The detrimental Effects of granting Access to Leniency Applications for EU Antitrust Law

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MASTER THESIS

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“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”

– Adam Smith
In 2008 the Bundeskartellamt (the German antitrust authority) had convicted three firms and five individuals to be members of a décor paper cartel in an infringement subsequent to Article 101 TFEU. After the conviction one of the main aggrieved parties, the German Pfleiderer AG, had asked inter alia for access to the leniency applications filed by the cartel members in order to substantiate its claim in a private action for damages. The Bundeskartellamt granted access to most files censored out however all sensible business information entailed in the leniency applications in accordance with Point 22 of the Bundeskartellamt Notice. After another explicit request for the sensible information and another denial by the Bundeskartellamt, Pfleiderer AG, who allegedly had ordered goods from the cartel members in excess of 60 million Euro during the concerned timeframe, initiated proceedings against the Bundeskartellamt and appealed the decision at the Amtsgericht Bonn relying on Paragraph 62(1) of the German Law on Administrative Offences (OWiG). The Amtsgericht Bonn ruled in favor of Pfleiderer AG subsequent to being “an aggrieved party” with a “legitimate interest” in obtaining access to the files in the context of paragraph 46(1) OWiG and Paragraph 406e of the German Code of Criminal Procedure.

1 Article 101 (ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   — any agreement or category of agreements between undertakings,
   — any decision or category of decisions by associations of undertakings,
   — any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

2 Article 22 Bundeskartellamt Notice no. 9/2006 Leniency Programme: Where an application for immunity or reduction of a fine has been filed the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.
The court stayed its decision however and asked for a preliminary ruling from the European Court of Justice (ECJ) in order to ensure that its decision would be in line with European competition law.

Advocate General Mazák evaluated the eventual outcomes of the request for a preliminary ruling in November 2010. He “focused on whether the grant of access to information voluntarily submitted by a leniency applicant by a national competition authority for the purpose of bringing a damages claim might undermine the effective enforcement of EU competition law and the system of cooperation and exchange of information between the Commission and the national competition authorities. In the view of Advocate General Mazák, the preliminary reference required the ECJ to weigh and balance the possibly diverging interests of ensuring the efficacy of leniency programmes established for the purpose of detecting, punishing and ultimately deterring the formation of illegal cartels on the one hand, with the right of any individual to claim damages for harm suffered as a result of such cartels on the other.” (Dewey & LeBoeuf, 2011) Mazák came to the conclusion that public enforcement of competition law must preside over private enforcement of civil claims and that this particular case would serve well as a landmark decision in order to establish a legal hierarchy. Nevertheless, he struck a compromise in that he acknowledged a clear distinction between voluntary information given by the applicant and information that had been previously discovered by the authorities. The latter, should be accessible for

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3 Section 406e. [Inspection of Files]

(1) An attorney-at-law may inspect for the aggrieved person the files which are available to the court or, if public charges were preferred, would have to be submitted to it, and may inspect officially impounded pieces of evidence, if he shows a legitimate interest. In the cases mentioned in Section 395 such legitimate interest need not be shown.

(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation appears to be jeopardized or if the proceedings would be considerably delayed thereby.

(3) Upon application and unless important reasons constitute an obstacle, the attorney-at-law may be handed the files, but not the pieces of evidence, to take to his office or private premises.

(4) The public prosecution office shall decide whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings, or otherwise the presiding judge of the court seized of the case. If the public prosecution office refuses inspection of the files, a court decision pursuant to Section 161a subsection (3), second to fourth sentences, may be applied for; the presiding judge’s decision shall be incontestable.

(5) Under the conditions in subsection (1) the aggrieved person may be given information and copies from the files; subsections (2) and (4), first sentence, shall apply mutatis mutandis.
private claims to the lawyers of the plaintiff as it could theoretically be discovered elsewhere as well whereas the voluntarily given information could not.

The ECJ did not hold with General Advocate Mazák’s advice, however. Instead the ECJ “concluded that the provisions of EU law in relation to cartels must not be interpreted as precluding a person, who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages, from being granted access to documents related to a leniency procedure involving the participant in that infringement.” (Pfleiderer v Bundeskartellamt, 2011) This does not mean that the ECJ encourages full access, but that it sees the necessity of upholding favorable rules regarding compensation claims even if this comes at the cost of sacrificing a certain degree of the efficiency of leniency programmes. In order to not completely destabilize the leniency programmes excessively the court ruled in addition that national courts must “weigh the respective interests in favor of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency” (Pfleiderer v Bundeskartellamt, 2011) on a case by case basis in order to come to the appropriate conclusion accordingly.

INTRODUCTION

The ruling of the ECJ Grand Chamber on the 14th June 2011 in the case C-360/09 Pfleiderer AG v Bundeskartellamt, is a prime example in the dilemma antitrust authorities worldwide face of acutely balancing private enforcement of those individuals that have been harmed by cartels on the one side and ensuring the efficiency of leniency programs on the other. It is a struggle between private and public enforcement of antitrust law in combination with aspects of fundamental rights. What makes the entire situation particularly complicated in the European Union however, is the fact that not just antitrust regulations but also procedural law in regards to the access of information vary from Member State to Member State as “neither the provisions of the EC Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency or common rules on the right to access to documents relating to a leniency procedure.” (Pfleiderer v Bundeskartellamt, 2011) Today, all Member States, except Malta, have introduced some form of leniency programme. The German Bundeskartellamt for instance has pursued a tactic in which it strictly withholds all
documents filed by the leniency applicant from the plaintiff in order to ensure the functioning of the installed leniency programme and with it the efficient ramification through public enforcement. The Bundeskartellamt has realized that its leniency programme has evolved to be the most efficient method of detecting cartels, an act that has previously been very strain full and costly. It now fears that without an efficient leniency program in place many undertakings that are willing to cooperate would refrain from doing so out of the unforeseeable danger of the magnitude of private enforcement claims that could arise on the basis on the given self-incriminating evidence and that this would greatly impede it’s successful antitrust fight. Conversely, other Member States place more trust in private enforcement and adhere to the perspective that it is of the utmost importance to grant access to ensure a fair chance of a trial for the plaintiff and that such would not be possible if he would not be equipped with all available information. In that perspective the defendant has acted intentionally in order to harm the other party and must be held liable for those actions accordingly in private suits, as it has already received beneficial treatment in the public persecution. Here public and private enforcement are in direct conflict to each other, particularly on the question of confidentiality regarding the information in the leniency applications. The extent antitrust authorities grant access to leniency application files is a key determinant of their success and efficiency and with it the public enforcement of cartels. The ECJ’s ruling above refrains from making an all or nothing decision and refers the authority back to the Member State courts to use appropriate judgment on a case by case basis, a sensible ruling, but one that does not further the systematic synchronization and hence functioning of European wide antitrust enforcement. Wouter Wils, a member of the Legal Service of the European Commission states in his essay *The Relationship between Public Antitrust Enforcement and Private Actions for Damages* that “the optimal antitrust enforcement system would appear to be a system in which public antitrust enforcement aims at clarification and development of the law and at deterrence and punishment, while private actions for damages aim at compensation” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009) yet this interplay must be constructed in a manner that one does not undermine the other. This paper therefore will attempt to illuminate the rationale behind the ruling, critically challenge the assumptions, evaluate the policy implications, and grant advice to the extent Member State courts should grant access, as the
fundamental question to the extent of access is always a question of what exactly is in the documents. For this purpose we will look at the economic and game theoretic reasoning behind cartels and antitrust law, view the rights of the claimant and the defendant, and Lastly assess the general policy the European Union has followed. This paper will only to a limited extent analyze the relationship of competencies between the national antitrust authorities and the Commission of the European Union.

DEFINITIONS

Unless stated otherwise, the subsequent terms shall be defined as follows for the purpose of this thesis. “Access” shall refer to antitrust authorities allowing aggrieved parties to view the leniency applications of the cartel members and use the information given in there in private prosecution claims. The term “full access” therefore indicates access to all information unfiltered and uncensored will be granted. The term “private enforcement” shall be defined as the pursuit of private entities to claim damages in a civil courts and “public enforcement” will denote all aspects related to actions committed by antitrust authorities, including persecution and fines. The clear cut differentiation between the two is of the essence for this discussion for they are both distinct processes that must be balanced against each other.

LENIENCY PROGRAMMES

ECONOMIC PURPOSE

MICROECONOMIC IMPLICATIONS

In order to fully grasp the extent of the ruling one must first understand the vital economic rationale behind cartels, and the efficient combat of leniency programmes against them. For simplicity reasons let us take a duopoly with Firm A and Firm B, both firms have identical cost structures and share the market equally. Firms A and B agree upon fixing prices above the duopoly price. As all firms they both are driven by the profit motive. If the firms agree upon fixing the price at the monopoly price level they will both be granted a half of the monopoly profit, the maximum attainable outcome for the two firms. As this maneuver would be too easily detectable by antitrust authorities
though, the cartel will set the price somewhere between the monopoly price and the perfect competition price, depending on the likelihood of detection and the industry (i.e. the nature of the goods and other industry factors that determine the sustainable price level such as buyer power, BATEX, etc). In order to find the optimal price the cartel participants will balance the return and the risk of detection. Here detection becomes more likely with higher margins and the monopoly price functions as a price ceiling, while at the same time the profit driven cartelists will strive for the highest possible return. As slight increases of prices are almost undetectable by conventional means for an antitrust authority the return grows faster than the anticipated risk in the beginning. After a while, however, the price becomes ever more exuberant and thus more obvious, which in turn will ensure that at some point the risk will start growing faster than the return. The expected return of a price cartel can therefore be graphically explained by a downward shaped parabola in a matrix with expected cartel return on the y-axis and the price above the perfect competition price on the x-axis. The parabola would naturally start at zero for both attributes, because there is no expected return from a cartel if one does not raise prices above the perfect competition price where profits are zero. Once the price rises the expected return increases as well, but so does the risk of detection. Due to the risk of detection which rises exponentially with higher cartel prices and at some point will be so large that the cartel must be detected, the graph must have a maximum point and falling expected return once prices become too high, until they inevitably reach a negative expected return, when detection and punishment become inevitable. That is the reason why it must be displayed with a parabola and not just a graph with a constantly decreasing slope. A sensible cartel member will therefore attempt to set prices at that maximum in order to maximize his return. This point marks the optimal price for the cartel and the most harmful price for society.

As leniency programmes inflate the chance of detection and thus a higher probable cost through incentives for the applicant the entire parabola shrinks with a new optimal expected return at a lower price. One can also expect that the slope behind the optimal point becomes steeper, as it becomes easier for nervous members to exit. This effect would be reduced however, if one reduces the incentives for the applicants, as it is the case here when they become more exposed to civil claims for damages. Graphically speaking this pushes out the parabola again to somewhere in-between the
two others. The question therefore must be to what extent does additional information for claimants shift out the curve again, and thus create a greater damage to society.

One can identify the additional costs to society when looking at the industry specific curve. In this graph the optimal societal gain is reached when consumer welfare is maximized where the price of the good is equal to marginal cost and average variable cost. As discussed above, however, the price will be set above the perfect competition price as the cartel participants strive for higher profit margins. That price, which again also remains below the monopoly price, will result in a certain output with given demand. The triangle that is formed by the perfect competition price and the cartel price and its quantity demanded represents the welfare loss. This clearly visualizes that the greater the price a cartel is able to charge the loss to society is becomes increasingly larger. On a macroeconomic level one could also visualize the implications of cartels through the help of an aggregate demand aggregate supply model, but since these are only of true relevance for the long term if they affect significant industries and are sustainable and would otherwise only trigger a negative short term supply shock (if at all), and the effects of leniency programmes can be, at least for this paper, viewed as neglect able.

GAME THEORETIC IMPLICATIONS

Leniency programmes are based on the game theory concept of the prisoner's dilemma. Nicolo Zingales from the European Policy Center even views that “the most appraised feature of the [...] EU programme is the automatic nature of the immunity in the case that no investigation has started. This is arguably the most important feature, which most strikingly fosters confession: it contributes by giving the strategy of “confession” a clear advantage when its pay-offs is compared to the less assessable probability of not being caught.” (Zingales, 2008) To illustrate how this works let us imagine a simultaneous move game, with again firms A and B in a duopoly. Both firms have agreed to uncompetitive behavior of some sort and have been committing the fraudulent behavior for some time. Each round the players are confronted with the same three decision options, 1) to continue with their cartel, 2) leave the cartel without applying for leniency, i.e. leave the cartel secretly, or lastly 3) leave the cartel through the help of a leniency application. Each choice comes at different costs and brings
various benefits depending on the other persons move. Lastly, the decision made will have an impact on the next period and is not reversible. If both parties decide on the same move option then they naturally harvest the same outcome, for all heterogeneous combinations one will benefit from the other persons losses. Only if both parties decide to stay both will benefit and be granted a positive return as the cartel will continue to grant the two members unnaturally high profits that both parties split equally. If, however, one party, say Firm A, chooses to leave secretly and Firm B choose to stay then Firm A would benefit more than Firm B as it would take some time for B to switch their production and more importantly their pricing strategy and their customers would switch from one to the other. This would result from the fact that Firm B, in the choice to continue the cartel would sell its goods somewhere between the monopoly and the best response price, whereas Firm A in its decision to leave the cartel would charge the best response price, which in this case would be lower than the price of Firm B, and lead to an increase of market share for Firm A. We see that choosing to leave the cartel is for the logic reasoned above a dominant strategy in a single shot game. As long as the game is continuous however the potential long run profits of remaining in the cartel, which after leaving once would not be attainable again as its trust foundation would be destroyed, outweigh the one turn gain of leaving, in other words the future cash flows of the annuity outweigh the onetime payment, this is the rationale behind the functioning of a cartel. Once the cartel members fear detection however, the rules change and the game becomes finite. In such a situation the players are confronted with the question of how much longer the cartel will stay intact (or how many more rounds are played), as the players are unable to know this they will treat each round like a one shot game. As continuing the cartel is a dominated strategy both members will choose to leave the cartel, as mentioned above, both now have two options of leaving, in silence or through a leniency programme. If both parties would choose the first option then both would leave with a payoff of zero as they enter into normal price competition. If one of the two nevertheless leaves through a leniency application the other member would be worse off due to the higher expected fines. Again we have a dominating strategy and both players will choose the application to a leniency programme. This choice is strongly supported by the fact that the first will be better off and that therefore a first mover advantage exists. (The filing for a leniency program is driven both by the likelihood of detection caused by the intrinsic motivation to file for an application resulting from a prisoner’s
dilemma, as well as the extent of private enforcement one might face, and with it the potential numeration one will be forced to pay. Both elements can be expressed in a financial value and therefore be assessed by the trust members, through more or less sophisticated mechanisms. One can for example roughly estimate the likelihood of a claim multiply it with the probability of success and the consequential remuneration, the result then is an educated guess that managers can work with. In any instance this number would always be higher if plaintiffs were granted access to the information given by the leniency applicant as it would raise the probability of a successful claim and hence the anticipated amount of damage one would have to pay. This clearly indicates that managers would be better off not applying for leniency if full access would be granted, if one does not take the public fine into account.

If now however, the first leniency applicant must fear a greater amount of civil persecution due to the additional information that will be available to civil claimants this first mover advantage will at a certain degree of civil claims disappear and as Thomas Eilmansberger proclaims a “first mover disadvantage” (Eilmansberger, 2007) will appear. This would furthermore turn the first mover advantage into a second mover advantage, yet the second mover would not choose the application as he himself would then become the first mover, a continuous “next-mover” advantage is therefore created. This next mover advantage will ensure that the previously unattainable Nash equilibrium of both choosing to exit secretly suddenly becomes the attainable and therefore the natural outcome, as both parties are always better off not to be the first to apply for leniency. The question the court therefore has to answer is not whether or not access to leniency files encourages civil claims in general, but what additional information in the files will be able to tip the game into a second mover advantage and with it, render the programmes obsolete.

THE INFORMATION AT STAKE

The information within the leniency applications lays at the core of the discussion and must therefore be outlined. Due to the fact that competition law is not harmonized entirely in the EU the list of information at stake in the various Member States is too extensive to discuss in detail in this paper, however. To simplify the issue we shall utilize the European Competition Network Model Leniency Programme (ECN
Model) as set out by the European Competition Network as a standard for all antitrust authorities, knowing fully well that the model is only a policy guideline towards harmonization. Yet the ECN consists of all 27 competition authorities of the Member States as well as the Directorate General of the Commission and as such includes in its concepts the general trends of the national competition legislatives. The ECN Model sets out in paragraph 19 of the explanatory notes that an “applicant must provide the competition authority with sufficient information to allow it to carry out targeted inspection” (European Competition Network, 2006) in order to be granted Type 1A full immunity. The information in particular as set out in paragraph 20 shall include the following: “(1) The name and address of the legal entity submitting the immunity application, as well as the names of individuals who are or have been involved in the alleged cartel on its behalf; (2) The identity of all the other undertakings which participate(d) in the alleged cartel as well as of the individuals who, to the applicant’s knowledge, are or have been involved in the alleged cartel; (3) A detailed description of the alleged cartel conduct, including for instance its aims, activities and functioning; the product(s) or service(s) concerned, the geographic coverage, the duration and the estimated market volumes affected by the alleged cartel; the dates, locations, content and participants of alleged cartel contacts; all relevant explanations in connection with evidence provided in support of the application; (4) Evidence relating to the alleged cartel in the possession of the applicant or available to it at the time of the submission, in particular contemporaneous evidence; and (5) Information on which other competition authority, inside or outside the EU, have been approached or are intended to be approached by the applicant in relation to the alleged cartel” (European Competition Network, 2006) Additionally, the ECN Model sets out three requirements for firms in order to remain allegeable for immunity, the second of which regards the cooperation with the respective competition authority. It is layed out in paragraph 30 of the explanatory notes to the ECN Model that applicants must within this scope of cooperation provide “without delay any pre-existing evidence and information which is available to the applicant or comes into its possession or under its control during the investigation.” (European Competition Network, 2006) The model programme furthermore “requires answering without delay any question from the competition authority and making current and, where possible former, individual employees and directors available for interviews with the competition authority [and] encompasses not
destroying, falsifying or concealing evidence which falls within the scope of the application after having applied for leniency” (European Competition Network, 2006) Failing to comply with any of these will result in withdrawal of immunity.

LEGAL POLICY IMPLEMENTATIONS

THE RIGHT TO A CLAIM

With the economic reasoning laid out and the basic framework set, the legal evaluation must take place on the grounds of competition law, fundamental rights, the concept of harmonization of the European Union, and lastly to a certain degree also the rights of the defendant. For this purpose we will take a closer look at the Council Regulation No 1/2003, the Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2008 White Paper on Damages actions for breach of the EC antitrust rules, and the relating case law and see how they alter or underline the economic implications.

The first legal field of relevance to the assessment of the ruling is naturally European competition law and even though generally speaking competition law appears to favor a denial of access in order to support leniency programmes, as these have become an elemental part of it, there are valid arguments on both sides. In its Notice on Immunity from fines and reduction of fines in cartel cases the Commission states that “the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article [101 TFEU]” (European Commission, 2006) and must be seen as essential to competition law in order to harmonize it with fundamental rights. Neelie Kroes, Commissioner for Competition, even said "the Commission is doing its utmost to encourage and facilitate actions for damages before national courts by victims of anticompetitive behavior." The fundamental basis for any argumentation in favor of access must therefore begin with the concept that any party that has suffered harm as a result of an infringement of Articles 101 or 102 TFEU has the right to bring an action for damages in a Member State court. In reliance upon Recital 74 and Article 65 of

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4 (7) "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national
Regulation 1/2003 and Courage v Crehan in which the Court of Justice implemented in points 25 and 26 that “in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see inter alia the judgments in Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, and in Case C-213/89 Factortame [1990] ECR 1-2433, paragraph 19)” (Courage v Crehan, 2001) and that thus “the full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.” (Courage v Crehan, 2001) This ruling was further underlined by Cases Manfredi et al in that the ECJ ruled that “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under [Article 101].” (Manfredi et al, 2006)

Any individual therefore has the right for a claim of damages, but the realization of this right can be a completely different story. As laid out above in Manfredi et al the claimant must be able to establish a causal link between the infringement and the personal damage. This hurdle is significantly higher without being able to view the detailed leniency application with all various information mentioned in the ECN Model above. As the word any, signifies that truly everybody, ought to have the right for damages then all damages entities ought to have the ability to gain access to all information necessary to prove the causal link between the infringement. On the extreme one might conclude that if only a single legal or natural person is unable to pursue its claim due to a lack of information even though that information could theoretically be available then the person is ultimately deprived of his right, not directly but indirectly, as it becomes unreasonable burdensome. In the Commission Staff Working Document - Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules - Impact Assessment (“Impact Assessment”) the Commission evaluates that “claimants often find it very difficult to produce proof that
the contested conduct produced actual anti-competitive effects. It also has to be assumed that some victims do not come forward to claim compensation, for instance because they prefer not to disrupt an ongoing business relationship with the infringer. Moreover, in some instances, victims will find it rather difficult to convince courts of a sufficiently close causal link between any particular damage and the infringement.” (European Commission, 2009)

The Courage v Crehan premise is founded on the Fundamental Rights of the European Union as set forth in the Charter of Fundamental Rights and the Convention on Human Rights of the European Union. The provisions of particular relevance in this case are the right to an effective remedy outlined in Article 47 Charter of Fundamental Rights of EU6, right to access of information proclaimed in Article 42 Charter of Fundamental Rights of EU7, in relation with Article 52(1) Charter of Fundamental Rights of EU8 and Article 15(3) TFEU9. The first two outline that any citizen of the European Union has the right to access documents of the Commission and the right to an effective remedy, where according to the Pfleiderer ruling a denial of access could lead to an infringement of Article 42 which in turn would trigger an infringement of Article 47 as the claimant could not be guaranteed an effective remedy without the information. Even if this be the case however, one must heed Article 15(3) TFEU in combination with Article 52 of the Charter of Fundamental Rights, as the first may limit the application as

6 Article 47 - Right to an effective remedy and to a fair trial
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

7 Article 42 - Right of access to documents
Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

8 Article 52 - Scope of guaranteed rights
1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

9 Article 15 (ex Article 255 TEC) 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. EN C 83/54 Official Journal of the European Union 30.3.2010

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.
The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.
The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.
long as the limitation in accordance to the latter fulfils “the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union.” (European Convention, 2000) Article 15(3) TFEU lays down that “any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institution” (Treaty on the Functioning of the European Union, 2007), in order to assess whether leniency applications fall within this scope one must refer to Council Regulation No. 1049/2001 (“Transparency Regulation”). A closer look at the regulation reveals that it certainly applies in accordance to Articles 2 and 3(1), but that the particular case at hand may fall under an exemption in the protection of a “public interest in regards to the financial, monetary or economic policy of the Community or a Member State” in accordance to Article 4(1). This certainly leaves the necessary room for discretion for a court to rule a denial for access, one that must according to Article 4(3) certainly at least be denied until the end of the Commission’s investigation in that matter.

A complicating factor in this construct worth mentioning is the fact that “private actions for damages can equally be brought by public bodies that, as buyers of goods or services, have suffered harm as a result of an antitrust infringement,” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009) as it has been established through for instance the Commission’s claim for damages against the members of the so called “elevator and escalator cartel” in a follow up suit after the cartel members had already been convicted by the Commission. In that case “KONE subsidiaries received full immunity from fines under the Commission’s leniency programme in respect of the cartels in Belgium and Luxembourg, for being first to provide information about these cartels [...] similarly, Otis received full immunity in

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10 Article 2 - Beneficiaries and scope
1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.
2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.
3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.
4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.
5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.
6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

11 Article 3 - Definitions
For the purpose of this Regulation:
(a) ‘document’ shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;
respect of the cartel in the Netherlands.” (European Commission, 2007) The Commission before bringing its private claims had already functioned in its public enforcement role and in it viewed the leniency applications of the above mentioned. The Commission, who had purchased elevators from the cartel members for its office buildings, would therefore naturally be in a better position than other infringed parties as it already had the information that has been granted. Even if it would not be allowed to directly use that information the Commission would at least be in a position in which it knows what information generally exists, and therefore be in a better position than a private party that was denied access to the applications.

RIGHT NOT TO INCRIMINATE ONESELF

Having looked at fundamental rights, the question naturally arises to what extent the defendant, i.e. the leniency applicant, or another cartel member, actually enjoys the right not to be obliged to incriminate oneself. First of all, it is important to note that generally, the strict right is not enjoyable to the same extent for legal entities as it is for natural persons. The extent furthermore varies from Member State to Member State with varying degrees of the duty to supply information. In general EU terms the Commission has through the appliance of Regulation 1/2003 the right to interview any individual as part of their antitrust investigation, as long as the desired information is not incriminating the individual itself but the company. However, the questioned party must not answer all questions in particular, the ECJ has held in Orkem v Commission that the Commission may not insist on receiving answers to questions about “details of any system or method which made it possible attribute sales targets or quotas to participants’ and details of any method facilitating annual monitoring of compliance with any system of targets in terms of volume or quotas.” (Orkem v Commission, 1989) In the same case the court outlined the framework for the rights of defense of the accused party in an antitrust investigation. The above mentioned is founded on the concepts outlined in paragraphs 28 to 35 of the ruling and states that “in the absence of any right to remain silent expressly embodied in Regulation No 17, it is appropriate to consider whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, as the applicant claims, recognition of the right
not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules.” (Orkem v Commission, 1989) The court realized however, that the protection is not suffice if it does not include preliminary rulings and other general acts of information gathering or situation assessments that lay in the hands of the Commission and it therefore holds in paragraphs 33 and following of the same ruling that relying on “its judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 Hoechst v Commission ((1989)) ECR 2859, paragraph 15, that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.” (Orkem v Commission, 1989) This right is granted as the Commission is entitled to upholding the efficiency of application of EU law, but it must nevertheless heed the rights of defence “accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2 ) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.” (Orkem v Commission, 1989) The court therefore held that “the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.” (Orkem v Commission, 1989)

The above leads to conclude that even though there is a certain protection of inside knowledge, that there is also a certain amount of information that the alleged cartel participants must surrender. The extent of this however, is once again, a Member State affair, but it does lead to conclude that there is certain amount of relevant information at the disposal for claimants that lie outside the protection of leniency programmes.
It is important to note for the discussion that even if full access is legally justified, there must still be some hurdles in order to be granted it, such as proving that one is an infringed party, by showing the antitrust authorities receipts or the according bookkeeping. If no prerequisites to full access such as these are in place and the information would come at no cost to the claimant than the courts could be overrun with unmeritorious claims. "Undoubtedly aware of these risks, the European Commission stressed in its 2008 White Paper on Damages actions for breach of the EC antitrust rules that it only wanted to propose 'balanced measures', that avoid 'a situation where unmeritorious litigation is encouraged or facilitated'. The White Paper indeed commends single compensatory damages, generally approves of the "loser pays" principle, which 'plays an important function in filtering out unmeritorious cases', and advocates a system of disclosure of evidence inter partes 'based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request'." (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009)

**RELEVANCE OF THE INFORMATION**

With the legal framework set it must be asked, however, to what extent the additional information as defined above in the ECN Model becomes necessary to formulate a claim and if a withholding would consequently lead to an inability to formulate a claim. For this purpose one must take a closer look at the five information rubrics mentioned in the ECN Model Programme and weigh of their necessity for a claim or as to whether or not they must be regarded as sensible business information. As mentioned above the first and second section demand the applicant to give "(1) the name and address of the legal entity submitting the immunity application, as well as the names of individuals who are or have been involved in the alleged cartel on its behalf [and] (2) the identity of all the other undertakings which participate(d) in the alleged cartel as well as of the individuals who, to the applicant’s knowledge, are or have been involved in the alleged cartel;" (European Competition Network, 2006) The information in that section can barely be seen as sensible business information nor seems to be there any other reason that would justify a denial for access to the information due to the nature of the content. As this information is usually publicly available anyhow, there
also seems to be no justification to grant access to leniency applications for this information. Most claims are follow-up cases that arise after the Commission has through public enforcement already convicted the alleged cartel members. In light of this, the information is then freely available and therefore attainable through other means; as long as this access is available there is no need to open the leniency files and create additional costs to courts. The question as to what would happen in a private attempt of antitrust enforcement does not rise here, due to the fact that in that case there simply would not be any leniency application. Another reason that would speak for a denial in this regard is the fact that follow-up damage claims are generally directed towards legal entities and not private persons, revealing the personnel composition of the cartel in detail may therefore infringe on certain privacy rights. Overall, the first two information sets barely support any attempt for a private claim as there is no information that cannot be attained through other means, the file may therefore just as well remain closed to the public under this respect. In the third set of information an applicant must deliver to the Commission “(3) a detailed description of the alleged cartel conduct, including for instance its aims, activities and functioning; the product(s) or service(s) concerned, the geographic coverage, the duration and the estimated market volumes affected by the alleged cartel; the dates, locations, content and participants of alleged cartel contacts; all relevant explanations in connection with evidence provided in support of the application;” (European Competition Network, 2006) This set of information regarding the functioning of the cartel is, together with the fourth section that deals with concrete evidence, the most sensible one. Obviously, it is this section that will interest claimants intently because with help of the information inside the damaged parties may be able to assess precisely the monetary loss that they had suffered by looking at, for example, the cost structure of the firm and comparing it with the actual price that they charged in order to determine the unjustified premium that they paid. It is also the section however that will entail a number of business secretees and other sensible information that ought to be protected from the eyes of third parties. The cost structure as an example again, may for instance foretell current and future business strategies and/or pricing policies that the previously harmed party may then use as basis in future negotiations or to establish its won best response price. As it would not have attained this valuable business information through any other means it becomes highly questionable as to whether one should grant full access, as it
may always deliver additional information that is not necessary for a successful claim for damages, but may be valuable for other business activities. Such an outcome cannot be desirable by any antitrust authority. The fourth section demands a revealing of “(4) evidence relating to the alleged cartel in the possession of the applicant or available to it at the time of the submission, in particular contemporaneous evidence,” (European Competition Network, 2006) and poses a significant threat to the leniency applicant in case a plaintiff is granted full access. This is the case as it is most probable that evidence the leniency applicant is able to reveal regards primarily his own conduct in the cartel for one usually has more information about one’s own dealings than those of another. This would greatly place the leniency applicant at risk to suffer from private claims of damages, because the entire necessary set of information for a claim may be neatly laid out in the documents and infringed parties will find it easier to go after the applicant then after the other cartel members. It is this section however, that ought to be governed by the Courage v Crehan decision mentioned above, in that it ought to be kept secret unless it is discoverable and was discovered by the Commission. This distinction is also promoted by GA Mazak. The last section deals with “(5) information on which other competition authority, inside or outside the EU, have been approached or are intended to be approached by the applicant in relation to the alleged cartel” (European Competition Network, 2006) and should not be viewed by outsiders. There is no sensible reasoning as to why this could be of relevance in forming a claim for damages. Any leakage of this sort of information to the public may greatly adversely affect the leniency applicant in applying to the respective antitrust authority, particularly if he operates on a multinational level and is planning on applying to other leniency programmes. Moreover, this information can be vital for the interaction between antitrust authorities. Allowing access to these files could therefore foster mistrust amongst the various authorities and could ultimately lead to a reduction in cooperation, which in turn would be detrimental to international antitrust enforcement and against EU law as it would hinder antitrust authorities from applying Articles 101 and 102 TFEU effectively. Overall it appears that at least sections one, two, and five should not be opened to the public, not even to aggrieved parties with a justifiable reason for a claim of damages. The three sections do not include information that would greatly enhance the chances of a successful claim, but on the other hand can have significant detrimental effect on the functioning of leniency programmes. The other two sections, three and
four, entail the sensible information that fuels the debate, sections one, two, and six should therefore not be part of the discussion and not be passed on. In accordance with other provisions mentioned above it appears wise if section four be governed GA Mazak’s proposal, in that the information that has been discovered by the Commission itself should be made available to claimants, but that additional evidence given by the applicant kept sealed. The third section appears to be the most critical to assess as it is seems impossible to strike a justifiable compromise. Three years ago the Commission itself declared in its 2008 White Paper on Damages actions for breach of the EC antitrust rules that claimants should not be granted access to what it defines as “corporate statements”. According to the Hearing Officer of the Commission, Wills, “these are statements in which a cartel participant sets out its knowledge of a cartel and of its role therein, and which have been produced by the cartel participant for the specific purpose of voluntary submission to the competition authority as part of an application for leniency” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009) Furthermore, the Commission in its current Cooperation Notice declares that it will only transmit such information to national courts with the leniency applicant’s consent, as otherwise the accomplishment of the tasks entrusted to it would be jeopardised (European Commission, 2008) The two statements clearly set out the Commission’s point of view on the matter. In particular the Commission expressly states in paragraph six of the Commission Notice on Immunity from fines and reduction of fines in cartel cases that “in addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of [Article 101 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement.” (European Commission, 2006) This view is further underlined in paragraph 31 of the notice as it reads that “other parties such as complainants will not be granted access to corporate statements.”
(European Commission, 2006) The fact that the Commission stresses this point underlines its commitment to full leniency and that the information contained in the third rubric should remain under closure.

MECHANISMS THAT SUPPORT PRIVATE CLAIMS

The foreclosure from the applications does not necessarily mean that claimants are kept from making their case as they have other effective mechanisms to access the information necessary. “In practice, the Commission publishes in the Official Journal of the European Union in all EU languages a concise summary of the decision, of only a few pages, and posts on its website the full decision, which often runs into several hundred pages, in the language(s) of the decision and in any other available language. If claimants had lodged a complaint with the European Commission, they will already have received in the course of the Commission’s administrative procedure a copy of the non-confidential version of the statement of objections, and may have participated in the oral hearing. 90 Regulation 1/2003 does not provide for other access to the Commission’s file by claimants in follow-on damages actions.” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009) Lastly, the claimants are greatly relieved by the fact once an antitrust authority has ruled an infringement of Articles 101 or 102 TFEU in a public enforcement action the private party does not need to prove the infringement again in a private claim for damages and instead must only prove a causal link between the infringement and a loss to the company. “Public antitrust enforcement has a strong facilitating effect on private actions for damages. Indeed, follow-on actions for damages are much easier to bring than stand-alone actions for damages, because the public enforcement action will have established the existence of the antitrust violation, and may also have generated useful evidence as to causation and as to the harm caused to the claimant in the follow-on action.” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009)

Without leniency programmes, less cartels would be uncovered, leaving the damaged parties with less chances to obtain indemnification, and more importantly without leniency programmes less information would also be available to the claimants in the event of a conviction. The claimants could thus even after a cartel has been
unveiled and persecuted successfully by antitrust authorities, not have as much information about the participation of its members, making it more difficult to formulate and proof a claim as “the corporate statement would not have existed (and could thus never have been obtained by the competition authority, either through the use of its compulsory investigation powers or from an informer or any other source, nor ever have been obtained by the damages claimant, through discovery or any other means), but for the cartel participant’s voluntary act of making a leniency application” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009, p. 23f) In this light it would appear foolish to grant full access to claimants as the overall information and more importantly overall indemnification attainable would be less, even though one attempts to grant more.

POLICY IMPLICATIONS

ECONOMIC IMPACT

Antitrust law is a goal driven legislative, with the aim to reduce anti competitive behavior in order to foster a healthy economy in the European Union. The primary role herein for public enforcement lays arguably at least in deterrence and punishment, as both Wils and his colleague Assimakis P. Komninos agree, even though they both add different third functions in addition. Within the field of public enforcement the introduction of leniency programmes has become the foremost facilitator to achieving the above mentioned aims and „tremendously successful.” (Riley, 2010) The efficiency of the leniency programmes is underlined by Commissioner Neelie Kroes proclamation that between 2002 and 2008 46 of the 52 statements of objection stemmed from leniency applications. In the Impact Assessment the Commission proclaims in paragraph 32 that “even in the most effective system of private enforcement, not all the harm to consumers and other victims reflected in the above estimates will be compensated: this is because, inter alia, a considerable number of antitrust infringements will remain undetected. For hardcore cartels, the detection rate is generally assumed to be no more than somewhere between 10% and 20%.” (European Commission, 2009) If we now assume that the 52 detected cartels represent about 15 % of all cartels, than the 6 anticompetitive agreements that were not detected through
leniency applications represent a mere 2%. Even though the Commission also indicates in paragraph 34 of the Impact Assessment that “recent decisions such as NBR, International Removal Services and Car Glass show that the Commission is able to uncover cartel behaviour on its own initiative, outside of its leniency policy” and that “the Commission continues to place considerable weight on such ex officio investigations, which may result from market monitoring, sector enquiries and complaints, and also via national competition authorities in the ECN” (European Commission, 2009) it is the leniency programmes that are the most efficient weapon in the fight against cartels. These numbers clearly underline the importance of leniency programmes. A reduction of their efficiency could therefore lead to a significant lower number of uncovered cases and therefore fewer chances for private actions for damages in the first place.

The superior functioning is jeopardized however, once the private litigation costs to the applicant become too great. When one looks at the Vitamins cartel case for example one will find that the cartel members had to pay a fine totaling about €791 million, with the exemption of the leniency applicant who had supplied the Commission with the necessary information. The latter ultimately faced significantly higher charges through private claims for damages in the United States, due to the fact that it became the easiest target as the claimants were granted access to the leniency application. In hindsight the leniency applicant would most likely not have applied for leniency and uncovered the cartel.

Nevertheless it is also important to note that leniency applicants also foster three distinct economic dilemmas that contravene general EU policy. First of all, the applicant may already be the dominant player in the industry and in the event that he is exempt from fines and from private enforcement claims he could most certainly expand his industry dominance such as it was the case in Germany with the Coffee Cartel that was uncovered by the industry leader Kraft Foods (Jacobs Kaffee). This grants greater influence over price and increase producer surplus at the cost of consumer welfare to the lenient applicant, which of course is absolutely contradictory to the fundamental values of antitrust law. Granted, there are various legislations such as Germany that when determining the reduction in fines or grant of immunity that look at the position of the players in the market and their role within the cartel. In Germany it has been
settled that neither the dominant player of an industry nor those that were able to exert power over the other participants may be eligible for grant of immunity. In the case of the coffee cartel this did not apply however, as the other members such as Melitta and Tschibo were said to have a bilaterally developed agreement with Jacobs and that the latter at that point, even though it was already the largest company in the industry, it was far from a position of dominance. The second dilemma, is the fact that if a plaintiff is unable to pursue his claim due to a lack of access to documents, he could not get back what he has lost, i.e. the resources would have been inefficiently allocated due to a criminal act and that wrong allocation would not have occurred in a healthy economy. Now that the plaintiff is unable to retrieve these resources he, even though he would have been a healthy undertaking under normal market conditions, might be pushed out of the market. An undesirable outcome when one regards the concept that competition law is designed to enhance the quality of the common market, as the “natural selection” of competition could not sort out the least fit participants. The third aspect, although a mere exception, is that in certain cases leniency programs can actually also uphold price fixing agreements. To illustrate this we must return to our prisoner’s dilemma from above. Again we have firms A and B with the payoffs as above, but this time the reaction time for both is imminent and the communication and trust levels are fairly high as well. If now one of the firms, say Firm A, suddenly decides to undercut the other (Firm B) in order to gain market share the latter is able to answer the threat by approaching the competition authorities and applying for leniency. This would result in Firm A having to pay a greater part (or all) of the fines imposed upon the cartel. This in turn would result in a higher cost structure which Firm B would be able to exploit and assume market dominance. The agreed price will therefore be maintained as the potential loss outweighs the potential gains for Firm A when Firm B is able to lay out this threat credibly. With that threat in place the options for Firm A would reduce to two (staying in the cartel or exiting through a leniency programme), and as long as Firm A fears no detection the profit motive would lead it to choose to stay in the cartel. In that regard one could even argue that there leniency programmes may also create a certain stabilizing factor to a cartel as well.

Despite the aforementioned dilemmas the introduction of leniency programs has revolutionized cartel prosecution. Leniency programs ensure a better chance of
detecting and persecuting trusts, to such a degree that it is safe to say that a majority of international cartels are exposed by them. It must therefore be of the utmost importance that cartel members that are willing to expose their cartel in the hope of being granted protection through a leniency program must not be detained from filing an application. As the ultimate purpose of all undertakings is to earn economic profits, the incentive to file must be economic, i.e. have a monetary value as well. Infringers will not differentiate to whom they would have to pay, be it the public body or private parties. The first of the two serves as a threat and grants leniency programmes its leverage the other always remains an insurmountable threat that if not kept at bay will outweigh the former. Community wide antitrust policy has been designed for efficiency and must therefore heed its course and continue it by disallowing access to the leniency applications to third parties in order to substantiate a civil claim for damages.

HARMONIZATION

For the European Union as a whole it has always been of the most elementary value to synchronize the economic and legal framework works of the Member States in order to ensure equality and the most efficient allocation of resources while fostering a strong belief in the reliability of the Union. As part of the synchronization it is clear that antitrust law and the application of it must be highly similar amongst the Member States to ensure its efficient functioning. The Pfeiderer AG ruling must therefore be seen as a step backwards when regarding the fact that Member State courts are only held to attempt to align their decision with European competition law and rule on a case to case basis; a step deviating from previously cohesive antitrust policy. In an effort to enhance the alignment European antitrust law overtook the concept laid down in paragraph 33(4) of the German Competition Act in that it has ruled that decisions by an antitrust authority of one Member State shall be binding to all other Member States as well in its 2008 White Paper. This further illuminates the urgency to also bring laws and judicial standards in the field of antitrust law into line. With the different Member States having various legislation for antitrust law but the same binding effect on all others, distinct phenomena are likely to occur. For one, both claimants as well as leniency applicants (whoever comes first) will attempt to choose a Member State whose judicial system is in their favor thus fostering arbitrage and creating two distinct legal systems. The problem
here is that when an infringer or the infringed can choose the arena ("forum shopping"), which is not without restrictions, but certainly possible to an extent one would then probably find two different antitrust systems. One would favor more private litigation and the other more public enforcement. The latter is more likely to be composed of more Member States as the authorities themselves earn more money with public enforcement and the resulting fines, and this would be in the interest of the law maker. There are already some pointers that indicate this kind of development on the example of the effect of the more moderate discovery rules in the UK, that sees higher numbers of private claims for damages then other countries in the EU. The other effect of disharmonized antitrust law, particularly with the aspects of international cartels and forum shopping, is that it greatly enhances both the complexity as well as the uncertainty leniency applicants face. Nicolo Zingales even argues that “the lack of coordination between the national enforcement systems and the leniency programmes themselves, is arguably one of the most critical problems affecting leniency programmes within Europe.” (Zingales, 2008) He furthermore believes that the formation of a harmonized system even though it may be difficult to realize due to “technical and political complications,” nevertheless “remains the best solution for the purpose of aligning the interests.” (Zingales, 2008)

Uncoordinated antitrust systems within the EU have two distinct negative effects on the behavior of leniency applicants and thus leniency programmes in general. To illustrate the problems that can arise with international cartels that operate in countries with different uncoordinated leniency programmes, we will look at the prisoners dilemma from above again. For one, international cartels frequently see themselves confronted with different antitrust regimes, this peculiar situation may, if the information flow is perfect result in a stabilizing factor for cartels. If Firm A decides to blow the whistle in Jurisdiction X, Firm B could blow the whistle in Jurisdiction Y and receive the benefit of leniency there. This results in Firm B being able to credibly threaten Firm A so that the pay offs change and it becomes beneficial to remain in the cartel unless detection in all jurisdictions is imminent. The second aspect is concerned with the vast amount of different legislature becoming practically insurmountable for most managers to see through. This uncertainty nourishes distrust for an application with all its eventualities. Since certainty is important for managers to assess the cost and benefit of applying for leniency this enhanced difficulty will cause less applications.
Zingales represents the view that “this lack of harmonization and coordination is dangerously detrimental to the objective of fighting EU-wide cartels” (Zingales) and that “the frequent involvement of different jurisdictions and thus different legal systems might deter some cartel members from confession, because they would fear not to receive the same treatment under other States’ national standards.” (Zingales)

To contravene this danger and achieve synchronization the EU has a number of tools at its disposal, such as directives, regulations, or white and green papers. Each has a different binding effect some more, some less. In order to fill those gaps that are left by generally worded legislation the EU relies heavily on case law as well. The ruling appears particular peculiar in regards to the synchronization when one takes a closer look at the established case law that the ECJ itself even mentions in the ruling. In the Case C-439/08 VEBIC the ECJ held that Member States must apply Articles 101 and 102 TFEU effectively in order to ensure community wide harmonization of antitrust law. In paragraph 56 the court underlined that “under Article 35(1) [of Regulation 1/2003], the Member States are to designate the competition authority or authorities responsible for the application of Articles 101 TFEU and 102 TFEU in such a way that the provisions of that regulation are effectively complied with. The authorities so designated must, in accordance with the regulation, ensure that those Treaty Articles are applied effectively in the general interest (see Recitals 5, 6, 8, 34 and 35 in the preamble to the Regulation).” (VEBIC, 2008) In the same ruling the court also decided that procedural rules, to which access to information belongs, must not be detrimental to the application of antitrust law in that states that “although Article 35(1) [of Regulation 1/2003] leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated there under, such rules must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities.” (VEBIC, 2008) If the rules are set and know to all participants this furthers antitrust law. Zingales argues that “to be precise, this is just one aspect of a more general policy guaranteeing transparency, predictability, and fair treatment to the applicants. The rationale of this policy is, if the dynamics and the rules are stated clearly, the strategy of the cartel member will be perfectly rational and foreseeable: conceivability, it will be inferable by simply creating a chart evaluating costs and benefits of the available choices for each particular case.” Even goes so far as
to say that To this extent it is fundamental that the rules be clear for calculating both the expected sanction and the possible damage that can be awarded to civil plaintiffs. Otherwise authorities cannot rely on game theory and more generally on the rationality of cartel members’ decisions, and will have less control over their choices.” (Zingales, 2008)

In addition to the general policy guidelines and their underlining through case law as exemplary mentioned above, the national antitrust authorities have come together with the Commission and founded the above mentioned ECN. The ECN’s sole purpose is to align the various national rules to the greatest possible extent. This however, cannot be achieved instantly, but must be developed slowly in a process. Ruling that Member States are to use their own digression upon granting access whilst heeding the general policy outlines, but not underlining a precise course of action must in that regard be viewed as a suboptimal ruling in the Pfleiderer case.

Whichever way one holds these arguments it cannot be beneficial to have different standards in the various Member States. Although safeguarding a high degree of sovereignty of the single national antitrust laws is elemental for the European Union, different standards will reduce the effectiveness of leniency programmes as it fosters forum shopping, creates control mechanisms for other cartel members by enabling credible threats, and lastly by cultivating uncertainty and unpredictability for the applicants.

CONCLUSION

“In the light of the foregoing, the answer to the question referred is that the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.” (Pfleiderer v Bundeskartellamt, 2011) So is the view of the ECJ, but evaluating the arguments mentioned in this paper one must conclude that overall, in
order to ensure the ongoing functioning of efficient leniency programs the applicant must be better off than the other cartel members not applying (or applying late). In economic terms this means that public persecutions and fines must significantly outweigh possible private claim fines in order for the system to create an incentive for the applicant. It appears not to be possible however, to codify the maximum fines in private law for these cases in order to guarantee this. Hence the only plausible alternatives if one would keep up the decision in Pfleiderer AG would be to further boost public fines, this in turn however, could have a tremendously detrimental effect on European firms and rob them of their competitiveness on a global scale if they would have to pay more than a maximum of 10% of their annual sales revenues in fines. Or have all members of the ECN agree on a very high level of disclosure requirements. Arguably a more sensible judgment could have gone along the lines of GA Mazak compromise as “it does not appear unfair to deny damages claimants the right to obtain the corporate statement, whereas the protection against disclosure of corporate statements in private actions for damages may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment” (Wils, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, 2009) Note that this refers only to the corporate statements, i.e. the documents that would have without the help of the applicant been unattainable. To not grant the applicants too much protection however, other information, particularly those that have been uncovered through other methods of investigation should be made easily accessible to private claimants. In light of the afore mentioned, and particularly when regarding Advocate General Mazak’s advice, one might come to the conclusion that the Court of Justice ruled too bluntly. The case granted the court the opportunity to lay down precedence and clearly define the boundaries for public and private antitrust enforcement, and could have made a significant step towards furthering the integration and harmonization of a uniform European antitrust law. The judges did not seize this opportunity however and left the issue basically, at the status quo. It is without a question that the right to claim damages must be upheld, to what extent access to leniency applications is necessary to uphold this be necessary the court did not however define. The ECJ must therefore live with the confrontation that it at least missed the opportunity to outline precisely what information may be granted as a necessity and lack of which would deny claimants the right for damages.
After the ECJ ruling, the competencies lie now again with the Amtsgericht Bonn. It is upon them to decide if they should follow suit with their previous decision to grant access to the documents or not. The danger for the German Bundeskartellamt in this is significant in the way that it determines the level of security of the information in its possession and therefore ultimately also its position amongst the antitrust authorities of all Member States. As antitrust authorities are only obliged to share their in depth knowledge of cartels with authorities from other Member States as long as the same level of safeguarding of the information is upheld the Bundeskartellamt may be maneuvered into isolation. This would greatly reduce the amount of information at its disposal and quickly render it notably less efficient. It must therefore be observed if this in turn might been seen as an infringement of the ruling itself as it would reduce the efficient application of Articles 101 and 102 TFEU.


Courage v Crehan, C-453/99 (European Court of Justice September 20, 2001).


Manfredi et al, C-295/04 to C-298/04 (European Court of Justice July 13, 2006).

Michalczyk, D. P. (n.d.). Der Austausch von Informationen im ECN - wer bekommt was wann zu sehen.

Orkem v Commission, Case 347/87 (European Court of Justice October 18, 1989).

Pfleiderer v Bundeskartellamt, C-360/09 (ECJ Grand Chamber 06 14, 2011).


VEBIC, C-439/08 (European Court of Justice December 7, 2008).


