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The Quest for Evidence – Still an Uphill Battle for Cartel Victims?

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I. INTRODUCTION

Nearly two decades have passed since the Court of Justice of the European Union (the Court or the ECJ) established that victims of competition law infringements should be able to seek damages and be entitled to compensation in full for any loss suffered.[1] However, the Court's rulings in the now seminal cases of *Courage* and *Manfredi* did not reflect the reality at the time. Surveys conducted by the Commission in the wake of the rulings revealed that most victims rarely obtained any compensation at all.[2] As a response, the Commission later presented a proposal for a Directive on antitrust damages actions. Following certain modifications, Directive 2014/104/EU (the Directive) was adopted in November 2014,[3] introducing a framework designed to ensure an effective private enforcement system throughout the Union.

The Directive identifies and addresses a number of obstacles to the realisation of such system, one being the difficulties that cartel victims encounter when they seek to obtain evidence of the damage sustained. It goes without saying that access to evidence is key to ensuring effective private enforcement. Actions for damages in this type of case typically require a complex factual and legal analysis, and the evidence required is often held exclusively by the opposing party, third parties or the competition authority investigating the case.[4]

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[1] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* EU:C:2001:465 and Case C-295/04 *Manfredi* EU:C:2006:461.

[2] European Commission, Green Paper – Damages actions for breach of the EC antitrust rules SEC(2005) 1732.

[3] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

[4] ibid, Recitals 14 and 15.

In its initial proposal, the Commission declared that it was widely recognised that in many Member States, the difficulty a claimant encountered in obtaining all necessary evidence constituted one of the key obstacles to damages actions in competition cases.[5]

In order to remove this hurdle, the Directive introduces a number of provisions on disclosure, requiring Member States to ensure that national courts are able to order disclosure of the evidence necessary for the applicants to prove their claim. However, disclosure is not 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, or whether they will allow national courts to hide behind proportionality analyses or the Commission's own practices to maintain the obstacles to effective private enforcement identified in the Directive's recitals.

This chapter presents the Directive's provisions on disclosure, and provides an analysis of these rules against the backdrop of the Commission's own practices and the ECJ's case-law on public access to cartel files and publication of infringement decisions. It is concluded that although the rules will require national courts to assess these questions against a new set of rules, the discretion left to the courts will allow them to carry on more or less as usual should they so desire.

II. TAKING THE RISK OF GOING TO COURT

As noted by the Commission in the Green Paper preceding the proposal for the Directive,[6] actions for damages in antitrust cases regularly require the investigation of a broad set of facts. In order for a court to award damages, the cartel victim will have to prove (i) the existence and extent of the cartel; (ii) that the 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 for why the survey conducted by the Commission in the wake of the *Courage* ruling revealed a state of 'total underdevelopment' throughout 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

[5] 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) 13.

[6] Green Paper (n 2).

[7] In the Green Paper, the Commission notes that while Community law demands an effective system for damages claims for infringements of antitrust rules, 'this area of law in the 25 Member States presents a picture of "total underdevelopment"'.

courts. First of all, there is now a rebuttable presumption of harm. According to Article 17(2) of the Directive, cartel infringements shall be presumed to cause harm, and the Commission has also published a guidance for national courts on how to quantify such harm.[8] Second, where several undertakings infringe the competition rules jointly, they shall be held jointly and severally liable for the entire harm caused by the infringement.[9] Third, not only are national courts bound by the decisions and rulings of the EU judicature, but Article 9 of the Directive also declares that where a national competition authority or court has established an infringement, such a finding shall be binding also on the court hearing the damages claim. 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.[10] Ideally, the potential claimant would want to access at least some evidence already before taking matters to court in order to properly assess the chances of success. A company considering a follow-on action may therefore attempt to access evidence from the competition authority investigating the case. However, the rules on public access have not been harmonised and, despite the Court's rulings in cases such as *Pfleiderer*[11] and *Donau Chemie*,[12] the chances of accessing evidence from national competition authorities vary between Member States.

As for the Commission's case files, it has proven difficult for cartel victims to access the documents contained therein. This being said, and as will be discussed in more detail later in this chapter, the Commission has recently chosen another route to further transparency and allow cartel victims to gather relevant information, and that is through the publication of longer and more detailed infringement decisions. Even though these 'new' and extended versions

[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] Art 11 of the Directive (n 3).

[10] A Riley and J Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 *European Law Review* 748, 749.

[11] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* EU:C:2011:389.

[12] Case C536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* EU:C:2013:366.

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, as will be discussed in section V below, these attempts by the Commission have met steep resistance from the addressees of the infringement decisions, who are claiming that the extended versions should not be made public due to the confidential information allegedly contained therein. 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. The remaining 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.

III. THE DIRECTIVE'S PROVISIONS ON DISCLOSURE

The Directive governs actions for damages before national courts. Recognising that access to evidence is key to achieving effective private enforcement, it contains a number of provisions on disclosure. Article 5 of the Directive deals with disclosure in general while Article 6 adds further requirements in situations where the evidence is sought from the file of a competition authority. As noted by Wils, the competition authorities' case files are obvious locations for potentially relevant evidence.[13] 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.[14]

A. Evidence Held by Other Parties or Third Parties

The main provision on disclosure is thus Article 5. The Article 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, provided that the claimant is able to present 'a reasoned justification containing reasonably available facts and evidence sufficient to support the

[13] WPJ Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40(1) *World Competition* 3, 31.
[14] ibid.

plausibility of its claim for damages'. 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. There is thus no obligation on the part of the courts to actually do so.[15] It is worth noting that the Commission's initial proposal did actually require national courts to order disclosure in certain circumstances. 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.

Second, the provision applies 'in proceedings relating to an action for damages'. A narrow reading suggests that it is only when the claimant has actually brought a damages claim before a national court that the provision is triggered, leaving pre-trial disclosure outside the scope of the Directive. Such a narrow reading is supported by the fact that the initial proposal did not make any reference to proceedings relating to actions for 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).[16] 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, which would be unfortunate. Given that the current version differs from the Commission's proposal in this respect, there is reason to believe that at least some Member States considered the initial wording to be too far-reaching, and will thus apply a restrictive approach to the Directive's obligations.

Third, the victim must present a reasoned justification containing 'reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'. Indeed this requirement is perfectly reasonable – defendants should not have to risk the costly, burdensome and undesired work of gathering and disclosing evidence 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.

[15] Directive Proposal (n 5).

[16] 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 Art 5(1) of the Directive Proposal (n 5).

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 based on 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.[17] Through the introduction of 'categories of documents' the legislator seeks to increase the chances of 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 perfectly reasonable, it may nevertheless discourage those victims that 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.[18] 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. This concern is further underlined by the ECJ's case-law on access to the Commission's cartel files, which is discussed further in section IV.B below.

Any risk of divergent 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 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

[17] F Wagner-von Papp, 'Access to Evidence and Leniency Materials', available at: ssrn.com/abstract=2733973. See also DA Woods, A Sinclair and D Ashton, 'Private Enforcement of Community Competition Law: Modernisation and the Road Ahead' (2004) *Competition Policy Newsletter No 2*, 34.

[18] N Dunne, 'The Role of Private Enforcement within EU Competition Law' (2014) 16 *Cambridge Yearbook of European Legal Studies* 143, 163.

interest should be allowed to prevail in any specific situation. This balancing exercise is strongly evaluative, and unless it is applied in a transparent and consistent fashion, may be open to criticism.

Given the wide discretion provided for in Article 5 of the Directive, 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.[19] 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 held by competition authorities.

B. Evidence Held by Competition Authorities

The Directive contains a number of additional provisions, which apply where the evidence requested may only be disclosed by a competition authority. As mentioned earlier, Article 6(10) imposes an obligation on the Member States to make sure that national courts only request disclosure from competition authorities when no party or third party is reasonably able to provide that evidence. In those situations, Article 6 applies alongside Article 5 and adds a number of additional conditions that need to be met in order for any evidence to be disclosed.

Whereas Article 5 governs proceedings relating to an action for damages, Article 6 appears to become applicable already at an earlier stage. The Article requires Member States to ensure that Article 6 is applied alongside Article 5 in those situations where, for the purpose of actions for damages, national courts order disclosure of documents held in the file of a competition authority. This apparent discrepancy seems odd, given that the first option should be to seek an order for disclosure from the cartel members, which, according to Article 5, requires that there are ongoing proceedings before a national court. However, while Article 5 was given a new and narrower wording during the legislative negotiations, Article 6 remains unaltered in this respect. Time will tell what practical implications this may have, although one would expect the Court to favour consistency and coherence in its interpretation of the rules. It will be interesting to see whether any cartel victim will argue that pre-trial disclosure should be ordered from a competition authority's case file on the grounds that the national rules do not allow national courts to order disclosure from cartel members until proceedings have been initiated.

Where a national court is considering the possibility of ordering disclosure from a competition authority's case file, it will have to consider some additional factors when carrying out the proportionality analysis. First of all, Article 6(4) requires the court to consider whether the request has been formulated specifically

[19] For a further discussion on this, see Wagner-von Papp, 'Access to Evidence' (n 17).

with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority. Given that Article 6 should apply alongside the requirements in Article 5, a number of questions arise.[20] Article 5 requires the applicant to request disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and narrowly as possible on the basis of reasonably available facts and in the reasoned justification. Although the provision opens up for broader disclosures than those limited to specified documents identified in advance, the wording of the Article suggests that the applicant shall be able to provide some guidance on which documents it wishes to have disclosed. However, when reading Article 6(4), which, it is presumed, aims at adding an extra requirement to the court's assessment, another picture emerges. The court should determine whether or not it is dealing with a 'non-specific application'. This triggers the obvious question whether the court is not required to do that already under Article 5.

Article 6(4) requires national courts to consider 'whether the party requesting disclosure is doing so in relation to an action for damages before a national court', presumably suggesting that the court should be more inclined to order disclosure where court proceedings are already ongoing. Why this is the case is difficult to see. If an applicant fulfils the requirements in Article 5 – and can thus both show a reasoned justification and limit the request to specified documents or categories of documents circumscribed as narrowly as possible – there is no reason why the court should be less inclined to order disclosure from the file of a competition authority on the sole ground that there are no ongoing court proceedings. One would assume that pre-trial disclosure would help keep down the costs of court proceedings.

National courts are also required under Article 6(4)(c) to consider the need to safeguard the effectiveness of the public enforcement of competition law. Given the ongoing debate on the possible effects that extensive disclosure rules may have on cartel members' willingness to cooperate with competition authorities, the provision may be interpreted as a reminder to national courts to bear this relationship in mind when considering disclosure of documents held by a competition authority. Should this be the case, the placing of the provision is unfortunate, as national courts should preferably also consider this when ordering disclosure from defendants or third parties. However, the recitals allow for another interpretation of the provision. According to Recital 21, the effectiveness and consistency of the application of Articles 101 and 102 TFEU require a common approach across the Union on the disclosure of evidence that is included in the file of a competition authority and that such disclosure should not unduly detract from the effectiveness of the enforcement of

[20] See wording in Art 6(1).

competition law by a competition authority. This suggests that the national courts shall ensure that the disclosure is not unduly burdensome. A competition authority with limited resources should not be forced to spend a considerable part of those resources on matters of disclosure. It is true that the process of granting requests for access is burdensome, and that national competition authorities in Member States with extensive transparency rules, spend considerable resources on these matters. The Commission's recent proposal for a Directive empowering national competition authorities reveals that some Member States struggle with limited resources, and the concerns expressed in the Directive may therefore be legitimate (the Proposed ECN+ Directive).[21] However, the question is whether the right way forward is to limit disclosure rather than increasing the resources allocated to competition law enforcement.

Article 6 of the Directive imposes a number of additional obligations on national courts. Article 6(5) prevents them from ordering disclosure of the following documents until after the competition authority has closed its proceedings by adopting an infringement decision or otherwise:

- information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and
- settlement submissions that have been withdrawn.

Thus, this prohibition only applies to a limited number of documents and during a limited period of time; that is until the competition authority has adopted an infringement decision. Article 6(6), on the other hand, imposes an absolute ban which is not limited in time. According to the Article, national courts may under no circumstances order disclosure of leniency statements or settlement submissions.

This brief presentation of the Directive's provisions on disclosure allows us to the draw the conclusion that although the Directive will definitely force national courts to carefully consider applications for disclosure, the wording of the provisions grants leeway to those courts that wish to adopt a restrictive approach. Anyone hoping for a radical change will thus have to rely on the ECJ to interpret the provisions in a more extensive manner. However, given the Court's case-law on access to evidence or information from the Commission, there is a risk (or chance for that matter) that the interests of ensuring effective public enforcement of the competition rules will be allowed to prevail. In the following section, two rulings from the ECJ, one concerning a request

[21] Commission proposal for a Directive with the aim to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017) 142 final, 2017/0063 (COD).

for information under Regulation 1049/2001 (the Transparency Regulation)[22] and the other concerning the publication of detailed versions of the Commission decisions, will be given. These practices may not only affect cartel victims' possibilities to access evidence, but may also have an impact on the willingness of national courts to order disclosure under the Directive.

IV. ACCESSING THE COMMISSION'S CASE FILE

Anyone considering filing a damages claim will first need to assess the likelihood of success. In those situations where the Commission has investigated the competition law infringement, the cartel victim might therefore want to access the Commission's file in order to determine whether or not to go ahead with a lawsuit. Article 15(3) TFEU, Article 42 of the EU Charter on Fundamental Rights (the Charter) and the Transparency Regulation all aim at ensuring public access to the documents held by the EU institutions. Yet, the Commission has managed, effectively, to close the door on any attempts to access its cartel files. In a number of decisions, endorsed by the ECJ, it has relied on the exemptions to the right of public access established in the Transparency Regulation, and refused access to its files. This section will give first a brief overview on the rules of public access to documents held by the EU institutions before presenting the *EnBW* case, concerning the granting of access to the Commission's cartel case file.

A. Public Access to Documents in the EU

After years of debate on the lack of transparency in the EU, the notion of openness has become not only one of the new guiding principles of the functioning of the EU machinery but also one of the foundations of democracy in the Union. The principle of transparency is set out in Article 15(3) TFEU and Article 42 of the Charter grants any EU citizen, and any natural or legal person residing or having its registered office in the EU, a right of access to European Parliament, Council and Commission documents. The modalities governing third parties' access to Commission files are laid down in the Transparency Regulation. Like Article 42 of the Charter, the Regulation provides citizens and legal persons of the Union the right of access to the documents of the EU institutions. This right does not only cover documents that have been drawn up by the institutions themselves, but also documents that fall into their possession. However, the right of access is not absolute. Article 4 of the Transparency Regulation provides for a number of exceptions.

[22] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

The exceptions invoked by the Commission in this type of case are primarily those found in Article 4(2) and 4(3). According to Article 4(2), the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. According to Article 4(3), access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. The Commission has been prone to invoke these exceptions when receiving requests from third parties to access its files, be it requests to access an entire file or just the statement of contents.[23] One of the more recent rulings is the one in *EnBW*.

B. The Court's Ruling in *EnBW*

The *EnBW* case concerned the Commission's refusal to grant access to its cartel case file and the possibilities of relying on a general presumption of confidentiality when doing so. EnBW considered itself to have been affected by a cartel operated by producers of gas-insulated switchgear. Relying on the Transparency Regulation, EnBW sought access to all the documents in the Commission's case file. Following discussions with the Commission, EnBW later withdrew its application and made a fresh application where it excluded three categories of documents, namely all documents (i) dealing exclusively with the structure of the undertakings concerned, (ii) relating exclusively to the identity of the addressees of the cartel decision, and (iii) that were drawn up wholly in Japanese.[24] The Commission rejected the request through a formal decision. According to the Commission, the documents all fell under the scope of the exception provided for in the third indent of Article 4(2) of the Transparency Regulation. Some of the documents in the category of internal documents also fell under the exception laid down in Article 4(3).[25] The Commission did not consider there to be any overriding public interest in disclosure. According to the Commission, all the documents in the file were fully covered by the aforementioned exceptions, and partial access could thus not be granted. EnBW brought an action for the annulment of the Commission decision before the General Court. Finding, inter alia, that the Commission was not entitled to rely on a general presumption that all the documents in the file were covered by the third indent of Article 4(2) of

[23] See eg Case T-437/08 *CDC Hydrogen Peroxide v Commission* EU:T:2011:752.

[24] Case C-365/12 P *European Commission v EnBW Energie Baden Württemberg AG* EU:C:2014:112, para 14.

[25] See above for the text of the two provisions.

the Transparency Regulation, the General Court annulled the contested decision in its entirety.[26] The Commission appealed.

In its ruling, the ECJ started by stressing the fact that Article 255(1) and (2) EC (now Article 15 TFEU) provided that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, were to have a right of access to the documents of the EU institutions.[27] The Court further recalled that the Transparency Regulation is designed to confer on the public as wide a right of access as possible to the documents of the institutions. Having established the main rule, the Court moved on to the exceptions. Here, the Court declared that where the exceptions in Article 4 of the Transparency Regulation applied, the institutions must refuse access unless there is an overriding public interest in disclosure. The Court further declared that according to well-established case-law, the institution concerned must provide explanations as to how access to a certain document could specifically and actually undermine the interest protected by an exception in Article 4. Having said that, the Court continued and declared that it is open to the institution concerned to base such decisions on general presumptions that apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.[28] The Court declared that it had already acknowledged the existence of such presumptions in four particular cases, and that all four cases were characterised by the fact that the request for access covered not just one document but a set of documents.

In that type of situation, the Court continued, the recognition that there is a general presumption that documents of a certain nature are covered by the exceptions in Article 4 of the Transparency Regulation enables the institution concerned to deal with a global application and to reply thereto accordingly. The present case entailed that type of situation, the Court noted.[29] As the Commission was likely to gather commercially sensitive information during the course of a competition law investigation and as the protection of commercial interests was closely linked to protecting the purpose of the investigation in these cases, the Court declared that a general presumption should apply.[30] Furthermore, the Court noted, the case was still pending before the General Court. According to the Court, a proceeding under Article 101 TFEU cannot be regarded as closed once the Commission's final decision has been adopted.[31]

In its appeal, the Commission had argued for a harmonious interpretation of the Transparency Regulation and the Antitrust Regulations. The ECJ agreed,

[26] Case C-365/12 P *EnBW* (n 24) para 28.
[27] ibid, para 61.
[28] ibid, para 65.
[29] ibid, para 69.
[30] ibid, para 81.
[31] ibid, para 99.

declaring that the Antitrust Regulations and the Transparency Regulation are on the same footing in the EU legal order, and that, accordingly, they should be applied consistently. If the purpose of the Transparency Regulation is to confer a right of access to the EU institutions' documents, the extent of such access should depend on the activities of the institution. According to the ECJ, the Commission's activity in antitrust proceedings does not require the same level of disclosure as compared to the legislative activities of the EU. Moreover, the exceptions set forth in Article 4 of the Transparency Regulation cannot be interpreted without taking account of the Antitrust Regulations' specific rules on access to the file. Here, the ECJ noted that, according to the Antitrust Regulations, in principle only the parties to cartel proceedings have a right to access the Commission's files. The ECJ thus found that if third parties, such as EnBW, were able to access the Commission's files through the Transparency Regulation, the specific system put in place by the Antitrust Regulations would be jeopardised. The Commission's investigative powers, which mostly rely on the information given by companies, would be undermined by the lack of guarantee that the documents submitted (voluntarily or not) by investigated companies would be treated with the highest degree of confidentiality.

Consequently, the ECJ concluded that the Commission was entitled to rely on a general presumption, stemming from the Antitrust Regulations, that the documents in a cartel file fell within one or more of the exceptions in Article 4 of the Transparency Regulation. The Commission could thus apply a blanket approach to a third party's broad and unspecified request, thereby sparing itself a fastidious document-by-document review of its voluminous cartel files.

The Court did take notice of the fact that EnBW sought access to the documents in question with the intention of later filing a damages claim. While acknowledging that any person is entitled to claim compensation for the loss caused by breach of the competition rules, and that such rights strengthen the enforcement of Article 101 TFEU, it did not consider such general considerations to be capable of prevailing over the reasons justifying the refusal to disclose the documents in question.[32] Furthermore, the Court noted that in order to ensure effective protection of the right to compensation, there is no need for every document relating to cartel proceedings to be disclosed to a claimant.[33]

This may be true, but how is the claimant to know which documents are actually necessary to prove the case? The *EnBW* case raises a number of questions of relevance to the present chapter. The Court discusses the relationship between the Transparency Regulation and the Antitrust Regulations at length. Although neither of these Regulations will come into play when a national court considers the possibilities of ordering disclosure of documents held in the file of national competition authority, it is fair to assume that at least some courts

[32] ibid, para 105.
[33] ibid, para 106.

will glance at the Court's jurisprudence and draw inspiration from these cases. This might discourage courts from ordering disclosure, especially in those situations where the request concerns a 'set of documents'. It is clear from the wording of the Directive, that national courts should be able to order disclosure of categories of documents, but at the same time avoid letting companies venture out on 'fishing expeditions'. The Court's ruling in *EnBW* will not provide any guidance to the national courts in this respect.

An additional reflection concerns the protection afforded where a case is still pending before a national court. In *EnBW*, the ECJ acknowledged that there is a general presumption that each and every one of the documents belonging to the Commission's case file are covered by the exceptions in Article 4(2) and/or 4(3) of the Transparency Regulation, and that access must therefore be denied until such time as the case is finally closed. The Directive, on the other hand, only protects a limited number of documents during the course of an investigation. The prohibition in Article 6(5) of the Directive only extends to certain categories of documents and during a limited period of time; that is until the competition authority has adopted an infringement decision or otherwise closed its proceedings. The ECJ, on the other hand, allows the Commission to rely on the presumption for all the documents in the file and until such time as the case has finally been adjudicated by the courts. This being said, the *EnBW* ruling should not be used to propose a more extensive ban on disclosure, as that would fit badly with the principle of proportionality and the Court's acknowledgement that the presumption of confidentiality is rebuttable. However, it may encourage some national courts to refuse disclosure also for documents other than those listed in the provision.

In the following section, another line of the Court's case-law relevant to disclosure and access to evidence will be discussed. Following requests from cartel victims,[34] the Commission has recently shown its willingness to publish more lengthy and detailed infringement decisions allowing possible cartel victims to access relevant information and circumscribe any requests for information properly.

V. ACCESSING INFORMATION THROUGH THE COMMISSION'S INFRINGEMENT DECISIONS – THE *EVONIK DEGUSSA* CASE

Article 339 TFEU and Article 28 of Regulation 1/2003 prevent the Commission from disclosing any information covered by the obligation of professional secrecy. At the same time, Article 30 of Regulation 1/2003 requires the Commission to

[34] According to CDC Damages Claims, it was following its request to the Commission to disclose confidential parts of its Hydrogen Peroxide cartel decision that the Commission finally agreed to re-publish a more detailed, non-confidential version of that decision. See www.carteldamageclaims.com/competition-law-damage-claims/accessing-information-cases.

publish infringement decisions, and Article 15 TFEU obliges the Commission to ensure the transparency of its proceedings. The Commission has to reconcile these potentially conflicting obligations when it comes to the publication of non-confidential versions of its decisions.

Article 30 of Regulation 1/2003 thus requires the Commission to publish its cartel decisions.[35] The publication shall state the name of the parties and the main content of the decision, including any penalties imposed. When doing so, the Commission should pay regard to the legitimate interests of undertakings in the protection of their business secrets. Traditionally, the public versions of the Commission's decisions have been rather succinct. In recent years, however, the Commission has endeavoured to publish longer and more detailed versions, which could potentially facilitate matters for cartel victims. Although longer versions of the decisions will not necessarily provide the sufficient amount of evidence, they may still help cartel victims to limit their requests in such a way that the Commission may actually grant access and/or the national courts may order disclosure. The attempts by the Commission to publish the full details of cartel decisions have met steep resistance from the addressees of the Commission's infringement decisions. The recent case of *Evonik Degussa* deals with this matter.[36]

In May 2006, the Commission adopted an infringement decision against 16 companies active in the hydrogen peroxide and perborate sector found to have participated in a cartel. Evonik Degussa had been the first company to report on the cartel, and had thus received immunity from fines. In the course of 2007, a first non-confidential version of the infringement decision (the PHP Decision) was published on the Commission's website. Four years later, the Commission informed Evonik Degussa of its intention to publish a new, more complete, non-confidential version of the PHP Decision, setting out the entire content of that decision save for any confidential information. The Commission asked Evonik Degussa to identify the information that it considered confidential, and which should thus be excluded from the public version.

Perhaps not too surprisingly, Evonik Degussa considered that the PHP Decision contained both confidential information and business secrets, and objected to the proposed publication. In support of the objection, it claimed that the extended version of the PHP Decision contained a significant amount of information provided in relation to the leniency application, including the names of a number of its collaborators as well as information concerning its business relations. Evonik Degussa argued that the proposed publication would infringe the principles of legitimate expectations and equal treatment and would be liable to have an adverse effect on the Commission's investigations.[37]

[35] ie decisions made pursuant to Art 23 of Regulation 1/2003.
[36] Case C-162/15 P *Evonik Degussa GmbH v European Commission* EU:C:2017:205.
[37] ibid, para 21.

The Commission agreed to delete all the information that would allow directly or indirectly the identification of the source of the information communicated pursuant to the 2002 Leniency Notice[38] and the names of Evonik Degussa's collaborators. As for the rest of the information covered by the objection (the contested information), the Commission did not consider that it should be granted the benefit of confidentiality. Evonik Degussa referred the matter to the Hearing Officer who in his turn rejected the request for confidentiality. This decision was challenged before the General Court, but was dismissed as unfounded.[39]

Evonik Degussa appealed, alleging inter alia an infringement of Article 339 TFEU, Article 30 of Regulation 1/2003, Article 4(2) of the Transparency Regulation as well as the right to privacy as provided by Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter. Moreover, it alleged an infringement of the principles of the protection of legitimate expectations and legal certainty. According to Evonik Degussa, the General Court had erred in law when holding that the contested information was neither confidential nor protected for reasons other than its confidential nature. First of all, the company argued against the General Court's view that the contested information had lost its confidential nature merely due to the passage of time. The Court did not accept this argument, noting that information which was secret or confidential, but which was at least five years old, must as a rule be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature was able to show that the information still constituted essential elements of its commercial position or that of interested third parties.[40] In the present case, Evonik Degussa had not put forward any specific argument to show that, in spite of its age, the information still constituted essential elements of its commercial position or that of a third party.[41] The Court saw no reason to reach another conclusion than that of the General Court.[42]

As for Evonik Degussa's claim that the publication was contrary to the Transparency Regulation, the Court noted that the Regulation was not applicable in the present case, and that the case-law deriving from the Regulation could not be transposed to the context of the publication of infringement decisions. Evonik Degussa had also argued that the publication of the contested information included information from the 'statements made by a leniency applicant', and that such publication amounted to publishing verbatim quotations and

[38] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). The notice was replaced by a new one in 2006 (2006/C 298/11).

[39] Case T-341/12 *Evonik Degussa GmbH v European Commission* EU:T:2015:51.

[40] Case C-162/15 P *Evonik Degussa* (n 36) para 64.

[41] All the contested information dated from more than five years previously, and some from more than ten years previously.

[42] Case C-162/15 P *Evonik Degussa* (n 36) para 67.

extracts from those statements, which, Evonik Degussa claimed, could not be permitted.[43] To this the Court responded that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differed from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication was not permitted in any circumstances.[44]

As regards the Commission's treatment of the information submitted by leniency applicants, the Court acknowledged that the Commission, in point 29 of the 2002 Leniency Notice, was aware that that notice would create legitimate expectations on which undertakings might rely when disclosing the existence of a cartel to it. In that regard, the Notice provides, first, in point 32, that normally, disclosure at any time of documents received in the context of that notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of the Transparency Regulation. Secondly, in point 33, the Notice provides that any written statement made vis-à-vis the Commission in relation to that notice forms part of its file and may not be disclosed or used for any other purpose than the enforcement of Article 101 TFEU. The Commission had thereby imposed on itself rules as regards the written statements received by it in accordance with that notice. However, the Court noted, those rules had neither the object nor the effect of prohibiting the Commission from publishing the information relating to the elements constituting the infringement of Article 101 TFEU which was submitted to it in the context of the leniency programme and which did not enjoy protection against publication on another ground.

Consequently, the only protection available to an undertaking which has cooperated with the Commission is the protection concerning (i) the immunity from or reduction in the fine in return for providing the Commission with evidence of the suspected infringement which represents significant added value with respect to the information already in its possession; and (ii) the non-disclosure by the Commission of the documents and written statements received by it in accordance with the Leniency Notice. Based on these findings, the Court concluded that publication, such as that envisaged, under Article 30 of Regulation 1/2003 in compliance with the protection of professional secrecy did not undermine the protection afforded by the Leniency Notice, since that protection could relate only to the determination of the fine and the treatment of the documents and statements specifically targeted by that notice. The Court thus concluded that the General Court had not erred in law in the course of its

[43] ibid, para 80.
[44] ibid, para 87.

analysis of the treatment to be given to information communicated by Evonik Degussa. The company's arguments in this respect were thus rejected.[45]

Through the Court's ruling, it is now clear that information that is more than five years old is presumed to have lost its confidential nature. Furthermore, in line with the Directive, the Court has now established that although leniency statements deserve absolute protection from publication, nothing else relating to the leniency procedure does. This may provide some guidance to national courts and will hopefully lead to a more timely publication of detailed Commission decisions.

VI. JOINING THE DOTS

Today, few question the benefits of effective competition policy. Instead, there is a widespread consensus in most democratic societies that measures should be taken to promote competitive markets, and that this in turn requires legislation that monitors, prevents and corrects anti-competitive behaviour.[46] Controlling competition between companies is an area where the EU is particularly powerful. However, the rulings in *Courage* and *Manfredi* revealed a weakness in the system. While the Court acknowledged that the full effectiveness of Article 101 TFEU required both public and private enforcement, the reality was another. In recent years, we have therefore witnessed an increased focus on private enforcement of the EU competition rules. As noted in the recitals to the Directive, it is indeed the view of the Union legislator that the full effectiveness of Articles 101 and 102 TFEU requires that anyone can claim compensation before a national court for the harm caused to them by an infringement of those provisions.[47]

As discussed above, the Directive introduces a number of provisions that aim at facilitating cartel victims' access to evidence. However, partly because the initial Directive proposal was amended during the course of the legislative process, the current rules cannot guarantee that cartel victims obtain the evidence they need. A narrow reading of the provisions suggests that pre-trial discovery is beyond the scope of the Directive. Furthermore, the requirement that the cartel victim should not only be able to present a reasoned justification for its claim, but also to specify the evidence requested are open to various interpretations by national courts. There is also a risk that national courts will be influenced by the jurisprudence of the ECJ and its willingness to allow the Commission to – when it receives a request for access which covers a 'set of

[45] ibid, para 99.

[46] Tellingly, by 2008, 111 countries had enacted competition laws, which is more than 50% of countries with a population exceeding 80,000 people: see OECD, *Fighting corruption and promoting competition* DAF/COMP/GF/WD(2014)53.

[47] Recital 3.

documents' rather than a specific document – rely on a general presumption that the documents held in its case file contain commercially sensitive material and should therefore not be disclosed. Add to that the requirement on the part of the national courts to carry out a proportionality analysis which should be based on, inter alia, the extent to which the claim or defence are supported by available facts and evidence, the costs of disclosure and the existence of confidential information among the requested documents. It is easy to see that the application of the rules laid down in the Directive may vary between the Member States unless and until the ECJ gives its view on their application.

In principle, there is no reason to object to the requirements stipulated in the Directive. The rules should be framed in such a way as to avoid 'ambulance chasers'; the courts should not be a place for fishing expeditions. This said, it is unfortunate that the wording of Article 5(2) as suggested in the Commission's initial proposal was not maintained, and that there is thus no obligation on the part of national courts to order disclosure in those situations where the party requesting disclosure can show that evidence in the hands of another party or a third party is relevant, and has specified either items of evidence or categories of evidence defined as precisely and as narrowly as possible.

Member States have a loyalty obligation under Article 4(3) TEU, and Article 4 of the Directive codifies the principles of effectiveness and equivalence, requiring Member States to ensure that national rules and procedures relating to the exercise of damages claims are designed and applied in such a way that they 'do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law'. This provision should in principle ensure that the Member States interpret, implement and apply the provisions of the Directive in such a way as to ensure that cartel victims may access the evidence necessary. However, the Proposed ECN+ Directive indicates that general obligations on the part of the Member States may not be sufficient to ensure effective competition law enforcement throughout the Union. That proposal reveals that despite the Member States' obligation to designate competition authorities in such a way that the provisions of Regulation 1/2003 are effectively complied with, many national competition authorities lack the means and instruments required to fulfil this obligation.[48] Given the non-binding character of the Directive's provisions, and the number of conditions that may need to be met in order for disclosure to be ordered, there is thus a clear risk that the regulatory framework surrounding access to evidence in cartel damages claims will fail to reach the stipulated goal.

[48] Proposed ECN+ Directive (n 21) p 2.