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Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?

by

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CONTENTS

Abstract

The paper gives an overview of the South African Corporate Leniency Policy which is a whistleblowing tool used by Competition agencies to detect and punish cartel behaviour. The leniency applicant provides vital information to the competition authorities to fulfil the needs of this Policy. This information

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would be of great assistance to a claimant harmed by the cartel and who wishes to submit a claim for follow-on damages. Revealing this information results in serious implications for both leniency applicants and civil damages plaintiffs and poses a dilemma to Competition authorities. This paper questions whether the interest of the leniency applicant should be protected or should the information be handed over to the claimant to pursue a case for damages. After considering the status quo of the South African legal context, a survey of the EU and USA position on this is provided. The paper concludes on how a balance should be struck.

Résumé

L'article donne un aperçu de la politique sud-africaine en matière de la clémence des entreprises qui est un outil d'alerte utilisé par les agences de compétition pour détecter et sanctionner le comportement de cartel. Le demandeur de clémence fournit les autorités de la concurrence en informations essentielles pour satisfaire les besoins de la présente politique. Ces informations seraient d'une grande aide à un prestataire lésé par le cartel et qui souhaite présenter une demande pour obtenir les dommages par la suite. La révélation de ces informations résulte en conséquences graves pour les deux demandeurs de clémence et les plaignants des dommages civils, et pose un dilemme aux autorités de la concurrence. Cet article pose la question si l'intérêt du demandeur de clémence doit être protégé ou peut-être l'information devrait être remise au demandeur afin de poursuivre une affaire de dommages-intérêts. Après avoir examiné le status quo du cadre juridique d'Afrique du Sud, une enquête de la position de l'UE et les Etats-Unis sur cette question est prévue. L'article se termine sur la façon dont un équilibre doit être trouvé.

Classification and key words: cartels, private enforcement; damages; leniency documents; South Africa competition rules, EU competition rules, USA competition rules, EU Proposed Directive

I. Introduction

The Corporate Leniency Policy (hereafter: CLP) is a successful tool for destabilizing cartels. It entices cartel members to rush to be first to the door to confess their role in a cartel and provide evidence to the South African Competition Commission (hereafter: CC) against other members of the cartel in exchange for leniency. Whereas their fellow cartelists face penalties running into millions of Euros, leniency applicants are rewarded for their confessions by receiving immunity from fines. However, the CLP does not

provide immunity to applicants named as respondents in private claims for damages[1].

It is often difficult to ascertain evidence to prove a damages case and, in particular, to demonstrate causation and quantum, even if liability was assumed on the basis of earlier administrative proceedings. In some cases, claimants might not even be able to formulate a *prima facie* case on the basis of publicly available information seeing as the very nature of cartel conduct is itself secretive. The damages claimant has to face the challenge of asymmetric information, while the leniency application contains evidence to prove the cartel. This information could be used to establish the causal link between the cartel conduct and the damages incurred by the claimants. This is why damages claimants wish to exercise their rights to claim damages and request access to documents obtained through the leniency application in order to make, and strengthen, their case. Competition authorities are weary of disclosing such information, as they do not want to undermine their leniency policy. Cartelists might hesitate to cooperate with the authorities if it is likely that their company information will be disclosed to third parties and used against them in damages claims, especially considering that damages might exceed administrative penalties that they are able to avoid through leniency.

The main questions addressed in this paper are:

(i) Whether a special dispensation should be given to leniency applicants so as to protect the integrity of the policy that competition authorities largely rely on to uncover cartels or;

(ii) Whether there is an overriding public interest to consider where private damages claimants have an automatic right to the evidence submitted by the leniency applicant?

This paper draws upon a comparison of jurisdictions (with a significant focus on European Union cases where these debates took place), and provides a brief analysis of the approach of American authorities in creating incentives to resolve this issue. The paper addresses the dichotomous role of competition authorities which, on the one hand, have to protect the leniency policy while, on the other hand, have to give due regard to the interest of victims of cartel cases. Recommendations on where the boundaries should lie in exercising these roles will then be provided.

[1] In South Africa cartelists are penalized up to 10% of their annual turnover. There are no criminal penalties enforced in terms of competition legislation. The CLP does not protect a cartelist from criminal sanctions based on any other legislation or criminal code.

II. The need for a Corporate Leniency Policy in cartel cases

There is no question that cartels operate in secret and are usually very difficult to detect. Based on the principles of "game theory" or the "prisoner's dilemma", leniency creates an incentive for a firm to break ranks with their fellow cartel members and race to the doors of competition authorities to provide information about the cartel in exchange for leniency. In South Africa, where the penalty for cartel conduct is 10% of the firm's annual turnover, leniency would provide a substantial saving for a successful applicant. Many competition jurisdictions around the world, including South Africa, have implemented their versions of the CLP.

1. Requirements and use of the CLP

South Africa's first CLP was published in 2004 and provided immunity to the first firm that confessed to the conduct, provided that it was not the instigator of the cartel[2]. Although the policy was based on international best practice, the first draft had a few drawbacks. The 2004 policy was underutilized due to its lack of clarity and certainty to potential leniency applicants[3]. Firms thus took the risk of remaining undetected rather than coming forth to blow the whistle. As a result, only 15 leniency applications[4] were submitted between April 2004 and March 2008. To be fair, it is often common for many jurisdictions to have an ineffective first draft of their leniency policy, which becomes more effective with later improvements[5].

The more successful 2008 version of South Africa's CLP provided a clearer outline of the immunity process[6]. Immunity is only given in cartel cases. Conditional immunity is given to the first firm making it "to the door" of

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[2] Corporate Leniency Policy, Government Gazette notice 194 of 2004. The policy came into effect on 1 February 2004.

[3] K. Moodaliyar, "Are Cartels Skating on thin Ice? An insight into the South African Corporate Leniency Policy" (2008) 125(1) *South African Law Journal* 175.

[4] Competition Commission (hereafter: CC) Annual Report 2011/2012, p. 21.

[5] For example, when the first American CLP was enacted in 1978, the Department of Justice had on average 1 application per year. It was also underutilized. Upon revision, the DoJ now receives about 50 applications per year. See S. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades", speech, 24th Annual National Institute On White Collar Crime Presented by the ABA Criminal Justice Section and the ABA Centre for Continuing Legal Education, Florida, 25 February 2010; available at http://www.justice.gov/atr/public/speeches/255515.htm.

[6] Corporate Leniency Policy, Notice 628 of 2008, Government Gazette No 31064, 23.05.2008.

the CC. The CC benefits in that it would now receive vital information about a cartel that: it may not have been aware of; a cartel it knew about, but did not have sufficient information about and thus was not investigating; or where there was a pending investigation and the CC had insufficient evidence to proceed with the case[7]. The applicant firm must act honestly and provide complete and full disclosure of information and evidence about the cartel so that it is possible for the CC to institute an investigation. The applicant must also cease the cartel conduct; must not alert other cartelists; nor destroy any information[8]. Immunity can be revoked if the CLP and the CC's instructions are not complied with[9].

If there are subsequent firms who wish to come clean about their cartel activities, the CC can consider this as a mitigating factor in those firms' request to negotiate a lesser fine, or ask the Tribunal for a favourable treatment of such firms, depending on their level of co-operation and the information they brings[10].

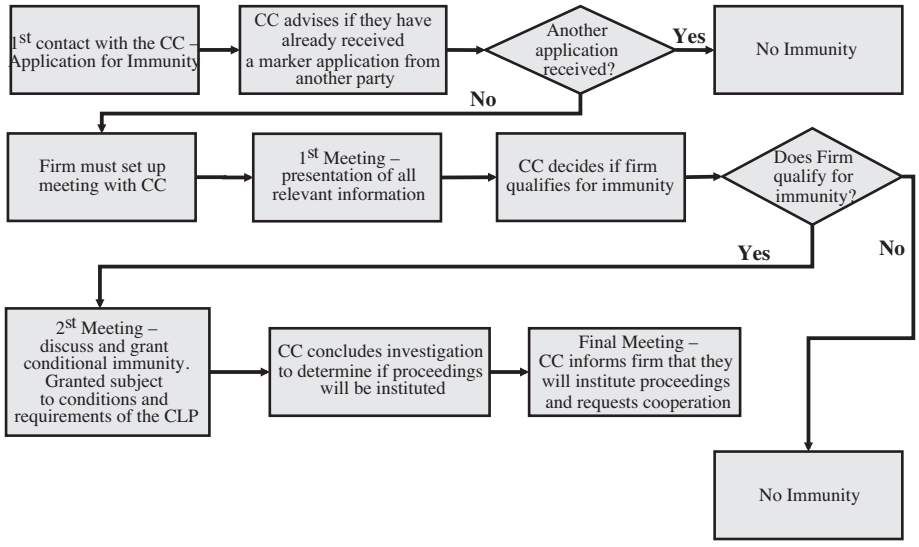
Total immunity is given once the case has been finalized before the Tribunal, or after an appeal if there is one and after all the conditions have been met. Total immunity is granted if the conditions of conditional immunity listed above are fulfilled[11]. Firm must apply for leniency with respect of each cartel transgression, seeing as the CLP does not provide for an overall blanket leniency of all cartel infringements, unless the contraventions cannot be separated[12]. The diagram in Figure 1 below shows the flow of the CLP application process. Immunity is dependent on all the requirements of the policy being met.

In comparison with the 2004 CLP, the 2008 policy removed the wide discretion of the CC (addressing a major criticism of the earlier CLP) and gave greater legal certainty to leniency applicants. Another change in the 2008 policy is that the instigator of the cartel is no longer excluded from bringing an application[13]. The reason for this is that there may be cases where the cartel has existed for decades – the turnover of staff and authority might thus make it difficult to identify which firm started the cartel in the first place. This amendment puts to rest any disputes that may have arisen in this regard. The 2008 policy now also provides for the applicant to make their submissions in

[7] CLP 2004, para 5.5.2, the same sentiment is expressed in CLP 2008, para 5.5.
[8] CLP 2008, para 10.1.
[9] CLP 2008, para 13.
[10] CLP 2008, para 5.6.
[11] CLP 2008, para 9.1.2.
[12] CLP 2008 para 5.4.
[13] The 2004 CLP excluded the instigator from applying for leniency in terms of para 5.8 ad 10.1(d) of the policy.

writing and orally[14]. Since some applicants are more comfortable giving oral statements, which can be later transcribed.

Figure 1.
Process of the Leniency application



The most important new development in the 2008 policy was the introduction of the marker system[15] which allows the firm to approach the Commission, requesting a marker for first place in the queue, whilst providing details of the firm, cartel conduct and participants. The CC has the discretion to accept the marker application and can provide the assurance that the firm is first in queue. The firm is then given time to gather evidence and to provide it to the CC. While the marker is in place, no other firm can take the first place. The marker system provides greater security to firms which may not have all the evidence available at the time of the application, but still wish to apply for immunity.

2. Legal challenge to the 2008 CLP mandate

The CC's power and authorization of the leniency policy was challenged in the *Agri Wire*[16] case. The case was based on an investigation initiated by the CC in the steel mill industry that involved several companies including

[14] CLP 2008 para 15.
[15] CLP 2008 para 12.
[16] *Agri Wire (Pty) Ltd et al v The CCet al*, North Gauteng High Court, Case No 7585/2010.

Scaw South Africa (Pty) Ltd (hereafter: Scaw). Scaw has management control of Consolidated Wire Industries (hereafter: CWI), which was one of the companies under investigation. Scaw conducted its own internal investigation and uncovered cartel conduct in both its companies. It applied for leniency, which the CC granted conditionally, in exchange for information and evidence of the cartel[17]. The CC subsequently referred the complaint to the Competition Tribunal. It cited 12 companies as members of the cartel, including Agri Wire, and asked that all of these companies, except CWI, pay the administrative penalty of 10% of their annual turnover[18].

Agri Wire took the case to the High Court challenging the immunity that the CC gave to CWI in terms of its immunity application. It argued that the Competition Act did not authorize the CLP and so any information provided by CWI in terms of the leniency policy was inadmissible. To the same extent, it argued that the complaint and the referral to the Tribunal were unlawful[19].

Judge Zondo explained in his dismissal of the complaint that conditional immunity contemplated in the CLP is not to be interpreted in the normal sense of "immunity", since the CC does not have the final say on the fate of the applicant[20]. It is a mere promise by the CC to ask the Tribunal not to impose a fine upon the leniency applicant, in exchange for the latter's cooperation and assistance in the referral. The Tribunal has the final authority to decide on whether or not a fine can be imposed. There is also nothing in the CLP obliging the Tribunal not to impose a fine on the leniency applicant[21].

Regarding Agri Wire's accusation that the CC was selectively prosecuting companies, Judge Zondo held that the CC had cited all the wrongdoers in its referral to the Tribunal, it acted well within its power to seek relief against the selected respondents and to seek leniency for CWI[22].

On Appeal, the Supreme Court of Appeal (hereafter: SCA) dismissed the *Agri Wire* case by taking an even more definitive stance. It said that the Competition Act vested power in the Commission to issue the CLP, thus allowing it to grant conditional and total immunity to the leniency applicant[23]. The SCA further stated that if the CC decides to refer a case to the Tribunal then "…the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint

[17] *Agri Wire*, para 10.
[18] *Agri Wire*, para 11.
[19] *Agri Wire*, para 29-31
[20] *Agri Wire*, para 58.
[21] *Agri Wire*, para 62.
[22] *Agri Wire*, para 72.
[23] *Agri Wire (Pty) Ltd et al v The Competition Commission*, SCA, Case no: 660/2011 (hereafter: *Agri Wire SCA*), para 24.

submitted by the complainant"[24]. The SCA also found that the High Court erred in its judgment by stating that where the CC had granted immunity, the Tribunal could still impose an administrative fine. The SCA made it clear that the CC is allowed to grant conditional immunity notwithstanding the power vested upon the Tribunal to take the party's co-operation into consideration in determining the sanction. The SCA held that the leniency applicant will "only be referred to the Tribunal for the purpose of adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity"[25].

The SCA reiterated that the CLP is a useful tool to combat cartel behaviour. It also correctly pointed out that "hard-headed businessmen, contemplating baring their souls to the competition authorities, will generally want a more secure undertaking of a tangible benefit, before furnishing the co-operation that the Commission seeks from them"[26]. To do so otherwise would render the CLP "far less effective, if not entirely useless"[27].

3. Successful outcomes of the CLP

Unlike the 2004 CLP which saw very little use, the 2008 policy stimulated a race for immunity. Lavoie attributes the success of the policy to a number of factors including:

"(i) a growing awareness among the public and business community of the existence of the [Competition] Act and the CLP and the consequences of contravening the Act;

(ii) the Commission's investigation in certain sectors of the economy creating instability amongst cartel members and a race to apply first for immunity;

(iii) the dismantling of cartels in related sectors of the economy;

(iv) the changing business environment whereby internal compliance investigations are being conducted within corporate ranks and

(v) the forthcoming introduction of criminal sanctions for individuals involved in cartel conduct"[28].

These are valid factors which, together with the improvements in the 2008 policy, created the environment for companies to come forth and make use of the CLP. Criminal sanctions, which were outlined in the Competition

[24] *Agri Wire SCA*, para 24.

[25] *Agri Wire SCA*, para 7.

[26] SCA, Ibid. para 9.

[27] Ibid.

[28] C. Lavoie, "South Africa's Corporate Leniency Policy: A Five-Year Review", (2010) 33(1) *World Competition* 155.

Amendment Act of 2009, have not come into effect yet.[29] The Commissioner, Tembinkosi Bonakele, stated in a recent news report that the Amendment Act will come into effect in stages, and that institutional structures are not yet in place to manage criminalization. The current CLP does not provide immunity in criminal cases and the Commissioner is weary that the threat of criminalization may discourage potential CLP applicants from coming forward. This may put the CLP at risk[30].

The table below gives an indication of the fines received in particular industries from the year 2011–2013. Many happen to concern intermediary products with fines running into millions.

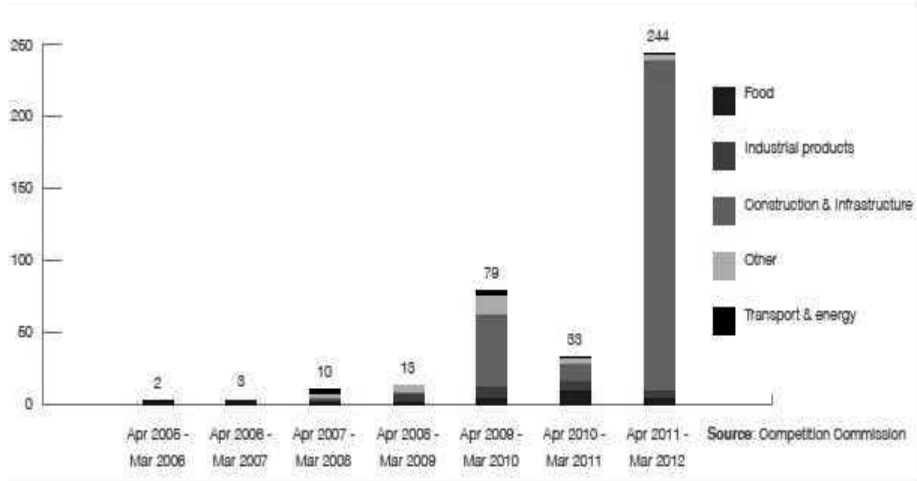
Table
Industries involved in cartel activity uncovered through the CLP process 2009–2011

Industry	Total Penalties in Euro
2011 Decisions	
Structural concrete reinforcement, construction, welded mesh fabric reinforcement and supply, cutting and bending of rebar (steel reinforcing bars),	11 144 616 222
Petroleum and energy, bitumen	489 459 565
Cement production	1 0 61 772 642
2012 Decisions	
Steel products	6 113 890 122
Milling (white maize and wheat)	4 249 4 66 127
Manufacture and supply of generic paving blocks	942 873 873
Property and rental property,	194 521 955
Airline	905 984
Petroleum, bitumen and bitumen products	486 394 167
2013 Decisions	
Construction and civil engineering	10 861 483 690
Wholesale of glass product, manufacture and distribution	3 590 574 414
Gas and Chemicals supply and distribution	525 926 294
Industrial and specialty gases	1 974 591 522
Manufacture and supply of generic paving blocks	480 655 922
TOTAL	**35 906 019 857**

[29] Competition Amendment Act No. 1 of 2009. The Amendment Act has been signed by the President but has not been given a date for it to become effective.

[30] A. Slabbert, "CompCom not ready to criminalise anticompetitive behavior", *Moneyweb*, 19.05.2014; available at http://www.moneyweb.co.za/mw/content/en/moneyweb-south-africa/compcom-not-ready-to-criminalise-anticompetitve-b.

The graph below, which tracks the number of CLP applications since the inception of the 2004 policy, shows a dramatic increase in applications after 2008 indicating the success of the amended policy.



Source: Competition Commission Annual Report 2011/2012

There was a sharp increase in the number of applications to 244 in the last financial year of the CC (2011/2012). This can be attributed to its fast track settlement process in the construction industry launched in February 2011. This was the first time the CC had invited firms in this industry to engage in a fast track settlement process of this nature. It became apparent that the construction industry was rife with cartel behaviour. The Commission settled with 15 construction companies who admitted to collusive tendering and paid fines totalling around 140 million Euro (Annexure A provides a detailed table of leniency applications from 2008–2013). Those companies who did not receive leniency paid a substantial amount in fines totalling over 3.5 billion Euro during that period.

III. Should leniency documents be disclosed to third party damages claimants?

1. Issuance of the certificate by the Competition Tribunal

Not long after the fines in the construction cases were imposed, there were numerous media reports that affected Government departments wish to claim

damages for losses suffered as a result of the price fixing[31]. Unlike in the United States, where damages claimants can approach a court directly to initiate a civil claim without waiting for a finding from the Department of Justice[32], damages cases in South Africa can be instituted in a civil court only after the damages claimant has obtained a certificate from the Competition Tribunal once the latter has made its finding[33]. In most cases, the CC does not cite the leniency applicant as a respondent on the referral papers. This became a contentious issue in the *Premier Foods* case heard in the North Gauteng High Court[34].

Premier Foods, a leniency applicant, sought to question whether the Chairperson of the Competition Tribunal, or the Tribunal itself, had the jurisdiction to issue the required certificate in terms of Section 65(6)(b) of the Competition Act against Premier seeing as the latter was not cited as a respondent in the case against the other cartelists which was heard by the Tribunal[35]. Without the certificate, a prospective damages claimant would not be able to pursue a civil claim against Premier.

Premier argued that having a certificate issued against it by the Chairperson of the Tribunal, even though it was not cited as a respondent by the CC, violated the *audi alterem partem* rule[36]. In his deliberation, Judge Kollapen held that: "in as much as the principle of *audi* is inextricably linked to considerations of fairness, even handedness, objectivity and inclusiveness in the decision-making process, it is also both a matter of form and of substance. It may be appropriate in circumstances where form may be said to be wanting to examine issues of substance in order to determine whether there has been observance of the principle notwithstanding any deficiency in form. Not to do so would run the risk of adopting an overly technical and formal approach to a principle that at the heart of it is about procedural fairness"[37].

In dismissing Premier's contention, Judge Kollapen maintained that the *audi* principle was applied to Premier in that it "was represented at the hearing, allowed its staff to participate and to contribute to the proceedings as witnesses

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[31] See, e.g. N. Gabara, "Salga wants construction firms to pay up", *SA News.Gov.ZA*, 5.07.2013; available at http://www.sanews.gov.za/south-africa/salga-wants-construction-firms-pay. R. Cokayne, "Charge colluding individuals" *Business Report*, 18.07.2013; available at http://www.iol.co.za/business/companies/charge-colluding-individuals-1.1548686#.Ugfh8hzdI3U. L. Gedye, "Construction cartel not off the hook yet", *City Press*, 30.06.2013; available at http://www.citypress.co.za/business/construction-cartel-not-off-the-hook-yet/.

[32] Section 4 of the Clayton Act 15 U.S.C. § 15.

[33] Section 65(6)(b) of the Competition Act.

[34] *Premier Foods (Pty) Ltd v Norman Maniom N.O and the Competition Tribunal et al, North Gauteng High Court*, Case no38235/2012, decision issued on 02.08.2013.

[35] *Premier Foods*, see para 9 and 10.

[36] *Premier Foods*, see para 12.

[37] *Premier Foods*, para 50.

and was heard in every sense of the term"[38]. In relation to whether a certificate could be issued against Premier, it was pointed out that a certificate is issued based on the fact that the Tribunal has made a finding in the given case[39]. In terms of Section 66 of the Competition Act, any person can apply for that finding to be amended, or set aside the order, if it was issued erroneously or granted in the absence of a party[40]. Premier did not make such an application.

The outcome of this case was that even though Premier (as the leniency applicant) was not cited as a respondent by the CC in the case against other cartelists, the Tribunal was still allowed to issue a certificate against it as their findings were not contested. There is thus no obligation on the CC to cite the CLP applicant as a respondent in its referral of a cartel case to the Tribunal. Having a certificate issued against the CLP applicant, even if not cited as a respondent, opens the door for claimants to pursue a follow on damages case against a CLP applicant.

2. A South African Courts' view of access to privileged CLP documents

The CLP does not prevent a plaintiff from instituting damages cases against the successful leniency applicant[41]. The question posed then is, without the extension of this immunity to civil cases, would the threat of a much higher civil compensation deter leniency applicants from coming forward? Should leniency documents receive special protection? The CLP has been a major tool in the detection and destabilization of cartels in South Africa. Zero penalty is a huge incentive for companies to use the policy. Would a case of damages against the leniency applicant take away that incentive? This begs the question whether the ultimate goal is to protect the leniency applicant, and maintain the attractiveness of the CLP, or to protect the public interest of cartel victims, and give them access to leniency documents, and thus providing greater access to justice.

Privileged documents provided by the leniency applicant were brought into question in the *Arcelor Mittal (AMSA)* case[42]. AMSA and Cape Gate, members of an alleged steel cartel, requested access to documents provided by the leniency applicant, Scaw, to address the allegations made against them. Cape Gate sought access to the leniency application and annexes of

[38] *Premier Foods*, para 51.
[39] *Premier Foods*, see para 42-43.
[40] *Premier Foods*, para 44.
[41] CLP 2008 para 5.9.
[42] *Competition Commission of SA v Arcerlormittal SA Ltd* et al (680/12) [2013] ZASCA 84 (hereafter: *AMSA*).

the supporting documents. It relied on Rule 35(12) of the Uniform Rules of Court, which confers the right to inspect and copy any document mentioned in the pleadings or affidavit by any party to the proceedings[43]. AMSA relied on the Competition Commission's rule 15(1) which gives the right to anyone (whether or not they are being investigated) to inspect or copy the CC's record. On this basis, AMSA sought access to all records of the CC generated after the investigation[44]. AMSA also requested access to the leniency application, marker, and discovery of all documents mentioned in the referral affidavit on the basis of Uniform Rule 32(12)[45]. The CC refused to disclose the documents saying that it formed privileged information prepared for litigation purposes. The Tribunal upheld the CC's argument and dismissed the submissions, save for an order of limited disclosure of three documents that were referred to in the CC's referral affidavit[46].

At the Competition Appeal Court (hereafter: CAC), AMSA only sought access to the CC's record while both AMSA and Cape Gate sought access to the leniency application. The CAC however made no such order saying that it found it unnecessary to decide on matters already determined by the Tribunal[47]. The CAC upheld Scaw's contention that the documents were protected from disclosure because Scaw claimed confidentiality under Section 44(1)(a) of the Competition Act. The CAC stated that access to information over which confidentiality had already been claimed was a matter to be determined by the Tribunal.

The case was ultimately brought before the SCA due to the CAC's failure to either confirm or set aside the Tribunals order. Before the SCA, the CC argued that it was entitled to withhold the information from AMSA and Cape Gate because firstly, it was protected by the litigation privilege and secondly, it was restricted information. It relied on Competition Commission rule 14(1), which gives it discretion to withhold information under 37(1)(b) of the Promotion of Access to Information Act (PAIA).[48] In relation to disclosure of its record, the CC argued that Competition Commission Rule 15 finds no application once litigation commences[49].

The SCA in its analysis indicated that the litigation privilege, which protects communication between a litigant, or its legal advisor, and a third party, exists when two requirements are met. First, "the document must have been

[43] *AMSA*, para 15.
[44] *AMSA*, para 16.
[45] Ibid.
[46] *AMSA*, para 17.
[47] *AMSA*, para 18.
[48] Act 2 of 2000.
[49] *AMSA*, para 19.

obtained or brought into existence for the purpose of the litigant's submission to the legal counsel for advice". Second, whether "litigation was pending and contemplated as likely at the time"[50].

The SCA stressed that whether or not the issue of litigation privilege is attached to the leniency application is dependent on the facts of the case[51]. The CC intended to use the information provided by Scaw to institute a prosecution and litigate against AMSA and Cape Gate. The SCA held that the documents held by the CC were privileged as a result[52]. However, the SCA stated also that the CC impliedly waived this privilege when it openly referred to the leniency application in its referral affidavit to the Tribunal[53]. The referral affidavit contains evidence that the CC intended to lead during the hearing and it was under no obligation to include or make reference to the leniency application[54]. The SCA also had to rule on Scaw's claim that some of their documents were confidential. This matter was referred back to the Tribunal.

The implication of this judgment is that any reference to a leniency application in the CC's referral affidavit can be regarded as a waiver of the litigation privilege. Cartel members who may be considering using the CLP may thus question the protection afforded by the policy. They may ask for assurance that their information is not unduly disclosed.

What does this judgment mean for the private plaintiff who wishes to claim damages? It gives them greater access to the documents provided during the CLP process. If applicants would like their documents to remain confidential, the Tribunal will have to decide whether such information relates to "trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available or known by others" as defined in the Competition Act[55]. The Tribunal will protect sensitive trade secrets, but any information outside this ambit would be subject to disclosure. Leniency applicants who have submitted their applications prior to this decision will now be concerned about the extent of information that the CC will be obliged to release. They would most likely be careful in how the information is disseminated to the CC, bearing in mind however, that non-cooperation will jeopardize their leniency application.[56]

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[50] *AMSA*, para 20-21.
[51] *AMSA*, para 28
[52] *AMSA*, para 31.
[53] *AMSA*, para 37.
[54] Ibid.
[55] Definitions. Competition Act 89 of 1998 (as amended).
[56] See A. Caruso, "Leniency Programs and Protection of Confidentiality: The Experience of the European Commission", (2010) *Journal of European Competition Law & Practice* 454 and

The question of third parties requesting access to documents submitted during the leniency process has also been dealt with in the European Union.

IV. Lessons from the EU

Courts in the EU have grappled with the question of leniency documents disclosure, which could undermine the leniency programme while at the same time recognizing third parties' rights to claim damages. The three cases below illustrate the development of EU jurisprudence in this regard. In all three cases, information was requested by a damages claimant, which was submitted as part of a leniency process, such as documents that were submitted by the cartel members and confidential information from the decision of the European Commission. European Courts faced a difficult task in dealing with this dichotomy taking into consideration both EU rules and national laws. Before *Pfleiderer*[57], there was not much interest in this issue[58]. *Pfleiderer* was the first case to set the ground rules.

1. *Pfleiderer*

1.1. Background

The German Federal Cartel Office, otherwise known as the Bundeskartellamt (hereafter: BKA), received a leniency application in 2008 from a company involved in a décor paper cartel. Three of Europe's largest décor companies were subsequently fined approximately 62 million Euros for their involvement in the cartel. One of their customers, Pfleiderer AG, claimed that it had purchased over 60 million Euros worth of special décor paper over approximately 3 years whilst the cartel was in operation. It had thus suffered losses as a result of the high cartel price and intended to claim damages against the three décor companies.

To strengthen its damages case, Pfleiderer approached the BKA for full access to these leniency applications, which implicated the cartel. The BKA

C. Hodges, "Competition enforcement, regulation and civil justice: what is the case?", (2006) 43(5) *Common Market Law Review* 1390.

[57] CJ judgment of 14 June 2011 in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161 (hereafter: *Pfleiderer ECJ*).

[58] Y. Botteman, P. Hughes, "Access to File: Striking the Balance between Leniency and Private Enforcement Tools", (2013) *Global Competition Review: The European Antitrust review*; available at www.globalcompetitionreview.com.

provided three decisions where fines were imposed, but removed from them certain information including a list of recorded evidence obtained during the investigation[59]. The BKA refused to grant Pfleiderer access to the statements and documentary evidence rendered as part of the leniency process. The BKA reasoned that the cartelists making use of leniency assisted the BKA with cracking the cartel in the décor industry. For the BKA to now grant access to leniency files to third parties, who would use that information in a civil damages case, would discourage future cartelists and witnesses from disclosing cartels[60]. Pfleiderer then applied to the local German court, the Amtsgericht Bonn, making a formal request for the leniency documents and to overturn the BKA decision.

In a confounding judgment, the Amtsgericht Bonn found that Pfleiderer had a "legitimate interest" in requesting the documents, and granted Pfleiderer's request to access the leniency documents. Having acknowledged the BKA's concern in protecting the confidentially of the leniency files, it also stayed the implementation of its order[61]. Instead the German Court referred the case to the European Court of Justice (hereafter: ECJ) to seek further clarity on the issue of disclosure of information from leniency applications to third parties[62].

1.2. ECJ judgment

The ECJ first considered the matter from the point of view of the BKA finding the leniency policy to be an effective mechanism in uncovering anticompetitive practices such as cartels[63]. ECJ believed that the effectiveness of the programme could be undermined if documents relating to leniency applications were to be disclosed; this would subsequently deter companies from cooperating with the National Competition Authority (hereafter: NCA)[64]. The ECJ then focused on the equally important right of Pfleiderer to claim damages, a right that it said was already established in the *Courage and Crehan* case[65]. It reiterated also a point made in that judgment whereby civil damages also "contributed to the maintenance of effective competition in the European Union"[66]. Emphasizing the principles of equivalence and effectiveness, the

[59] *Pfleiderer ECJ*, para 11.

[60] 9(22) A. Geiger, "The End of the EU Cartel Leniency programme"; available at www.euractiv.com.

[61] *Pfleiderer ECJ*, para 14-16.

[62] The German leniency policy is based on the European Commission Council regulation 1/2003.

[63] *Pfleiderer ECJ*, para 25.

[64] *Pfleiderer ECJ*, para 26.

[65] *Courage and Crehan* [2001] ECR 1-6297

[66] *Pfleiderer ECJ*, para 29, and see *Courage and Crehan*, para 27.

ECJ held that there is nothing in the leniency regulation precluding a third party from gaining access to leniency documents[67]. To reach a solution, the court would have to weigh "the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency"[68]. In a disappointing turn, the ECJ decided not to do the weighing exercise itself, but rather left it to the discretion of national courts on a case-by-case basis[69]. When making such decisions, the ECJ urged national courts to consider the facts of the case in relation to national laws, the conditions and type of evidence submitted under the leniency programme, and the rights and interests of the third party who wishes to institute a civil claim for damages[70].

The weighing exercise raises an interesting debate, especially when considering damages claims against non-leniency and leniency applicants. The leniency process has been an overwhelmingly important tool for the competition authorities to detect cartels. It seems that globally almost all cartels would not have been discovered without leniency. Even total immunity from damages is still "pro-claimant". However, as noted above, even allowing some penalty against leniency applicants may be regarded as a fair practice and not render the CLP totally ineffective. This will favour a harsher line against leniency applicants.

The Attorney General, Advocate General Mazák, provided an accompanying opinion in the Pfleiderer case[71]. His solution was to provide the leniency documents to the third party and withhold any self-incriminating documents or statements provided by a leniency applicant. He saw the refusal to disclose leniency information to the third party claiming damages as a violation of their right to a fair trial, especially if those documents (provided they do not contain confidential business information) could help the claimant establish the causal link between the harm caused and the anticompetitive conduct[72]. This also gives leniency applicants, or even a non-leniency cartelist for that matter, an opportunity to raise the "defence" of confidential business information. Like in South Africa, it would be up to the courts to decide whether the evidence does actually contain information that would unduly prejudice the business. Although the ECJ did not follow the opinion expressed by Advocate General Mazák, the latter appears to provide for a clearer solution.

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67 *Pfleiderer ECJ*, para 30 and 32.
68 *Pfleiderer ECJ*, para 30.
69 *Pfleiderer ECJ*, para 31.
70 *Pfleiderer ECJ*, para 30-31.
71 AG Mazak, Opinion in Pfleiderer, Case 360/09, www.curia.en, No 48.
72 Ibid.

1.3. Back to the local German court

Following the ECJ judgment, the *Pfleiderer* case was referred back to Amtsgericht Bonn – the court that initially granted Pfleiderer's access request. Following its guidance and weighing the factors outlined by the ECJ, Amtsgericht Bonn reversed its initial decision and denied Pfleiderer access to the leniency documents held by the BKA[73].

Amtsgericht Bonn considered the value of the information given in the framework of a leniency programme where the leniency applicant provided self-incriminating evidence and had the expectation that the information would remain confidential and the applicant's constitutional right in terms of German law, to have a say regarding the information it submitted and how much of it could be disseminated to third parties. The leniency programme proved very successful in uncovering cartel activity in the EU. Going back on these principles would jeopardize the attractiveness of the leniency programme[74].

Amstgericht Bonn, in its deliberations, also considered that many of the civil damages claims were follow-on cases after the competition authorities had uncovered the cartel. Subverting a successful leniency tool, and thus hampering future cartel investigations, would also negatively impact future damages cases[75]. The NCA's decision in itself should be useful enough to show the causal link between the cartel conduct and the damages to the third party. The court thus asserted that information from a leniency application would not be useful in quantifying those damages, and that normal civil procedure rules could be used to assess the loss suffered by the third party[76].

1.4 Implications of *Pfleiderer*

The ECJ ruling in *Pfleiderer* has been plagued with criticisms from the bar[77]. Instead of providing clarity sought by the parties, it introduced new problems. The ECJ ruling could have set an EU-wide standard for dealing with information requests concerning leniency applications. Instead, it left this decision in the hands of each Member State to deal with. The decision of Amtsgericht Bonn, which was welcomed by the BKA and the EC, had a detrimental impact on third party damages claimants. Confidentiality is

[73] *Pfleiderer v Bundeskartellamt*, 51 Gs 53/09 AG Bonn, 18.01.2012.

[74] C. Cauffman, "The Interaction of Leniency Programmes and Actions for Damages" (2011) 7(2) *The Competition Law Review* 3-4.

[75] Ibid. at 4.

[76] Ibid.

[77] See S. Campbell, T. Feunteun, "Article on developments in English Cartel and enforcement" (2012) *Stewarts law;* available at. www.stewartslaw.com; 9(22) A. Geiger, "The End…", op. cit.; 9(24) Y. Botteman, P. Hughes, "Access to File…", op. cit.

a distinctive feature of leniency, and these decisions neither provide much security to future leniency applicants, nor to third parties needing the information for their damages claim.

2. *Donau Chemie*

2.1. Background

On 6 June 2013, the Court of Justice (hereafter: CJ)[78] published its judgment in the *Donau Chemie*[79] case. This matter originated in Austria in 2010 where the Austrian competition authority, the Bundeswettberbsbehörde (hereafter: BWB), through their leniency programme, uncovered a cartel in the wholesale distribution of printing chemicals and imposed a fine of 1.5 million Euros on Donau Chemie and other companies involved[80]. The trade associations Verband Druck and Medientechnik asked BWB for access to leniency documents in order to use them in their follow-on damages case against the cartel.

The local Austrian court, the Oberlandesgericht Wien (the Vienna Higher Regional Court) found upon its analysis that Austrian provisions, applicable only in cartel cases, protected information submitted in cartel cases in so far as such information could only be divulged to third parties if all the parties consent to this waiver[81]. Moreover, parties can refuse to provide access to that information without furnishing reasons. This blanket restriction does not leave much room for the NCA to consider the interest of the third party. The Austrian Court was in doubt as to the compatibility of the national rules with EU law, especially in light of the *Pfleiderer* ruling, and thus approached the CJ for guidance.

2.2. Court of Justice ruling

Drawing on the *Pfleiderer* dicta and its principle of effectiveness, the CJ reiterated that a balancing exercise must be performed to weigh, on the one hand, the interests of the third party who would like access to the documents

[78] The name of the ECJ court changed to the Court of Justice of the EU when the Treaty of Lisbon came into force in 2009.

[79] *Bundeswettberbsbehörde v Donau Chemie AG and others*, Case C 536/11; available at www.eurlex.europa/LexUriServ.do?uri=CELEX: 62011CJ0536:EN:HTML (hereafter: *Donau Chemie CJ*).

[80] *Donau Chemie* CJ, para 5.

[81] Austrian Federal Law of 2005 of Cartels and Other Restrictions of Competition, Paragraph 39(2) which states "Persons, who are not parties to the procedure, may gain access to the files of the Cartel Court only with the consent of the parties".

to help enforce its rights to claim damages, and, on the other hand, the right to protect the information contained in the leniency application (such as the rights to protect personal or business secrets[82]) and not compromise the leniency programme[83].

In its appraisal of the law the CJ found that:

- The blanket restriction denying access to leniency information imposed by Austrian law should not result in making it virtually impossible for a third party to exercise its rights to claim damages[84].
- National courts must weigh the interests of the parties who wish to have access to the documents and those who do not want to disclose the information, because "any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application" of the legislation, and "the rights that provision confers on individuals"[85].
- National courts can conduct this balancing exercise on a case-by-case basis[86].
- To say that the mere risk that access to documents from a leniency file would in itself undermine the leniency programme cannot be justified[87].
- The fact that such refusal by a leniency applicant may circumvent a damages action "to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused"[88].
- The only exception is if there is a risk that the document may "undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified"[89].

2.3. Implications of the judgment

The CJ's judgment in *Donau Chemie* can be seen as a victory for potential damages claimants especially where national laws provide a blanket restriction to access leniency documents. However, the Court did not stray any further

[82] *Donau Chemie CJ*, para 33.
[83] *Pfleiderer ECJ*, paras 30 and 31, and reiterated in *Donau Chemie CJ*, para 9.
[84] *Donau Chemie CJ*, para 27.
[85] *Donau Chemie CJ*, para 31.
[86] *Donau Chemie CJ*, para 47.
[87] *Donau Chemie CJ*, para 46.
[88] *Donau Chemie CJ*, para 47.
[89] *Donau Chemie CJ*, para 48.

from *Pfleiderer* and merely reiterated the weighing of interests test to be decided on a case-by-case basis and in some respects, on a document-by-document basis[90]. The *Donau Chemie* ruling has not properly defined the criterion in this weighing exercise. Measuring the public interest in relation to the principle of the effectiveness of leniency also requires a proper assessment standard, which was not addressed in this ruling. It also appears that the competition authorities bear the burden of proving the public interest test. There is also no guarantee to prospective leniency applicants regarding the certainty of the confidentially of their documents. The court provided in *Donau Chemie*, just like in *Pfleiderer*, a broad approach without the comfort of clarity to either the leniency applicant or the damages claimants. This case does show that it is becoming more accessible for damages claimants to obtain access to leniency documents, and that the competition authorities cannot provide a leniency applicant with an absolute assurance that their information will be protected.

3. *National Grid*[91]

3.1. Background

The *National Grid*[92] case was brought to the Chancery Division of the English High Court which had to evaluate whether confidential documents given to the European Commission (hereafter: EC) could be disclosed to a potential damages claimant. National Grid Electricity and Transmission (NGET) wished to bring damages against those[93] involved in the Gas Insulated Switchgear cartel. A 750million Euro fine was imposed upon the cartel members by the EC. NGET requested these documents arguing that disclosure was needed so that it could collect as much information as possible in preparation of its follow on damages claim. The documents in question comprised the confidential version of the EC's report. Some of the documents were disclosed to NGET, but the company argued that it required more information still[94].

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[90] *Donau Chemie CJ*, para 47.

[91] *National Grid Electricity Transmission Plc v ABB Ltd*, Chancery Division, [2012] EWHC 869 (Ch).

[92] *National Grid Electricity Transmission Plc v ABB Ltd*, Chancery Division, [2012] EWHC 869 (Ch).

[93] Some of the parent companies involved in the cartel were ABB, Siemens, Alstom and Areva. ABB was granted immunity from the fine in terms of the Commission's 2002 Leniency Notice.

[94] See para 7 citing the High Court judgment [2009] EWHC 1326 (Ch) rejecting the defendant cartels' application to stay the proceedings.

3.2. High Court ruling

Justice Roth of the English High Court invited the EC to make oral submissions on the following points:

(1) Whether *Pfleiderer* applies to the disclosure of leniency documents in the context of a decision of the EC?

(2) Whether national courts have the jurisdiction to hear matters related to the disclosure of leniency documents or whether this request could only be made to the EC in relation to Article 15(1) of Regulation 1/2003, OJ 2003 L1/1?[95]

(3) If national courts do have such jurisdiction, what factors should they take into account to weigh the interests of the parties as indicated in *Pfleiderer* paragraphs 30-31?[96]

After hearing the arguments, Justice Roth's response was that:

(1) *Pfleiderer* had a broad appeal, which was not limited to national leniency programmes only. He emphasized that it was not the EC who suggested that there was any policy reason to give *Pfleiderer* a more restricted interpretation. He found that the ECJ's judgment did not allow for any qualification. Consequently, *Pfleiderer* applies with equal force to both the EC's leniency programme and that of NCAs'[97].

(2) Justice Roth made it clear that national courts did have the jurisdiction to rule on the disclosure application. He said: "there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents"[98]. He agreed with the EC that there is nothing precluding Member States from adopting their own rules relating to the disclosure of leniency materials. He added that to rule otherwise would create a huge burden on the EC if every disclosure application for leniency documents had to be referred to the EC, and if there were potential appeals, it could lead to substantial delays in finalizing these cases[99].

(3) He considered the weighing exercise proposed by *Pfleiderer* by taking note of the fact that this is not a simple exercise "because the considerations that apply on the two sides are of a very different character, although it has similarities to the task of the court where

[95] Article 15(3) gives the NCAs and the EC the right to submit written submissions to the local/national courts of the Member States for matters in relation to Article 81 and 82 (now Article 101 and 102) European Treaty.

[96] *National Grid*, para 18.

[97] *National Grid*, para 26.

[98] *National Grid*, para 28.

[99] *National Grid*, para 29.

a claim to public interest immunity is raised"[100]. In his application, Justice Roth took several factors into account:

(a) He said that consideration must be given to the actual documents sought. In this case, NGET requested access to certain extracts that were incorporated into the EC's decision as well as certain replies and requests for information and explanations. It did not ask for all documents related to the leniency application[101].

(b) Some of the defendants argued that leniency applicants have a legitimate expectation that their documents would be protected. He stressed that the programme did not offer any legitimate expectations to leniency applicants that their documents would be protected from disclosure to third parties[102].

(c) All parties to the cartel are equally liable for the wrongdoing. Therefore, disclosing the leniency documents would not increase the leniency applicant's legal liability to a greater extent than of those parties who were not granted leniency[103].

(d) He considered factors such as the amount of the fine that the leniency applicant avoided by applying for leniency, the duration for which the cartel had been in operation, the gain attained by the cartel members, the alleged loss suffered by NGET, and the difficulty for the damages claimant to access evidence required to substantiate its claim or to establish causation between the prohibited practice, the damage and the quantification of damages[104]. These factors were weighed against the "potential effect of a disclosure order" in this case, and the deterrent effect it may have on potential leniency applicants in other cartels which are yet to be uncovered. If this is a company's main concern for not racing to the door to apply for leniency, it is a huge risk to take. Another cartel member could come forth and apply for leniency, thus uncovering the cartel. The company who decided not to apply for leniency will thus be exposed to higher fines and potential civil damages claims[105]. He assessed the proportionality of these factors in the following terms: "(a) whether the information is available from other sources, and (b) the relevance of the leniency materials to the issues in this case."[106]

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[100] *National Grid*, para 30.
[101] *National Grid*, para 31.
[102] *National Grid*, para 34.
[103] *National Grid*, para 35.
[104] *National Grid*, para 37 and 40.
[105] *National Grid*, para 37.
[106] *National Grid*, para 39.

(e) Justice Roth qualified that even if the claimant could obtain the requested documents from other sources, there is no guarantee that it will be able to use those documents because cartel documents are usually known to be "opaque or literally, cryptic"[107]. It is thus better to rely on information given to the EC, which is probably more reliable[108]. However, this does not mean that all information requests should be granted without considering the "countervailing factor[s] to be weighed against disclosure"[109]. "It is necessary to ascertain whether the particular documents or parts of the documents are of such potential relevance that specific disclosure should be ordered"[110]. Not all documents requested are relevant for the claimant's purpose. Accordingly, it would be wrong to order disclosure of all leniency materials without a proper examination of them all[111].

After inspecting the documents, Justice Roth observed that the decision of the EC could be distinguished from other documents access to which was sought. Some of the information that was redacted in the decision's non-confidential version related to confidential commercial information obtained from company statements. This would not have any effect on the leniency applicant's defence to the damages claim as it was already covered by the "confidentiality ring"[112]. He concluded that only a partial disclosure of the documents should be allowed[113].

3.3. Implications of the judgment

This judgment shed more light on the factors to consider when conducting the weighing exercise. However, it is noted that the weighing exercise was based on the facts peculiar to this case and should not be used as a definitive template. The weighing exercise as said in *Pfleiderer*, should be done on a case-by-case basis.

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107 *National Grid*, para 50.
108 *National Grid*, para 43.
109 *National Grid*, para 52.
110 Ibid.
111 *National Grid*, para 52 and 55.
112 *National Grid*, para 57.
113 *National Grid*, para 58.

4. *CDC Hydrogen Peroxide*

4.1. Background

The applicant, CDC Hydrogen Peroxide Cartel Damages Claims[114], was formed in order to institute damages against a cartel in the hydrogen peroxide industry were the EC fined 9 companies 338million Euro for price fixing[115]. In its quest to recover damages, CDC asked the EC for "full access to the statement of contents of the case file in the hydrogen peroxide decision"[116]. CDC requested the non-confidential version of the index of content relying on Article 4(2) of the Transparency Regulation[117]. This information would have helped CDC in the discovery process of identifying documents that the cartelist held, which could be used to strengthen their civil case. The EC raised exceptions to the Transparency Regulation and denied CDC access to the requested documents on the grounds that it could not disclose the companies' confidential commercial information and to do so would undermine the leniency process and investigation. The CDC turned to the General Court (hereafter: GC) asking for disclosure.

4.2. The General Court outcome

The GC dismissed the exceptions raised by the EC. The Court considered whether the index to the file, which was requested by the damages claimant, constituted protected commercial interest information. It held that the index itself was not submitted by the leniency applicant, and does not contain any information that could prejudice its commercial interests[118]. The usefulness of that information to further the claimant's case is a question that would be raised during the discovery process in the civil case[119]. Protecting the commercial interest of documents should not allow for the leniency applicant to avoid facing civil damages claims[120].

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[114] GC judgment of 15 December 2011 in Case T- 437/08 *CDC Hydrogen Peroxide Cartel Damages Claims (CDC Hydrogen Peroxide) v European Commission* [2011] ECR II-08251 (hereafter: *CDC*). CDC is a company called Cartel Damages Claims that brings actions on behalf of cartel victims.

[115] Commission Decision of 3 May 2006 in Case COMP/F/C.38.620 (2006) OJ L 353/54 (hydrogen peroxide decision).

[116] *CDC Hydrogen Peroxide*, para 1.

[117] Regulation (EC) No. 1049/2001, which allows the public access to European Parliament, Council and European Commission documents ([2001] OJ L145/43) (Transparency Regulation).

[118] *CDC*, para 45 and 70.

[119] *CDC*, para 47.

[120] *CDC*, para 49.

The EC submitted that the case may be appealed and thus disclosure would not be appropriate at this stage. The GC found that the EC's investigation was complete and said that even if the case went on appeal, this does not mean that access to the index should be denied[121].

The EC raised concerns that disclosure would undermine the leniency programme as potential applicants would not cooperate. The GC dismissed this argument saying that the leniency policy did not deserve any higher level of protection than a damages claim as both private and public enforcement contributed to deterring cartel conduct.

4.3. Implication of *CDC Hydrogen Peroxide*

Although the Commission jealously guarded every piece of information relating to the leniency case, including the index to its case file, this case raises further issues of uncertainty. Perhaps this specific request to see the index may not have been the ideal point to make for the EC in protecting access to documents. The index could clearly not be seen as confidential commercial interest information that would be used at a later stage. This case, like the others, emphasized the fact that the damages claimants have just as big a role to play in enforcement of cartels as leniency. Their requests should not be easily disregarded and dismissed.

V. The USA approach

In the United States a successful damages claimant, who has been harmed by a cartel, is awarded treble damages. Being awarded three times what you have quantified in your claim is a great incentive to sue for damages. Leniency applicants could thus easily become target respondents for damages cases. American competition authorities were thus also concerned about protecting their leniency policy, especially since the policy has been immensely successful in uncovering cartels[122]. In order to incentivize the use of the programme, the US authorities enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which de-trebles the damages award. This means that a claimant is only entitled to single damages from a successful leniency applicant (and the leniency applicant is not jointly and severally liable, e.g. in the case of bankruptcy of a co-conspirator, which is very important, given the prevalence of "crisis cartels"), and the claimant can sue the other

[121] *CDC*, para 65.

[122] S. Hammond, "The Evolution of…", op. cit.

members of the cartel, who remain jointly and severally liable for treble damages[123]. A company being sued cannot recover its compensation from fellow co-conspirators[124]. The ACPERA incentive works well in the United States because of the parallel treble damages incentive. It also provides the leniency applicant some relief from civil damages in exchange for satisfactory and timely co-operation with the damages claimant[125]. Considering that there is no triple damages incentive in South Africa, it would not be possible to incorporate this solution directly into its law. However, it is worth considering.

Empirical evidence shows that the enactment of ACPERA has caused a minimal change in the number of leniency applications[126]. 78 leniency applications were submitted in the six-year period before the enactment of ACPERA in 2004, 81 applications were submitted during the six-year period after its enactment[127]. For those who did apply, there was a 6% increase of successful applications, especially in cases where the Department of Justice did not yet know about the existence of the cartel[128]. Although there is a slight shift of applications, ACPERA may have brought only slight relief to leniency applicants. The threat of criminal penalties still remains a greater incentive for these applicants to come forward to blow the whistle on the cartel[129].

Most importantly, it was found in the US Government Accountability office report that the information the damages claimant obtained through the co-operation in the ACPERA process helped to "streamline their cases by reducing the burden of long and costly civil discovery because leniency applicants provided a roadmap to the conspiracy"[130].

Through ACPERA, US authorities appear to have found a way to maintain the integrity of their leniency policy and destabilize cartels. Damages claimants can strengthen their case through the co-operation of the leniency applicant in exchange for a de-trebled damages award.

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[123] J. Green and I. McCall, "Leniency and civil claims" (2009) *Competition Law Insight* 3-5; S.W. Waller, "Towards a Constructive Public-Private Partnership to Enforce Competition Law" (2006) *World Competition* 367-381.

[124] *Texas Indus., Inc v Radcliff Materials, Inc*. 451 U.S. 630 (1981).

[125] ACPERA § 201–215. See also 2010 amendment to ACPERA Pub. L. No. 111–190 § 3, which added the "timeouts" requirement.

[126] United States Government Accountability Office (GAO), "Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection", Report to Congressional Committees, July 2011, GAO-11-619 p. 15 (otherwise known as the "GAO report").

[127] GAO report p. 16. "These data include both corporate and individual applications though the vast majority of applications submitted both before and after ACPERA were corporate leniency applications". Fn 40 GMO report.

[128] GAO report, p. 16.

[129] GAO report, p. 20.

[130] GAO report, p. 29.

VI. Finding the balance

There are a number of factors which can guide the process of finding a balance in weighing up the rights of damages claimants to access documents with the imperative to protect evidence gained through public enforcement. It should be noted that unlike in the EU or the US, damages claimants in South Africa have to wait for the outcome of the administrative decision – they must be issued a certificate by the Competition Tribunal before proceeding with a damages action. This might affect the balance.

The EC has consulted the public on how to encourage damages cases and proposed a procedure in the 2005 Green Paper and later in the 2008 White Paper. In June 2013, it issued a draft directive[131]. With regard to the disclosure of evidence, the EC calls for full protection of leniency documents, which cannot be disclosed even once the case has been finalized. This would apply to corporate statements, replies to requests for information, and other settlement submissions[132]. These documents are completely off limits and cannot be disclosed to third party damages claimants. This was also confirmed recently in the *Gas Switchgear Cartel* case where the CJ held that there was no overriding public interest on the part of a damages claimant to have access and use of the leniency documents[133].

The Proposed Directive gives some reprieve to the damages claimants if they would like a precise disclosure of documents, which would be substantively relevant to their case. These documents can only be disclosed after the competition authorities have finalized their case. National Courts are now given the discretion to determine the scope and cost of the disclosure request, whilst still protecting confidential and privileged information.

The EC Directive also proposes that a damages claimant can claim from the co-conspirators who will be liable jointly and severally for their conduct. The incentive to the leniency applicant is that it won't be liable for the entire compensatory amount, but rather, only liable for its own responsibility or share of the harm. The leniency applicant can be jointly and severally liable

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[131] European Commission "Proposal for a Directive of the European Parliament and of the Council on Certain Rules governing Actions for damages under National Law for infringements of the competition law provisions of the Member States and of the European Union" C(2013)3539/3.

[132] Ibid. at 4.2.

[133] CJ judgment of 10 April 2014 in Joined Cases C-231/11P, C-232/11P and C-233/11P and in Joined cases C-247/11P and C-253/11P *Commission v Siemens Österreich and Others, Siemens Transmission & Distribution v Commission, Siemens Transmission and Distribution and Nouva Magrini Galileo v Commission, Areva v Commission and Alstom and Others v Commission* (also known as the "Gas Switchgear Cartel" Case).

only if the claimant cannot recover the damages from other cartel members, albeit it seems this would only be allowed under exceptional circumstances[134].

VII. Conclusion

The South African competition authorities place considerable value on the CLP and indeed it has proven very effective in detecting cartel conduct[135]. It is therefore in their interest to protect the integrity of the policy. This becomes difficult in light of paramount public interest for third parties claiming damages to gain access to information which may help in establishing causation and the quantum of harm, in order to exercise their right to recover their losses. Private and public enforcement should be complementary tools for the eradication of cartels. However, this often results in a battle over access to the leniency information.

One outcome would be to find a perfect balance between suing the leniency applicant for damages (ability for follow on claims), versus partial leniency (such as in the US under ACPERA, where leniency applicants are still liable for single, but not treble damages), versus full leniency (with no follow on claims). Empirical evidence on ACPERA, which allows for some penalty, is still quite an encouraging incentive.

The South African courts have not had the opportunity to deal comprehensively with this dilemma, albeit some of these issues did come to the fore in the *AMSA* case. In this case, the SCA did find an interest in protecting the litigation privilege but did not have much choice regarding the disclosure of leniency information considering that the leniency applicant was mentioned in the referral document. This opened the door to disclosure, with AMSA and Cape Gate requesting information so that they could properly answer the CC's allegations. However, the case did not deal with the challenges facing a damages claimant.

It is thus worth looking to the EU for guidance on this. *Pfleiderer's* introduction of the principle of the weighing of interests, and its consideration of the principle of equivalence and effectiveness, introduced a new dimension to this debate. It could be argued that the ECJ could have taken the matter further by identifying the factors that should be considered by national courts when conducting this exercise, rather than leaving it in the discretion of the national judiciary on a case-by-case basis. This case should be lauded for

[134] Ibid. at 4.3.

[135] Annexure A is a list of cases, which have been successfully prosecuted as a result of the CLP.

entertaining the possibility that damages claimants could show that their interest in obtaining access to the documents to strengthen their case is worth serious consideration. The CJ agreed in *Donau Chemie* with *Pfleiderer's* weighing exercise and guarded against local laws that imposed blanket restrictions on the access to documents. *National Grid* went ahead to outline certain factors to consider, but keeping in mind that it was fact-based.

These cases appear to be leaning in favour of disclosing certain leniency documents to damages claimants, and not shutting them out completely. They have emphasized that private enforcement has just as big a role to play as public enforcement in eradicating cartels. The potential effect of the application of the CLP came into question and all courts were quite adamant that the programme did not offer a legitimate expectation that all evidence submitted by the leniency applications would remain undisclosed to third parties.

It was emphasized in *National Grid* that there is a greater risk in not applying for leniency (i.e. a greater financial risk of being fined by the competition authorities as well as the possibility of losing a damages case) than using the programme to obtain immunity. *National Grid* was also an important case after *Pfleiderer* by providing more guidance at the national level.

The *CDC* case illustrated that the competition authorities could be very conservative when it comes to the protection of leniency information. The authorities in CDC even tried to extend this protection to an index of a referral file. It remains to be seen whether companies would risk having their information being exposed to third parties and whether national courts would permit full disclosure to third parties without revealing business secrets and confidential company information.

The US does not offer much help in finding a balance because the existing legal incentives differ greatly. De-trebling of damages would be very encouraging to a potential leniency applicant. The EU and the US appear to be on the same page regarding joint and several liability of co-conspirators. The EU does take a step further with its exception allowing for joining of liability of the leniency applicant. This addition unfortunately allows for uncertainty to creep in.

The EC Proposed Directives are worth considering in the South African context. The national court rules may not directly apply because of South Africa's different legal structure. However, the provisions could still be considered. It does seem as though thesedirectives were in direct response to the Pfleiderer judgment. The EC is attempting to take a decisive stance and it would be interesting to see if it holds up in court. The directives closely protect information given within the leniency process, which is a step back from the judgments in *Pfleiderer*, *Donau Chemie*, *National Grid* and *CDC*. Indeed, all of the jurisprudence employs a balancing test, and understands

the position of damages claimants having asymmetrical information and the need to access leniency documents to strengthen their case. This is disquieting especially since the motivation behind the EC Green and White paper, and now the proposed directive, was to encourage more damages actions. Access to information that is available to damages claimants is quite limited in terms of the Proposed Directive.

At this stage it is uncertain whether South African courts would support the denial of access to leniency documents to uphold the integrity of the CC's leniency policy. It would be worrisome to think that they would have such a one sided view, especially when damages cases in competition law are still lacking, and claimants need to be incentivized and encouraged in South Africa so that they can get some reprieve. Hopefully, any recommendation issued by the Courts will seek to provide a balance between strengthening public enforcement and allowing damages claimants access to justice in private enforcement cases.