

Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?

by

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Abstract

Information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages. The Damages Directive is a step forward in the facilitation of access to evidence relevant for private action claims. Its focus lies on, *inter alia*, 3rd party access to files in proceedings conducted by national competition authorities (NCAs). The harmonization was triggered by the inconsistencies in European

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case-law and yet the uniform rules on access to documents held in NCAs' files proposed in the Damages Directive seem to follow a very stringent approach in order to protect public competition law enforcement. The article summarizes the most relevant case-law and new provisions of the Damages Directive and presents practical issues with respect to its implementation from the Polish perspective.

Résumé

L'asymétrie d'information entre les demandeurs, réclamant des dommages pour les violations du droit de la concurrence, et les entreprises, accusées d'une infraction, est un problème clé dans le développement d'application privée du droit de la concurrence, car elle empêche souvent les actions efficaces. La Directive relative aux actions en dommages est un pas en avant dans la simplification d'accès à la preuve par les demandeurs, réclamant des dommages pour les violations du droit de la concurrence. La Directive se focalise, entre autres, sur la question d'accès par des tiers aux documents figurant dans les dossiers des autorités nationales de concurrence (ANCs). L'harmonisation a été déclenchée par des incohérences dans la jurisprudence européenne, alors que les règles uniformes sur l'accès aux documents figurant dans les dossiers des ANCs proposées dans la Directive, semblent suivre une approche rigoureuse afin de protéger l'application publique du droit de la concurrence. L'article résume la jurisprudence la plus pertinente, ainsi que des nouvelles dispositions de la Directive relative aux actions en dommages et présente des problèmes pratiques concernant sa transposition dans la loi polonaise.

Key words: competition; cartels; private enforcement; damages actions; leniency; Damages Directive; access to file.

JEL: K23; K42.

I. Introduction

The issue of information asymmetry between claimants seeking damages for competition law violations and the alleged infringing undertaking(s) is a key problem in the development of private antitrust enforcement because it often prevents successful actions for damages.

Evidence required to prove a claim in private antitrust enforcement actions (based on EU or national competition law infringements) is usually held exclusively by the opposing party or by 3rd parties – including the competition authority pursuing a public action – and is neither easily nor directly accessible to the claimant. In some cases, it may be overly difficult to formulate a case solely on the basis of publicly available information since the very nature

of a cartel's operation is in itself secretive. Even competition authorities themselves must often put a lot of time and effort into making their public enforcement cases stand.

The situation is even more difficult in private enforcement cases since in order to establish the 'damage', claimants have to build a counterfactual scenario – compare the anti-competitive situation resulting from an infringement to a situation which would have existed in the absence of the violation in a hypothetical competitive market¹.

For this purpose, the claimant will often depend on information that lies in the sphere of the defendants, and possibly their partners in the infringement. Such information could include, for example: notes on the overcharges agreed secretly between the cartel members; details on how and when they influenced the price as well as other parameters of competition; or the infringer's internal documents showing its own analysis of market conditions and developments as well as its regular invoices². Reconstructing a hypothetical competitive market, in order to quantify the damage caused by the infringer, usually also presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market. The same or similar types of difficulties arise in the context of causation when, for example, claimants try to identify the precise elements of an infringer's anticompetitive behaviour that have caused the claimant's damage, or the extent to which several infringers had individually contributed to the damage caused³. The European Commission (hereafter, Commission or EC) describes this difficulty as "*the structural asymmetry in the distribution of information required by claimants*"⁴.

The above issue was recognized and addressed in Directive 2014/104/EU on antitrust damages actions (hereafter, the Damages Directive)⁵. It is noted already in its preamble that evidence is an important element for bringing actions for damages for an infringement of EU or national competition law.

¹ See Commission Staff working document – Practical guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union {C(2013) 3440}, p. 10.

² Commission Staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, p. 28.

³ *Ibidem*, p. 29.

⁴ *Ibidem*.

⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (OJ L 349, 05.12.2014, p. 1). The Damages Directive needs to be implemented by Member States in their legal systems by 27 December 2016.

It is also said that it is appropriate to ensure that claimants are afforded the right to obtain disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence sought because private antitrust enforcement litigations are characterized by information asymmetry⁶.

II. Hitherto practice regarding access to competition authorities' files – the European Commission's perspective

Claimants from common-law jurisdictions can currently benefit from the revealing material documents during discovery. By contrast, claimants from civil law jurisdictions – including Central and Eastern European countries – have to cope with this problem by other means such as, for example, through access to the files held by competition authorities.

Both Article 15 of the Treaty on the Functioning of the European Union (hereafter, TFEU) and Article 42 of the Charter of Fundamental Rights of the European Union (hereafter, the Charter) recognize the right to access documents held by EU institutions.

Until now, 3rd party access to the case files of the Commission was in most cases enforced either by the claimant referring to the Transparency Regulation⁷ (an action admissible basically at any stage of a dispute, even before bringing an action to a civil court) or to Article 15 of Regulation 1/2003⁸ (by a request from national courts filed in the course of private action proceedings). Neither of these routes is perfect and each allows the Commission some degree of flexibility in deciding on the scope of the disclosure, a fact well illustrated in vast case-law concerning the application of these provisions⁹.

Under Article 4 of the Transparency Regulation, an institution can refuse access to a document where disclosure would undermine the protection of:

- the public interest as well as the privacy and integrity of the individual;
- and,

⁶ See point 15 of the preamble.

⁷ 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 (OJ L 145 of 31.05.2001).

⁸ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p. 1).

⁹ See e.g. the General Court's Judgment of 15 December 2011 in Case T-437/08 – *CDC Hydrogene Peroxide Cartel Damage Claims v European Commission*; the CJEU's Judgment of 27 February 2014 in Case C-365/12 P – *European Commission v EnBW Energie Baden-Württemberg AG*.

unless there is an overriding public interest in disclosure:

- commercial interests of a natural or legal person, including intellectual property;
- court proceedings and legal advice; or
- the purpose of inspections, investigations and audits.

A Commission decision refusing access to its file can of course be appealed. However, this makes it necessary for the injured parties to carry out a cost/time analysis bearing in mind the limitation periods applicable for private actions.

As regards orders coming directly from national courts via Article 15(1) of Regulation 1/2003, the practical application of requests to transmit information held by the Commission or its opinion on questions concerning the application of EU competition rules may be overly difficult in civil law jurisdictions. Firstly, Article 15 of Regulation 1/2003 does not provide claimants with a legal basis to obtain documents directly – it is in the court’s discretion to request specific documents – private litigants may only suggest this route to the court dealing with their claim and rely on its receptiveness to this request. Secondly, it is uncommon in civil law jurisdictions to approach a national court without the relevant evidence to sustain the claim, since evidence is normally gathered and analysed prior to rather than during the trial. Uncertainty regarding the content of the documents to be obtained represents another significant obstacle here. Moreover, further to the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC¹⁰, the EC may refuse to transmit the requested information or documents if the national judiciary cannot offer a guarantee that it will protect confidential information and business secrets contained in such file. The Commission may also refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the EU or to avoid interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to the Commission.

Finally, rules on access to the file and the treatment of confidential information in competition proceedings are also set out in Articles 15 and 16 of 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 (hereafter, Regulation 773/2004)¹¹. Rights of access under Regulation 773/2004 are only available to the parties to an investigation and to those with the status of a ‘complainant’.

¹⁰ OJ C 101, 27.04.2004.

¹¹ OJ L123, 27.04.2004, p. 18.

III. Hitherto practice regarding access to competition authorities' files – the case of Poland

The possibility of accessing documents held in Poland in the case files of the National Competition Authority (hereafter, NCA or the UOKiK President) is a matter of ongoing debate. The route generally recognized by the UOKiK President is governed by the laws on access to public information, in particular by the Act of 6 September 2001 on access to public information. As in the case of the EU Transparency Regulation, Polish laws provide for a certain amount of discretion as regards the categorization of a given document as 'public information', hence again any dispute can be resolved only by the relevant courts. This issue is interrelated with the necessity to protect business secrets. The latest novelization of the Act of 16 February 2007 on Competition and Consumer Protection (hereafter, Competition Act 2007) has already established and expressly confirmed that information on the initiation of public enforcement proceedings, on the issuance of a decision by the UOKiK President and on the conclusions of such decision are to be made available to the public. The NCA holds a publicly available on-line register of its decisions but other documents prepared by it can potentially be obtained via the 'access to public information' route. This may be the case, for example, with respect to a resolution on the initiation of antitrust proceedings where the NCA states the main points of its interests in the pending proceedings.

The question remains open as to other documents gathered by the NCA in its case file – particular doubts concern documents prepared and filed by the parties to the proceedings. Moreover, the right to access public information is subject to restrictions governing conduct with confidential information, business secrets and an individual's privacy.

The jurisprudence of Polish administrative courts regarding access to information gathered in the UOKiK President's case files clarifies the above issues to some extent.

The Polish judiciary expressed views that it is not sufficient for the UOKiK President to state that a document cannot be disclosed simply because it was prepared by an undertaking being a party to the proceedings. The courts noted that the very fact that a private entity (entrepreneur) generated given information does not preclude that it is not public information. It is the content of the document that should be analysed here (see judgment of the Supreme Administrative Court in Warsaw of 17 June 2011 in case reference I OSK 490/11).

As regards documents prepared by the NCA, the administrative court in Warsaw stated in one of its cases that an internal memo cannot be accessed since it is not an 'official' document but merely a working draft. On the other

hand, the court noted that a letter sent by the UOKiK President to the EC within the information exchange procedure could constitute public information and that it is up to the NCA to prove and duly justify that such letter contains protected information (see judgement of the Regional Administrative Court in Warsaw of 5 February 2015 in case reference II SA/Wa 1536/14).

In another case, the NCA very thoroughly described the scope of protected business secrets and the court agreed with the refusal to access public information (see judgment of the Regional Administrative Court in Warsaw of 13 March 2014 in case reference II SA/Wa 2178/13).

IV. The new approach adopted in the Damages Directive

The Damages Directive puts forward measures designed to give parties easier access to evidence required in private actions for damages, so as to minimize the information asymmetry between the claimant and the alleged infringing undertaking. Under the Damages Directive, the parties will therefore have the possibility to seek disclosure of specified (relevant) evidence through a court order, subject to proportionality and legitimate interest criteria – judges will thus have to ensure that disclosure orders are proportionate and that confidential information is duly protected. The Damages Directive states that it is not necessary for every document relating to public enforcement proceedings to be disclosed to a claimant merely on the grounds of the latter's intended action for damages. It is highly unlikely that the action for damages will need to be based on all the evidence held in the case file relating to the respective public proceedings (see point 22 of the preamble). The Damages Directive further notes that the requirement of proportionality should be carefully assessed when disclosure risks unravelling a competition authority's investigative strategy by revealing which documents are part of its case file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities. Particular attention should be paid to preventing 'fishing expeditions' – non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the private enforcement proceedings. In line with the Damages Directive, disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents held in the relevant case file of a competition authority, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible (see point 23 of the preamble).

V. Is access to leniency materials at all possible?

The main issue, however, is access to case files in proceedings conducted by the Commission and NCAs. The major concern raised by the authorities is to prevent the rules on access to documents collected in case files by damages claimants from compromising the effectiveness of public enforcement, with particular focus on protecting leniency programmes or settlement procedures.

The need to weigh up different interests protected by EU law – on the one hand, the right to obtain damages for loss caused by conduct which is liable to restrict or distort competition and, on the other hand, the effectiveness of leniency programmes – was stated by the Court of Justice of the European Union (hereafter, CJEU or the Court) in its *Pfleiderer*¹² judgment. The Court did not provide a conclusive answer to the question posed by a German court on whether access to a file containing a leniency application should be granted in civil proceedings. The CJEU stated only that damages claims and procedures related to damages claims are matters of national law. The Court held that neither TFEU rules on competition nor Regulation 1/2003 contained common provisions governing the right of access to documents voluntarily submitted to a NCA under a national leniency programme. In particular, the Commission's notices are not binding on Member States, NCAs or national courts. In the absence of binding EU rules governing this matter, the issue of access to leniency documents gathered in a NCA's case file for cartel damages claimants fell within the competence of individual Member States. The Court stressed, however, that national procedural rules must not render the implementation of EU law impossible or excessively difficult, and that they must serve the effective application of Article 101 and 102 TFEU. The CJEU concluded that national courts have to weigh the interests of protecting information submitted under leniency programmes against those of private damages claimants suing for breaches of EU law¹³. The Court did not pose an absolute ban on disclosing leniency materials. Instead, it noted that weighing the interests protected by EU law, national judges should determine the conditions under which access to documents submitted under a domestic leniency programme may be made available to a claimant seeking damages for a cartel injury. Importantly also, the CJEU noted that actions for damages before national courts can make a significant contribution to the maintenance

¹² Judgment of the Court of 14 June 2011 in Case C-360/09 – *Pfleiderer AG v Bundeskartellamt*.

¹³ See also P. Callol, 'The European Court of Justice acknowledges the need to weigh the different interests at stake when granting access to documents containing leniency applications in the context of civil claims for damages, in line with US courts (*Pfleiderer*)' (2011) June 14 *e-Competitions Bulletin* Article N° 36988.

of effective competition in the European Union as they serve as a deterrent mechanism for potential infringers. The conclusion of the Court was that it is for the national judiciary to determine the basis of domestic law and, on a case-by-case basis, the conditions under which access to documents relating to a national leniency procedure must be permitted or refused.

The *Pfleiderer* ruling was widely discussed by both EU and Polish doctrine. It was noted that the judgment does not give an answer to the question on the possibility (or even necessity) to limit access by civil claimants to the leniency case file and some of the doctrine postulated that access to the competition authority's case file by civil claimants should be a rule, bearing in mind procedural economy with the author's indication that leniency documents should be protected¹⁴. In general, the judgment was however appreciated as a step forward in the liberalization of access to leniency documents gathered in the European competition authorities' case files¹⁵. It was also noted that *Pfleiderer* was the trigger for the current harmonization initiative of private enforcement of competition law rules with its particular emphasis on access to leniency documents¹⁶.

The CJEU confirmed the principle adopted in *Pfleiderer* in its later *Donau Chemie*¹⁷ judgment. It stressed therein the necessity of a case-by-case weighing up of competing interests, keeping the proportionality criterion in mind. It was however noted by commentators that the *Donau Chemie* judgment does not only fail to provide for clear criteria for weighing the public and private interests, but is also somewhat incoherent and hence may create confusion for national courts¹⁸. On the one hand, the CJEU noted that refusal to grant access to evidence cannot be justified by the general argument highlighting the risk that access to evidence (contained in a competition authority's

¹⁴ See A. Jurkowska-Gomułka, 'Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia Article 101 ust. 1 TFUE. Glosa do wyroku TS z dnia 14 czerwca 2011 r., C-360/09, *Pfleiderer AG v. Bundeskartellamt*' ['Between effectiveness of the fight against cartels and the effectiveness of claims for infringement of Article 101 Sec. 1 TFEU. Commentary to the judgment of the CJ of June 14, 2011, C-360/09, *Pfleiderer AG v. Bundeskartellamt*'] (2012) 7 *Europejski Przegląd Sądowy* 39.

¹⁵ See H.M. Sifton, C.S. Davis, D. Levisohn, '*Pfleiderer AG v. Bundeskartellamt*: A Step Forward in Efforts to Obtain Discovery from European Commission Antitrust Proceedings' (2011) 19(6) *Westlaw Journal* 2.

¹⁶ See A.E. Beumer, A. Karpetas, 'The disclosure of files and documents in EU cartel cases: fairytale or reality?' (2012) 8(1) *European Competition Journal* 123.

¹⁷ Judgment of the Court of 3 June 2013 in Case C-536/11 – *Bundeswettbewerbshörde v Donau Chemie AG and Others*.

¹⁸ See K. Kohutek, 'Glosa do wyroku Trybunału z dnia 6 czerwca 2013 r. w sprawie C-536/11 Bundeswettbewerbshörde przeciwko Donau Chemie AG' ['Commentary to the judgment of the Court of June 6, 2013, in case C-536/11 *Bundeswettbewerbshörde vs Donau Chemie AG*'], LEX el. 2014.

case file), which is necessary as a basis for a private action, may undermine the effectiveness of a leniency programme in which those documents were disclosed. On the other hand, the court noted that if there is a specific risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme, the non-disclosure of that document may be justified¹⁹.

However, a presumption of general protection of leniency material was established in the CJEU's *European Commission v EnBW Energie Baden-Württemberg AG* judgment of 27 February 2014 (Case C-365/12P). The CJEU concluded therein that there is a general presumption that leniency materials could not be disclosed to 3rd parties since the Transparency Regulation cannot be read *in abstracto* – exceptions from Regulation 1/2003 and Regulation 773/2004 should be applied to the exceptions to the right of access provided for in Article 4 of the Transparency Regulation. The CJEU also noted that the administrative activity of the EC does not require access to documents as extensive as that required by an EU institution's legislative activity. As a result, the Commission could apply a general approach to a 3rd party's broad and unspecified request, thereby saving itself a case-by-case analysis of documents gathered in its cartel case files.

Very recently the General Court (hereafter, GC) ruled once again on the scope of protected leniency materials. In the *Axa Versicherung AG v European Commission* judgment of 7 July 2015 (Case T-677/13), the GC noted that the EC should not have deleted references to potentially sensitive leniency information contained in the index of its investigative case file relating to the car glass cartel, which was fined by the Commission in 2008. Access to its case files was sought by Axa, an insurance company, for the purposes of pursuing damages claims against car glass manufacturers. In addition to certain documents gathered in the file itself, Axa was also seeking an un-redacted version of the index of the relevant case file. While the GC agreed that leniency statements require protection, it also noted that the Commission should each time make a full analysis and appropriately justify any rejection decision. It should not rest on a general presumption that such information would always be covered by exceptions to disclosure rules. The GC generally agreed that leniency documents sought by Axa should not be disclosed and only annulled the Commission's decision in so far as it refused to grant Axa access to references to documents provided within the leniency programme, which were contained in the index of the Commission's case file.

¹⁹ See also E. Matei, 'The EU Court of Justice decides that the Austrian Consent Rule allows no possibility for the national courts of weighing up the interests involved and it was precluded by the effectiveness principle (*Donau Chemie*)' (2013) June 6 *e-Competitions Bulletin* Article N° 52707.

Another perspective was presented in the *AGC v European Commission* judgment of the General Court of 15 July 2015 (Case T-465/12). The GC took a stance here regarding the scope of information which may be treated as confidential in final Commission decisions, including a reference to information provided in leniency proceedings. The judiciary strongly opposed the views of the parties and noted that except for a fine reduction, the Leniency Notice does not provide for any other advantage which an undertaking can claim in exchange for its cooperation. The fact that a leniency applicant is granted immunity or a fine reduction cannot protect it from the civil law consequences of its participation in an infringement under Article 101 TFEU. The GC explained that the Commission should not be prevented from publishing in its decisions information relating to the description of the infringement, which was submitted to it as part of the leniency programme. On this basis, the GC made a distinction whereby rules on the protection of leniency material apply at a different (investigative) stage of the Commission procedure, and should not interfere with its right to publish its final decision²⁰.

The Damages Directive's uniform rules on access to documents held in the files of NCAs seem to follow the strictest possible approach meant to maximise the protection of public enforcement. The harmonization provides that national courts will not be able to order disclosure (at any time) with respect to leniency statements and settlement submissions for the purposes of an action for damages. This approach raises serious doubts considering national variations in the design of leniency and settlement programmes, in particular considering the possible definitions adopted in domestic laws. The Damages Directive provides for express definitions of leniency statements and states that it is '*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*'. It stems from this definition that only leniency statements concerning cartels should be protected under the Damages Directive. By the same token, the Directive introduces a definition of a cartel as an '*agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales*

²⁰ See para 67–68 and 70–72 of the judgement.

quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors'. It needs to be emphasised however that national leniency programmes differ. Taking the example of Poland for instance, a leniency application is admissible domestically for all types of anticompetitive agreements, including vertical agreements – an option often used in resale price maintenance cases.

Similarly, the Damages Directive's definition of a settlement submission sees it as '*a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure*'. The case of Poland again shows its national particularities. The very recent introduction of a domestic procedure similar to EU settlement enables undertakings to benefit from a 10% fine reduction if they decide to voluntarily submit to a fine imposed by the UOKiK President. However, the prerequisites for benefitting from this procedure are different to those described in the Damages Directive's definition of the settlement procedure. It is therefore doubtful if Polish statements regarding a voluntary submission to a fine would be caught under the above EU definition.

Moreover, the Damages Directive notes that not only actual statements should be protected but also any quotes taken from leniency statements and settlement submissions that are included in other documents. It would however be reasonable to assume that this only refers to information prepared and provided by the leniency applicant for the purposes of filing a leniency/settlement application. It would not refer to information which was included in pre-existing documents and was only quoted by the applicant in the leniency statement or settlement submission.

The Damages Directive also introduces temporary restrictions applicable until a competition authority has closed its proceedings. During on-going public proceedings, the courts will not be able to order the disclosure of three categories of evidence:

- 1) information that was prepared by a natural or legal person specifically for the proceedings (this covers, *inter alia*, replies to questions from the authority);
- 2) information drawn up by a competition authority and sent to parties in the course of its proceedings (such as information requests and statements of objections); and
- 3) settlement submissions that had been withdrawn.

As a side note, the above point on information drawn up by a competition authority and sent to parties in the course of its proceedings seems to be more

stringent than the current Polish approach. The UOKiK President generally allows access to its resolutions on the initiation of proceedings to a 3rd party via the ‘access to public information’ route even during on-going proceedings.

Moreover, limiting access to certain documents during on-going public proceedings may basically force claimants to wait with the decision on lodging a potential private action until public proceedings are closed and a decision is issued. Paradoxically, access to the relevant case file may in such cases no longer be necessary because an infringement decision should generally contain all relevant information describing the violation.

The Damages Directive facilitates the disclosure of other evidence in the case file of a competition authority at any time, provided it does not fall into the above two categories – this basically amounts to the possibility of accessing pre-existing documents at any time. Still, the courts may request that a competition authority discloses evidence held in its case file only if none of the procedural parties, or 3rd parties, is reasonably able to provide that evidence.

The Damages Directive provides for additional safeguards for protected documents. When such documents are obtained in the context of public enforcement proceedings (for instance, through access to the file exercisable by one of the parties to the proceedings), they will not be admissible as evidence in an action for damages so as to comply with general disclosure limits provided for in the Damages Directive.

Only the person who obtained documents through access to the file (or their legal successor) will in general be able to use them as evidence in an action for damages. This safeguard was structured so as to avoid the trading of evidence.

Against this background, it should be stressed that a leniency application includes two kinds of documents that prove the existence of a cartel: corporate statements or their national equivalents and pre-existing documents. These documents could therefore be crucial for 3rd parties for bringing damages actions against cartelists, especially in order to prove the existence of damages and the causality link between them and the infringement. From the overall context it seems to be the goal of the Damages Directive to only protect corporate statements and its national equivalents. At the same time, pre-existing documents should be made available under normal rules (basically at any point in time) – see definition of leniency statements adopted in the Damages Directive.

It is worth stressing as a side note that limitations with respect to access to leniency applications are not the only measure adopted to facilitate the effectiveness of this public enforcement tool. Relevant here are also rules on the limitation of joint and several liability of a leniency applicant. According

to Joaquín Almunia's view expressed in a speech devoted to fighting against cartels delivered on 3 April 2014:

Leniency programmes have produced a consistent stream of good applications; on average four per month, including immunity applications.

The figure will likely go up when the private-enforcement Directive takes effect because of the limits it puts on joint liability.

... the new rules will preserve leniency programmes. While they will make more evidence available to victims, they also make clear that crucial documents for public enforcement voluntarily submitted by the parties can never be disclosed – namely, leniency corporate statements and settlement submissions.²¹

VI. Practical issues with respect to the implementation of the Damages Directive – the case of Poland

As regards the Polish approach, leniency materials are already protected under Article 70 of the Competition Act 2007. This provision expressly states that information and evidence gathered through leniency applications and procedures relating to voluntary submission to a fine cannot be subject to disclosure – this is ensured by the express statement that the 'access to public information' procedure cannot be used with respect to such documents. The scope of the protection given in Poland to leniency applicants seems therefore wider than necessary under the Damages Directive – according to the new EU rule it should be possible to disclose pre-existing documents even if they were provided as annexes to a leniency application *sensu stricto*.

There is virtually no court practice of requesting documents held in the UOKiK President's case-files at the moment. Polish civil procedure does not provide for evidentiary motions with respect to case files in different proceedings and requests for such evidence should be rejected by the court²². However, the party may name as evidence specific documents attached to different case files with the indication of the pages of that case file where the requested documents are located. In any event however, the above possibilities are limited in private antitrust enforcement cases as regards access to the NCA's case files. This is because Article 73 of the Competition Act 2007 expressly refers to the principle that information gathered in the course of

²¹ http://europa.eu/rapid/press-release_SPEECH-14-281_en.htm?locale=en (accessed on 24.09.2015).

²² K. Pietrzykowski, *Metodyka pracy sędziego w sprawach cywilnych [Methodology of a judge in civil cases]*, Warsaw 2012, p. 472–473.

the UOKiK President's proceedings may not be used in any other proceedings based on separate legal provisions. This rule – similarly to the rule of limited access to files – serves as a guarantee for the non-disclosure to unauthorized persons of information protected under separate regulations. Only a few exemptions from this rule exist, enumerated as follows:

- penal proceedings following by a public-complaint procedure, or fiscal penal proceedings;
- other proceedings conducted by the UOKiK President;
- sharing information with the EC and other NCAs under Regulation 1/2003/EC;
- sharing information with the EC and competent authorities of EU Member States pursuant to Regulation 2006/2004/EC;
- providing competent authorities with information which may indicate that any separate provisions have been infringed;
- providing specific information to regulatory authorities.

As can be seen from the above list, none of the exemptions expressly refers to private enforcement actions.

Ongoing doctrinal debate surrounds the question whether the exemption making it possible to provide competent authorities with information which may indicate that any separate legal provisions have been infringed may serve as the basis for the disclosure of information gathered in the UOKiK President's case files for the purposes of private enforcement actions. One interpretation is that civil courts ruling on private enforcement cases could be caught by the definition of 'competent authorities', since the 'separate provisions' which could have been infringed may as well be civil law provisions on torts²³. Another interpretation argues that this particular provision only gives the NCA the initiative to provide information to other authorities if it considers it relevant. It does not, however, constitute grounds for requesting any such information from the NCA by 3rd parties²⁴. It was very recently confirmed that the UOKiK President's hitherto practice shows that all attempts to obtain information by civil courts have so far invariably ended with a refusal to provide such documents, with the author's simultaneous emphasis on the fact that none of such requests was connected with claims for damages²⁵.

²³ A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie praktyk ograniczających konkurencję* [Public and private enforcement of practices restricting competition], Warsaw 2013, p. 222; K. Kohutek [in:] K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Act on competition and consumer protection. Commentary], Warsaw 2014, p. 816.

²⁴ M. Bernatt [in:] T. Skoczny (ed.), *Komentarz do artykułu 73 ustawy o ochronie konkurencji i konsumentów* [Commentary to Article 73 of the Act on competition and consumer protection], Legalis 2015.

²⁵ M. Błachucki, 'Dostęp do informacji przekazywanych Komisji Europejskiej i Prezesowi UOKiK w trakcie procedury łagodzenia kar pieniężnych (*leniency*)' [Access to information

From the practical point of view, the implementation of the rules of the Damages Directive relating to access to case files will require changes to be made to the current wording of the Competition Act 2007. It will also require the formulation of a dedicated procedure for the disclosure of documents contained in the case files of the NCA for the purpose of private enforcement actions. Currently it seems that access to case files will not be granted directly to the claimant but rather that it should be a prerogative of the court to request disclosure of certain documents gathered in the case file by the UOKiK President (for instance, like in the Commission Notice on cooperation between the Commission and the national courts). However, this assumption does not seem to resolve the current issues surrounding information asymmetry at the pre-trial stage. The claimant will still have no way of knowing what was collected by the NCA before it actually decides to file a claim, unless a special disclosure procedure is established, which will enable claimants to secure specific documents before filing a reasoned claim. Polish civil procedure currently provides for ways of securing evidence by the court at a pre-trial stage yet none seem to be applicable without necessary modifications.

VII. The European Commission's efforts to harmonize its own rules on access to its files

The Commission introduced in August 2015 widespread changes to its internal procedures concerning access to its own case files. The modifications were made in an effort to harmonize rules applicable to EC case files so as to accommodate the new provisions stemming from the Damages Directive which concern NCAs. Most importantly, the EC introduced a new Article into Regulation 773/2004 on the limitation of the use of information obtained in the course of Commission proceedings, which would reflect restrictions imposed upon NCAs by the Damages Directive, on the disclosure of leniency corporate statements and settlement submissions.

In particular, in order to ensure effective protection of leniency corporate statements and settlement submissions in EC investigations, the Commission proposed to amend relevant provisions of Regulation 773/2004 on EU antitrust procedure as well as modify the content of four related soft law documents: the notice on access to the Commission's file, the leniency notice, the settlements notice and the notice on cooperation with national courts.

submitted by applicants to the European Commission and President of the Office of Competition and Consumer Protection under leniency programmes'] (2015) 5 *Europejski Przegląd Sądowy* 10.

The Commission noted also that in order to ensure that undertakings are not discouraged from voluntarily acknowledging their participation in EU competition law infringements in the framework of the EU leniency programme or settlement procedure, other parties will be granted access to such acknowledgement through access to the EC's files pursuant to Regulation 773/2004 only for the purposes of exercising their rights of defense in proceedings before the Commission itself. It will be possible to use this information only in the review proceedings before the EU judiciary or before national courts of its Member States in cases which are directly related to the case in which access had been granted and which either concern the allocation of a fine between cartel participants, or the review of an infringement decision adopted by a NCA.

While proposing amendments the Commission was of the view that the use of information obtained pursuant to Regulation 773/2004 in proceedings before national courts should not unduly interfere with a pending Commission investigation of an infringement of EU competition law. Where such information was prepared by the EC in the course of its EU competition law proceedings (such as a statement of objections) or by a party to those proceedings (such as replies to requests for information of the EC), a party should not be able to use such information in proceedings before national courts until after the Commission has closed its proceedings against all parties under investigation by adopting a decision under Article 7, 9 or 10 of Regulation 1/2003, or has otherwise terminated its administrative procedure. The Commission clarified at the same time that pre-existing information, that is evidence that exists irrespective of EC proceedings and that is submitted to the Commission by an undertaking in the context of its leniency application, is not part of a leniency corporate statement.

As regards changes to the procedure of transmission of information held by the EC to national courts, the Commission included a very general statement that disclosure of information to national courts should not unduly affect the effectiveness of competition law enforcement by the EC, in particular so as not to interfere with pending investigations nor with the functioning of leniency programmes and settlement procedures. The Commission also added new paragraphs into Notice on the cooperation between the Commission and national courts expressly stating that for that purpose, the EC will not at any time transmit the following information to national courts for use in actions for damages for breaches of Article 101 or 102 TFEU:

- leniency corporate statements, within the meaning of Article 4a(2) of Regulation 773/2004; and
- settlement submissions, within the meaning of Article 10a(2) of Regulation 773/2004.

The EC further included the proviso that, as regards other types of information, the Commission will not transmit the following to the national courts for use in actions for damages for breaches of Article 101 or 102 TFEU, before it has closed its proceedings against all investigated parties by adopting a decision referred to in Article 7, 9 or 10 of Regulation 1/2003, or before it has otherwise terminated its administrative procedure:

- information prepared by a natural or legal person specifically for the proceedings of the Commission; and
- information that the Commission had drawn up and sent to the parties in the course of its proceedings.

Furthermore, the Commission noted that when asked to transmit the said information to national courts for other purposes than the use in actions for damages for breaches of Article 101 or 102 TFEU, the EC will, in principle, apply the same time limitation as mentioned in the above provision, in order to protect its pending investigations.

Public consultation on the proposed modifications ended on 25 March 2015. While the proposed changes were generally in line with the Damages Directive, stakeholders pinpointed during the consultation process a few issues which required, in their opinion, further clarification. According to the stakeholders:

- as regards leniency and settlement materials protected from disclosure, the new provisions should note that evidence pertaining to the alleged infringement, and in particular pre-existing documents, should not be treated as part of corporate statements and should be made available upon request if they do not contain any additional notes/explanations prepared solely for the purposes of filing the application;
- for the second type of protected documents, that is time-protected materials, the Commission should clearly specify the point in time when it deems its investigation to be closed; it would seem reasonable to assume that EC proceedings are closed with the adoption of a decision, irrespective of the parties' potential court appeals; moreover, stakeholders were of the opinion that it seemed unnecessary to condition disclosure of documents on closing the proceedings against all investigated parties; it is not uncommon to issue a couple of decisions in one proceedings, in particular in cases with hybrid proceedings where one party may decide to settle hence closing the proceedings while they continue against remaining alleged infringers;
- it was worth clarifying in the new rules that an infringer may voluntarily disclose its leniency statements and settlement submissions after the Commission has closed its proceedings as this may facilitate civil settlements and avoid the burden of a court trial.

Following the consultation process, the Commission adopted a number of amendments to Regulation 773/2004 and the four related notices on 3 August 2015. The amendments were largely reflecting the ones proposed in the consultation process and only minor comments provided in the consultation process were addressed in the final documents.

VIII. Conclusions

To close this intriguing topic it needs to be noted that the practical use of procedures relating to access to competition authorities' files may prove limited due to the proviso of Article 6 section 10 of the Damages Directive whereby it needs to be ensured that national courts request disclosure of evidence held in a competition authority's case file only where no party, or 3rd party, is reasonably able to provide that evidence. In practice, this may mean that any document prepared by a party to the proceedings before the competition authority should first be requested directly from that party. It seems that this procedure will thus act somewhat as a back-up plan and its practical application may be very limited. This is all the more so because the Damages Directive does not cover the disclosure of internal documents of, or correspondence between, competition authorities, which is a basic category of documents which can be obtained only from the competition authority and not from 3rd parties.

The implementation of the Damages Directive into national laws and the practical application of the resulting national rules will gradually show if the approach of wanting to avoid the interference of private damages claims with effective public enforcement will still allow successful private actions or whether a more lenient approach to access to case files would have been necessary.

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