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Accessing Evidence of Competition Law Infringements through National Courts – A Mission Impossible?

More than five years have passed since Directive 2014/104/EU on antitrust damages actions (the Directive) was adopted and, by now, all Member States have transposed the rules into their national legislation. [1] The Directive introduces a framework designed to ensure an effective private enforcement system throughout the Union, adding a second layer of remedies to the EU public enforcement system.[2] The Directive identifies and addresses a number of obstacles to the realisation of a more effective system of antitrust damages actions, one being the difficulties that cartel victims encounter when they seek to obtain the evidence needed to prove their case. As is recognised in the Directive's recitals, actions for antitrust damages typically require a complex factual and economic analysis. Furthermore, the necessary evidence is often held exclusively by the opposing party or by third parties, and is therefore not sufficiently known by, or accessible to, the claimant.[3] In its initial directive proposal, the Commission declared that it was widely recognised that in many Member States, the difficulty in obtaining all the necessary evidence constituted one of the key obstacles to damages actions in competition cases.[4]

In order to remove this hurdle, the Directive introduces a number of provisions on disclosure, requiring Member States to ensure that national courts have the power to order disclosure of the evidence necessary for the applicants to prove their claim. However, contrary to the initial proposal, disclosure has not been made mandatory and there are a number of conditions governing its application. The question is therefore whether the rules, as they are now framed, will ensure a level playing field throughout the Union and guarantee the access required for the private enforcement system to become truly effective, or whether they will allow national courts to hide behind proportionality analyses or the Commission's own practices to maintain the obstacles identified in the Directive's recitals.

This article examines the Directive's provisions on disclosure. It concludes that although the Directive requires national courts to assess these questions against a new set of rules – unless

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[1] Directive (EU) No 2014/104 of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
[2] J Drexl, *The interaction Between Private and Public Enforcement in European Competition Law,* in H W Micklitz and A Wechsler (eds), *The Transformation of Enforcement – European Economic Law in a Global Perspective* (Oxford, Hart Publishing, 2016), p. 136.
[3] Recitals 14 and 15 of the Directive.
[4] Commission Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 2013/0185 (COD), p. 13.

and until there is any case-law from the ECJ on the interpretation of the Directive's provisions on disclosure – the discretion left to the national courts will allow them to carry on more or less as usual should they so desire. With one exception. That is the few Member States which have traditionally had wide (pre-trial) disclosure rules, and which have now had to adjust their practices to accommodate the Directive's requirement that disclosure orders should be proportionate, which, according to wording of the Directive, excludes wide or non-specific disclosure requests. Thus, while some hurdles may have been removed, others have surfaced, and the road towards a level playing field still appears bumpy.

1. *Bringing Matters to Court – Any Chance of Success?*

As noted by the Commission already in the Green Paper preceding the proposal for the Directive,[5] actions for damages in antitrust cases regularly require the investigation of a broad set of facts. In order for a national court to award damages, the cartel victim will have to prove (i) the existence and extent of the cartel, (ii) that the unlawful actions of (each of) the cartel members have caused the applicant harm, as well as (iii) the amount of the harm caused. This is no doubt an uphill battle, and probably a partial explanation why the survey conducted by the Commission in the wake of *Courage*[6] was such a gloomy read, revealing a state of 'astonishing diversity and total underdevelopment' throughout the Member States of the European Union.[7]

The Directive introduces a number of provisions that seek to remedy these problems and encourage individuals to make use of private action before national courts. First of all, there is now a rebuttable presumption of harm. According to Article 17(2) of the Directive, it shall be presumed that cartel infringements cause harm, and the Commission has also published a guidance to national courts on how to quantify harm in these cases.[8] Second, where several undertakings infringe the competition rules jointly, as in the case of a cartel, the co-infringers are held jointly and severally liable for the entire harm caused by the infringement.[9] The claimant will thus not have to show the portion of the harm caused by each member of the cartel, but can seek compensation for the total loss suffered from anyone of the cartel

[5] Green Paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}.
[6] Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465.
[7] Ashurst, *Study on the Conditions of Claim for Damages in Case of Infringement of EC Competition Rules*, Comparative Report, August 2004. Prepared by D Waelbroeck, D Slater and G Even-Shoshan for the European Commission (the Ashurst Report). See also the Commission's Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}.
[8] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013/C 16/07. The Communication is accompanied by a more comprehensive and detailed practical guide drawn up by the Commission's services, Commission Staff Working Document, Practical Guide, Quantifying harm in actions for damages based on breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union{C(2013)3440}.
[9] Article 11 of the Directive.

members.[10] Third, not only are national courts bound by the decisions and rulings of the EU judicature, Article 9 of the Directive declares that where a national competition authority or court has established an infringement, such finding shall be binding also on the court hearing the damages claim.[11] Where the action for damages is brought before a court in another Member State, the finding of an infringement must constitute at least *prima facie* evidence of an infringement.

Even considering these attempts at invigorating the private enforcement system, filing a damages claim is not without risk. The burden of proof may not be as heavy to bear as it used to be, but the cartel victim will still need to collect a substantial amount of evidence in order to be successful in court. To use the words of *Riley* and *Peysner*, running a competition case – and particularly a damages case – in a national court is not for the fainthearted. The time that such cases take can be lengthy, the demands for documentary and economic evidence considerable and the costs substantial.[12] Ideally, the company suspecting that it has suffered loss would therefore want to access at least some evidence already before taking matters to court. This in order to assess the risks involved in court proceedings and the chances of success or settlement. In those situations where the company is considering a follow-on action, it may therefore avail itself of any applicable rules on public access, and attempt to obtain the evidence directly from the competition authority investigating the case. However, unlike the rules governing damages litigations, these rules have not been harmonised and the chances of accessing evidence from national competition authorities vary between Member States.[13]

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[10] Save for any immunity recipients. Article 11 of the Directive stipulates that the amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

[11] This obligation has been interpreted narrowly, at least by the UK courts, which have found that the binding effect does not relieve the parties of proving the infringement for time periods that were not addressed in the infringement decision. See S Peyer, *Private Antitrust Enforcement in England and Wales after the EU Damages Directive: Where are We Heading?*, in P L Parcu, G Monti and M Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Cheltenham, Edward Elgar Publishing, 2018), at p. 95. Peyer refers to cases both from the High Court ant the Competition Appeal Tribunal; *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2016] CAT 23, and *Asda Stores Ltd v Mastercard Incorporated* [2017] EWHC 93.

[12] A Riley and J Peysner, *Damages in EC Antitrust Actions: Who Pays the Piper?*, (2006) 31 E.L. Rev. October 2006, p. 749. *Laborde* gives an example from the Finnish courts where the main hearing in the damages action following upon the decision to impose fines on the members of the raw wood cartel lasted more than 34 days, and where the legal costs of the defendants, which the claimants was asked to compensate, exceeded EUR 12 million. See J F Laborde, *Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges*, Concurrences (2018 ed.), No 1 2019.

[13] In January 2019, a directive aimed at empowering national competition authorities was adopted; Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Article 31 of the directive mirrors Article 6(6) of the damages directive and requires Member States to ensure that access to leniency statements and settlement submissions are only granted to the parties under investigation, and only for the purpose of allowing them to exercise their right of the defence. The directive does not otherwise harmonize the rules on public access.

As for the case files held by the Commission, it has proven difficult for cartel victims to access the documents contained therein. While Regulation 1049/2001 on public access to documents declares that all documents held by the EU institutions should be available to the public,[14] the Commission has consistently invoked the exceptions laid down in Article 4 of the regulation, and has refused access even to the cartel case files' tables of contents.[15] The Court has endorsed the Commission's restrictive policy, allowing the Commission to rely on a general presumption that all the documents in its cartel case files are confidential in nature and should therefore not be disclosed to third parties.[16] Furthermore, an increased recourse to cartel settlements has affected the possibilities for cartel victims to gain important information, as the Commission's decisions in these cases are often shorter than ordinary infringement decisions and are seldom challenged before the EU Courts.

That said, there are of course a number of cartel cases that are not settled, and the Commission has recently chosen another route to further transparency and allow cartel victims to gather relevant information in these cases. That is through the publication of longer and more detailed infringement decisions. Even though these 'new' and extended versions of the Commission's decisions may not always provide the evidence required to file a successful cartel damages claim, they may nevertheless help victims narrow down and specify any request for disclosure of or access to documents, thereby also increasing the chances of accessing the evidence required. However, Commission's attempts to publish more detailed infringement decisions have met steep resistance from the addressees of those decisions, who are alleging that the extended versions should not be made public due to the confidential information allegedly contained therein.[17] This has resulted in lengthy court proceedings preventing the Commission from publishing the final versions of the infringement decisions for years, even decades.[18] Thus, anyone who chooses to await the publication of a (more detailed) Commission decision before taking matters to court will need to be patient and will also risk having to wait in vain or see the statutory limitation period expire.[19] The remaining

[14] Regulation 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents was adopted on 30 May 2001, and entered into force six months later, on 3 December 2001.
[15] See e.g. Case T-437/08, *CDC Hydrogene Peroxide Cartel Damage Claims v European Commission*, EU:T:2011:752 and Case T-677/13, *Axa Versicherung AG v European Commission*, EU:T:2015:473. These attempts have not been successful.
[16] Table of contents excluded.
[17] See e.g. Case C-162/15 P, *Evonik Degussa GmbH v European Commission*, EU:C:2017:205.
[18] The infringement decision against the members of the Hydrogen Peroxide Cartel was adopted in May 2006. The full version was not published on the Commission's website until April 2017, elven years after its adoption. By the time of publication, many of the damages claims had already been settled and the publication had thus lost much of its value. Decision C(2006) 1766 final relating to a proceeding pursuant to Article 81 [EC] and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, Eka Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret SA, Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/38.620 — Hydrogen Peroxide and Perborate).
[19] There is of course the possibility for cartel victims to initiate damages proceedings, and then try obtain a stay of the national proceedings. This was acknowledged by the President of the General Court in *Pilkington*. When challenging the Commission's decisions to publish a more detailed infringement decision, the applicants often

option is for the cartel victim to take matters to court and convince the national courts to order disclosure. This is where the Directive comes into play.

2. *Accessing Evidence Prior to the Directive's Adoption*

Before presenting the Directive's rules on disclosure, it is necessary to give a brief overview of the rules that were in place prior to its adoption. Rather than providing an exhaustive overview of these rules, the aim is to set the new rules in context and point to the fact that prior to the harmonisation of the national rules on disclosure, the possibilities to access evidence through national courts varied considerably between Member States.

Following the Court's ruling in *Courage*, the Commission saw it necessary to do some stock-taking and to determine whether the right to compensation which had now been confirmed by the Court was a right in theory only or whether the national systems provided for effective remedies. It therefore commissioned a survey on the state of play in the Member States. More precisely, the survey aimed at providing a comparative analysis of national rules and case law regarding the private enforcement of the competition rules throughout the European Union. As mentioned in Section 1 above, the result of the survey presented a gloomy read, as the picture which had emerged was not only one of astonishing diversity, but also one of total underdevelopment.[20]

The report, also known as the Ashurst report, identified the difficulty of obtaining evidence as one of the major obstacles to damages actions. At the time, the powers of national courts to order production of documents varied widely between the Member States. At one end of the scale were the UK, Ireland and Cyprus where wide (pre-trial) discovery existed. Besides these countries, courts in Poland and Spain also had relatively wide powers, which allowed parties to request categories of documents. However, in all other Member States, the rules in place required the parties to more or less specify the individual documents that they wished to be

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seek interim measures in order to postpone such publication until the underlying case has been adjudicated by the EU Courts. Pilkington is one of these companies. When it applied for interim measures, the Commission objected and argued that a postponed publication would be detrimental to potential cartel victims who need the information to make their cases against the cartel members. To this the President of the General Court simply responded that there was nothing to prevent them from bringing their actions for damages in due time whilst obtaining a stay of national proceedings until judgment was given in the main action. See T-462/12, *Pilkington Group Ltd v European Commission*, EU:T:2013:119, para 36. According to Article 10 of the Directive, the limitation period may not start to run before the infringement has ceased, and the claimant knows or could reasonably be expected to know (i) about the infringement, (ii) that it has caused the claimant harm, and (ii) the identity of the infringer. The limitation period shall be at least five years, and shall be suspended or interrupted if a competition authority takes action against the infringement. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

[20] Ashurst, *Study on the Conditions of Claim for Damages in Case of Infringement of EC Competition Rules*, Comparative Report, August 2004. Prepared by D Waelbroeck, D Slater and G Even-Shoshan for the European Commission (the Ashurst Report). See also the Commission's Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}.

disclosed. The level of specification required varied from one Member State to another. In some Member States the party requesting disclosure was more or less required to identify the document in question.[21] In other Member States, less detail was required.[22] In Germany, the judge could order a party to produce a document if it was referred to in that party's or the other party's pleadings. A party could also be required to produce its accounts and any document to which another party had a legal right of access. In Italy, the approach was case by case, and any document could be demanded if it was shown to be related to the dispute, indispensable to the case and in the possession of the other/third party. These conditions meant that the document would have to be identified with some degree of precision, the report noted. In Denmark the requesting party was required to specify the facts that he wished to prove via the requested documents and the disputed fact did then have to be of relevance for the case.

As noted by *Bentley* and *Henry*, this disparity in the laws of the Member State disfavoured a private litigant established in one Member State as compared to a private litigant established in another and was conducive to forum shopping, which, *Bentley* and *Henry* note, is anathema to the principles underpinning the internal market.[23] In its proposal for a directive on antitrust damages actions, the Commission sought to eliminate the risks of forum shopping through the creation of a level playing field.

3. *The Commission's Proposal*

Following the publication of a Green Paper in 2005 and a White Paper in 2008, the Commission eventually presented its proposal for a directive on damages actions in June 2013 ('the Proposal'). In the Proposal, the Commission declared that the obstacles to a more effective private enforcement system which had been identified in the Green Paper not only continued to exist in a large majority of the Member States, they had even increased since 2005.[24] These obstacles related to, among other things, obtaining the evidence needed to prove a case. The Proposal therefore contained a number of provisions on disclosure which aimed at ensuring a minimum level of effective access to the evidence needed to prove antitrust damages claims and/or a related defence.

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[21] The report mentions Austria, Belgium, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Slovakia. However, also in Sweden were the plaintiffs required to identify the documents requested. See the report, p. 63.
[22] France is mentioned.
[23] P Bentley QC and D Henry, *Antitrust Damages Actions: Obtaining Probative Evidence in the Hands of Another Party*, World Competition 37, no 3 (2014), p. 272.
[24] That the differences had increased was stated in the impact assessment report accompanying the Proposal, See 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 of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final.

However, and as noted by the Commission in the impact assessment report accompanying the Proposal (the Impact Assessment Report), there was now a cloud on the horizon. In June 2011, the Court had delivered its ruling in *Pfleiderer*, creating – or highlighting – a potential tension between the right to compensation and the interest of ensuring effective public enforcement.[25] Acknowledging the interest of maintaining an effective leniency system, the Court nevertheless pointed to the fact that every individual have a right to claim compensation for the loss caused to him by competition law infringements. Thus, the Court concluded, national rules on access to leniency documents may not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation. Absent harmonisation, national courts and competition authorities should therefore, on a case-by-case basis, weigh the respective interests in favour of disclosure against those in favour of protecting the information voluntarily provided by the leniency applicant, the Court concluded.[26] Through a single blow by the Court, a crack now appeared in the once so solid public enforcement system, as it was no longer possible for national competition authorities or courts to apply a blanket ban on access to leniency material. While, in practice, it would most likely still be hard for cartel victims to access such material the door could not be firmly shut.

It is clear from the Proposal that the Commission seeks to address this issue, and to balance the interests of public and private enforcement against each other in the hope of finding a viable solution. The avoidance of overly broad or costly disclosure obligations is one such attempt. Under the Proposal, a number of requirements were introduced, which while forcing some jurisdictions to abandon any requirement to identify each document covered by a disclosure order, still aimed at limiting the scope of such orders. According to the Commission, this approach had been chosen in order to avoid undue burdens for the parties involved as well as any risks of abuse. The Commission also declared that it had paid particular attention to ensuring that the proposal was compatible with the different legal orders of the Member States. To this end, the proposal followed the tradition of the great majority of Member States and relied on the central function of the court seized with an action for damages: disclosure of evidence held by the opposing party or a third party could only be ordered by judges and should be subject to strict and active judicial control as to its necessity, scope and proportionality.[27]

While the Commission may have opted for this approach knowing that it had the greatest likelihood of passing through the Member States in the Council, the model chosen does also appear to have been the one preferred by the Commission. Acknowledging the need to ensure an effective private enforcement system, the Commission is nevertheless eager to maintain an

[25] Ibid, p. 1.
[26] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389, para 30.
[27] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 Final.

effective public enforcement system and to guarantee the effectiveness of its leniency programme. Recital 5 of the Proposal declared that to ensure effective public and private enforcement of the competition rules, it was necessary to regulate the way the two forms of enforcement were coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level would also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market, the recital declared. Furthermore, and perhaps more importantly, the Commission noted in the Proposal that the willingness of undertakings to supply evidence when cooperating with competition authorities may be negatively affected by disclosure requests that identify a category of documents by reference to their presence in the file of a competition authority rather than their type, nature or object (e.g. requests for all documents in the file of a competition authority or all documents submitted thereto by a party). Therefore, the Commission declared, such global disclosure requests for documents should normally be deemed by the national court as disproportionate and not complying with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.[28]

Avoiding 'overly broad and costly disclosure obligations' may thus have been in the interest of both a majority of the Member States and the Commission, and when drafting this provision, the Commission may very well have paid particular attention to ensuring that the Proposal was compatible with the different legal orders of the Member States. However, the Commission appears to have decided to take things further than most Member States at least on one point, and that concerns pre-trial disclosure. While not explicitly requiring the Member States to provide for pre-trial disclosure, the Proposal required Member States to make sure that national courts could order disclosure where a claimant had 'presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'. There was no mention of ongoing damages proceedings. As will be discussed in the following section, the Commission's proposal was not accepted by the legislator, as Article 5 of the Directive now declares that this obligation on the part of the Member States is limited to claims made in proceedings relating to an action for damages.

4. The Directive's Provisions on Disclosure

The Directive addresses itself to the Member States and, as the title suggests, governs actions for damages before national courts. Recognising that access to evidence is key to achieving effective private enforcement, the Directive contains a number of provisions governing the Member States' obligations to ensure that national courts are empowered to order disclosure of documents related to damages claims. Article 5 of the Directive governs disclosure in

[28] The Proposal, p. 14.

general while Article 6 adds further requirements in situations where the evidence is sought from or included in the file of a competition authority. As noted by *Wils*, the competition authorities' case files are obvious locations for potentially relevant evidence.[29] Yet, both Recital 29 and Article 6(10) of the Directive make competition authorities the last possible resort for obtaining evidence. The Directive provides that they shall only have to disclose evidence where such evidence 'cannot possibly be obtained from another party or from a third party'. The rationale behind this approach being that competition authorities have limited resources, and should focus those resources on the core task of detecting and punishing competition law infringements.[30]

4.1 Article 5 Governing Disclosure in General

The main provision on disclosure is Article 5. It requires Member States to ensure that national courts, in proceedings relating to damages actions, are able to order defendants or third parties to disclose relevant evidence. However, this requires that the claimant is able to present 'a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'. In order to ensure equality of arms, defendants have a corresponding right to request disclosure, and national courts should thus also be empowered to order the claimant or a third party to disclose relevant evidence. The wording of the provision prompts a number of reflections.

First, Member States are only required to enable national courts to order disclosure of evidence. Unlike the Proposal, there is no obligation on the part of the courts to actually do so. Article 5(2) of the Proposal required disclosure where the party requesting disclosure (i) could show that evidence in the hands of another party or a third party was relevant, and (ii) had specified either items of evidence or categories of evidence defined as precisely and as narrowly as possible. The legislator has thus taken a deliberate step back, and left it to the national court to decide whether or not to order disclosure. From a private enforcement perspective this is unfortunate, especially given the fact that there are a number of requirements which need to be met by the requesting party, and that any obligation on the part of the courts to order disclosure would thus have been restricted in scope.

Second, the provision applies 'in proceedings relating to an action for damages'. As discussed in the previous section, a narrow reading suggests that it is only when the claimant has actually brought a damages claim before a national court that the provision applies, leaving pre-trial disclosure outside the scope of the Directive. Such a narrow reading is supported by the fact that the Proposal did not make any reference to proceedings relating to actions for

[29] W P J Wils, *Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future*, World Competition, Volume 40, Issue 1, March 2017.
[30] Ibid.

damages, but simply imposed an obligation on Member States to enable national courts to order disclosure where the claimant had fulfilled the criteria listed in Article 5(1).[31] According to the Ashurst report, pre-trial discovery was only available in a limited number of Member States at the time of the survey, and it could thus be assumed that some Member States considered the initial wording to be too far-reaching fearing that it would force them to abandon their legal traditions and introduce a new feature into their procedural framework. As discussed above, cartel damages cases are both complex and fact-intensive (read costly), and one would imagine that most cartel victims would want to access the evidence while still assessing their chances in court. However, those situations are not expressly governed by the Directive, leaving it open for Member States to exclude pre-trial disclosure.

As discussed in Section 1 above, national rules on transparency and public access may allow cartel victims very limited possibilities to obtain evidence directly from the competition authorities. The Commission is consistently rejecting any requests under Regulation 1049/2001 for access to its cartel case files, and it is safe to assume that there are national competition authorities that are equally reluctant or unable to open the doors to their archives.[32] Anyone trying to rely on a right of public access may therefore end up empty-handed. Given the fact that the Directive imposes a number of obligations relating to the (i) relevance and plausibility of the claim, and (ii) scope of any order for disclosure, it would not be too burdensome for national courts to deal with pre-trial disclosure requests. While national courts are thus unlikely to be swamped by pre-trial disclosure requests, it would no doubt guarantee a more effective and efficient private enforcement system, as cartel victims would then be allowed the possibility to assess the strength of their case before initiating proceedings or negotiating a settlement. It should be noted that, at least in Germany, Portugal and Spain, the national rules implementing the Directive go beyond what is required and allow claimants that potentially suffered loss to request disclosure even before an action for compensation is lodged.[33]

Third, Article 5(1) requires potential victims to present a reasoned justification containing ‘reasonably available facts and evidence sufficient to support the plausibility of its claim for

[31] The criteria are that the claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant’s infringement of competition law. See Article 5(1) of the Directive Proposal.

[32] Directive 2019/1 prevents national competition authorities from granting third parties access to leniency statements and settlement submissions. However, national rules on public access are not otherwise affected by either the Damages Directive, which is addressed to national courts, or Directive 2019/1. This could be illustrated by the situation in Sweden, where the Competition Authority is bound by broad rules on public access and will have to grant third parties access to the case file. The Swedish government has recently presented a proposal on how to transpose Directive 2019/1 into Swedish legislation. According to the proposal, the Public Access to Information and Secrecy Act (*Sw. Offentlighets- och sekretesslagen*, 2009:400) should be amended to explicitly acknowledge that leniency statements and settlement submissions should be regard as confidential. See Government Proposal Ds 2020:3, at p. 233.

[33] B J Rodgers, M Sousa Ferro and F Marcos, *A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in Sixteen Member States*, Maastricht Journal of European and Comparative Law 2019, Vol. 26(4) 480–504, at p. 488.

damages'. Indeed, this requirement is perfectly reasonable – defendants should not have to risk the costly, burdensome, and undesired work of gathering and disclosing information unless there is reason to suspect that they have participated in a cartel, and that the cartel activity has caused the claimant harm. However, one cannot disregard the fact that the provision, as it is now framed, will discourage some victims from taking matters to court and that the national courts which do get to deal with these questions may interpret the requirements of the provision in a variety of ways, creating a risk that the aspired level playing field will not materialise.

Article 5(2) governs the specificity of the requests for disclosure. According to the Article, national courts should not be prevented from ordering disclosure where the applicant has managed to limit the request to specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts. As noted by *Wagner-von Papp*, the wording of the Article caters to the restrictive continental jurisdictions where disclosure rules tend to have two major limitations; disclosure will usually only be ordered if the applicant has requested disclosure of specified pieces of evidence, and these pieces of evidence have to be identified fairly precisely.[34] Through the introduction of 'categories of documents' the legislator seeks to increase the chances of obtaining disclosure also in continental jurisdictions. However, it is not clear from the wording exactly how narrowly these categories must be defined, and although this requirement is reasonable, it may nevertheless discourage those victims which have not seen the file of the competition authority and do not know which documents to request. As noted by *Dunne*, the Directive emphasises that only 'relevant' evidence is subject to the disclosure requirement and, at least in the recitals, indicates a degree of suspicion in respect of requests relating to categories of evidence rather than specified pieces of evidence.[35] Indeed, Recital 23 states explicitly that '[p]articular attention should be paid to preventing fishing expeditions'. Given the above, there is a likelihood that national courts, even within the same Member State, may interpret the requirement in different ways. As noted by *Rodgers et al*, it may be a challenge for national courts to overcome their traditional legal instincts, and they may instead tend to interpret the new rules in light of existing general principles of civil procedure.

Any risk of diverging applications is further heightened by Article 5(3), which requires national courts to carry out a proportionality analysis and to limit disclosure of evidence to that which is proportionate. When doing so, the national court shall consider (i) the legitimate interests of all parties and third parties concerned, (ii) the extent to which the claim or defence is supported by available facts and evidence, (iii) the scope and cost of disclosure, and (iv) whether the evidence in question contains confidential information and the arrangements in

[34] F Wagner-von Papp, *Access to Evidence and Leniency Materials*, available at ssrn.com/abstract=2733973 (last accessed 30 April 2020). See also D A Woods, A Sinclair and D Ashton, *Private Enforcement of Community Competition Law: Modernisation and the Road Ahead*, (2004) *Competition Policy Newsletter No 2*, p 34.
[35] N Dunne, *The Role of Private Enforcement within EU Competition Law* (2014) 16 *Cambridge Yearbook of European Legal Studies* 143, p 163.

place to protect such information. Imposing a proportionality restriction is of course both appropriate and necessary. Few would argue that disclosure should be arbitrary or disproportionate. However, a proportionality analysis involves a number of steps and inherently allows the national courts a certain room for manoeuvre, as it requires them to balance certain interests or rights against each other in order to determine which interest should be allowed to prevail in any specific situation. This balancing exercise is by necessity evaluative, and unless it is applied in a transparent and consistent fashion, may be open to criticism.[36]

Furthermore, while the rules have apparently been framed to 'cater to the restrictive continental jurisdictions' and to ensure that the possibilities to obtain disclosure are increased in those Member States, they may actually limit the possibilities for the common law systems to maintain their broad disclosure rules. *Peyer* notes that, overall, the Directive has reduced the scope of disclosure for claimants in England and Wales.[37] This can be illustrated by the various damages proceedings lodged against the truck maker DAF in the wake of the Commission's truck cartel decision.[38] In the proceedings between Royal Mail and DAF, Royal Mail had requested disclosure of a redacted version of the Commission's infringement decision against DAF as well as documents from the Commission's case file. The High Court judge ruled that DAF should disclose the entire file, bar leniency material, privileged material and certain categories of data. This meant that 32,000 documents out of a total of 39,000 documents were to be disclosed.[39] In subsequent and parallel proceedings brought by various distribution, logistics and utility companies, a number of claimants applied to the High Court for disclosure from DAF of the same version of the Commission case file that had previously been disclosed to Royal Mail. While Royal Mail had obtained disclosure prior to the transposition of the Directive into UK legislation, the subsequent requests were made under the new rules. Allegedly, the broad request prompted the Commission to issue a letter to the English court, raising concern that the requirements of the Directive were not being complied with.[40] DAF had raised similar concerns, and had further argued that if the court were to allow the request for broad disclosure, this would force defendants to disclose a considerable

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[36] See e.g. S Tsakyrakis, *Proportionality: An Assault on Human Rights?*, International Journal of Constitutional Law (ICON), vol. 7, no. 3, 2009, pp. 468-493, p. 470.

[37] S Peyer, *Private Antitrust Enforcement in England and Wales after the EU Damages Directive: Where are We Heading?*, in P L Parcu, G Monti and M Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Cheltenham, Edward Elgar Publishing, 2018). The situation may of course be reversed once the UK has left the EU.

[38] Case AT.39824 — Trucks. In July 2016, the Commission reached a settlement decision with MAN, DAF, Daimler, Iveco and Volvo/Renault imposing fines totalling nearly EUR 3 billion (MAN had applied for and been awarded immunity from fines). Scania was the only member of the cartel that decided not to settle the cartel case with the Commission. As a result, the Commission's investigation against Scania was carried out under the standard cartel procedure, and in September the following year, the Commission imposed a fine exceeding EUR 880 million on Scania.

[39] https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1018650&siteid=190&rdir=1 (last accessed 28 November 2019).

[40] Ashurst Competition Law Newsletter, October 2018. Available at file://storage/home/hean/Downloads/Competition%20Newsletter%20Oct%2018%20Ashurst%20(2).pdf.

amount of information that was irrelevant and unnecessary to the damages claim. The High Court judge ultimately ordered DAF to hand over the confidential version of the Commission's decision and related documents from the Royal Mail litigation, subject to redaction of irrelevant material.[41] The ruling ordering broad disclosure of documents appears to have been influenced by the fact that the documents in question had already been disclosed to Royal Mail, and that disclosure in the subsequent cases would therefore add very little burden or cost.

Recital 23 of the Directive imposes a ban on disclosure orders covering the entire case file, declaring that they should not be deemed proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Furthermore, from a civil – or continental – law perspective a disclosure order encompassing 32,000 documents appears disproportionate in and of itself, this irrespective of the nature of the documents. It is therefore fair to assume that few judges within these systems would be comfortable ordering disclosure of an entire case file. However, and as noted by *Ashton*, the modern rationale for disclosure in the common law systems is that it helps to clarify the issues being litigated, it enables the parties to see the strengths and weaknesses of their respective cases, and so encourages settlement out of court. In this way, it contributes to an efficient administration of justice.[42] Seen from this perspective, and weighed against the interest of an efficient administration of justice, broad discovery obligations should not necessarily be considered disproportionate. However, the wording of Article 5 limits the number and types of weights that may be put in the balance, as it dictates that national courts should assess proportionality on the basis of the costs involved and that wide disclosure obligations should be avoided. It would be interesting to see how the ECJ interprets this provision. While there will be no preliminary references made by the UK courts post Brexit, other national courts will no doubt give the ECJ the opportunity to give life and meaning to this provision.

That said, at the moment and absent guidance from the Court, Article 5 leaves national legislators and courts ample room for manoeuvre. There is thus an apparent risk that at least some national courts will refrain from changing their previous practices and that the desired level playing field will not materialise.[43] This risk is further emphasised by Article 6, which adds additional requirements in those situations where national courts consider the possibility of ordering disclosure of documents included in the file of a competition authority.

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[41] [2018] EWHC 1994 (Ch).
[42] D Ashton, *Competition Damages Actions in the EU – Law and Practice*, 2nd edn (Cheltenham, Edward Elgar, 2018), p. 89.
[43] For a further discussion on this, see F Wagner-von Papp, *Access to Evidence and Leniency Materials*, available at ssrn.com/abstract=2733973 (last accessed 30 April 2020)

4.2 Article 6 on Evidence Included in the File of a Competition Authority

Article 6 governs 'Disclosure of evidence included in the file of a competition authority'. Already the heading requires comment, as it is not evident which situations that should be caught by the provision. The chosen wording allows for at least four different interpretations. It may govern situations where the national court orders/requests:

a) the Commission or a national competition authority to disclose the documents in its file, or
b) a party or third party (other than a competition authority) to disclose documents which it has obtained from a competition authority, and which is thus included in the file of a competition authority, or
c) a party or third party (other than a competition authority) to disclose documents which it has submitted to a competition authority, and which is thus included in the file of a competition authority, or
d) disclosure in all or any of the above situations.

Reading the Article in its entirety excludes the interpretation suggested in a) as subparagraph 6 declares that national courts should at no time be able to order a party or a third party to disclose leniency statements or settlement submissions, thereby extending the personal scope of the Article beyond competition authorities.[44] It also excludes the interpretations in b) and c) as subparagraphs 2, 3 and 10 are only of relevance if access is sought directly from the competition authority. However, if the heading is given the interpretation suggested in d), this may cause some practical problems. Whereas a request for disclosure of documents 'received by or submitted to the Commission' is obviously caught by the provisions in Article 6,[45] it may not always be equally obvious whether other evidence held by a party or third party is also included in the file of the competition authority. This may lead to a situation where national courts will always abide by the standard set in Article 6 irrespective of whether or not the evidence in question is also included in the file of a competition authority.

Unfortunately, it is not only the heading of Article 6 that may require further clarification. Also subparagraphs 5 and 6 are likely to become the subject of preliminary references. In the Impact Assessment Report, the Commission acknowledged that, since the publication of the White Paper, 'a new issue had arisen' showing that the EU right to compensation could at times be at odds with the effectiveness of the public enforcement system. What the Commission referred to was the Court's then recent ruling in *Pfleiderer*, where it had established that, absent harmonisation, national competition authorities or courts could not

[44] It is clear from Recital 15 that third parties include competition authorities, as it declares that national courts should also be able to order that evidence be disclosed by third parties, including public authorities.
[45] Although we have now learned that it should not be granted as it is not referring to the nature of the documents but only to their location in the case file.

refuse access to leniency material without first carrying out a balancing exercise weighing the interests of private and public enforcement against each other.[46] The ruling came as a surprise to many competition authorities and concern was expressed that the effectiveness of the public enforcement system was now in jeopardy. Subparagraphs 5 and 6 address these concerns and impose restrictions on the disclosure of certain types of documents. While national courts may at no times order the disclosure of leniency statements or settlement submissions, other information may only be disclosed after the competition authority – by adopting a decision or otherwise – has closed its proceedings. This restriction concerns information that were prepared by a natural or legal person specifically for the proceedings of a competition authority, information which the competition authority has drawn up and sent to the parties in the course of the proceedings (such as statement of objections and replies to such statements), and settlement submissions which have been withdrawn.

First, whereas the wording indicates that the information may be disclosed as soon as the competition authority has adopted an infringement decision, the case law from the ECJ suggests that protection may be extended until such date as the decision finding an infringement has acquired the force of *res judicata*.[47] In the case of *EnBW* concerning a request for access to documents under Regulation 1049/2001, the Court declared that a proceeding under Article 101 TFEU cannot be regarded as closed once the Commission's final decision has been adopted irrespective of any possible future judgment by the EU judicature annulling that decision.[48] Given that the annulment of such decision may lead the Commission to resume its investigation with a view to adopting a new decision, investigations relating to a proceeding under Article 101 TFEU may be regarded as completed only when the decision adopted by the Commission is final. The rationale behind the Court's finding in *EnBW* is applicable also to disclosure within the frame of a damages proceeding, and may be used as an argument for extending the period of protection.[49]

A second observation concerns the addressee of the any decisions. Article 6(5) only allows disclosure of the information in question after the competition authority – by adopting a decision or otherwise – has closed its proceedings. The provision does not provide any guidance on against whom the decision should have been adopted. It is no longer uncommon that members of a cartel choose different routes to end the matter before the Commission or a

[46] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389.
[47] In the list of definitions provided for in Article 2 of the Directive, a distinction is made between 'infringement decisions' and 'final infringement decisions'. Article 6(5) on the other hand declares that certain documents may only be disclosed after the competition authority has closed its proceedings 'by adopting a decision'.
[48] Case C-365/12 P, *European Commission v. EnBW Energie Baden Württemberg AG*, EU:C:2014:112, para 99.
[49] That said, the ECJ has allowed the Commission to adopt a more restrictive approach than national courts and competition authorities, allowing it to rely on a general presumption that all the documents in its case files fall under the exceptions to the rule on public access (see e.g. *EnBW*), but requiring Member State authorities to carry out a case-by-case assessment when receiving requests from third parties to access leniency material (*Pfleiderer*). It is therefore not certain that the Court would automatically apply the standard set under the Transparency Regulation to damages cases.

national competition authority. While one member may apply for and receive immunity, another may enter into a settlement agreement, and a third member may decide to take its chances in court and therefore become the addressee of an infringement decision. In the Trucks cartel referred to earlier, all cartel members except Scania chose to settle with the Commission. While the settlement decision was adopted in 2016, the decision against Scania was adopted in 2017.[50] In situations like these, the cartel victim may want to bring a damages action already before the Commission has adopted its infringement decision against the non-settling member. Will the cartel victim then have to await the adoption of the infringement decision before it can get access to documents (other than the leniency statement) provided to the competition authority by the parties? According to recital 25 of the Directive, the provision aims at preventing disclosure from unduly interfering with ongoing investigations, and chances are that at least some national courts will therefore answer this question in the affirmative, requiring the case to be closed against all members of the cartel before ordering disclosure of the information listed in Article 6(5). The provision has been transposed into the legislation of 28 Member States, and will be applied by a large number of national courts. It is fair to assume that the application may not always be consistent.

Article 6(6) prohibits the disclosure of leniency statements and settlement submissions. While these obligations may be necessary to ensure the desired balance between public and private enforcement, they may not be sufficient to achieve such balance. The Directive protects the physical documents, but it does not protect the information contained therein. Perhaps rightly so. The leniency statement contains a description of the infringement, and as established by the Court in several cases on the publication of infringement decisions, such information is not protected from publication as that would prevent the Commission from fulfilling its obligations in Article 30 of Regulation 1/2003.[51] Thus pre-existing documents, handed in during the course of the investigation and containing the same information are fair game under Article 6(6), and nothing prevents the national courts from hearing witnesses working for otherwise representing immunity recipients.[52] Banning leniency statements from disclosure is an obvious attempt at maintaining the attractiveness of leniency programmes while at the same time ensuring effective private enforcement. The question is of course whether this attempt will manage to shore up the Commission's leniency programme, or whether some other measures will have to be taken. The real threat against the leniency programme is not the fear of having to disclose leniency statements, but rather the fear of having to pay damages. Companies apply for immunity in order to escape sanctions. If, by drawing the Commission's attention to a secret cartel, the company escapes a fine but instead has to pay damages which cannot be calculated beforehand but which may well meet or exceed the potential fine, it may choose to keep the cartel from the eyes of the Commission.

[50] A so-called staggered hybrid procedure. Case AT.39824 — Trucks.
[51] See e.g. Case C-162/15 P, *Evonik Degussa GmbH v European Commission*, EU:C:2017:205. The Commission is only prevented from publishing verbatim quotations from the leniency statements, narrowing the scope of protection considerably.
[52] Other statements than oral leniency statements.

According to a study carried out by *Jaspers*, any damages may be as much as four or five times as high as the fines imposed by the Commission.[53] This means that unless fines or other public sanctions are increased significantly, a leniency system which does not provide immunity also from civil liability is unlikely to be reconcilable with an effective private enforcement system. This irrespective of how the rules on disclosure are framed. According to *Ysewyn* and *Kahmann*, the number of leniency applications received by the Commission has reduced by almost 50 percent over the last few years. In their article, they also refer to a survey among a number of practitioners with allegedly extensive leniency experience, declaring that an overwhelming majority of the participants had sensed a decrease in interest from their clients to apply for leniency in recent years.[54] The increased exposure to civil damages claims was the factor most frequently mentioned in the survey.[55] Thus while subparagraph 6 is an attempt at keeping the leniency programmes attractive, it will be interesting to see if it is adequate.

As mentioned earlier, Article 6(10) makes competition authorities the last possible resort for obtaining evidence. The Article provides that they shall only have to disclose evidence where such evidence 'cannot possibly be obtained from another party or from a third party'. This will no doubt affect the application of Article 15 of Regulation 1/2003. The Commission has a general obligation under Article 4(3) TEU to assist national courts when they apply EU legislation. In competition matters, this obligation is further reinforced by Article 15 of Regulation 1/2003 which allows national courts to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition rules. Over the years, the Commission has taken this obligation seriously and has even been willing to hand over documents to which not even the parties to the investigation normally have access, and which the Commission would not disclose under the Regulation 1049/2001.[56]

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[53] J D Jaspers, *Leniency in Exchange for Cartel Confessions*, European Journal of Criminology, 2020, Vol 17(1), at p. 120.

[54] 30 practitioners of which 83 percent considered the risk of damages claims to be the major deterrent.

[55] J Ysewyn and S Kahmann, *The Decline and Fall of the Leniency Programme in Europe*, Concurrences No 1-2018, pp 44-59, at p. 45. The authors refer to Global Competition Review, Rating Enforcement. The survey referred to was prepared by Brussels Matters for its meeting: The European antitrust leniency calculus c. 2016: still worth it? (Brussels 16 June 2016), referred to in W Wils' article, *Private enforcement of EU Antitrust Law and its relationship with Public Enforcement: Past, Present and Future*, World Competition Law and Economics Review 2017, 41. The issue was also addressed by a Working Party of the OECD as recently as in June 2018. In his report to the Working Party meeting, *Snyder* takes note of the fact that some competition enforcers have expressed concern that the number of leniency applications, particularly related to international cartels, has been declining. See B Snyder, *Challenges to Leniency Posed by the Proliferation of Leniency Programs and Private Enforcement*; Paper submitted as background material for Item 3 at the 127th Meeting of the OECD Working Party No 3 on Co-operation and Enforcement of 5 June 2018.

[56] In 2007, the Commission imposed fines totalling EUR 750 million on Alstom and a number of its competitors for participation in a cartel on the gas insulated switchgear market. One of its customers, National Grid later brought an action for damages before the High Court, seeking £249 million in damages from the cartel members ([2012] EWHC 869). During the course of these proceedings, National Grid made applications for disclosure of evidence held by the defendants and the Commission. The Commission later conceded to transmit Alstom's reply to the SO together with some other documents, but stated that it had first to inform Alstom of its intent to forward the reply to the UK court. Perhaps not too surprisingly, Alstom declared that it would challenge any

A final comment on Article 6 concerns its purpose, and the reason why the legislator has chosen to divide the provisions on disclosure into two different articles. Given that Article 6 – despite the wording of its heading – is not restricted to situations where disclosure is sought directly from the competition authority, it is not clear why or how the legislator has made its division between the provisions in Articles 5 and 6. Should national courts not at all times be required to consider the need to safeguard the effectiveness of the public enforcement system? Should information which a company has drawn up specifically for the proceedings of a competition authority, but which has not been submitted to the authority, automatically be fair game? Furthermore, which situations are caught by Article 6(4)(b), requiring the national court to consider whether the request for disclosure has been made in relation to an action for damages before a national court? Article 6 shall apply in addition to Article 5,[57] which explicitly limits the scope of any disclosure obligations in the Directive to 'proceedings relating to an action for damages in the Union'. It is fair to assume that the Court will be given ample opportunity to interpret and define the meaning of the provisions in Articles 5 and 6 of the Directive.

5. Diverging Interests Weaken the Rules on Disclosure

The Directive's provisions on disclosure prompts two reflections. First, it is evident both from the preparatory works and the recitals of the Directive that the difficulties that cartel victims experienced when seeking access to evidence was considered one of the key obstacles to securing an effective private enforcement system throughout the European Union. While the Directive addresses this problem, it does not manage to completely remove the hurdle. Second, if the Commission was initially enthusiastic about having a private enforcement system put in place alongside the rules on public enforcement, at least part of the enthusiasm must have vanished into thin air when the Court delivered its ruling in *Pfleiderer*. The Directive does address the Commission's concern about the well-being of its leniency programme, but it remains to be seen whether the legislator has struck a balance between the interests of public and private enforcement, or whether the rules on disclosure as they are now framed will neither manage to ensure a level playing field in the area of private enforcement, nor manage to maintain the attractiveness of the leniency system.[58]

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decision by the Commission to share the reply with the UK court. Alstom stuck to its words and later brought an action before the General Court seeking the annulment of the Commission's decision to accede to the request for cooperation (Case T-164/12). Following the development in the proceedings before the national court, the High Court later withdrew its request for cooperation, and the Commission agreed also to formally withdraw the contested decision. This is discussed in more detail in H Andersson, *Access to the European Commission's Cartel Case Files – Promoting or Preventing Effective Competition Law Enforcement?*, Forthcoming at Hart Publishing, Autumn 2020.

[57] Article 6(1)(b).

[58] The question whether the leniency system should be saved or whether there are alternative solutions falls outside the scope of this article.

Already the Ashurst report identified the difficulties of obtaining the necessary evidence as one of the key obstacles to achieving effective private enforcement throughout the European Union. Noting that the rules on disclosure varied widely between the Member States with the UK, Ireland and Cyprus on one side and the remaining Member States on the other, the Ashurst report quite matter-of-factly identified the obstacles in the following way:

> The clearest obstacle here is the fact that in most Member States parties are not under an obligation to produce relevant information and often will only be ordered to do so when the requesting party can identify the individual document he seeks, which in many cases will simply not be possible.[59]

Through the Directive, the national rules on disclosure will be drawn closer to each other as some Member States will allow for broader disclosure rules than earlier, whereas the rules in other Member States may have to be applied more restrictively. Under the Directive, claimants should no longer be required to identify specific documents. Instead it should be sufficient for them to limit the request to relevant categories of evidence 'circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts'. It is not clear from the wording exactly how narrowly these categories must be defined, and there is an obvious risk that at least some national courts will continue to require a high degree of specificity. This especially since the Directive explicitly requires any categories to be identified on the basis of the nature or content of the documents, and bans any requests where the categories have been defined more generally with references to the competition authorities' case files. The requirement is motivated by the legislator's interest in ensuring that competition law infringers cooperate with the competition authorities and provide those authorities with evidence of their unlawful behaviour.

Indeed, it is clear from the Impact Assessment Report that when drafting the Proposal, the Commission was not willing to abandon its leniency programme, as it did not consider there to be any other means of ensuring an equally effective and efficient cartel enforcement. In the report, the Commission declared that, in the absence of adequate protection of leniency programmes, the negative consequences arising from any uncertainty as regards the protection of leniency material could not be offset by efficient alternatives. In particular, the Commission declared, it would not be possible to offset the negative effects by increased *ex-officio* investigations into suspected infringements. Such an attempt, the Commission continued, would not only be more costly both for public enforcers and undertakings alike, but would not enable public enforcers to uncover comparably useful evidence with a view at proving infringements. On the one hand, leniency programmes allow the Commission and NCAs to pursue a targeted enforcement on conducts where the likelihood to find an

[59] Ashurst report (n 7), p. 4.

infringement is much higher, and free resources for the pursuit of *ex officio* cases while maintaining an adequate degree of deterrence.[60] Thus, the Directive's provisions seek to maintain the attractiveness of the leniency programme by prohibiting broad disclosure requests, and by keeping leniency statements out of reach from the cartel victims.

The question is of course whether these attempts at protecting the leniency system are adequate. As long as the information contained in the leniency statements is not protected, and as long as any other leniency material may be disclosed, the protection appears too weak to be effective. Furthermore, and perhaps more importantly, it is likely that it is the fear of private enforcement as such that affects the attractiveness of the leniency programme, rather than the nature or scope of the information disclosed to cartel victims. Should that be the case, then extending protection to cover other leniency material or to prevent immunity recipients' employees to be called as witness will not save the leniency system, but will instead weaken the private enforcement system. Perhaps the only solution is either to find a worthy substitute for the leniency programme or to extend leniency into the sphere of antirust damages actions, in which case there would no longer be any need to maintain a restrictive approach to disclosure.

A final issue which deserves reflection concerns the need for a level playing field in the area of access to evidence. As is shown in the foregoing, there is a risk that national courts find ways to maintain their previous practices, and that cartel victims will continue to experience difficulties in accessing evidence in some Member States. The question is to which extent other provisions in the Directive manage to make up for any 'flaws' or weaknesses in the area of evidence gathering. The Ashurst report identified causation as one of the hardest points to prove for a cartel victim. Through the Directive, cartels are presumed to cause harm, infringement decisions are now binding upon national courts, and anyone who has participated in the cartel is jointly and severally liable for the harm caused.[61] Thus while the cartel victim will have to prove the overcharge (or any other loss suffered), it is unlikely that it will have to focus on the measures taken by the cartel participants within the cartel and show 'who did what'. Instead it will be the responsibility of the defendants to sort out their respective proportions of liability and payment.

A recent study carried out by *Laborde* could be taken to support this view, as it shows that the number of cartel damages actions appears to be growing rapidly.[62] The study, which was carried out in 30 European countries,[63] identified 144 cartel damages actions in these countries. However, the cases identified all came from thirteen countries. In the remaining

[60] The Impact Assessment Report, para 35.
[61] Save for the infringer which has received immunity from fines and who will only be liable for its share of the harm caused.
[62] J F Laborde, *Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges*, Concurrences (2018 ed.), No 1 2019.
[63] The EU Member States plus Norway and Switzerland.

seventeen countries, no cases were thus identified. While there may be a number of reasons for this, there is an evident risk that in at least some Member States, cartel victims still experience difficulties in accessing the evidence necessary for them to prove their case, that this affects their willingness to bring matters to court, and that the envisaged level playing field envisaged by the Directive has thus failed to materialise.

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