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Danger? Some Comments from
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Perspective

Romina Polley
Cleary Gottlieb Steen & Hamilton LLP

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I. INTRODUCTION

For many years leniency has been the most successful tool in uncovering secret hardcore cartels, both at the level of the European Commission and national competition authorities (“NCAs”) in the European Union.² Hardly any cartels have been prosecuted without input from an immunity applicant and, apart from evidence collected during inspections, the authorities obtain all the evidence from leniency applicants including lower-ranking ones, e.g., written evidence resulting from detailed electronic review and personal statements. Not surprisingly, the competition authorities (“CAs”) continue to praise the effectiveness of the leniency tool.³

However, some recent developments, combined with disincentives that have always existed, risk gradually undermining the existing leniency system.⁴ While it is unlikely that it will collapse any time soon, companies are already weighing more carefully than ever the pros and cons of applying for leniency. This trend will likely continue in the future because, in recent years, the risks and frustrations of cooperation with the authorities have increased. Three main groups of threats or disincentives to leniency can be distinguished:

1. The first group of threats lies in the companies' sphere and relate to the increasing difficulty of uncovering smoking-gun evidence as well as growing challenges to organize internal investigations in such a way as to obtain a reliable set of underlying facts as a basis to make an informed decision on whether to apply for leniency.
2. The second group relate to the application of leniency rules by the enforcers. CAs that apply the existing leniency rules have great discretion in how they handle applications

¹ Romina Polley is a partner based in Cleary Gottlieb's Cologne office where she practices competition law.

² In 2014, 80 percent of European cartel investigations were initiated by leniency applicants, cf *European cartel fines in 2014 Casenote*, ECON. OF COMPETITION, REGULATION & LITIGATION (January 2015); in Germany about 50 percent of investigations originate in leniency applications: see *Wirtschaftwoche, Interview with Andreas Mundt, 2014, DAS REKORDJAHR DES BUNDESKARTELLAMTS* (01 December 2014), available at <http://www.wiwo.de/unternehmen/handel/andreas-mundt-2014-das-rekordjahr-des-bundeskartellamts/11056950.html>.

³ Commission, *Commission Staff Working Document accompanying the document 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Competition Policy'* 2014, COM(2015) 247 final, 21 f.; *Hannoversche Allgemeinen Zeitung* (01 Nov 2015), *Interview with Andreas Mundt, WIR SCHÜTZEN VOR ZU HOHEN PREISEN*, available at <http://www.haz.de/Nachrichten/Wirtschaft/Deutschland-Welt/Wir-schuetzen-vor-zu-hohen-Preisen>.

⁴ *Swaak & Wesseling, Reconsidering the leniency option: if not first in, good reasons to stay out*, 36 E.C.L.R. 346 (2015); *Schwab & Steinle, Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed*, 29 E.C.L.R. 523 (2008).

and can therefore encourage or discourage leniency applicants. In this context, key questions are (i) how much applications by lower-ranking applicants are rewarded, (ii) whether the procedure offers predictability and reliability with regard to leniency status, and (iii) the interpretation of what cooperation with the authority means.

3. The third group of threats result from policy decisions to stimulate private enforcement, which conflicts with public enforcement in the area of leniency.⁵ In this context, it matters how the Commission and NCAs handle third-party access to file (“TPA”) requests and how the national courts will order disclosure of incriminating documents after the implementation of the Damages Directive⁶ into national law. In light of the increasing number of follow-on damages actions launched by private plaintiffs,⁷ companies considering leniency may well wonder whether voluntarily incriminating oneself before the CAs becomes too dangerous in times where leniency documents are no longer safe from disclosure to private plaintiffs by CAs or the courts.

II. CHALLENGES TO LENIENCY IN THE COMPANIES’ SPHERE

On the basis of an unreliable, incomplete set of facts, the risks of applying for leniency outweigh the benefits, because the CAs could feel betrayed and claim lack of cooperation and withdraw the leniency status, but still use the evidence so far provided by the applicant.⁸

Another risk arising from an incomplete application is the risk of an additional investigation, where the applicant is not protected from fines. The risk of spill-over of pending investigations into other product groups and territories has always existed, but the fact that many companies have had bad experiences in past investigations nowadays makes it a more prominent consideration in the assessment. In this context, it is unhelpful that there still is no central marker system.

A. Effect of Compliance Trainings on Availability of Evidence

One factor that makes leniency applications more difficult now than ten years ago is that internal investigations in which infringements are uncovered have become more difficult and are less likely to lead to the discovery of the necessary key pieces of evidence. One threat to the leniency system is the growing lack of written evidence as a result of increased awareness by employees on what constitutes a competition-law infringement. Due to companies’ increased compliance activity, employees have become better at leaving no traces in those cases where

⁵ Cf. Art. 1 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, [2014] OJ L 349.

⁶ *Supra* note 5.

⁷ See European Commission, *Commission Staff Working Document – Impact Assessment Report: Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and 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*, COM(2013) 404 final, SWD(2013) 204 final, [52], which contains data collected by the Commission.

⁸ Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17 (“Leniency Notice”), (30).

cartel activity is not sufficiently deterred by compliance efforts.⁹ At the Commission and other EU jurisdictions that continue to rely heavily on written evidence, this is an obstacle to applying for leniency.¹⁰ Where no such documents exist, applying for leniency bears the risk of being rejected.¹¹ To some degree, the CAs have reacted and are now searching mobile devices for communication other than emails. However, it is still true that finding written evidence for an infringement has become more difficult.

The situation is different in Germany, where the lack of written evidence can be overcome by witness testimony. In several recent German cartel cases in consumer goods, companies have been fined without a single smoking-gun document in the file. The Federal Cartel Office (“FCO”) has relied on oral testimony from offenders in witness hearings and on accompanying written evidence that the relevant contact took place. Exclusive reliance on oral testimony however has its risks as well, because of the incentive of lower-ranking applicants to exaggerate their account of what was discussed with competitors in order to obtain a discount from fines.

B. Decreasing Willingness to Offer Employees Incentives for Cooperation

Another factor that makes internal investigations less fruitful is the companies’ decreasing willingness to indemnify interviewees from fines or to give any job guarantees prior to cartel interviews. In the public debate on compliance, companies feel increasingly under pressure to act as good corporate citizens. In this context, rewarding employees who have been involved in cartel conduct is no longer perceived as acceptable in the business community and attracts criticism from shareholders. This is especially true of companies that have already been involved in cartel investigations in the past and think that they cannot afford internal leniency for a second time—even if the relevant conduct concerns a different business unit. The risk is to be blamed for rewarding unlawful conduct and failure to implement a change in the company’s culture.

Both the lack of protection offered by the company and of transparency on how the results of the interview will be used against the employee, however, will normally lead to a lack of cooperation on the part of the employees who are asked to disclose any relevant conduct and provide any evidence. An interviewee who is left in the dark as to whether the information he or she provides will be used against him or her will likely not cooperate and remain silent. The interests of the individual and the company are only aligned if the company offers certain guarantees like indemnity from fines and abstention from sanctions.¹² The fact that the

⁹ Marx & Mezzetti, *Effects of antitrust leniency on concealment effort by colluding firms*, 2 J.A.E. 305, 310 (2014).

¹⁰ Cf. ECJ, *Salzgitter Mannesmann GmbH v Commission of the European Communities*, judgment of January 25, 2007, Case C-411/04 P, ECLI:EU:C:2007:54, [42]: “In Community competition law cases, oral evidence plays only a minor role, whereas written documents play a central role.”

¹¹ The lack of written evidence at the applicant does not mean that there is no risk of an investigation because there could still be written evidence at other cartel participants.

¹² On individual leniency programs, see Lasserre, *Antitrust: A Good Deal for All in Times of Globalization and Recession*, 7 COMPETITION POL’Y INT’L 245, 268 (2011); sometimes an indemnification from fines is restricted, e.g. for directors of a stock corporation in Germany s 93 (4) sentence 3 Aktiengesetz provides that the indemnification cannot be granted by the supervisory board but must be granted by the general assembly, see BGH judgment of 8. July .2014, Case File No II ZR 174/13, [2014] D.S.T.R. 2518, 2519.

individual's incentives are not aligned with the company's in the absence of indemnification is aggravated in legal regimes where the wrongdoers are subject to penal liability, *e.g.*, in the event of bid-rigging,¹³ and leniency only extends to the cartel proceedings.

If no offers are made by the company in protection of those employees potentially involved in cartel conduct the investigation risks being ineffective and its results untrustworthy. Either no evidence is found at all or there remains a significant risk that such evidence is not complete. A single employee's lack of cooperation risks undermining the company's significant efforts to cooperate with the authorities, which creates a strong disincentive to apply for leniency.

C. Increasing Formalism in Internal Investigations

Increasing experience with cartel investigations, corporate internal investigations, and press coverage of cartel cases have led to higher sophistication in the process but also to additional burdens. Data-protection issues are a cause for delay and are sometimes used as an excuse to withhold information or block an internal investigation. The very wording of the consent declaration by employees asked to make the electronic files available for review can become highly controversial.¹⁴ Questions about who has to be informed about an investigation, *e.g.*, the works council or supervisory board,¹⁵ have gained weight and the fear of doing something wrong presses for internal disclosure.

On the other hand, the confidentiality of the leniency status is at risk if information obligations under laws other than competition law are fully respected and more and more stakeholders are informed.¹⁶ Interviewed employees now often bring their own lawyers because they have read about what happened to employees engaged in cartel activity in the past. Companies are also struggling with the obligation to make former employees available,¹⁷ who generally have no interest in cooperating anymore but want to focus on their career at their new employer.

The high cost of an internal investigation, in particular the electronic review of significant amounts of electronic data of a number of different employees—which can cost millions of

¹³ Cf. s 298 German Criminal Code (Strafgesetzbuch).

¹⁴ Cf. s 4 German Federal Data Protection Act (Bundesdatenschutzgesetz): "The collection, processing and use of personal data shall be admissible only if permitted or prescribed by this Act or any other legal provision or if the data subject has consented." The data subject is the employee, whose consent has to be informed and must cover the specific information used, *see* s 4a Federal Data Protection Act. However, under exceptional circumstances it is possible to proceed without consent of the individual concerned. According to Section 32(1) sentence 2 BDSG, the processing of employee data is permissible if there are factual circumstances indicating that an employee may have committed a crime, that the data processing is necessary for uncovering such crime, and the legitimate interest of the employee in keeping his personal data secret does not outweigh the employer's interest in the data processing for purposes of investigating the potential crime.

¹⁵ s 80 (2) German Works Constitution Act (Betriebsverfassungsgesetz) requires the work council to be informed before conducting internal investigations; Breßler/Kuhnke/Schulz/Stein, 'Inhalte und Grenzen von Amnestien bei Internal Investigations' [2009] N.Z.G. 721, 724f; s. 90 (1) (3) German Stock Corporation Act (Aktiengesetz), cf. Schockenhoff, 'Geheimhaltung von Compliance-Verstößen' [2015] N.Z.G. 409, 415f..

¹⁶ Leniency Notice, (12) (c); *see also* General Court, *Deltafina SpA v European Commission*, judgment of 12 June 2014, Case C-578/11 P, ECLI:EU:C:2014:1742.

¹⁷ Leniency Notice, (12) (a).

euros—often leads to the launch of half-hearted internal investigations only relying on interviews, which carries the risk of not uncovering the full underlying facts. Employees who might have been involved in cartel conduct, but have not been offered any incentive to cooperate prior to the interview, tend to downplay relevant contacts and usually only become more transparent once they are confronted with written evidence like emails or calendar entries in the interview. An investigation that does not involve review of electronic files is unlikely to form a solid basis for a decision on whether or not to file for leniency.

III. THREATS TO LENIENCY RESULTING FROM THE ENFORCEMENT OF THE LENIENCY RULES BY THE COMMISSION AND NCAS

A. Risk of Not Being Rewarded for Cooperation

To some degree, CAs have contributed to discouraging companies from filing for leniency. The clear ranking based on the timing of the application under the European leniency regime¹⁸ has caused frustration because, in some cases, lower-ranking applicants that provided significant amounts of evidence did not get any fine reduction from the Commission because the Commission already had enough evidence in its possession.¹⁹

The General Court decided in *Versalis and Eni* that the Commission has a wide margin of discretion in assessing cooperation, and that the assessment of added value relates to the Commission's investigation and not to the maximum evidence a company could provide.²⁰ However, at the time they make the decision to cooperate, companies do not have the information to assess whether the cooperation is still worthwhile, because they do not know how much evidence the Commission already has. It also leads to frustration if lower-ranking applicants get a lower discount even if the value-add they provide is more significant than that provided by higher-ranking ones.²¹

The number and quality of leniency applications after inspections could be improved if ranking was not the exclusive consideration under the EU Leniency Notice, but if the added value was also taken into account. Hybrid settlements could potentially be avoided if lower-ranking applicants also had a sufficient interest in cooperating with the Commission.

The risk for lower-ranking applicants of getting no bonus at all, despite significant effort, is avoided under the German leniency regime, where both the timing and the value-add of the

¹⁸ Leniency Notice (8).

¹⁹ Cf. Commission Decision of 23 June 2010 relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case COMP/39.092—Bathroom fittings and fixtures) where several companies did not receive a reduction for lack of value add; also see *Swaak & Wesseling*, *supra* note 4 at 346, 349 (fn 19) with further reference to a number of cases where reductions were very low.

²⁰ General Court, *Versali and Others v Commission*, judgment of 13 December 2012, Case T-103/08, ECLI:EU:T:2012:686, [360], confirmed by ECJ, *Commission and Others v Versalis and Others*, judgment of 5 March 2015, Case C-93/13 P, ECLI:EU:C:2015:150.

²¹ The Commission's "Bathroom fittings" case is also an example for this phenomenon. In that case the third applicant filed its application only four days after the second one (see, *supra* note 19).

application are taken into account.²² In practice, the FCO even grants significant discounts to lower-ranking applicants in order to encourage them to cooperate; in some cases lower-ranking applicants have obtained higher discounts than the companies ranking before them. The downside of the German system is that lower-ranking applicants have a strong incentive to report additional conduct in order to obtain the discount, which bears the risk of exaggeration—especially in a system where oral testimony has the same value as written evidence.

Excessive demands in requests for information to leniency applicants under tight deadlines without any understanding on the part of officials of both the underlying costs of electronic review as well as the practical difficulties of obtaining evidence are another disincentive to leniency that should be mentioned in this context.

Some authors have mentioned frustrations caused if no investigation follows after an application.²³ Rationally speaking, it is still best for an applicant if no investigation is opened, as long as it is able to protect its rank in case the authority changes its mind, which is normally the case in no-action letters. In contrast, closing the file against other participants in the cartel that do not cooperate might indeed cause frustration among leniency applicants.

B. Uncertainty on the Scope of the Duty to Cooperate

Another disincentive to leniency is a remaining insecurity on what “cooperation” of the leniency applicant with the authorities really means.²⁴ In many jurisdictions, it is not clear what is considered as lack of cooperation. Is the duty to cooperate limited to providing incriminating facts? Or if the company makes certain legal arguments, *e.g.*, on the CA’s jurisdiction, the qualification of the relevant conduct as a single complex continuous infringement, or the hardcore nature of the relevant conduct, is that non-cooperation?

In some cases, CAs have not shied away from threatening a withdrawal of the cooperative status if a company made legal arguments on the relevant conduct. In light of the increasing pursuit of borderline conduct falling short of a hardcore cartel, in particular by certain NCAs, it is of concern that a leniency applicant should have to give up legal defense arguments. This applies to horizontal information exchange cases as well as vertical cases. As long as making legal arguments in defense of the relevant conduct, *e.g.*, that it is not hardcore, is not clearly outside the danger zone when it comes to evaluating the company’s cooperation, then leniency risks not being attractive in borderline cases.

Renewed enforcement in the area of vertical infringements calls the policy decision into question that in most jurisdictions (with exceptions, for example, in Belgium and Austria) vertical conduct is not covered by the applicable leniency regime. In hub-and-spoke scenarios, the fact that leniency is not available for purely vertical conduct constitutes a disincentive to leniency, because such cases can in fact comprise a mixture of horizontal and vertical conduct.

²² FCO, Notice No 9/2006, Notice on the immunity from and reduction of fines in cartel cases - Leniency Programme - of 7 March 2006, [5]: “The amount of the reduction shall be based on the value of the contributions to uncovering the illegal agreement and the sequence of the applications.”

²³ Swaak & Wesseling, *supra* note 4 at 346, 350 with further references.

²⁴ *Id.*, 351.

Since indirect horizontal coordination is difficult to prove, companies risk being rejected under the leniency regime, while the CA could in theory pursue the remaining vertical conduct.

The FCO tried to avoid frustrating a recent applicant by analogous application of the leniency notice in its latest vertical RPM case. However, these were special circumstances where conditional immunity was granted under the leniency notice; only later did it emerge that the horizontal elements in the file were not strong enough and the FCO then decided to pursue the vertical conduct. While the analogous application of the German leniency notice protected the leniency applicant in the case at issue, legal certainty and inclusion of vertical conduct into the leniency programs would be preferable.

IV. PRIVATE ENFORCEMENT THREAT HAS BECOME MORE IMMEDIATE

A further dangerous trend discouraging leniency applications is the fact that CAs in the European Union have become less stringent in protecting information provided by leniency applicants from disclosure to third-party claimants. Further, the courts have not resisted this development, but have rather contributed to it. The transformation of the Damages Directive into national law—which will provide the civil courts with a disclosure mechanism further facilitating plaintiff access to incriminating documents, including documents submitted by leniency applicants—further aggravates the situation.

A. TPA to File at the Level of CAs

To understand this problem, one has to distinguish between access to files and publication of fine decisions at the level of the CAs and disclosure of evidence ordered by courts in civil follow-on damages proceedings.

1. The Commission's Approach

The Commission has recently started to publish more detailed non-confidential versions of fine decisions than previously; these now include information sourced from leniency applications, but still avoid direct quotations from the corporate statement. This approach was cleared by the General Court in its recent “*Akzo Nobel*” judgment.²⁵ The Court found that information contained in leniency applications could only be excluded from the non-confidential version of the decision if it were confidential.

To be confidential, information must be known to a limited number of persons, its disclosure must be liable to cause serious harm to the person who provided it or to third parties, and the interests at risk from disclosure need to be worthy of protection. The last condition was denied by the General Court. It found that the leniency applicant's interest in non-disclosure not only did not merit any particular protection but that, on the contrary, third-party plaintiffs' interests in asserting their rights are worthy of protection. The Court therefore insisted that leniency applicants cannot rely on their exposure to civil claims as a reason to legitimately oppose the disclosure of leniency applications.

²⁵ General Court, *Akzo Nobel and others v Commission*, judgment of 28 January 2015, Case T-345/12, ECLI:EU:T:2015:50; Kafetzopoulous, *European Commission Policy on publication of cartel decisions: the latest victory of damage claimants against leniency applicants* 36 E.C.L.R. 295 (2015).

TPA to the Commission's cartel file²⁶ has so far been handled conservatively by the Commission, which was temporarily challenged by the General Court in *CDC*,²⁷ where it annulled a Commission decision that had rejected the application of a third party for disclosure of the table of contents of the Commission's case file. However, the confirmation of a presumption against disclosure of documents in the file by the European Court of Justice ("ECJ") in the *EnBW* case in order to protect the confidentiality of cartel proceedings²⁸ has helped to keep the threshold for TPA to the Commission's file high.

The presumption against disclosure allows the Commission to lawfully dispense with a specific and individual assessment of each document requested. Interestingly, the ECJ decided that the presumption extends not only to leniency documents, but also to all documents in the cartel proceedings. However, the ECJ also decided that the presumption against disclosure is a rebuttable one.²⁹ This means that a TPA applicant can still claim that a specific document does not fall under the presumption, or that there is an overriding public interest in disclosure.³⁰

In this context, the ECJ decided that fostering private enforcement is generally not a public but a private interest.³¹ Only when there is no other way of obtaining the requested information, and the information is needed to establish the claim for damages, may the claimant's interest in the requested document constitute an overriding public interest.³² This also means that there is no certainty that a leniency application or other evidence voluntarily provided by a leniency applicant is 100 percent protected from TPA to file.

2. The FCO's Approach

In Germany, fine decisions in cartel cases are not published, not even in non-confidential versions. However, third parties seeking access to the FCO's files have so far been provided with a redacted version of the fine decision.³³ Only in exceptional cases will the FCO provide the potentially damaged party with further documents.³⁴ Despite the FCO's restrictive approach, the number of applications for disclosure is steadily rising, with some 150 applications for disclosure made to the FCO in 2014.³⁵

²⁶ Claims are based on Regulation (EC) No 1049/2001.

²⁷ General Court, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Commission*, judgment of 15 December 2011, Case T-437/08, Reports 2011 II-08251, ECLI:EU:T:2011:752, [79]-[81].

²⁸ ECJ, *European Commission v EnBW Energie Baden-Württemberg AG*, judgment of 27 February 2014, Case C-365/12 P, ECLI:EU:C:2014:112 ("*EnBW*"), [65] ff; General Court, *Koninklijke Wegenbouw Stevin BV v European Commission*, judgment of 27 September 2012, Case T-357/06, ECLI:EU:T:2012:488.

²⁹ *EnBW*, [100].

³⁰ Article 4 (2) Regulation 1049/2001.

³¹ *EnBW*, [108].

³² *EnBW*, [132].

³³ FCO, *Annual Activity Report 2013/2014*, (German version), available at http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202014.pdf?__blob=publicationFile&v=2, p. 27.

³⁴ FCO, *Annual Activity Report 2013/2014*, (German version), p. 27.

³⁵ FCO, *Annual Activity Report 2013/2014*, (German version), p. 27.

According to German case law in the wake of the ECJ's *Pfleiderer*³⁶ and *Donauchemie*³⁷ preliminary rulings—which required a case-by-case balancing of the plaintiff's interest in disclosure with the public interest in preserving the attractiveness of leniency—leniency statements and accompanying documents have so far been found to be protected by the Bonn Local Court.³⁸ However, in a recent judgment, the Higher Frankfurt Regional Court cast doubt on this practice, emphasizing that in light of the ECJ's case law, which requires a case-by-case balancing of interests, disclosure of leniency applications cannot be excluded as a matter of principle. In the same vein, the Hamm Higher Regional Court ruled that a public prosecutor must grant access to the files, including leniency applications from a criminal investigation into bid-rigging, to the civil courts.³⁹

The above shows that significant legal uncertainty on the protection of leniency information from private plaintiffs has arisen both at EU and national levels. While the Damages Directive increases legal certainty, which was one of its main goals,⁴⁰ the protection of the leniency applicant is limited, which reduces the incentive to cooperate with the CAs, as will be explained below.

B. TPA to Evidence in Court Proceedings

Prior to the enactment of the Damages Directive, national courts had already tried to obtain confidential information from the Commission.⁴¹ However, the Damages Directive has further increased the risk that leniency documents in civil damages proceedings are no longer safe from the hands of private plaintiffs. Once it has been implemented in the different Member States,⁴² national courts will benefit from a disclosure mechanism.⁴³

This means that a court will be able to order the plaintiffs, defendants, or third parties to disclose specified items of evidence or entire categories of evidence that have to be defined as precisely as possible, provided there is a justified request that supports the plausibility of the claim for damages.⁴⁴ Disclosure must be proportionate, which requires the court to consider the legitimate interests of all parties involved and third parties.⁴⁵ The leniency applicant's interest not

³⁶ ECJ, *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011. Case C-360/09; ECLI:EU:C:2011:389; 2011 I-05161, especially [31].

³⁷ ECJ, *Bundeswettbewerbshörde v Donau Chemie AG and Others*, judgment of 6 June 2013, Case C-536/11, ECLI:EU:C:2013:366, especially [34].

³⁸ Local Court Bonn, order of 29 December 2011, Case File No 51 Gs 2496/10; Higher Regional Court Düsseldorf, order of 22 August 2012, Case File No V – 4 Kart 5 + 6/11 OWi.

³⁹ Higher Regional Court Hamm, order of 26 November 2013, Case File No 1 VAs 116/13 - 120/13 and 122/13, confirmed by German Federal Constitution Court Case File No 1 BvR 3541/13, 1 BvR 3543/13 and 1 BvR 3600/13; ECLI:DE:BVerfG:2014:rk20140306.1bvr354113; available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/03/rk20140306_1bvr354113.html.

⁴⁰ Directive 2014/104/EU, recital 9.

⁴¹ General Court, *Alstom v European Commission*, order of 29 November 2012, Case T-164/12 R, ECLI:EU:T:2012:637.

⁴² Art. 21 Directive 2014/104/EU; transposition deadline : 27 December 2016.

⁴³ Art. 5 Directive 2014/104/EU.

⁴⁴ Art. 5 Directive 2014/104/EU.

⁴⁵ Art. 5 (3) Directive 2014/104/EU.

to be charged with damage claims is defined as interest that does not warrant protection.⁴⁶ Courts must be able to order the disclosure of confidential information where this is considered relevant to the action.⁴⁷

The Damages Directive only grants absolute protection from disclosure to leniency statements and settlement submissions.⁴⁸ However, pre-existing information, *i.e.*, evidence that exists irrespective of the Commission proceedings and that is submitted to the Commission by an undertaking in the context of its application for immunity from or reduction of the fine, is not protected.⁴⁹ This means that evidence accompanying a corporate statement will not be protected from disclosure. In the *Pfleiderer* case, the companies had urged the ECJ to include documents accompanying a leniency application in the protective scope, but the ECJ followed Advocate-General Mazák's proposal to distinguish between the statement and pre-existing documents, as the Commission had also argued.⁵⁰

Another risk is that only temporary protection (pending closure of proceedings before the NCAs) is awarded to documents specifically prepared for the proceedings of a CA, information the CA has drawn up, and settlement submissions that have been withdrawn.⁵¹ This means that the statement of objections and responses to requests for information are only temporarily excluded from disclosure. This is also potentially dangerous for a leniency applicant because it cannot defend itself like a company that does not cooperate with the CA in responding to an SO and an RFI, as these documents are likely to contain incriminating statements.

The leniency applicant's expectation not to be treated less favorably than other participants in a cartel, and that documents voluntarily provided as part of cooperation with the authorities are protected, is already frustrated by the disclosure mechanism foreseen in the Damages Directive. Whether further damage to public enforcement will be done will depend on how Member States implement it and how national courts make use of it.

This private practitioner's experience that companies are becoming ever more reluctant to apply for leniency should serve as a warning to the legislator and the courts not to expand the scope of disclosure too far when transposing the Damages Directive. It should also serve as a reminder to national courts to adhere to the principle of proportionality when granting disclosure orders.

⁴⁶ Art. 5 (5) Directive 2014/104/EU.

⁴⁷ Art. 5 (4) Directive 2014/104/EU.

⁴⁸ Art. 6 (6) Directive 2014/104/EU.

⁴⁹ Art. 4a (3) Regulation (EC) No 773/2004.

⁵⁰ Opinion of AG Mazák in *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, ECLI:EU:C:2010:782, [17].

⁵¹ Art. 6 (5) (c) Directive 2014/104/EU.