration of the district court's order granting full discovery to plaintiffs of certain defendants' European investigatory materials.

A. U.S. Leniency Materials

1. *Flat Glass I*

In the late 1990s, U.S. civil plaintiffs filed civil antitrust actions against domestic flat glass producers, alleging a price-fixing conspiracy. The actions were consolidated into a Multi-District Litigation ("MDL") in the Western District of Pennsylvania in 1998, *Flat Glass I*.[34] Shortly before, the plaintiffs in one of the pre-consolidated actions had filed a motion seeking discovery of "[a]ll documents relating to any application to the Antitrust Division of the United States Department of Justice under its Corporate Leniency Policy, with respect to any conduct or activity relating to the

[31] Restatement (Third) of Foreign Relations Law, § 442 cmt. d (emphasis added); *see also* White v. Kenneth Warren & Son, Ltd., 203 F.R.D. 369, 372 (N.D. Ill. 2001) ("if a privilege is recognized in a foreign country, then comity requires us to apply that country's laws to the documents at issue.") (citing McCook Metals L.L.C. v. Alcoa, Inc., 192 F.R.D. 242, 256 (N.D. Ill. 2000)).

[32] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); *see also* Restatement (Third) of Foreign Relations Law § 443(1) (courts should not invalidate the "acts of a governmental character done by a foreign state within its own territory and applicable there").

[33] W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990).

[34] In re Flat Glass Antitrust, MDL No. 98-0550 (W.D. Pa.) (*hereinafter* Flat Glass I).

manufacture, marketing or sale of flat glass."[35] But the defendant had entered into a consent decree with the United States in 1994 regarding civil and criminal matters,[36] and the Division was then conducting a grand jury investigation into allegations of criminal anticompetitive conduct in the flat glass industry.

In response, the United States filed an amicus brief opposing the discovery request.[37] In its brief, the United States argued that any such materials were protected by two interrelated privileges: the law enforcement investigatory privilege, and the informer's privilege.[38] The district court granted the plaintiffs' motion to compel, holding that the balance of interests favored compelling discovery despite the law enforcement privilege, suggesting that such privileges were unnecessary to secure cooperation with government investigations.[39] The United States filed an appeal with the Third Circuit, raising again the argument that the law enforcement privilege protected these materials from discovery. [40]After oral argument in April 1999, the United States entered into a settlement agreement with the plaintiffs, vacating the district court's order. Although the Third Circuit did not have an opportunity to weigh in on the decision below, the fact that the district court had compelled discovery of amnesty-related documents created a direct threat to the U.S. government's leniency program.

2. *Intel v. AMD*

As noted above, non-privileged confidential materials are not expressly protected from discovery. In fact, federal law authorizes—but does not require—district courts to allow discovery to foreign litigants of any or all non-privileged materials. Indeed, in *Intel Corp. v. Adv. Micro Devices,*[41] a case involving the sought-for discovery by one foreign litigant of U.S. litigation materials that were subject to a protective order, the U.S. Supreme Court determined that the materials did not need to be independently discoverable in either U.S. or foreign proceedings to qualify under § 1782. Therefore, under the prevailing statutory regime, non-privileged confidential materials (potentially including U.S. and EU leniency applications and associated investigative documents) may be subject to discovery.

3. *In re Micron Technology*

The unsettled outcome in disputes like the first *Flat Glass* MDL did not resolve the issue of discovery of the DOJ's leniency program materials, nor did the enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004,[42] a law that encouraged (but did not require) DOJ leniency applicants to cooperate with civil plaintiffs in exchange for limitations on their civil liability. [43]The importance of confidentiality to the DOJ leniency program was recently stressed by the Antitrust Division in opposing discovery of statements made to the DOJ by

[35] Br. of Plaintiffs, The Lurie Companies, Inc. v. Pilkington, No. 97-1766, Request No. 3 (W.D. Pa. Oct. 10, 1997).

[36] *See* 59 Fed. Reg. 30,604, 30,608 (1994),

[37] Br. of United States as amicus curiae, Flat Glass I (Mar. 26, 1998).

[38] *Id.* at 7-14.

[39] Order, Flat Glass I, at 4, 6 (July 20, 1998).

[40] Br. of United States, In re Flat Glass I, No. 98-3498, 14-25 (3d Cir. Dec. 7, 1998).

[41] Intel Corp. v. Adv. Micro 542 U.S. 241, 260-63 (2004).

[42] Antitrust Criminal Penalty Enhancement and Reform Act of 2004,[42] Pub. L. 108-237, codified at 15 U.S.C. § 4301 et seq. ("ACPERA")

[43] *See* In re TFT-LCD (Flat Panel) Antitrust Litig., 618 F.Supp. 2d 1194, 1194-95 (N.D. Cal. 2009) (confirming that the 2004 Act did not mandate cooperation if the applicant did not seek ACPERA's damage caps).

employees of a leniency applicant in the recent case of *In re Micron Technology*.[44] In a Memorandum Opinion issued on February 1, 2010, the Court denied plaintiffs' motion to compel production by the DOJ of notes of interviews of officers and employees of Micron Technology, Inc. ("Micron"), which had been made to the Antitrust Division in support of Micron's leniency application in the DRAM Antitrust Investigation. Plaintiffs were seeking the DOJ's records of interviews with Micron officers and employees in a securities lawsuit brought by shareholders of Micron, alleging that Micron had committed securities fraud by failing to disclose its participation in the price-fixing scheme. The Court agreed with the DOJ's position that "the government's disclosure of its investigative memorandum will strongly damage the integrity of the Division's leniency program, current open investigations, and the ability to pursue investigations in the future."[45] Accordingly, the Court ruled that these materials were protected from disclosure under the law enforcement privilege.

B. EU Leniency and Investigative Materials

1. *In re Vitamins*

In the *Vitamins* antitrust litigation, a case involving an alleged cartel reaching Japan and Europe, the district court was confronted with plaintiffs' motion to compel discovery of the defendants' corporate statements made to the Commission in the context of its leniency program. In response, the Commission submitted a letter in October 2001 arguing that:

> Should all documents and statements provided to the Commission by companies/US defendants as a result of a leniency application, have to be communicated to US plaintiffs in the course of a US civil litigation, the effectiveness of the EU antitrust procedures could indeed be seriously undermined.[46]

The district court granted the plaintiffs' motion, holding that the Commission's concerns were "insufficient to protect the defendants' submissions to these authorities from disclosure standing on their own and when weighed against the U.S. interests in open discovery and enforcement of its antitrust laws."[47] The Commission then intervened as an *amicus curiae* and filed a request for reconsideration, raising for the first time the argument that the documents were protected by the law enforcement investigatory privilege.[48] The court rejected the request, holding that a "full comity analysis" had already been completed, and that there was a strong presumption that the prior order was correct. Importantly, the court also held that the law did not support "the proposition that a governmental authority may invoke the privilege to protect documents in the hands of a third party."[49] Thus, the privilege did not apply here because the documents were in the defendant's custody,[50] and comity was held to favor production under U.S. procedures.

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[44] In re Micron Technology Inc. Securities Litigation, Case No. 09-mc-00609 (Doc. No. 17) (D.D.C. Feb. 01, 2010)

[45] *Op.* at p. 11.

[46] Letter of De Bronett, & Rec. of Special Master, In re Vitamins Antitrust Litig., 2002 U.S. Dist. LEXIS 26490, No. 99-197, 8 (D.D.C. Jan. 23, 2002) and 25815 (Dec. 18, 2005) (emphasis added); *see also*, K. Nordlander, Discovering Discovery: US Discovery of EC Leniency Statements, 2004 E.C.L.R. 646, 650-51.

[47] Vitamins at 81.

[48] Vitamins, at 32; Br. of Commission, In re Vitamins Antitrust Litig., 4-5 (2002).

[49] Rep. of Special Master, at 41.

[50] *Id.* at 42,

2. *In re Methionine*

About the same time as the *Vitamins* case, the Northern District of California was confronted by a similar discovery request implicating a defendant's EU leniency application materials (with the important exception that the plaintiffs already had possession of a redacted copy of the defendant's corporate statement). But the outcome was very different: the court denied the motion to compel.[51] After the motion was filed, the Commission sent a letter to the court that incorporated its amicus brief filed in the *Vitamins* matter. The court found the Commission's submissions particularly important: "This is not a case of the parties merely speculating over how a foreign government might feel about such an action" because "the foreign government itself had clearly stated its position and the reasons why the production of the documents would harm its interests."[52] By contrast, the plaintiffs' interests were more limited because "[they] already have the ability to question witnesses ... [and] have not been impeded in their independent quest for information."[53] Not only did the court find that the Commission's interests in preserving confidentiality warranted denying the plaintiffs' motion under comity,[54] but it also held that, in the alternative, the confidentiality should be protected under the law enforcement investigatory privilege.[55]

3. *In re Rubber Chemicals*

Five years after the *Methionine* litigation, the Northern District of California again had the opportunity to weigh in on the confidentiality of materials related to the European Commission's leniency program. In this decision, *Rubber Chemicals*, the court promulgated a powerful and persuasive comity analysis that strongly favored non-production of confidential EU materials in U.S. civil litigation—an analysis that may have ready application in many, if not most, cases in which civil plaintiffs seek discovery of confidential EU materials.[56] In this case, the plaintiff demanded that the defendant produce all business documents it had produced to the Commission, including communications between the defendant and the Commission. The defendant objected, and submitted a letter from the Commission opposing discovery. The district court first noted the Commission's apparent strong feelings about the matter.[57]

Second, the court applied the comity doctrine (the version enunciated in *Aérospatiale*) to "conclude that the principles of comity outweigh the need for production of the EC documents."[58] Applying the first comity factor (importance of the documents to the litigation), the court explained that "courts are less inclined to ignore a foreign state's concerns where the outcome of litigation 'does not stand or fall on the present discovery order.'"[59] Considering that the defendant had already "produced all business records . . . turned over to the Commission" and "documents relating to the investigation by the [Justice Department], including all documents relating to any

[51] Report of Special Master, In re Methionine Antitrust Litig., MDL No. 00-1311 CRB (N.D. Cal. June 17, 2002); *see* Nordlander at 652

[52] *Id.* at 13; *see* Nordlander at 652.

[53] *Id.* at 9.

[54] *Id.* at 13,

[55] *Id.* at 14.

[56] In re Rubber Chemicals Antitrust Litig., 486 F.Supp. 2d 1078 (N.D. Cal. 2007).

[57] *Id.* at 1081 n.2 (citing the Commission's briefs in Vitamins and Methionine).

[58] *Id.* at 1082.

[59] *Id.* at 1082-83

actual or proposed amnesty agreement, or plea," the court concluded that the withheld documents at issue in the plaintiff's motion were neither important nor relevant to the litigation.[60]

Third, the court found that the third comity factor (whether the information originated in the United States)[61] favored non-production: after noting that the documents were European in nature, the court concluded that "[t]he fact that [the defendant] has access to these documents in the U.S. is not dispositive."[62]

The fourth comity factor (whether the information sought can be obtained through alternative means) also favored applying comity because the defendant had already "produced the documents exchanged with the DOJ in the course of its investigation, including any amnesty or plea agreement," and because the publicly-available Commission decision simply "recite[s] the entire file."[63]

Finally, the court found that the fifth comity factor (balancing the interests of the two states) strongly favored non-production in light of the Commission's "strong objection to the production of the statements sought by [plaintiff]" which also "raises some concerns that discovery of the EC documents could impact U.S.-E.U. cooperation in the enforcement of the antitrust laws." [64]In short,

> [i]t seems that any marginal benefit that the plaintiff would gain from disclosure is outweighed by the impact that disclosure will have on the Commission's interests in the effective enforcement of its competition laws and its cooperation with the U.S. to enforce those laws internationally, especially considering that the other factors substantially disfavor production.[65]

The *Rubber Chemicals* court premised its decision not to compel production in U.S. civil litigation of documents that are confidential under EU law on the conventional comity doctrine. But this analysis had two essential components. First, the court found that the most important factor—the balance of competing national interests—favored non-production where the foreign state had filed briefs or letters opposing discovery, This was reinforced by many or most of the less critical comity factors that demonstrated the documents' small importance in the litigation. But there was one feature of the *Rubber Chemicals* decision that may distinguish it from others: the defendant had already produced some or all of the materials it provided to the DOJ pursuant to the corporate leniency program. In other words, documents presumably more relevant to cartel activities in the United States, as opposed to in the EU, had already been produced, reducing thereby the plaintiff's perceived need for the additional documents at issue. Nevertheless, this unique feature has not been treated as necessary by more recent courts applying *Rubber Chemicals*.[66]

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[60] *Id.*

[61] The defendant did not object under the second comity factor (specificity of the request). *Id.* at 1083.

[62] *Id.* at 1083.

[63] *Id.* at 1084 (citation and quotation marks omitted).

[64] *Id.* at 1084.

[65] *Id.*

[66] *See, e.g.*, In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-01819, Doc. No. 624, slip op. at 3 (Jan. 5, 2009) (denying discovery of defendants' documents produced to foreign investigative bodies pursuant to the "reasoning set forth" in Rubber Chemicals and Methionine).

4. *In re Flat Glass*

In the wake of *Rubber Chemicals*, the DOJ and the Commission moved to assert their common interest in preserving the confidentiality of EU materials in a pending matter before the Western District of Pennsylvania. In the *Flat Glass II* MDL, the plaintiffs filed a motion to compel one of the defendants to produce a wide variety of European documents that it had obtained during the Commission's prosecution. These documents included third party materials that had come into the defendant's possession through the EU's so-called Access to File procedure, as well as the Commission's own Statement of Objections and other sensitive material reflecting on the Commission's investigation and prosecution. As in *Rubber Chemicals*, the Commission prepared a letter that the defendant submitted to the court along with its opposition brief. Nevertheless, in July 2009 the court ruled in the plaintiffs' favor, holding in a brief memorandum opinion that comity did not require non-production.[67] In light of this ruling, in October, 2009, the Commission took the unusual step of filing a request to intervene in the *Flat Glass* litigation as a party to the proceedings. At the same time, it also filed a motion to reconsider the discovery order on comity grounds. These motions included two critical supplementary materials: a declaration by the Director-General of DG-Competition, and a letter from the Justice Department's Antitrust Division. Through these public papers, the Commission argued that the plaintiffs' motion to compel should be partially denied on reconsideration on comity grounds.

First, the Commission's papers strongly argued that the sovereign interests of the United States and EU in enforcing global anti-cartel policies would be undermined if the Commission's confidential investigative materials were to be used in U.S. civil antitrust proceedings. The Commission described in outline its peculiar (to U.S.-trained lawyers) process for exchanging discovery during its investigation and prosecution of cartel activities, and reiterated many of the same arguments that it had already made to the U.S. Antitrust Modernization Commission in April 2007.[68] Specifically, as related above in Section I, the Commission argued that disclosure of confidential information obtained by defendants through the Access to File process "could seriously undermine the effectiveness of the Commission's and other authorities' antitrust enforcement actions."[69] The Commission further submitted "that authorizing discovery in American litigation of documents that are strictly confidential under European competition law would be highly detrimental to the sovereign interests and public policies of the European Union, and would substantially undermine the Commission's ability to detect and punish unlawful cartel activity in the European Union."[70] Not only would such a consequence adversely affect Europe, but "the ramifications of increased cartel activity could also cause substantial harm in other places, including the United States."[71]

The Justice Department concurred. In its letter, the DOJ recited the importance of the leniency program in detecting and punishing cartels in the United States and abroad, and warned that "harm to [the EU's] leniency program[] could result in harm to the [U.S.]'s leniency program and corresponding harm to the [U.S.]'s ability to detect and prosecute international cartels."[72] Thus, "[t]urning over information provided by a leniency applicant will create disincentives for

[67] Order, In re Flat Glass Antitrust Litig., No. 08-180 (Doc. No. 185) (July 29, 2009).
[68] *See* http://govinfo.library.unt.edu/amc/comments/request_comment_fr_28902/international_comments.pdf.
[69] Lowe Decl. at 5.
[70] *Id.* at 6.
[71] *Id.*
[72] DOJ Flat Glass Letter at 1.

companies to apply for leniency in the European Union. If companies that have dual exposure in the United States and the European Union are dissuaded from applying for leniency with the European Commission, then they may also choose not to apply for leniency in the United States," which "could result in harm to the [Antitrust] Division's ability to detect and successfully prosecute international cartels that target U.S. businesses and consumers."[73] In short, the U.S. and EU interests and policies worked in harmony, and unrestrained U.S. civil discovery created undue risks to the ability of both sovereigns to detect and punish unlawful cartels.

In addition to addressing the principal comity factor (competing national interests), the Commission further argued that the remainder of the comity factors also supported non-production of the bulk of the documents sought in discovery. As in *Rubber Chemicals*, the Commission argued that the materials did not originate in the United States, and that the materials were not dispositive of the plaintiffs' litigation. Moreover, the Commission noted that many of the documents sought were discoverable through alternative means; for instance, EU law did not prohibit the plaintiffs from obtaining pre-existing third-party business documents by issuing discovery requests on each of those parties, rather than seeking all of the documents that one defendant had come to possess via the confidential Access to File procedure.

Although the court granted the Commission's motion to intervene, the court never reached the merits of the motion to reconsider. Instead, the parties entered into a consent order that vacated the original order and substituted it with one that substantially reflected the Commission's initial demands.

IV. CONCLUSIONS

The broad scope of U.S. civil discovery remains a potential threat to the continued viability of the U.S. and EU leniency programs and to the preservation of the EU's specific procedures for sharing evidence with all co-defendants during an anti-cartel prosecution under the aegis of confidentiality. Under Rule 26, U.S. plaintiffs will likely continue to attempt to compel production of U.S. leniency application materials, or confidential materials in the possession of one or more cartel defendants in the wake of the Commission's prosecution of the same defendants for conduct in Europe. As noted, there is no explicit provision of U.S. law that specifically prevents the discovery of materials that are confidential in foreign states. Thus, defendants and foreign sovereigns must resort to broad doctrines such as international comity to oppose U.S. discovery. Although these doctrines are contextual and require case-by-case analysis, opposition by the United states. and EU have proven remarkably persuasive, and now there appears to be a growing consensus that the importance to the sovereign interests of the United States and the EU of preserving the viability of anti-cartel leniency programs warrants applying privilege or comity principles more widely than in other contexts. Nevertheless, the EU and United States will have to remain vigilant and intervene in appropriate cases where plaintiffs seek discovery of confidential materials. In such cases, the two sovereigns (and defendants from whom discovery is sought) would benefit from continuing with the successful *Rubber Chemicals/Flat Glass* approach by drawing the attention of the courts about the fact that preserving confidentiality is in the vital sovereign interests of both the United States and EU.

[73] *Id.* at 4.