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**Disclosure of evidence under the Damages
Directive: conflicts and compatibility between
the ECJ's case-by-case analysis and the rules on
protection of immunity recipients' information**

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Disclosure of evidence under the Damages Directive: conflicts and compatibility between the ECJ's case-by-case analysis and the rules on protection of immunity recipients' information

Matías Palma Rodríguez*

Abstract

This Thesis is dedicated to explain that the Damages Directive's rule prohibiting the disclosure of certain immunity recipient's information is a necessary step towards a better and complementary relationship between public and private enforcement of EU competition law. At the same time, it seeks to demonstrate that the conflicts between the prohibition and the case-by-case analysis proposed by the ECJ are only apparent, since the Directive offers a wide set of procedural instruments to facilitate damages claims according to the principle of effectiveness. The prior absence of EU Law and the protection of leniency programs as a public interest are also addressed to assess these conflicts. With that in mind, this work analyses the pertinent landmark judgments of the European Court of Justice, reviewing the main elements which configure the concept of the right to full compensation and presents the cases where this right collided with the protection of effective leniency programmes. Through an examination of the Directive's instruments, this work offers a practical guide on the norms regarding the protection of immunity recipient's information.

Keywords: Damages Directive – disclosure of evidence – protection of leniency statements – prohibition of disclosure – right to compensation – effectiveness of leniency programmes – private enforcement of competition law.

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Table of Abbreviations:

TFEU	Treaty on Functioning of the European Union
TEU	Treaty on the European Union
DD	Directive 2014/104/EU 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 Members States and of the European Union
CFREU ("Charter")	Charter of Fundamental Rights of the European Union
ECJ	European Court of Justice
AG	Advocate General
ECN	European Competition Network
NCA	National Competition Authority
EU	European Union

Introduction

Overview

In the EU, competition law¹ rules are mainly enforced by the Commission and NCAs. For them, leniency programmes² are the most important tool to detect and deter cartelisation. The effectiveness of these programs critically depends on their attractiveness to applicants. Particularly, undertakings may be less attracted to cooperate if documents voluntarily submitted within leniency proceedings were disclosed to persons wishing to bring an action for damages³.

On the other hand, private enforcement of competition law has been fostered in the two last decades since it discourages agreements or practices which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union. This was recognized by the ECJ on his judgment in *Courage*⁴ where the Court established the right of any person to claim reparation of the harm caused by a breach of EU competition law.

The cornerstone of this private enforcement is that every natural and legal person has a right not to be harmed by anticompetitive

¹ In this document the term “competition law” is used in narrow sense, excluding the norms of EU law on State aid and Merger Control. The terms “antitrust law” and “competition law” are used interchangeably.

² Article 2(15) DD defines leniency programme as “a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel”.

³ See Commission Green Paper, COM (2005), paras. 2.1 and 2.7. (Hereinafter referred to as the “Green Paper”).

⁴ Judgment in *Courage and Crehan*, Case C-453/99. See para. 27.

behaviours⁵. That right becomes futile if there do not exist ways to held the infringer liable for the damages caused.⁶ Correspondingly, the appropriate proceedings to obtain compensation have to be ensured both at the European and national level.

In its landmark cases *Pfleiderer*⁷ and *Donau Chemie*⁸, the ECJ confronted the conflict between the public interest to protect the effectiveness of leniency programs and the private interest of claimants seeking access to leniency evidence to support their claims. In that opportunity, the Court pronounced against the existence of a superiority of one interest over the other. Both interests have to be balanced in a case-by-case analysis.

Notwithstanding these advancements, it is true that until today the private enforcement of competition law has not found a great utilisation among citizens. Between 2008 and 2013, statistics indicate that only 25% of the Commission decisions in competition law have been followed on by civil damages claims.⁹

Possibly, one of the reasons for these low numbers was the legal uncertainty faced by victims seeking for compensation. It was utterly unpredictable if access to the necessary leniency evidence would be granted. The same can be said for the infringers at the time to assess the rationality to blow the whistle.

On the part of the Commission there have been several steps forward

⁵ Articles 101 and 102 TFEU.

⁶ See Speech of Commission's Vice-president *Neelie Kroes* "More private antitrust enforcement through better access to damages: an invitation for an open debate", 09.03.2006.

⁷ Judgment in *Pfleiderer*, Case C-360/09.

⁸ Judgment in *Donau Chemie*, Case C-536/2011.

⁹ See European Commission Memo of 11.06.2013, available at: [http://europa.eu/rapid/press-release MEMO-13-531_en.htm](http://europa.eu/rapid/press-release_MEMO-13-531_en.htm). See also: Speech of Commission's Vice-president *Joaquín Almunia* "Antitrust damages in EU law and policy", 07.11.2013.

to promote the exercise of the right to claim for compensation. Already in the 2005 Green Paper and 2008 White Paper¹⁰ the main obstacles to an adequate system for bringing damages claims for infringement of EU antitrust law were identified. Among them, the insufficient access to evidence was the most critical.

Both the obstacles signalized in the Commission's documents and the rulings and principles of the ECJ case law were addressed by the Proposal of the Commission¹¹, published in June 2013. Its text suffered only few -but relevant- modifications¹² through the legislative procedure in order to become the Damages Directive as approved on December 2014¹³.

One of the objectives of the Directive is indeed to coordinate the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts. The other is to ensure the effective exercise of the right to claim full compensation.

This Thesis is dedicated to explain that the Directive's rule prohibiting the disclosure of certain immunity recipient's information is a necessary step towards a better and complementary relationship between public and private enforcement mechanisms. At the same time, it seeks to demonstrate that the conflicts between the prohibition

¹⁰ Commission White Paper, COM (2008) 165, hereinafter referred to as the "White Paper".

¹¹ 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. 11.6.2013 COM(2013) 404 final

¹² For example, Article 6 DD was restructured after intense negotiations. See, Analysis of the final compromise text with a view to agreement from the Council to the Permanent Representatives Committee, available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208088%202014%20INIT>

¹³ Directive 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 2014/104/EU of 05.12.2014. Hereinafter indistinctly referred as "the Directive" or "Damages Directive".

and the case-by-case analysis proposed by the ECJ are only apparent, since the Directive offers a wide set of procedural instruments to facilitate damages claims.

Structure

In Part I, this thesis analyses the pertinent landmark judgments of the European Court of Justice in two phases.

The first phase reviews the main elements which configure the concept of the right to full compensation as derivative from the direct effect of Articles 101 and 102 TFEU. In parallel, it elaborates the material and personal scope of such a right, and highlights the first traces given by the ECJ in relation to the idea that private claims could be useful for the effective enforcement of competition law.

The second phase, on its turn, presents the cases where the right to full compensation entered into conflict with the protection of effective leniency programmes. Particularly, analysing the *Pfleiderer* doctrine, it describes the judicial solution to the problematic co-existence of private and public interest in competition law enforcement. Following, this part remarks the meaning of the ECJ case law and explains why the unclear legal scenario *post-Pfleiderer* accelerated the process to provide for EU legislation.

In Part II, the Damages Directive is examined, describing the procedural instruments which seek to enhance the coordination between private and public enforcement of EU competition law. Under the question “what information can be disclosed?” this Thesis offers a practical guide on the norms regarding the access to evidence and the protection of immunity recipient’s information. At this point, the requirements to obtain evidence other than blacklisted documents are detailed, and the extent of the prohibition to disclose leniency

statements is defined.

In Part III, the conflicts and compatibility of the new rules on disclosure with the case-by-case analysis are addressed.

In relation to the conflicts, a first approach refers to the problematic effect of an absolute prohibition of access to evidence which makes the judicial case-by-case assessment impracticable. Following, the rules of the Damages Directive are contrasted with the principle of effective judicial protection, analysing how the prohibition may in practice undermine the claimant's position in the dispute.

On its turn, in regard to the compatibility, this part strive to demonstrate that all the elements which make up the ECJ case law in this matter are well undertaken in the Directive. Moreover, it presents the different tasks public and private enforcement execute, providing arguments to assert that the complementary and symbiotic relation between them relies on the consideration that the protection of leniency statements is a public interest.

Finally, the conclusions and final remarks of this work are presented.

Part I: ECJ case law – from the right to compensation to the case-by-case analysis

This part presents the already renowned case law of the ECJ related to the right to claim for compensation and disclosure of leniency material with the purpose of being presented as evidence in damages actions.

1. First phase - recognition and extent of the right to claim for compensation as a consequence of an infringement of competition law

Courage and Crehan

In *Courage and Crehan* (Judgment of 20.9.2001 – Case C-453/99), the ECJ firstly admitted “the right to any individual to claim damages for loss caused to him by a conduct liable to restrict or distort competition”¹⁴, and secondly, acquiesced that “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [Union]¹⁵”.

In 1990 *Courage*, a major British brewery, entered into an agreement with *Grand Metropolitan* to form a new company (*IEL*) and to lease a group of pubs in the UK. The agreement provided a beer tie which obligated all *IEL*'s tenants to purchase their beer supply exclusively from *Courage* at a fixed price. Under these conditions, in 1991 *Mr. Crehan* concluded an agreement with *IEL* to lease a pub. In 1993 *Courage* sued *Mr. Crehan* for unpaid deliveries of beer. On his defence, *Mr. Crehan* declared that the agreement was contrary to Article 85 EC Treaty (now 101 TFEU) and it was consequently void. He counterclaimed that such infringement put him in a less favourable situation in comparison with his competitors, causing a harm which

¹⁴ Judgment in *Courage*, para. 26.

¹⁵ *Ibid.*, para. 27.

entitles him to compensation.

English law, as well as the majority of legal system of Member States, applies the general principle of law *nemo auditur propiam turpitudinem allegans* and *in pari causa turpitudinis cessat repetitio*¹⁶.

The Court of Appeal of England and Wales understood that the applicable national law which does not allow a party to an illegal agreement to claim damages from the other party might be in conflict to the Treaty provisions. In other words, a categorical rejection to *Mr. Crehan's* counterclaim might impair the direct effect of Article 85 EC.

Therefore, via preliminary ruling proceeding the ECJ was asked whether a national rule precluding a party to an illegal agreement to claim damages from the other party was compatible with EU competition law.

Following the reasoning proposed by *AG Jean Misho* on his opinion¹⁷, the Court judged that any contract prohibited pursuant to Article 85 EC is automatically void, and has no effect as between the contracting parties¹⁸.

This legal consequence can be invoked by any individual, because Article 85 EC produce direct effect in relations between individuals and create rights for them which the national courts must safeguard. That is to say, any citizen -even a co-infringer- has the right to seek compensation for a loss caused by an infringement of EU competition law. Any national rule which contains an absolute bar to this right has to be considered in conflict with the Treaties, since the exercise of the

¹⁶ *Von Bar/Swann*, Principles of European Law, Study Group on a European Civil Code, Unjustified Enrichment (PEL Unj. Enr.), 2010, p.275.

¹⁷ Opinion of *AG Misho* in *Courage*, Case C-453/99.

¹⁸ See the Judgment in *Béguelin*, Case 22/71, para. 29.

right to claim compensation can contribute to an effective enforcement of competition law¹⁹.

Finally, giving further ground for its conclusions, the Court indicated that in absence of EU rules governing the matter; it is for the domestic legal order to lay down the detailed procedural rules governing damages actions provided that such rules do not render practically impossible or excessively difficult the exercise of rights conferred by EU law²⁰.

Manfredi and others

In *Manfredi and others* (Judgment of 13.7.2006 - Joined Cases C-295/04 to C-298/04) the ECJ clarified the scope of the right to compensation pointed out in *Courage*.

During the decade of the 90's a group of insurance companies implemented an unlawful agreement for the purpose of exchanging information on the insurance sector. In the year 2000, the Italian national competition authority declared such agreement unlawful as it caused an unjustified increase on the costs of premiums for compulsory civil liability auto insurance during the years 1994 and 1999. *Mr. Manfredi* and other citizens, being third parties to the agreement, brought actions before the Italian Court to obtain a restitution of the increase in the premiums paid by reason of the arrangement being declared unlawful.

Via preliminary ruling proceeding, the Italian Court referred several

¹⁹ Judgment in *Courage*, para. 27. Later supported by the Judgment in *CDC Hydrogen Peroxide*, Case T-437/08, para. 77: "the leniency and co-operation programmes whose effectiveness the Commission is seeking to protect are not the only means of ensuring compliance with EU Competition law. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU".

²⁰ *Ibid.*, para 29.

question to the ECJ concerning the application of EU (then Community) competition law. For the interest of this thesis, the relevant questions asked were two. First, whether third parties can claim damages against competition law infringers. And second, whether the national rules applicable on the amount of damages to be paid were compatible with Article 81 EC (now Article 101 TFEU).

Following the arguments formulated by *AG Ad Geelhoed*²¹, the decision of the ECJ in this case complemented the judgment in *Courage*.

In regard to the first question, the Court indicated that the effect of competition rules reaches even third parties and consumers affected by an infringement where there is a causal relationship between the harm suffered and the prohibited arrangement. Thus, any individual “including the consumer and end user of a service, may consider itself entitled to rely on the invalidity of an agreement prohibited under Article 81 EC and claim compensation in damages”²².

In relation to the applicable rules to determine the amount of damages, the court indicated that the right to claim for compensation covers “not only actual loss (*damnum emergens*) but also compensation for loss of profit (*lucrum cessans*) plus interests”²³. Especially in the context of economical disputes, exclusion of loss of profit and interest would make reparation of damage pointless.²⁴

Finally, the Court also incorporated a set of statements on the

²¹ Opinion of *AG Geelhoed* in *Manfredi and others*, Joined Cases C-295/04 to C-298/04. *AG Geelhoed* insistently referred to the growing importance that had been attached to private enforcement since the introduction of Regulation 1/2003 and alluded to the necessity of coordination to avoid increasingly uncertainty due to the disparity and divergent solutions among jurisdictions of Member States. See paras. 27, 30-31, 54, 64.

²² Judgment in *Manfredi*, para. 17.

²³ This is the right to full compensation now enshrined in Article 3(2) DD.

²⁴ Judgment in *Manfredi*, para. 96.

application of the principles of equivalence and effectiveness²⁵. According to the Court, those principles are to be deemed as yardstick and limit to the application of domestic law in absence of EU law governing the relevant matters. These are, for example, the necessity and application of the concept of causal relationship; the application of punitive damages; the tribunals having jurisdiction to hear actions for damages and to prescribe the detailed procedural rules governing those actions²⁶; limitation periods for seeking compensation for harm; and criteria for determining the extent of the damages.

2. Second phase - trade-off between the right to compensation and cartel detection

Pfleiderer and Bundeskartellamt

In *Pfleiderer and Bundeskartellamt*²⁷ (Judgment of 14.07.2011 – Case C-360/09) the ECJ was confronted for the first time with questions related to the trade-off between the right to compensation, in the context of follow-on claims, and the effectiveness of leniency programs established for the purpose of detecting, punishing and deterring the formation of cartels²⁸.

In 2008, the *Bundeskartellamt* found that three manufacturers

²⁵ In *Courage*, the Court merely enounced the principle in relation to the autonomy of Member States to enact procedural rules to safeguard rights conferred on citizens by EU law as long as they “do not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.

²⁶ Application of the *Rewe Formula* of national procedural autonomy: “In the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law”, Judgment in *Rewe-Zentralfinanz*, Case 33/76, para. 5. For further development of the ECJ case law in this relevant topic see, inter alia, Judgment in *Van der Weerd*, Joined Cases C-222/05 to C-225/05, para. 28, Judgment in *Impact*, Case C-268/06, paras. 44-46, and Judgment in *Alassini and Others*, Case C-320/08, para. 47.

²⁷ German Federal Cartel Office.

²⁸ *Wilman, Folkert*, Private Enforcement of EU law before National Courts, The EU Legislative Framework, Elgar European Law and Practice, 2015, para. 6.21.

concluded agreements to fix prices and capacity shutdowns on the decor paper market. Shortly afterwards, in order to prepare a civil action for damages, *Pfleiderer* asked for access to the *Bundeskartellamt's* files on the case. In accordance with the German applicable rules, the *Bundeskartellamt* is generally obliged to grant victims access to its files²⁹. However, “this right may be limited if overriding interests worthy of protection constitute an obstacle thereto”³⁰. In the particular case, the *Bundeskartellamt* rejected to grant access to the documents relating to the leniency applications in order to protect the effectiveness of its leniency programmes. *Pfleiderer* appealed this decision to the the *Amtsgericht Bonn*, which referred to the ECJ for preliminary rulings.

On his earlier jurisprudence the ECJ had established the rule that facing an infringement of competition law, the Member States must ensure the right to any person affected by the infringement to seek full compensation according to its own national rules, as long as those rules “do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation”³¹.

In *Pfleiderer*, the Court was asked to examine whether EU law on cartels can be interpreted as precluding a person of access to evidence from leniency procedures, especially if such disclosure of information could undermine the effective enforcement of EU competition law. The German Court requested to consider that a disclosure of leniency material may deter infringers to submit leniency applications if authorities were able to exchange information which that person had

²⁹ Paragraph 406e (1) of the German Code of Criminal Procedure (Strafprozessordnung) confers an aggrieved person with the right to inspect evidence held by authorities. Paragraph 46 of the Law on administrative offences (Gesetz über Ordnungswidrigkeiten) makes the precedent rules applicable for the procedures imposing fines.

³⁰ Paragraph 406e (2) of the German Code of Criminal Procedure (Strafprozessordnung).

³¹ See judgment in *Courage*, para 27. See also Judgment in *Pfleiderer*, para. 30.

voluntarily provided.

As developed by *AG Ján Mazak* in his opinion³², the significance of the case lies in the determination of the possibility of a national competition authority to reject to disclose information from the leniency file to an aggrieved third party when this party seeks access to evidence with the purpose of the preparation of an action for damages caused by the cartel.

Although the basis of his analysis was followed by the Court, his legal solutions were not supported at the time. For instance, he argued that protection of voluntary and self-incriminating statements was justified by the legitimate aim of ensuring the effective enforcement of EU competition law by NCAs and private interests in detecting and punishing cartels. In addition, he considered the leniency applicant to have an “overriding legitimate expectation” that self-incriminating statements will not be disclosed. Finally, he added that these protected statements were different from all *pre-existing information* to which access may be granted to victims³³.

The ECJ recognized the beneficial effects of leniency procedure for the public enforcement of Articles 101 and 102 TFEU³⁴, and acknowledged that attractiveness (and thus effectiveness) of these programs might be reduced if provided documents could be disclosed. However, it stated that EU competition law at that time did not contain any prohibition against the disclosure of leniency material with a view to preparing a claim for damages; on the contrary, the reinforcement of the resulting civil actions could make a great contribution to the maintenance of effective competition³⁵.

³² Opinion of *AG Mazak* delivered on 16 December 2010, Case C-360/09, para. 1.

³³ *Ibid.*, paras. 44-46.

³⁴ Judgment in *Pfleiderer*, para. 25.

³⁵ *Ibid.*, para.29.

In accordance, the Court then forcefully issued its famous *Pfleiderer* doctrine, stating that with regard to requests for disclosure of leniency evidence and, in absence of EU law, it is for the national courts to decide whether or not to allow such disclosure of leniency documents. This decision has to be taken on a case-by-case basis³⁶, weighing the respective interests in favour of disclosure and in favour of the protection of voluntary and self-incriminating statements, according to national law and taking into account all the relevant factors in the case. National courts, in consequence, have to put into the balance, on the one side, the public interest related to the protection of leniency program efficiency, while on the other, victims' individual interest to obtain an integral compensation.

Regrettably, the ECJ did not provide clear criteria to be taken into account when evaluating the multiple interests concerned; neither indications of what may be deemed as being relevant factors in the case. This created a “certain degree of legal uncertainty concerning the possibility to disclose leniency documents in follow-on actions for damages.”³⁷

Donau Chemie

Resulting from an Austrian preliminary reference, in *Donau Chemie* (Judgment of 07.02.2013 - Case C-536/11) the Court extended the case-by-case approach and rejected a presumption in favour of or against disclosure of leniency evidence.

On 2010 the *Kartellgericht*³⁸ imposed fines totalling € 1.5 million on *Donau Chemie* and other companies for their participation in a cartel

³⁶ Judgment in *Pfleiderer*, para. 30.

³⁷ OECD, Working Party No. 3 on Co-operation and Enforcement, Relationship between Public and Private Antitrust Enforcement, 11.06.2015, p. 25.

³⁸ The Oberlandesgericht Wien (Higher Regional Court of Vienna), sitting as a Kartellgericht (Cartel Court).

affecting the supply of industrial printing chemicals. One year later, *Verband Druck & Medientechnik* (“VDMT”), an industry association, considered filing an action for private damages against the cartelists and requested access to the file relating to the judicial proceedings carried out by the NCA. However, according to Austrian cartel law, access to the case file can only be given with the consent of all the parties to the proceedings³⁹. The parties can refuse to give such consent, without necessarily giving any reasons.

The *Kartellgericht* sent a preliminary question to the ECJ asking whether a provision of the Austrian cartel law that precluded third-party access to material containing leniency documents unless all parties concerned give their consent to it was compatible with EU competition law, and especially with the principle of effectiveness and the case-by-case analysis from *Pfleiderer*.

The Court answered reiterating the reasoning and conclusions from its precedent jurisprudence, insisting that it is to the national courts to weigh the public and private interests regarding the disclosure. That judicial activity of weighing up is necessary because a strict rule either prohibiting or granting access would undermine the effective application of the EU competition law rules⁴⁰.

In application of the principle of effectiveness to the case, the ECJ stated that a strict rule prohibiting access has to be rejected because it is liable to make the exercise of the right to compensation excessively difficult⁴¹. In the case, the rule created a *de facto* exclusion of disclosure in follow-on litigation, since it is illusory to expect that infringers are likely to consent to a disclosure of documents that

³⁹ See Paragraph 39(2) of the 2005 Austrian Law on cartels (Kartellgesetz 2005).

⁴⁰ Judgment in *Donau Chemie*, paras. 30-31.

⁴¹ *Ibid.*, para 32: “a refusal to grant access to the file renders nugatory the right to compensation which they derive directly from European Union law”⁴¹.

would increase their exposure to civil liability. Additionally, such a refusal is liable to prevent damage actions from being brought which has the effect of giving the immunity recipient, who may have already benefited from immunity, an opportunity to circumvent their civil liability⁴².

On the other hand, a rule allowing generalised access to leniency material is to be deemed as incompatible with public enforcement of competition law since, in this situation, the undertaking willing to cooperate would be deterred from taking the opportunity offered by leniency programmes. Furthermore, generalised access is not necessary in order to ensure effective protection of the right to compensation, as it is highly unlikely that the action for damages must be based on all of the evidence in the file of the competition authority⁴³.

In conclusion, a refusal to grant access to certain documents can be only accepted if access may “actually undermine” the public interest relating to the effectiveness of the national leniency programme. Here is important to remark that the Court defined the protection of leniency programs as a public interest, which would be affected if infringers were less likely to cooperate because of the higher risk of being easier targets of follow-on civil claims⁴⁴.

3. Meaning of the ECJ case law

Through the years the ECJ developed and gave substance to the cornerstone concept of “the effective exercise of the right to full compensation”. To understand the conflicts and compatibility between the Directive’s provisions and the ECJ jurisprudence, it is mandatory to ponder that concept as an ensemble of superimposed components,

⁴² Judgment in *Donau Chemie*, para. 47.

⁴³ *Ibid.*, para. 42.

⁴⁴ *Ibid.*, paras. 31, 41-42, 45, 48

where all and each of them have to be taken into account simultaneously. From the case law above described, it is possible to synthesise the following elements:

First, EU law grants and protects the right to anyone who has suffered harm from an infringement of EU competition law to claim for full compensation against the infringers⁴⁵, when there is a causal link between the harm and the anticompetitive conduct. This right also contributes to strengthening the implementation of EU competition rules and might have a deterrent effect on possible infringers.

Second, in application of the national procedural autonomy⁴⁶; in absence of EU law, Member States are free to lay down rules governing the relevant matters, taking into account the application of the principle of effectiveness, which means that the domestic legal order of each Member State cannot impose measures which have as effect as to make it practically impossible or excessively difficult to obtain the aforementioned compensation⁴⁷.

Third, in absence of EU law it is for the national courts to decide on a case-by-case basis, weighing the respective interest in favour of

⁴⁵Since the implementation of the Damages Directive, this is without prejudice of the derogation established on Article 11(4) DD which limits the joint and several liability of the immunity recipient to those cases where full compensation cannot be obtained from the others co-infringers. As general rule, the immunity recipient is severally liable only to its indirect and direct purchaser or providers.

⁴⁶ Among current and former Advocates General it is disputed whether the concept of “national procedural autonomy” is indeed a principle of EU law (See, in particular, *Kakouris*, Do the Member States possess judicial procedural “autonomy”?, *C.M.L. Rev.*, p. 1389 et seq., and *Bobek*, Why There is no Principle of “Procedural Autonomy” of the Member States, in: *The European Court of Justice and Autonomy of the Member States*, pp. 305 - 322, *De Witte/Micklitz* (eds.), Intersentia, 2011). Whilst, the extent and nature of the concept is questioned by others as *AG Trstenjak* (Opinion in *Littlewoods Retail*, Case C-591/10, para. 24) and by *Van Gerven*, (see *Van Gerven*, Of Rights, Remedies and Procedures, *C.M.L.Rev.*, pp. 501-502) who proposes replacing the expression “procedural autonomy” with the expression “procedural competence” of the Member States.

⁴⁷For a complete analysis of the ECJ Case Law about the obligation of national courts to provide effective judicial protection see *Dougan*, National remedies before the Court of Justice: issues of harmonization and differentiation, p. 380.

disclosure and in favour of the protection of voluntary and self-incriminating statements, according to national law and taking into account all the relevant factors in the case, whether or not to allow such disclosure of leniency documents.

Fourth, the protection of the effectiveness of leniency programs is deemed to be a public interest, nevertheless, is not per se a justifiable ground to deny the access to leniency evidence; an actual undermining is required.

4. Impact: speeding up the process towards an approximation of rules

The *Pfleiderer* doctrine created a certain unpredictability in relation to the possibility that documents submitted by one undertaking during the leniency program may be open to access to anyone who alleges, with more or less justification, to have suffered a harm caused by his infringement of competition law.

This uncertainty was increased due to the fact that in spite of the application of the same case-by-case rule, diametrically opposed solutions were adopted by the Member States immediately after *Pfleiderer*⁴⁸.

For instance, in Germany the *Amtsgericht Bonn*⁴⁹, whose reference under Article 267 TFEU motivated the pronouncement of the *Pfleiderer* doctrine by the ECJ, refused *Pfleiderer AG's* petition seeking for full access to the evidence contained in the *Bundeskartellamt*. The court reasoned that after weighing the relevant

⁴⁸ *Webber, James*, Observations on the Implications of *Pfleiderer* for Leniency Programmes, in: *Cross-border EU competition law actions*, *Danov, Mihail/ Becker, Florian/ Beaumont, Paul* (eds.), p. 215.

⁴⁹ Judgment in case N° 51 Gs 53/09 (*Pfleiderer*), *Amtsgericht Bonn* (Bonn Local Court).

interests in the case, it was clear that such a refusal would not render practically impossible or excessively difficult for *Pfleiderer* to obtain a fair compensation for the damages suffered. According to the applicable German rules⁵⁰, it is possible to limit the access to evidence on grounds of public interest such as the protection of the integrity and effectiveness of national leniency programmes, nevertheless, these rules are still in conformity with the principle of effectiveness of EU law and the *Pfleiderer* doctrine since the claimant would have anyhow access to all other documents seized during the dawn-raids, and, it would not need the evidence to prove that an infringement has occurred because of the binding legal effect of the *Bundeskartellamt* decisions for German courts.

A few months later the High Court of Justice of the United Kingdom issued a judgment in the case *National Grid*⁵¹ awarding the claimant with access to certain documents that may include leniency material. In his decision, Mr. Justice Roth extended the scope of *Pfleiderer* founding that its test applies not only to documents held by the national competition authorities but also by the Commission. More importantly, the decision improved the ambiguous standard provided in *Pfleiderer* and *Donau Chemie* developing a number of criteria to weigh the interest in disclosure against the need to protect an effective leniency programme. The relevant factors considered were⁵²:

- The nature of the documents sought by way of disclosure. In the case at question, the claimant was not seeking access to the complete leniency statements, but only extracts of them.
- Whether the disclosure would increase the leniency applicant's exposure to civil liability compared to non-cooperating parties.

⁵⁰ See above the German rules applicable in the *Pfleiderer* Case.

⁵¹ Judgment in Case No HC08C03243 (*National Grid*), High Court of Justice of England and Wales.

⁵² Judgment in *National Grid*, paras. 34-44.

- The potential effect of a disclosure order to deter potential leniency applicants⁵³.
- Whether the gravity and duration of the infringement outweigh the concerns about the deterrence of potential leniency applicants.
- Whether the disclosure is proportionate. For the proportionality test, Justice Roth took into account the (i) relevance of the requested documents and (ii) whether the requested documents were available from other sources.

Apparently, there is no report available which may lead to think that the ruling from the European Court of Justice has had an actual negative impact on the effective functioning of leniency programmes whether at the European or national level⁵⁴. However, on account of the possibility of different approaches along Member States' jurisdictions and the creation of significant risks of inconsistency, it can be stated that it had led to a high degree of legal uncertainty for undertakings⁵⁵, which, in this context, could have been deterred from co-operating if disclosure of documents could expose them to civil liability under worse conditions than the co-infringers that do not co-operate⁵⁶.

The Commission was concerned that this ambiguity may affect the number of leniency applications⁵⁷, thus affecting the effectiveness of leniency programs as a whole. In these circumstances, it prompted the

⁵³ Judgment in *National Grid*, para. 37: "It is significant that a decision not to go to the Commission would not have given ABB any guarantee of protection from civil liability since if any of the other participants had informed the Commission the cartel would have been exposed. Then ABB would similarly have been liable to civil claims but in addition would have faced a very substantial fine".

⁵⁴ *Wilman*, p. 219.

⁵⁵ *Groussot/Pierce*, Transparency and Liability in Leniency Programmes: A Question of Balancing?, in: *Bergström/Iacovides/Strand* (eds.), Harmonising EU competition litigation: the new Directive and Beyond, p. 154.

⁵⁶ ECN Resolution of the meeting of Heads of the European Competition Authorities 23.05.2012, on the protection of leniency material in the context of civil damages actions, p.2.

⁵⁷ Commission Proposal, p. 25.

submission of a project for adoption to the European Parliament and the Council of the European Union under the ordinary legislative procedure in conformity with Article 294 TFEU.

The Damages Directive, which was proposed few days after the issuance of the *Donau Chemie* Judgment, is addressed to dissipate a major part of this legal unpredictability through the positive harmonization of rules on disclosure of leniency evidence. From the point of view of immunity recipients, at least, there should be no more doubts in this regard as Article 6(6) DD envisages an absolute and direct prohibition of disclosure of the documents contained in the leniency statement.

Therefore, the remaining questions to resolve, after the respective implementation⁵⁸ of the Directive in the domestic legal order of the Member States, are whether the directive contemplates tools which are enough to ensure the exercise of the right to compensation in conformity with the principle of effectiveness, and whether the prohibition of disclosure is compatible with the case-by-case analysis.

To answer the first question above posed, the tools and procedural instruments contained in the Directive are analysed in the next Part of this Thesis.

⁵⁸ To 14 June 2017 transposition of the Directive is still outstanding in eight Member States. See European Commission's website: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

Part II: The Damages Directive

In competition law, it is well known the presence of technical barriers and high costs related to the obtainment of evidence to prove an infringement; the existence and *quantum* of the harm; and the causation. This burden usually requires intricate models only feasible (and understandable) by experts.

With the aim to improve the situation of victims and to boost follow-on civil claims⁵⁹, the Directive includes a variety of tools to access information in possession of the defendant or third persons. As well, it contains useful presumptions to assist their claims, especially when evidence is banned of disclosure by application of one of the exceptions included. These measures are also directed to decrease the cost for private litigants.⁶⁰

Most of those instruments are also focused to improve the co-existence and relation between private and public enforcement. Recognizing the importance of leniency programmes⁶¹, and to maintain its attractiveness for infringers willing to cooperate, the Directive also establishes few and narrow restrictions in the access to information and a cap on the joint liability of the immunity recipient.

1. Main procedural instruments⁶² on the Damages Directive

- i. Scope of application: Article 1 DD establishes the nature of infringements which triggers damages compensation regulated by

⁵⁹ Article 1(1) DD.

⁶⁰ *Bastidas, Vladimir*, The Damages Directive and Other Enforcement Measures in EU Competition Law, in: *Bergström/Iacovides/Strand* (eds.), *Harmonising EU competition litigation: the new Directive and Beyond*, p. 94.

⁶¹ Recital 26 DD.

⁶² *Hodges* refers to these instruments as “procedural innovations”; concept that is not used here as most of them have already been part of the national legal system of Member States (see *Hodges, Christopher*, *Competition Enforcement, Regulation and Civil Justice: What is the Case?*, CML Rev, p. 1400).

the Directive. It extends its scope of normative harmonization to the regulation of compensation of harm caused by infringement of both EU competition law and national law, to the extent the latter is applied in conformity to Article 3(1) of Regulation 1/2003.

- ii. Full compensation: Article 3 DD contemplates the right to full compensation, which implies that any natural or legal person that has suffered harm caused by infringement of competition law is able to claim and obtain full compensation of that damage. Such reparation encompasses actual losses (*damnum emergens*) and loss of reasonably expected profits (*lucrum cessans*)⁶³. Full compensation to this effect may not lead to overcompensation, leaving aside the possibility for punitive damages.

- iii. Effects of national decisions: In line with Article 16 of Regulation 1/2003⁶⁴, infringements found by NCA's final decisions are to be deemed irrefutably established (full proof value) in later claims for damages in the courts of the same member state⁶⁵. A decision shall be considered final after being confirmed in judicial procedures, or after not being challenged in due time and form according to national law. When final decisions from a NCA of one member state is brought before Courts of another member state, it may be presented at least as *prima facie* evidence that an infringement occurred.

- iv. Limitation periods: New rules on time barring have the objective

⁶³ As for the concepts "*damnum emergens*" and "*lucrum cessans*", AG Capotorti defined them in his Opinion in *Ireks-Arkady*, Case C-238/78: "It is well known that the legal concept of 'damage' covers both a material loss *stricto sensu*, that is to say, a reduction in a person's assets, and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place (these two alternatives are known respectively as *damnum emergens* and *lucrum cessans*)".

⁶⁴ In order to ensure the uniform application of EU competition law, the Regulation 1/2003 establishes that national courts and NCAs cannot take decisions running counter to the decisions adopted by the Commission.

⁶⁵ Article 9 DD.

to render victims of infringement with a reasonable period to exercise their right to claim for compensation⁶⁶. Firstly, the Directive indicates that periods shall not start to count before the infringement has brought to an end and the applicant has actually, or could have, acquired knowledge of: the anticompetitive conduct; that the conduct has caused harm on him; and the identity of the infringer. Secondly, the Directive establishes a period of five years since the occurrence of the circumstances described in the previous paragraph. This period shall be suspended while proceedings by a national authority are open.

- v. Joint and several liability: the Directive regulates the cases where several undertakings have collectively violated a rule of competition law, being the cartel the most typical of these situations. The rule allows victims to target their civil claims, in principle, to any of the infringers for the total amount of the harm suffered⁶⁷.

- vi. Immunity recipient's liability⁶⁸: at the same time the Directive alters the general regime of joint and several liability to protect the immunity recipients, since they are likely to be the primary targets of damages actions⁶⁹. The purpose is to safeguard the continuity of leniency programs; hence the Directive caps the immunity recipient's liability, as well as its intra-cartel contribution to debt, only to the harm caused to its own direct and indirect purchasers (or suppliers)⁷⁰. Without prejudice of this rule, immunity recipient shall be held in any case liable of full compensation to victims when other members of the cartel are not able to face the full

⁶⁶ Article 10 DD.

⁶⁷ Article 11(1) DD.

⁶⁸ As defined in Article 2(19) DD: 'immunity recipient' means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency program.

⁶⁹ Commission Proposal, p. 16.

⁷⁰ Article 11(4) DD.

amount of the compensation.

- vii.** Passing on defence: The Directive accept the argument traditionally called passing-on defence in those cases where it is possible for the defendant to demonstrate that the whole or part of the overcharges⁷¹, caused by his anticompetitive behaviour, have been already transferred to the buyers downstream⁷². This aims to avoid overcompensations, and can also be applied conversely, *mutatis mutandi*, in buying cartels.

- viii.** Compensation to indirect purchasers: In Article 14 the Directive gathers the conditions to be fulfilled by indirect purchasers to claim compensations against infringers of competition law. According to such provision, claimants shall evince that (i) the defendant has effectively committed an infringement of competition law; (ii) such infringement caused overcharges to the direct purchaser of the defendant, and (iii) he has acquired the products affected by the infringement and the overcharge.

- ix.** Procedural Instruments to facilitate proof:
 - a.** General Principle of effectiveness and estimation of damages: to reduce the obstacles related to obtain and bringing evidence to the proceedings, the Directive establishes the principle of effectiveness⁷³ in the same terms as it was built by the ECJ in *Manfredi*, namely, meaning that rules and procedures relating to claims for damages cannot render practically impossible or excessively difficult the exercise of the right to full

⁷¹ As defined in Article 2 (20) DD: ‘overcharge’ means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

⁷² Articles 12(1), 12(2) and 13 DD.

⁷³ Article 4 DD.

compensation.

Article 17(1) DD enshrines this principle specifically in relation to the burden and standard of proof needed for the quantification of harm, and subsequently allows national courts “to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available”⁷⁴.

- b. **Presumption of harm:** With the same practical objective, Article 17(1) materializes the Directive’s aspiration to strengthen private enforcement of competition law, by laying down the presumption that cartel infringements cause harm. The infringer shall have in any case the right to rebut that presumption (*praesumptio iuris tantum*). The reasoning behind such grant comes from the awareness that at least nine out of ten cartels create illicit overcharge harm⁷⁵.

- c. **Quantification of harm:** additionally, national courts may request the NCAs’ assistance to determinate the quantum of damages. In relation to this power, the Commission has previously issued a Communication on quantifying harm⁷⁶, accompanied by a practical guide⁷⁷. Both documents, whilst not binding for Member States’ judges, may be of great utility to estimate the damages, foremost in those

⁷⁴ Article 17(1).

⁷⁵ *Jones/Sufrin*, EU competition Law, p. 1118. See also, *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts*, study prepared for the European Commission, Directorate General for Competition, December, 2009, p. 91.

⁷⁶ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU.

⁷⁷ Practical guide quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU.

cases with only little evidence at hand.

- d. **Penalties:** Penalties are to be provided for cases of non-compliance with a disclosure order, the destruction of evidence, non-compliance with an obligation to protect confidential information and breaches of the limits on use of evidence⁷⁸. These penalties must be effective, proportionate and dissuasive and they must include the possibility for the national court to draw adverse inferences and to order the payment of costs⁷⁹.

- x. **Disclosure of evidence:** given its relevance for this thesis, these rules are treated separately in the next title.

2. Disclosure of evidence on the Damages Directive

Due to the economic nature of competition law infringements follow-on civil cases are very “fact intensive”⁸⁰, this mean that it can be fairly hard, especially for individual final consumers, to obtain the underlying circumstantial elements in order to prove that they are entitled to claim damages. Most of the relevant facts and information related to the case are unknown to claimants in detail.

In consequence, the success of the claims is strongly depending on the ability of the claimant to access the necessary evidence that is in the hands of the defendant, a third party or, in a major number of cases, in hand of the competition authority. By providing an easier access to public enforcement files the Directive commits to facilitate private antitrust litigation because the file of the NCAs can include significant information about the anticompetitive violation itself and also about

⁷⁸ Article 8(1) DD.

⁷⁹ Article 8(2) DD.

⁸⁰ OECD, p. 14.

the amount of damages and the causal link between the infringement and the damage⁸¹.

In concrete, the Damages Directive enshrines measures related to the minimum level of disclosure, conditions to obtain a discovery order, preservation and use of evidence in the context of follow-on civil actions⁸².

3. General rule on disclosure: What information can be disclosed?

Article 5 DD provides the general rules on discovery stating that upon request the national court must be able to order the defendant or third parties to disclose relevant specified items of evidence or categories of evidence that lies in their control⁸³.

The rule comes together with a set of (not really systematic) appraisal criteria that must guide the national court's decisions in the balancing of the claimant and defendant' interests⁸⁴:

- i. Plausible assertion: The party interested in obtaining the evidence must deliver a reasoned justification and description on the basis of facts which are reasonably available to him, stating "that the claimant has suffered harm that was caused by the defendant"⁸⁵.

In relation to information included in the file of a competition

⁸¹ *Wils Wouter P.J.*, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, *World Competition*, 32, 2009, p 19.

⁸² In order to ensure equality of arms, the rules on access to evidence are also available for the defendants in actions for damages, so that they can request the disclosure of evidence in possession of the claimants. See also, Recital 15 DD.

⁸³ Article 5(1) DD.

⁸⁴ *YanesYanes, Pedro*, Confidencialidad y clemencia en la Directiva de daños: una aproximación, in: *Morillas/Perales/Porifirio*, Estudios sobre el futuro Código Mercantil: libro homenaje al Profesor Rafael Illescas Ortiz, 2015, pp. 1143-1147.

⁸⁵ Recital 16 DD.

authority, national courts can grant the disclosure only where no party or third party is reasonably able to provide that evidence⁸⁶.

- ii. Relevance: The requested evidence must be related to the subject matter of the proceeding, and the facts pretended to be proven must have a tendency to be determining to obtain a positive decision (in order to avoid fishing-expeditions). This criterion has to be appraised and weighted according to the rules on relevance of each member state.⁸⁷
- iii. Proportionality: National courts must limit the disclosure of evidence to that what is proportionate and necessary, considering the legitimate interests of all parties and third parties concerned. In that connection, the Directive comes up with a non-exhaustive list of factors that national judges may consider along with the concrete circumstances of each particular case⁸⁸.
- iv. Contradiction: Applying the general principle of law *audi alteram partem*⁸⁹, the rule of Article 5(7) DD not merely gives each party the right to be heard before the court orders a disclosure, but also implies a right for the parties to be able to debate and oppose on the related matters of fact and of law which will determine the outcome of the decision⁹⁰.

4. Disclosure of confidential information

Confidential information or information containing business secrets

⁸⁶ Article 6(10) DD.

⁸⁷ *Lianos, Ioannis/ Genakos, Christos*, Econometric evidence in EU competition law: an empirical and theoretical analysis, in: *Lianos/Geradin*, Handbook on European Competition Law: Enforcement and Procedure, Edward Elgar, 2013, p.77.

⁸⁸ See Article 5(3) DD. In relation to the proportionality test, see also the elements considered by *Mr. Justice Roth* on the Judgment in *National Grid*, above described.

⁸⁹ *Giannakopoulos, Themistoklis K.*, Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-Subsidies proceedings, 2011, p.155.

⁹⁰ Judgment in *OHIM*, Case C-530/12, para. 54.

are not excluded from the general rules on disclosure, therefore it can in principle be disclosed where the court considers this relevant⁹¹. However, disclosure of this category of information required that effective measures to protect the evidence are granted. Among others, “those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera and restricting the persons allowed to see the evidence”⁹². Moreover, the infringer affected by the disclosure has the right to according to Article 5(6) DD full effect must be given to legal professional privileges applicable under national or EU law.

In any case, the Directive offers a clear rule of balance in this regard by stating that the application of these measures protecting business secrets and other confidential information cannot mean an impairment of the effective exercise of the right to compensation.⁹³ It is also relevant to remark that these rules are without prejudice of the rules applicable under Article 8 of Decision 2011/695/EU which regulates the access to confidential information within the administrative proceedings of the Commission.⁹⁴

5. Disclosure of evidence included in the file of a competition authority

The provision of Article 6 DD governs access to evidence contained

⁹¹ Article 5(4) DD.

⁹² Recital 18 DD.

⁹³ Article 5(6) DD.

⁹⁴ See Judgment in *Evonik*, Case C-162/15, paras. 41-42. See also Opinion of AG Szpunar in *Evonik*, Case C-162/15, para. 92. “The disclosure of information relating to an infringement of competition law by publication of a Commission decision penalising that infringement cannot in principle be confused with access by third parties to documents in the Commission’s investigation file. The publication of such information would not result in the communication of leniency statements to third parties”.

in the file of a competition authority⁹⁵. Without prejudice that general rules for disclosure described above are in principle applicable to this category, Article 6 DD contains additional proportionality requirements and enshrines a strict prohibition of disclosure for leniency statements and settlement submissions. This means that parties should generally be granted access to the evidence from the file of a competition authority, to the extent that this evidence is not part of the leniency statement or the settlement submission.

As per this provision, there are three levels or categories for the information contained in the file of a competition authority which is requested in the context of follow-on damages claims.

The national courts must first check if the request includes a document from the permanent *blacklist*⁹⁶ composed by leniency statements and (successful) settlement submissions. Such documents shall never be revealed. If the party seeking access is not interested in documents from the black list, but any other document listed in the *grey list*⁹⁷, the court will move on to the second level which covers documents that can only be accessible after the achievement of the final decision or after the proceeding is closed. In the event the documents requested are not banned from disclosure, neither during nor after the investigation, they are part of the *white list*⁹⁸ –third level–, then the court will authorize the access only if the requirements of the proportionality test of Article 5(3) DD additionally to those of Article 6(4) DD are fulfilled.

⁹⁵ Article 2(8) DD: ““competition authority” means the Commission or a national competition authority or both, as the context may require”.

⁹⁶ Article 6(6) DD.

⁹⁷ Article 6(5) DD: “(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn”.

⁹⁸ Article 6(9) DD.

6. Additional proportionality requirements

For this category of evidence, the Directive prescribes several additional factors that national courts must take into account for the proportionality assessment. They are necessary in account of the possibility that disclosure of the contents of the NCA's file could produce a "chilling effect" on the level of cooperation of applicants or may interfere with the investigative activities of the authorities.

- i.** Specification: the request must be formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof.
- ii.** Scope: the request must be made in relation to an action for damages before a national court.
- iii.** Public enforcement: in relation to white and grey listed evidence, or upon request of a competition authority⁹⁹, national courts have to consider that the disclosure does not affect the effectiveness of the public enforcement of competition law.

7. Black List: a direct prohibition of disclosure of leniency statements

Article 6(6) DD acknowledges the relevance of leniency programs as an important tool for the public enforcement of competition in the extent that they can make detection and prosecution of infringements easier and more effective¹⁰⁰. In consequence, it recognizes the necessity to protect the self incriminating evidence produced within these programs against disclosure. The reason is that otherwise,

⁹⁹ Article 6(11). See also, Recital 30 DD.

¹⁰⁰ *Wils, Wouter P.J.*, Leniency in Antitrust Enforcement: Theory and Practice, 2007, pp. 19-26.

undertakings might be deterred from cooperating with competition authorities if they knew their declarations may be used against them in civil claims, affecting the effectiveness of this tool.

To protect this category of evidence, Article 6(6) DD establishes a black list, composed by leniency statements¹⁰¹ and settlement submissions, meaning that the elements of these pieces of evidence cannot be disclosed at any time. This protection is absolute but, of course, only in relation to damages actions before national courts. Rules for disclosure in administrative¹⁰² or criminal proceedings have to be observed in the respective cases.

8. Scope of leniency statements protection

This category includes the formal leniency submissions together with all the documents and declarations that were presented at the time of the leniency application in the corporate statement¹⁰³ -in the case of a written submission- and the record and its transcription -if applicable according to national law-. This evidence will typically comprise: description of the cartel arrangement; aims and activities of the cartel; the relevant market affected; the duration of the infringement and market volumes affected; date and location of the meetings; names and addresses of the entities and individuals involved, among others.

Under the Directive the protection covers:

¹⁰¹ Article 2(15) DD: “‘leniency statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information”.

¹⁰² See below the analysis about the compatibility of the rules on disclosure of evidence of the Damages Directive and those from the Transparency Regulation.

¹⁰³ This concept can be used as a synonym of leniency statement. See, Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C), para. 31.

- i.** Those voluntary (because the ratio is to keep the incentives to expose and destabilize the cartel) and self-incriminating (because the purpose is to protect the immunity recipient's declarations and documents only) statements drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency program¹⁰⁴. Thus, not all leniency material is protected, and for instance all declarations and evidence presented by the immunity recipient related to the co-infringers concerned should be accessible.
- ii.** Verbatim quotations from leniency statements or settlement submissions included in other documents¹⁰⁵, which makes it impossible to extract a particular declaration from any administrative document, such as an NCA decision. This applies *a fortiori* to declarations contained in documents others than official texts.
- iii.** Documents previously obtained from the competition agency when such access was given to undertakings so as to allow them to exercise their right of defence in public enforcement proceedings. Blacklisted evidence obtained in this manner has to be declared inadmissible in follow-on damages claims. The same applies for grey listed evidence until the NCA proceedings are closed. All other pieces of evidence obtained from access to the file can be presented in follow-on claims, but only to be used by the party concerned or its legal successor¹⁰⁶.

¹⁰⁴ Recital 26.

¹⁰⁵ *Idem*.

¹⁰⁶ See Article 7 (1), (2) and (3) DD.

9. Role of national Courts in the classification of leniency statements

In consistency with the ECJ jurisprudence and respectful of national legal traditions¹⁰⁷, this Directive seeks to give a central function to the national courts. In regard to leniency statements, the courts have to delimitate its perimeter and exclude from it those elements that, even being part of the leniency material, do not fulfil the premises of the directive. Thereupon, any document falling beyond those definitions should be subjected to the medium (grey list) or minimum (white list) protection according to each case¹⁰⁸.

In relation to white and grey listed evidence, national courts are expected to exercise strict control and balance all interest involved in ordering the disclosure of specified pieces or categories of evidence¹⁰⁹. This control has to be made as precisely and narrowly as possible; limiting the access only to what is proportionate in the concrete case. (Note that the interest of an undertaking to avoid actions for damages does not constitute an interest that warrants protection¹¹⁰).

Notwithstanding these apparently clear rules, in practice it is a tough challenge to elucidate which pieces of information are restricted. Because of this, and to avoid any excessive protection, the Directive allows the national courts, upon request of the claimant, to access the leniency material with the only purpose to make a judicial assessment, eventually assisted by NCAs, to check if its content corresponds with

¹⁰⁷ Commission Proposal, p. 14. See also, *Hodges*, op. Cit., pp. 1382-1384, who criticise this view and links the growing interest on private enforcement in the EU with what he calls the “Americanization of European Antitrust”.

¹⁰⁸ Article 6(8) DD: “If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article”

¹⁰⁹ Recital 16 DD.

¹¹⁰ Article 5(5) DD.

the definition and scope of Article 6(6) DD¹¹¹.

10. Disclosure of pre-existing information

In his opinion for *Pfleiderer*, AG Mazak has made a distinction between documents created for the submission of the *corporate statement* or during the leniency program, and another group of evidence which pre-existed irrespectively of the proceeding of the competition authority and that were submitted at any time in the course of a leniency procedure¹¹².

Although this differentiation was not incorporated in the Judgment by the ECJ, it can be found in the Leniency Notice of 2006¹¹³ and in the definitions of Article 2 DD where *pre-existing documents* are expressly excluded from the protection conferred to leniency statements. In consequence, national courts can order the disclosure of pre-existing materials at any time in actions for damages, even if the pre-existing documents are subsequently included in the materials submitted to the agency by a leniency applicant.¹¹⁴

11. Application of the Transparency Regulation rules on disclosure must be compatible with the Damages Directive provisions

The Transparency Regulation¹¹⁵ confers on the public a wide right of access to EU institutions documents including documents obtained by the Commission in the framework of a leniency program.

¹¹¹ Article 6(7) DD.

¹¹² Opinion of AG Mazak in *Pfleiderer*, para. 17.

¹¹³ Commission Notice on Immunity from fines and reduction of fines in cartel cases, para 6.

¹¹⁴ OECD, 2015, p. 29.

¹¹⁵ 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 (Hereinafter referred as to the “Transparency Regulation”).

During the legislative discussion of the Directive, the EU Parliament amended the Commission Proposal in order to include that the rules on disclosure of evidence contained in the competition authorities' files are to be applied "without prejudice to the rules and practices under Union law on access to documents"¹¹⁶. Such caveat was finally included in Article 6 (2) and (3) DD indicating that the system provided for Article 6 DD does not suppress the rules under the Transparency Regulation and national rules on the protection of internal documents of competition authorities.

Then, in principle, the prohibition of Article 6(6) DD should not impede the disclosure of leniency statements under the norms of the Transparency Regulation.

However, the fact that any natural or legal person can obtain access to the information contained in a particular leniency statement does not mean they can use it as evidence to prove a civil claim against an immunity recipient. As explained above, according to Article 7(1) DD, blacklisted evidence obtained solely through access to the file of a competition authority has to be declared inadmissible in follow-on damages claims¹¹⁷.

Both the rules from the Regulation and from the Directive are to apply in a way which ensures that they are compatible and consistently with each other as they "do not contain a provision expressly giving one regulation primacy over the other"¹¹⁸.

¹¹⁶ Report on 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, delivered on 4 February 2014, p. 22.

¹¹⁷ *Niamh Dunne*, *Antitrust and the Making of European Tort Law*, 2016, p 382.

¹¹⁸ The reference is taken from the Judgment in *EnBW*, Case C-365/12, para 84. The case concerned a request for access to certain leniency material under Article 4 of the Transparency Regulation which collides with certain rules of Regulations

This approach was established by the jurisprudence of the ECJ in the judgment for the *EnBW*¹¹⁹ case, concerning a request for access to the leniency documents in possession of the Commission under the rules of the Transparency Regulation.

Furthermore, in that opportunity the Court also stated that when assessing the limits to the public access to information and deciding whether or not award a disclosure, the rules from the Transparency Regulation cannot be interpreted “without taking account of the specific rules governing access to those documents”¹²⁰. Such specific rules are contained in the Damages Directive and the Regulation 773/2004¹²¹.

Consistently, in August 2015 the Commission amended the provisions in Regulation 773/2004 and the four Notices concerning the disclosure and use of information contained in the Commission’s file¹²². These modifications aimed to limit the use of information obtained in the course of commission proceeding following the rationale of Article 6 (5) and (6) DD¹²³.

For the reasons above exposed, the possibility of disclosure under the Transparency Regulation rules does not increase the risk of facing civil liabilities; in consequence, it has no impact on the attractiveness

773/2004 and 1/2003. Nevertheless, there is no reason to not make that ruling applicable to conflicts between Directives and Regulations, since both are legal acts of the Union in the same level of hierarchy. And even more so, if the Directive in question contains a provision remitting to the other legal act of the EU. See, *Bradley, Kieran St C*, Legislating in the EU, in: *Barnard/Peers* (eds.), European Union Law, 2014, p. 103.

¹¹⁹Judgment in *EnBW*, Case C-365/12, paras. 61-90.

¹²⁰ *Ibid.*, para. 83.

¹²¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

¹²² The consolidated versions of these Notices are available on the Commission website at:

http://ec.europa.eu/competition/antitrust/actionsdamages/evidence_en.html

¹²³ See Article 16a of the Regulation 773/2004.

of leniency programs for undertakings¹²⁴.

Part III: Conflicts and compatibility between the ECJ's case-by-case analysis and the rules on protection of immunity recipients' information

1. Conflicts

It is possible to argue that the *per se* prohibition on disclosure of leniency statements is conflictive with the case-by-case assessment formulated by the ECJ because of two reasons: Primarily, it makes the case-by-case analysis impracticable, and secondly, as a consequence of the first reason, it might affect the principle of effective judicial protection. In both cases it would be contrary to the correct application of the principle of effectiveness as established by the ECJ case law.

i. Article 6(6) DD makes the case-by-case analysis in relation to the disclosure of information contained in the leniency statement impracticable

Since the moment the Directive enters into force the national courts will be precluded to apply any discretionary balancing *vis-a-vis* a request for disclosure for information forming part of the leniency statement.¹²⁵ They are obligated to deny such petition based on the rule of Article 6(6) DD. A legislative rule providing for absolute non-disclosure in this regard precludes by definition the weighing exercise

¹²⁴ For a contrary opinion see *Kirst/Van den Bergh*, The European directive on damages actions: a missed opportunity to reconcile compensation of victims and leniency incentives, *Journal of Competition Law & Economics*, 2016, pp. 1–30. The authors consider that documents disclosed under the rules of the Transparency Regulation may be used as evidence in damages actions. Consequently, from a game theory approach, they state that such a disclosure may negatively affect the incentives of leniency applicants to cooperate.

¹²⁵ *Drexl, Josef*, The Interaction between private and Public Enforcement in European Competition Law, in: *Micklitz, Hans/Wechsler Andrea* (eds.), *The Transformation of Enforcement: European Economic Law in a Global Perspective*, Bloomsbury, Hart Publishing, 2016, p. 144.

imparted by the Court through the *Pfleiderer* doctrine.¹²⁶

It must be recalled that in its ruling above analysed the ECJ¹²⁷ rejected to prioritize the interest associated with public enforcement and in particular the protection of leniency programmes over the interest of private parties injured by the infringement. In that occasion, it rather emphasized the importance of both interests and insisted on a *case by case* assessment by the judiciary according to the principle of effectiveness.

The principle of effectiveness in this regard was worded meaning that “the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must [...]not make it in practice impossible or excessively difficult to exercise rights conferred by EU law”¹²⁸.

More precisely, the Court pointed out that an absolute prohibition is susceptible to make it impossible or, at the very least, excessively difficult to protect the right to compensation. This is particularly the case when the only way to obtain the evidence needed to establish a claim for damages is by having access to the documents relating to the proceedings before the competent NCA. In those cases “a refusal to grant access to the file renders nugatory the right to compensation which they derive directly from European Union law”¹²⁹.

This formula has been radically challenged in the Directive where the legislators decided to outpace this solution and have given predominance to the protection of the leniency statements instead of

¹²⁶ *Kersting, Christian*, Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants, JECLAP, 2014, pp. 2-5.

¹²⁷ See Judgment in *Pfleiderer* and Judgment in *Donau Chemie*.

¹²⁸ Judgment in *Donau Chemie*, para. 27.

¹²⁹ *Ibid.*, para. 32.

conferring permissive rules which may, on their opinions, affect the integrity of leniency programs. The approach chosen by the lawmaker is indeed closer to the one suggested by *AG Mazak*¹³⁰ in *Pfleiderer* than to the Court ruling in that case¹³¹.

In consequence, such a *per se* rule, without any exception provided, is not only liable to be contrary to the ECJ case Law, but might also be incompatible with primary law, specifically with the principle of effectiveness of EU law, which is binding on the Member States and the EU law maker.¹³²

ii. The prohibition might affect the principle of effective judicial protection

The effective judicial protection is a fundamental right¹³³ as well as a general principle of the EU¹³⁴ which has to be observed by national courts when implementing EU law¹³⁵. This principle comprises several elements, among them, the right to adversarial proceedings, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented¹³⁶. Any individual may rely on that with a view to protect the substantive rights conferred

¹³⁰ He argued that protection of voluntary and self-incriminating statements was justified by: (i) the legitimate aim of ensuring the effective enforcement of EU competition law by NCAs and (ii) private interests in detecting and punishing cartels.

¹³¹ *Kumar, Singh, Pfleiderer: Assessing its Impact on the Effectiveness of the European Leniency Programme*, ECLR, 2014, p. 118.

¹³² *Kersting, Christian*, op. Cit., p.2. To support his arguments *Prof. Dr. Kersting* also submits that since the Directive establish a cap on the joint liability of the immunity recipient, the “disclosure of documents would not be a deterrent to potential leniency applicants, because they would ultimately be immune from civil liability”.

¹³³ In application of Article 47, in conjunction with Article 51(1), of the Charter, as interpreted in the light of Article 6(1) and 13 of the ECHR.

¹³⁴ See Judgment in *Johnston*, Case C-222/84, para 18, and Judgment in *Arcor*, Case C-55/06, para. 174.

¹³⁵ Pursuant Article 51(1) of the Charter, acts of the Member States, including national courts, are covered by its rules when implementing EU Law.

¹³⁶ See the judgment in *Otis*, Case C-199/11, para. 48. See also Opinion of *AG Jaaskinen* in *Donau Chemie*, para. 52.

upon them by EU law.

In the context under analysis, to obtain compensation the claimant usually needs to prove: the existence of the infringement, the harm and its quantum, and a causal relationship between the infringement and a loss¹³⁷. With the intention to balance the prohibition of Article 6(6), the Directive offers certain procedural instruments to improve the weak position of claimants in terms of access to means of proof. Such are the presumption of the existence of the infringement, awarded through the binding legal effect of NCAs decisions in national courts, and the presumption that cartels cause harm¹³⁸.

However, in most cases it could still result impossible to prove causation, and thus obtain a positive judgment, because of the lack of appropriate access to evidence since there is no tool on the Directive stating a presumption in this regard. After the implementation of the Directive the determination of requirements to prove causation remains solely within the sphere of domestic legal orders. The Ashurst Study¹³⁹ has clarified with empirical data the “astonishing diversity” in the approaches taken by Member States in this matter and analyzes how these divergences constitute an obstacle to successful damage actions. This obstacle becomes insuperable when access to the leniency statement, which could proportionate the only means of proof available, is absolutely banned.

As held by *AG Mazak* in his opinion¹⁴⁰ for *Pfleiderer*, a refusal of access to voluntary and self-incriminating leniency statements is capable to create obstacles to or hinder to some extent an allegedly injured party’s fundamental right to an effective remedy and a fair

¹³⁷ Judgment in *Otis*, para. 65.

¹³⁸ See respectively Article 9 and 17(2) DD

¹³⁹ *Ashurst*, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative Report, 2004.

¹⁴⁰ Opinion of *AG Mazak* in *Pfleiderer*, para. 3.

trial. With greater reason, as held by *AG Jaaskinen* in his opinion¹⁴¹ for *Donau Chemie*, a direct and absolute restriction of disclosure, in the terms above outlined which makes the case-by-case assessment impracticable for national courts, is a disproportionate impediment to the right of access to a court.

The ECJ recognized that the *right of access to a court* implies for national tribunals to have a “power” to consider all the questions of fact and law relevant to decide the dispute¹⁴². The prohibition of Article 6(6) DD deprives national courts of such a power, imposing an absolute bar on access to fundamental evidence from the file of NCAs. Certainly, access to leniency evidence is necessary to enable individuals to justify and support their contentions. But it is even more important from the perspective of the proper performance of the judicial function of national courts, when this access signifies the only source of evidence to take a fair resolution.

Additionally, the prohibition of Article 6(6) DD breaks the balance between the parties to the dispute affecting *the principle of equality of arms*, which is a corollary of the *right to a fair hearing* and means “that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”¹⁴³ Thus, one party might be favored with a better position in the dispute when the other has no real opportunity to examine and challenge specific leniency evidence, in particular when it entails economical information which is likely to have a decisive character on the final assessment of the facts and grounds by the courts.

Finally, it is necessary to mention than an impairment of the *principle*

¹⁴¹ Opinion of *AG Jaaskinen* in *Donau Chemie*, para. 65.

¹⁴² *Otis*, para. 49.

¹⁴³ *Otis*, paras. 71-72.

of effective judicial protection in the terms just explained, also contravenes the *principle of effectiveness* by making the exercise of the right to full compensation impossible in practice or, at least, excessively difficult.

iii. Wide access to evidence is necessary for an effective exercise of the right to compensation

For the purpose of illustrating the relevance and necessity of, first, a wide access to evidence contained in the file of the competition authorities and, second, the possibility for the national courts to make a complete assessment of the concrete circumstances, may be of interest to briefly review the Commission's (so far) unsuccessful attempt to obtain a civil compensation before the Brussels Commercial Court.

In 2008, on behalf of the EU, the Commission brought before the Belgian Commercial Court a private claim seeking damages because of the overcharge which it paid as owner and occupant of buildings supplied and maintained by the companies fined in the *Elevators Cartel*¹⁴⁴.

In its judgment¹⁴⁵, released only some days after the formal approval of the Damages Directive, the Court rejected the EU's claim in its entirety arguing that, despite the technical economical report submitted and the existence of a binding Commission's decision

¹⁴⁴ On 21 February 2007, the Commission adopted a decision and imposed fines totalling €992 million on the Otis, Kone, Schindler and ThyssenKrupp groups for operating cartels for the sale, installation, maintenance and modernisation of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands (Case COMP/E-1/38.823 — PO/Elevators and Escalators).

¹⁴⁵ See the Judgment of 24.11.2014, Case A/08/06816 (*EU v Otis and others*), Brussels Commercial Court.

establishing the existence of a harmful event and the characteristics¹⁴⁶ thereto, the national judge was not prevented from judging independently on the existence and the quantum of these damages and the causal link¹⁴⁷ under its national law. Accordingly, the Belgian Court ruled that (i) insufficient evidence was adduced as to the causal link between the anticompetitive behaviour and loss; and (ii) the Commission failed to prove an overcharge (harm)¹⁴⁸.

The judgment presented shows that, with relation to (i), it usually results extremely difficult to measure the actual effect an infringement causes on the assets of an individual, even when for the national court it is clear and undisputed that the anticompetitive conduct had an impact on the market. In relation to (ii), despite providing all the contracts and evidence which may endorse the legal relation and the scope of the transactions, evidence of the “certainty” and of the “tangibility” of the damages suffered due to a cartel could still be insufficient and needs to be accompanied by convincing technical economic information¹⁴⁹.

2. Conflicts are only apparent

¹⁴⁶ Cartel infringements are to be considered as anticompetitive conducts “by object” (hardcore infringements). For this category of violations is unnecessary to demonstrate any actual or likely anticompetitive effects on the market. Therefore, Commission’s decisions founding these illegal behaviours are not likely to offer relevant information in regard of the effects or extension of the harm, making more difficult for claimants to obtain the pertinent evidence. See, Commission Staff Working Document - Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the *De Minimis Notice* of 25 June 2014.

¹⁴⁷ *Ramos, Jorge Marcos/Muheme, Daniel*, The Brussels Court judgment in *Commission v Elevators manufacturers*, or the story of how the Commission lost an action for damages based on its own infringement decision, ECLR, p.8.

¹⁴⁸ For the same reasons, a few months later, the Brussels Commercial Court dismissed in its entirety a claim for damages by the Belgian and Flemish state authorities against four members of the *Elevators Cartel*.

¹⁴⁹ In the case reviewed, the main question for the assessment of the alleged damages caused by the cartel entailed a counterfactual analysis: what would have happened had the infringement never occurred. Hence, the claimant had to demonstrate the damages actually (not hypothetically) suffered.

The above exposed assertions are laudable legal arguments, and for sure, they have been taken into account in the solutions finally agreed by the EU legislators. However, they have to be discarded as possible conflicts as they display only a partial view of the whole current legal scheme:

First, they do not take into consideration the change in the circumstances on which the precedent case law was formulated. That is to say, the case-by-case assessment was essentially built over the “absence of EU law”¹⁵⁰.

Second, the principle of effective judicial protection, as a fundamental right, is not absolute and may be curtailed by restrictions which are in the general interest, proportionate and do not amount to an “intolerable interference which infringes upon the very substance of the right guaranteed”¹⁵¹. In the concrete case, the prohibition may be justified by the protection of the effectiveness of leniency programs as a public interest.

Third, under the rules of the Directive, the parties and the judges have wide access to evidence and several procedural instruments which are necessary to ensure and strengthen an effective exercise of the right to compensation. Altogether, this avoids granting the immunity recipient a more favorable position compared to the claimant in compliance with the principle of judicial protection.¹⁵²

These arguments are further developed in the next titles to support that the Damages Directive, including the prohibition of Article 6(6), is compatible with the ECJ case law.

¹⁵⁰ *Vandenborre, Ingrid/Goetz, Thorsten*, EU competition law procedural issues, JECLAP, pp. 648-650.

¹⁵¹ See Judgment in *Allassini and others*, Joined Cases C-317-320/08, paras. 61-63.

¹⁵² *Bastidas*, op. Cit., p. 97.

3. The Directive's rules -particularly Article 6(6)- are compatible with the case-by-case assessment

i. The case-by-case analysis was formulated in absence of EU law

There may be discussion about the definition and scope of the concept of national procedural¹⁵³ autonomy, as it has already been noted in some passages of this thesis. However, scholars and the ECJ are consistent that its application depends on the absence of measures of *harmonization* (or *unification*) in relation to a concrete right conferred by EU law¹⁵⁴.

The case-by-case assessment was a roadmap and the limit to the choices due to be taken by Member States in relation to the rules of disclosure of leniency evidence in civil follow on claims. It pursued to bring any national measure in conformity with the Treaties and to give effectiveness to the rights conferred by them upon citizens. In other words, the case-by-case assessment was a limit to the national procedural autonomy.

Already in *Manfredi* the ECJ recognized that competition law rules of the TFEU produce direct effect, thereby any citizen is entitled to invoke the substantial rights conferred upon them before national courts, in application of the principle of sincere cooperation¹⁵⁵. It is also through the enforcement of those rights that compliance with EU

¹⁵³ In this context, the term “procedural” should be understood in a very broad sense, covering “virtually all remedial and procedural rules, mechanisms and arrangements available in legal proceedings before national courts that are concerned with the enforcement of EU law.” See, *Wilman*, op. Cit., p.26 fn. 4.

¹⁵⁴ *Wilman*, op. Cit., p. 25. See also Judgment in *Impact*, para. 44-46, Judgment in *Rewe-Zentralfinanz*, para. 5, and Judgment in *Unibet*, Case C-432/05, para. 39.

¹⁵⁵ Article 4(3) TEU.

norms can be safeguarded¹⁵⁶, for that reason; Member States are obligated to offer sufficient legal instruments to ensure effective judicial protection¹⁵⁷ in the areas covered by EU law according to their own national remedies and procedural rules, having as a guideline the principle of equivalence and effectiveness¹⁵⁸.

When describing how the national procedural rules for enforcing EU law rights in the Member States works, two different situations can be observed.

In the first situation, when there are no binding rules¹⁵⁹ on the specific matter, it is the responsibility of each national legal system to choose for procedures, rules and principles according to which EU rights can be effectively enforced at the domestic level¹⁶⁰. This was the case in relation to rules on disclosure of leniency evidence in the context of civil claims before the Directive was implemented. To grant such effectiveness the ECJ can also formulate rules of judicial origin to orientate, and to limit when necessary, the application of Member State's laws. Of course, those judicial rules cannot be contravened by the national laws.

In this way, the first situation corresponds to the legal framework in which the case-by-case *assessment* rule of the ECJ was developed. The Court's criteria were made at that time to ensure the effective exercise of the right of full compensation, by indicating that the protection of public national interests -as the protection of leniency programs- was not *per se* strong enough to impair the performance of

¹⁵⁶ Judgment in *Manfredi* para. 91 and Judgment in *Courage* para. 27. See also, *Eilmansberger, Thomas*, The relationship between rights and remedies in EC Law: In search of the missing link, 2004, p. 1205.

¹⁵⁷ Pursuant to Article 19(1) TEU as inserted after the Lisbon Treaty codifying the Court's well stated *Rewe Formula*.

¹⁵⁸ See *Wilman*, op. Cit., pp. 30-36.

¹⁵⁹ Judgment in *Pfleiderer*, para. 30.

¹⁶⁰ Judgment in *Impact*, para. 44.

rights derived from the direct effect of Articles 101 and 102 TFEU. This formula, which is rather imprecise, can be explained in terms that the court was careful not to establish *minimum standards* –these have to be enacted by legislative acts of the Union– as well as being respectful of the civil law traditions of each Member State.

In contrast, the second situation is where the EU has promulgated its own procedural rules *harmonizing*, by means of Directives, the national regimes (*unifying*, in the case of Regulations) in given specific areas where the Member States have conferred competences to the EU.

The enactment and later implementation of a Directive truly breaks the national procedural autonomy, altering the *status quo* where before only national procedural provisions governed the enforcement of EU law in national courts. Although, all national rules not touched by the Directive remain applicable and they shall work interlinked between each other.

Likewise, the implementation of the Damages Directive in the national legal order of Member States changed the circumstances¹⁶¹ under which the case-by-case assessment was elaborated, in a way that balancing in regard of disclosure of leniency statements should be re-considered.

The case law of the ECJ, within the context presented in this thesis, is essentially addressed (and deliberately limited) to establishing a balance, under EU law, between the different interests involved in the disputes; that is to say, the interest of the individual affected by an infringement of antitrust law to perform its right to compensation, in accordance with the principle of effectiveness, and, on the contrary,

¹⁶¹ See, for instance, Judgment in *Donau Chemie*, para. 25.

the interest of the NCAs to protect the effectual functioning of the leniency programs¹⁶². The ECJ averts to give clear predominance to one over the other, probably because it recognize that taking that decision is a power which belongs to other EU Institutions¹⁶³, and has to be made according to the concrete policy areas involved.

In that balance, the new rules on disclosure of information contained in the Directive provide a large group of devices to correct the scale when the access to pieces of evidence, or the assessment of them, is becoming excessively difficult. A different interpretation, for instance saying that the prohibition of Article 6(6) is incompatible with the case-by-case assessment, may have as a result the assumption that the ECJ can perform legislative powers that cannot be modified by means of democratic and legitimate procedures.

To conclude the analysis of this topic, it must be noted that as a secondary source of law, the rules contained in a Directive cannot in any aspect limit the judicial reach of the Court. This is to say, all the rules contained in the Directive, and the national law passes according to it, are subject to judicial review on the European level to verify its conformity with the Treaties, the Charter and the principles of law contained therein.

ii. The protection of effective leniency programmes is a public interest which justify the prohibition of Article 6(6) DD

The concept of public interest is a very broad one, and “has to be understood as a generic category of policy objectives that not only

¹⁶² *Bastidas*, op. Cit., p.97.

¹⁶³ In fact, Article 103 TFEU enshrines the competences for the Commission to propose the appropriate Regulations and Directives to give effect to the principles of Articles 101 and 102 TFEU. Whilst, Article 114 TFEU refers to the competences of the Council and the Parliament to make proposals in relation to the functioning of the internal market.

comprises non-economic values but also encompasses economic interest”¹⁶⁴. The EU legislator, as well as the Court of Justice, have developed an open-ended list of public interest justifications includes a wide range of grounds, such as the effectiveness of fiscal supervision, the protection of public health, the protection of the environment, and the correct functioning of a system ensuring that competition in the internal market is not distorted. In this regard the Commission has formulated that “EU competition rules are a matter of public policy. They are primarily enforced by the Commission and NCAs [...], this type of enforcement, which is exercised by competition authorities in the public interest, is generally referred to as public enforcement”.¹⁶⁵

In the case law above examined, the ECJ emphasises the need to balance considerations of the public interest in having effective leniency programmes against individuals' rights to effectively pursue actions for damages. The public interest that justifies the system of leniency programmes is based on the desire to repress illegal conducts that could be prejudicial for the community¹⁶⁶. In concrete, the judgment in *Donau Chemie* asserted that the effectiveness of anti-infringement policies in the area of competition law, such as leniency programmes, is deemed to be a public interest which cannot be undermined¹⁶⁷.

The EU Directive on Antitrust Damages Actions is the paradigm on how a set of diverse rules on disclosure for different categories of documents can balance the interest of leniency applicants and

¹⁶⁴ *Wendt, Ida*, Competition Law and Liberal Professions: an uneasy relationship?, p. 560.

¹⁶⁵ Commission Staff Working Document Impact Assessment Report (IAR) accompanying the Commission Proposal, 2013, para. 28. See also, *Manfredi*, para. 31.

¹⁶⁶ Opinion of *AG Szpunar* in the case *Evonik*, Case C-162/15.

¹⁶⁷ See Judgment in *Donau Chemie*, paras. 31, 41-42, 45, 48. See also, Judgment in *Pfleiderer*, para. 19.

potential follow-on claimants for damages, bestowing many options to the incumbents to have access to the necessary evidence to prove their claims. These rules rely on the idea that the majority of evidence will be already in the possession of the competition authority¹⁶⁸, situation that in many cases will be true because the respective information was submitted by a leniency applicant during the administrative stage.

There is abundant comparative case law and literature, as well as reports of the Commission, which highlight how leniency programmes have dramatically changed the ability of competition authorities to detect and investigate cartel activity¹⁶⁹. In most of these studies, it is possible to find arguments to support the idea that offering immunity to a cartel member, who decides to denounce the cartel to the authorities and co-operate, thereby providing help to punish its co-infringers, is that the benefits for society derived from such cooperation outweigh the public interest in convicting infringers. These benefits include increased detection rates; destabilising effects on other cartels; cost savings in investigations and prosecutions as a result of the applicant providing evidence directly from within the cartel;¹⁷⁰ altogether without the need for corresponding resource investment.

In a vast majority of cases, for a victim to become aware of the existence of an infringement depends on the activity developed by the competition authorities, which in turn are to a large extent successful due to cooperation of whistle blowers. Thus, for the incumbent, the possibilities to bring a claim for civil damages and obtain a favourable judgment increase in the extent that the leniency programs of the authorities are efficacious.

¹⁶⁸ Recital 27 DD.

¹⁶⁹ *Wilman*, op. Cit., pp. 19-26. For a critical approach see *Stephan, Andreas*, An Empirical Assessment of the European Leniency Notice, JCLE, 2009, pp. 537-561.

¹⁷⁰ OECD, p. 23.

The protection of leniency programs as a public interest becomes more evident in words of *Wouter P.J. Wils*, who states that the absolute bar on disclosure is justified for the reason that the corporate statement only exist in account of a voluntary act of the applicant. The evidence afforded is not only useful to discover and punish the cartel by the authority, but it also facilitate follow-on claims, “[i]n such a situation, it does not appear unfair to deny damages claimants the right to obtain the corporate statement, whereas the protection against disclosure of corporate statements in private actions for damages may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment.”¹⁷¹

In the same line, *AG Mazak* argued that “In the absence of effective leniency programs many cartels may never come to light and their negative effects on competition in general and on particular private parties could therefore persist unchecked”¹⁷²

However, “the mere fact that disclosure of corporate statements in private actions for damages may make leniency programmes less attractive is not a sufficient reason for granting protection against disclosure¹⁷³” by itself. Therefore the preference to protect leniency material as public interest (and effectiveness of leniency programs, as a consequence) rather relies in a complex group of social positive effects that can be measured, such as the imposition of more and higher penalties and increased difficulties to maintain cartels¹⁷⁴. Furthermore, the evidence obtained by means of these procedures could otherwise never have been obtained neither by the competition authority, through its compulsory mechanisms described in Chapter V of the Regulation 1/2003, nor by the damages claimant, through any

¹⁷¹ *Wils*, The Relationship between Public Antitrust Enforcement and Private Actions for Damages, op. Cit., p.24.

¹⁷² Opinion of *AG Mazak* in *Pfleiderer*, para 41.

¹⁷³ *Wils*, The relationship between public and private actions, p.24.

¹⁷⁴ *Wils*, Leniency in Antitrust Enforcement: Theory and Practice, pp. 19-26.

other means.

The above said reasons make possible that the design of the private enforcement system of the EU competition law takes into account -as done in the elaboration of the Directive- the fundamental need to preserve the effectiveness of leniency programs as a public interest.

iii. The Directive's rules are coherent with the application of the principle of effectiveness and effective judicial protection

The principle of effectiveness was early defined in the case law of the ECJ¹⁷⁵ and was later included in Article 4 DD¹⁷⁶. Fundamentally, it requires that the right to claim for damages derived from infringements of Articles 101 and 102 TFEU cannot be rendered practically impossible or excessively difficult to exercise.

Its wording can be found in similar terms in a broad range of ECJ jurisprudence. Nonetheless, the exact content of the principle is hard to refine and needs to be evaluated in connection with the particular subject matter of the case.

In general terms, “impossible” refers to those situations in which an appropriate remedy would not be available at all for any of the involved parties¹⁷⁷. Hence, the fact that one specific piece of evidence is excluded of access for the claimant does not necessarily mean that the claimant is automatically dispossessed of all his possibilities to obtain a remedy to repair the harm suffered by an infringement, even

¹⁷⁵ See Judgments in *Courage*, para. 29, *Manfredi*, para. 62, *Pfleiderer*, para. 30, *Donau Chemie*, para. 49.

¹⁷⁶ Article 4 DD: “In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages 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.”.

¹⁷⁷ *Bobek, Michel*, The effects of EU Law in the national legal system, in: *Barnard/Peers* (eds.), *European Union Law*, 2017, p.167.

further, if other sources of evidence and procedural instruments are still available.

For its part, “excessively difficult” has to be connected with the particular and subjective legal and economical situation of the claimant who pretends to exercise his right. In consequence, final consumers have a different standard on difficulty in comparison to transnational business, even when affected by the same infringement.

Additionally as a ground rule to shape the concept, Article 19(1) TEU indicates that Member States shall ensure effectiveness by providing sufficient remedies. In other words, in the application of the principle of effectiveness the principle of effective judicial protection has to be observed¹⁷⁸.

In the context of follow-on damages claims, adequate access to evidence is of crucial relevance, and it is the reason that justifies the necessity to offer rules on disclosure of evidence that, from the point of view of the applicant, can be perceived as generally permissive and less costly. These claims need to be accompanied by a robust economic analysis about the position of the agents in the market, prices, sale volumes, inter alia, all with the purpose to establish (i) the infringement; (ii) quantify the damage suffered and, as if that wasn't enough, (iii) to demonstrate there is a causal relationship between the anticompetitive conduct and the harm individually suffered.

Bearing the above in mind, the Directive endows several procedural instruments to foster the effective exercise of the right to full compensation. This is achieved by:

¹⁷⁸ See Judgment in *Alassini*, para 49: “The requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure effective judicial protection of an individual’s rights under [EU] law”.

- Conferring several ways to obtain evidence: upon request of the claimant, the national courts can order the disclosure of any relevant evidence which is in possession of the defendant, third parties or is contained in the file of competition authorities (save the exception of Article 6(6) DD and the temporal restriction of Article 6(5) DD). Such a disclosure can also be extended to include confidential and pre-existing information. Failure to comply with a disclosure order shall be sanctioned¹⁷⁹. These rights can be exercised by anyone who has suffered harm as a consequence of an infringement of EU competition law at any level of the supply chain.
- Providing useful presumptions: before national courts, decisions of NCAs establishing an infringement of EU competition law shall have probative value¹⁸⁰. Likewise, it includes a legal presumption that cartels cause harm. National courts can make an estimation of the harm suffered, in cases where it is practically impossible or excessively difficult to quantify it.

At this point, it must be stressed that the prohibition of Article 6(6) DD is coherent with the principle of effectiveness for the following reasons:

- The evidence contained in the blacklist¹⁸¹ is exclusively confined to the documents that touch “upon the very essence of the public enforcement tools, namely leniency statements

¹⁷⁹ Sanctions imposed by national courts can consist of fines or the possibility for the courts to draw adverse inferences. For an example of the former, see the new Art. XVII.81 of the Belgian Code of Economic Law which allows Judges to impose sanctions up to 10 million Euro. For an example of the latter, see the new Article 283 bis h) 1 of the Spanish Civil Procedure Law.

¹⁸⁰ Value as conclusive or prima facie evidence, depending on the case according Article 9 (1), (2) DD.

¹⁸¹ Article 6(6) DD.

and settlement submissions”¹⁸². To safeguard these strict limits, the Directive recognizes the “power” of national courts to verify whether a particular document indeed qualifies as such¹⁸³.

- The prohibition does not award the defendant a better position *vis-a-vis* the claimant. The latter will still have a reasonable opportunity to present his case and his evidence, since the Directive offers other procedural instruments to obtain the necessary means of proof to support his claim, as explained above.
- There is no reason to believe that access to leniency statements is the only way to prove the causal relationship between the harm suffered and the infringement.¹⁸⁴ Among the Member States, the requirements to prove causation differ considerably¹⁸⁵. However, applicants having suffered harm usually need to address a number of factors to prove the causal link, within which they usually have to demonstrate that those elements which are capable to break the causality chain have not occurred; such are the acts or omissions of third parties and their own behaviour.

In accordance, any natural or legal person who has suffered such harm shall be able to effectively exercise its right to claim full compensation, and be granted of equal protection throughout the Union. Hence, the Directive seeks to overcome most of the obstacles, uncertainties and divergences in rules and procedures which makes difficult or simply impossible to obtain compensatory justice.

¹⁸² *Wilman*, op. Cit., p. 235.

¹⁸³ Article 7(1) DD. Note that in the performance of these activities national courts are allowed to consult the NCAs for assistance.

¹⁸⁴ *Wilman*, op. Cit., p.236.

¹⁸⁵ *Ashurst*, Study, pp. 72-74. This is a matter not dealt with in the Directive, and is left to be regulated by national rules. See Recital 11 DD.

A strict prohibition of disclosure of certain specific documents do not contravene this objective, because such a rule is necessary to protect the integrity and effectiveness of leniency programs which in turn are capable to make civil follow-on claims more likely to succeed.

iv. The strict prohibition of Article 6(6) DD was necessary to remove the legal uncertainty of the case-by-case analysis.

A final argument can be presented to complement the compatibility test above developed.

When balancing the interest between optimal leniency incentives and compensation for all victims in a legislative initiative, both a clear and defined rule and a judicial approach seem to offer good gains in contrast to the previous situation of unpredictability created by the judgments of the ECJ in *Pfleiderer* and *Donau Chemie*.

For instance, during the legislative debate on the part of the European Parliament¹⁸⁶, it was suggested to provide for the non-disclosure of these documents as a general rule, then allowing exceptions in certain cases (thus, codifying the case-by-case balance of *Pfleiderer*). This alternative solution would have rendered the possibility for the court to take into account the overall circumstances of each case individually, as in the exemplary judgment of Mr. Justice Roth in the *National Grid* case. Though, this solution would not have removed the legal uncertainty faced by leniency applicants in relation to the later disclosure of their corporate statements and the uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU.

From this point of view, a legislative act of harmonization, providing

¹⁸⁶ See European Parliament report on the proposal for a directive, op. Cit., p. 22.

all parties to the dispute with specific criteria concerning the definition and scope of categories of evidence liable or excluded to disclosure was necessary. This, not only to coordinate the fostering of compensatory justice without detracting public enforcement, but also to ensure a more level field and to service the correct functioning of the internal market and the four freedoms (this explains the inclusion of Article 114 TFEU, together with Article 103 TFEU as legal basis for the Directive¹⁸⁷). Precisely, in recitals 7 to 9 DD it is explained how the pre-existing divergences detected among Members States in relation to the right to compensation could grant a competitive advantage for some infringers, who take advantages of the weaker enforcements, producing disincentives to the exercise of the rights of establishment in those Member States where the right to compensation is enforced more effectively.

¹⁸⁷ The use of a dual legal basis for a legal act of the EU is fairly exceptional. See Judgment in *Parliament v Council*, Case C-155/07, paras. 35-37; 76-85.

Conclusion – Clarifying the role of private enforcement

The role to be played by private enforcement of competition law, its functions and necessity, has been the subject of large debate not only in Europe but globally¹⁸⁸. Nevertheless, the development of private enforcement have in Europe a special source of origin, and consequently has to be moulded according to its sui generis infrastructure provided by the Treaties, its principles, and the direct effects of its norms¹⁸⁹.

A comprehensive analysis of the Directive's text leads to formulate that its rules are not directly addressed to improve deterrence from cartelisation through private claims. Instead, they are rather directed to facilitate the exercise of the right to compensation, as a mean to bring compensatory justice for victims affected by an anticompetitive conduct. Nevertheless, it is accurate to mention that the Directive includes the protection of determined tools of the public enforcement, such as leniency programs and settlement procedures, which may indirectly help to increase the deterrence rates¹⁹⁰.

Certainly, private and public enforcement serve different tasks¹⁹¹. That's why they have to be coordinated, and that's why the effectiveness of leniency programs has to be protected to ensure the effectiveness of competition regime as a whole aimed at promoting a fair and efficient internal market.

It is still disputed if private enforcement has a quantifiable effect on

¹⁸⁸ In the US, the Congress already argued about the role to be played by private claimants to repel anticompetitive conducts in the legislative debate of the Sherman Act in 1890. This role was better defined and improved after the Clayton Act was passed in 1914, incentivising greater private enforcement awarding treble damages.

¹⁸⁹ In opposition to the US model where the private litigation was conceived as an incentive to individuals to aid in the enforcement of the antitrust law.

¹⁹⁰ Commission Proposal, p. 4.

¹⁹¹ *Morais, Luis Silva*, Integrating Public and Private Enforcement of Competition Law in Europe, 2015, pp. 15-16.

reducing the number of undertakings colluding¹⁹². Nevertheless, by means of the instrumental procedures described in the examination of this Thesis, the Directive's rules pursue to raise the number of follow-on claims to reinforce corrective justice in relation to the rights affected by a violation of EU competition law. In that regard, the exercise of these rights by means of private actions, in the same fashion as civil damages claim operates in other areas of law, seems more virtuous to other mechanisms.

Recital 6 DD is emphatic and insists that coherent coordination is necessary to achieve maximum effectiveness of competition law, while Recital 26 DD explains the reason why for this coordination it was decided to give predominance to the protection of leniency programs¹⁹³. In this sense, coordination¹⁹⁴ of public and private interests could rather be seen as limiting private enforcement when there is a high degree of interference with the activity of NCAs or the Commission. Such interference can be measured in terms of the threat of leniency programs becoming unattractive for cartelists at the moment of assessing the cost-benefit of submitting a corporate statement and to cooperate with authorities.

In other words, there is a high degree of interference when cooperating becomes irrational for undertakings because the risk of

¹⁹² See *Wils, Wouter P.J.*, Should Private Antitrust Enforcement Be Encouraged in Europe?, *World Competition*, 2003, p. 18, who hold the opinion that private enforcement in the EU should be only aimed to provide compensation, and it is not capable to produce relevant effects on deterring anticompetitive conducts. This view is supported by the "consumer's protection" analysis of competition rules (see, *Ioannidou, Maria*, Consumer Involvement in Private EU Competition Law Enforcement, 2015, pp. 62 et seq.). For an opposite point of view, see *Jones, Clifford A.*, Private Antitrust Enforcement in Europe: a policy analysis and reality check, *World Competition*, 2004, pp. 13-24.

¹⁹³ Additionally, the Commission values these programs as one of the most effective tools against cartels. See Observations of the European Commission Pursuant to Article 15(3) of Regulation 1/2003, submitted as *amicus curiae* in the case *National Grid*, para. 12.

¹⁹⁴ Article 1(2) DD "This Directive sets out a group of rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts."

facing follow-on civil liabilities increases in comparison with a non-cooperating situation. This scenario, avoided under the disclosure regime of the Directive, would be likely to happen if full access to leniency material were to be awarded to third parties seeking to gather evidence to prepare their actions for damages.

One may suppose that for the Commission and the ECJ such a interference does not occur when the disclosure of information occurs in the context of the administrative proceedings carried out by the Commission or the NCAs.

Yet, it isn't completely clear what the aim and role of the private enforcement is¹⁹⁵. Though, exist a general support on the idea to preclude the disclosure of leniency applications and that it is "important to preserve the high level of effectiveness of the leniency programmes in Europe, while not affecting the right of injured parties to effective redress"¹⁹⁶.

¹⁹⁵ See in general *Dunne, Niahm*, *The Role of Private Enforcement within EU Competition Law*, 2014.

¹⁹⁶ *De Smijter, Eddy/O'sullivan, Denis*, *The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions*, 2006, p. 4.

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- Opinion of *Mr. Advocate General Jean Misho*, delivered on 22 March 2011, in *Courage*, Case C-453/99.
- Opinion of *Mr. Advocate General Ad Geelhoed* delivered on 26 January 2006, in *Manfredi and others*, Joined Cases C-295/04 to C-298/04.
- Opinion of *Mr. Advocate General Jan Mazak* delivered on 16 December 2010, in *Pfleiderer*, Case C-360/09.
- Opinion of *Mr. Advocate General Niilo Jaaskinen*, delivered on 7 February 2013, in *Donau Chemie*, Case C-536/2011.
- Opinion of *Ms. Advocate General. Verica Trstenjak*, delivered on 12 January 2012, in *Littlewoods Retail*, Case C-591/10.
- Opinion of *Mr. Advocate General F. Capotorti* delivered on 12 September 1979, in *DGV*, Case 238/78.
- Opinion of *Mr. Advocate General Maciej Szpunar*, delivered on 21 July 2016, in *Evonik*, Case C-162/15.