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Private Enforcement: Where Do we Stand? - An Update of the State of the Art

DISCLOSURE OF LENIENCY CORPORATE STATEMENTS AND SETTLEMENT SUBMISSIONS

Roberto Baratta[1, 2]

1. INTRODUCTION

Despite its call for removing the existing obstacles to ensure the effectiveness of the EU right to compensation ('full compensation' for any natural or legal person),[3] Directive N° 2014/104/EU provides for a systemic protection from disclosure of leniency corporate statements and settlement submissions. They are blacklisted, so to speak. Indeed, Article 6(6) sets out that "*Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: (a) leniency statements; and (b) settlement submissions.*"

While the scope of this provision is relatively limited, recital No 26 amplifies it: "*exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents*". Yet recitals are not meant to have a normative role.[4] As a result, Member States should not be required to implement the blacklist accordingly. Recital No 26 is nonetheless an interpretative means of Article 6(6) capable of enlarging its scope to the extent that national authorities implement or apply it.

The overall impression is that the Directive enhances the attractiveness of early applications under leniency regimes even in terms of limiting the liability of the recipient of immunity for the harm it caused. This might ultimately accentuate the *divide* between cartel members and whistle-blowers. It seems that the Directive's rationale is to protect the vital role of public authorities in antitrust infringements, with private enforcement being a complementary means.[5] In that perspective, preventing the disclosure of leniency statements or settlement submissions – while offering a tool to enlarge its scope in interpretative terms – is a consequential legislative choice. It is assumed that such a disclosure would have a detrimental effect on

[1] Professor at the University of Macerata.

[2] Article based on the speech given at the conference: "*The Interplay between Public e Private Enforcement in the Light of Directive 2014/104/UE*", Rome, 28 May 2015.

[3] See recital n° 13 of 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, Official Journal 5.12.2014 L 349/1.

[4] R. Baratta, 'Complexity of EU Law in the Domestic Implementing Process', *Theory and Practice of Legislation*, (3)2014, pp. 293-302, and namely the case law cited thereof.

[5] G. Muscolo, 'L'accesso alla prova e lo standard probatorio', *passim*.

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entities cooperating under the leniency and settlement programs.

2. The European Court of Justice Approach

The European Court of Justice ("ECJ") has pursued a different approach in terms of the interaction between public and private enforcement of competition law. In *Pfleiderer*, the Grand Chamber emphasised both the interests of protecting effective public enforcement of EU competition rules, on the one hand, and of guaranteeing the effective exercise of the right to full compensation for damages, on the other hand: in considering the application for access to documents relating to a leniency programme in order to obtain damages from another person who has been granted leniency, the national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of those documents 'only on a case-by-case basis … and taking into account all the relevant factors in the case'.[6]

The same holds true for *Donau Chemie*.[7] In this case, under an Austrian provision, access to documents was possible only if none of the parties to the proceedings objected to it. Thus, national judges could not take into account the fact that 'access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim for compensation'; as the ECJ underscored, that provision "*is liable to make the exercise of the right to compensation which those persons derive from European Union law excessively difficult*".[8] Certainly, rules on file access should not be applied to undermine public interests, such as the effectiveness of anti-infringement policies in the area of competition law, since leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective for ensuring the success of efforts to uncover and bring to an end infringements of competition rules, thus guaranteeing the enforcement of Articles 101 TFEU and 102 TFEU.[9] However, *access may not be systematically refused*: any request for access 'must be assessed on a case-by-case basis, taking into account all the relevant factors in the case': it is for the national courts 'to appraise, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of other possibilities it may have';[10] and secondly 'to take into consideration the actual harmful consequences which may result from such access having regard to public interests or the legitimate interests of other parties'.[11] The ECJ finally stressed that a non-disclosure provision "*is liable to prevent those actions from being brought, by*

[6] Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, ECR 2011, I-5161, paras. 30-31.

[7] Case 536/11, *Donau Chemie*, ECR 2013, 366.

[8] Ivi, para. 39.

[9] Ivi, paras. 41 and 42.

[10] Ivi, para. 44.

[11] Ivi, para. 45.

giving the undertakings concerned, who may have already benefited from immunity, at the very least partial, from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, 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. It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified".[12]

It seems reasonable to conclude that the ECJ aimed to counterbalance the so-called information asymmetry, which is a distinguishing feature of competition law litigation: the evidence necessary to prove a claim for damages is usually held by the opposing party or by third parties.[13] That is why it is often considered appropriate to ensure that the claimant is, in principle, granted the right to obtain the disclosure of evidence relevant to their claim.

3. The Relationship Between the Directive's Provisions and the Relevant Jurisprudence

One may expect that the principles held in *Pfleiderer* and *Donau Chemie* are to be applied even to the EU legislator. Admittedly, in both cases the ECJ *incidenter tantum* noted that EU law does not lay down common rules as regards the right of access to documents relating to a leniency procedure, which have been voluntarily submitted to a national competition authority pursuant to a national leniency programme.[14] Is it possible to argue that the Article 6(6) of the Directive, while assuming that the role of deterrence of antitrust infringements remains with public authorities, is somehow grounded on that *obiter dictum* so that it fills a gap left open by the ECJ? An in-depth analysis of the ECJ case law as a whole might suggest a more nuanced conclusion.

It is worth recalling that, according to the ECJ's settled case law, every individual enjoys the right to claim damages for losses caused to him by conduct that is liable to restrict or distort competition.[15] The ECJ's approach may be interpreted in the sense that the right to full compensation is guaranteed by the Treaty, it being an inherent part of the *acquis*. Indeed, the Court has held that actions for damages before national courts can make a significant

[12] Ivi, paras. 48-49.

[13] See C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, OUP, Oxford, 1999, p. 248: this author points out that the greatest practical challenge to private antitrust litigation in Europe is the difficulties of gathering evidence.

[14] See cases *Pfleiderer*, cit., *supra* fn. 4, para. 20, and *Donau Chemie*, cit. *supra*, fn. 5, para. 25.

[15] See case C-453/99 *Courage and Crehan* ECR 2001, I-6297, paragraphs 24 and 26, and joined cases C-295/04 to C-298/04 *Manfredi and Others* ECR 2006, I-6619, paragraphs 59 and 61.

contribution to the maintenance of effective competition in the European Union.[16] Additionally, the ECJ pointed out that the existence of such a right strengthens the efficacy of the EU competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. It is worth recalling that one of the main obstacles to a more effective system of antitrust damages actions relates to obtaining the evidence needed to prove a case.[17] In *Courage and Crehan*, the ECJ clearly stated that "*there should not be any absolute bar*" to action for damages 'being brought' by a party claiming compensation for violation of competition rules.[18] *Pfleiderer* (and subsequently *Donau Chemie*) complemented this jurisprudence. As pointed out above, it weighed the respective interests in favour of disclosure of the information, *i.e.* the right to full compensation, against the ones in favour of the protection of that information provided voluntarily by the applicant for leniency, *i.e.* the interest of protecting effective public enforcement, *only on a case-by-case basis, while taking into account all the relevant factors in the case*. It is noteworthy that the ECJ did so in *Pfleiderer* despite the fact that General Advocate Mazak seemed to suggest quite a different solution, according to which 'access to voluntary self-incriminating statements made by leniency applicant should not, in principle, be granted'.[19]

4. Conclusions

As regards the black list – although restrictively implemented – the problem is whether it fits the underlying EU principles reflected in the ECJ case law whenever such a prohibition is liable to permit the whistle blower to circumvent its obligation to compensate for the harm resulting from the infringement, to the detriment of the injured parties, *without* considering if there is *in the specific case* a real risk of actually undermining the public interest relating to the effectiveness of the national leniency programme. Indeed, according to the ECJ, only if there are overriding reasons that disclosure adversely affects the public interest relating to the effectiveness of the leniency programme can the non-disclosure of a given document be justified.

Unless the black list leaves enough room for accessing information voluntarily disclosed by the applicant for leniency, a potential collision with the ECJ case law might arise. Put differently, insofar as injured parties do not retain sufficient alternative means by which to obtain access to the relevant evidence they need in order to lodge an action for damages, such as for instance 'pre-existing information', the exemption laid down in Article 6(6) may amount to a legal immunity from liability and

[16] *Courage and Crehan*, cit., para. 27.

[17] Cf. Green Paper on damages actions for breach of the EC antitrust rules (COM(2005) 672 final.

[18] *Courage and Crehan*, cit., *supra* fn. 13, para. 28.

[19] Case C-360/09 *Pfleiderer AG*, cit. *supra* fn. 4, para. 46.

ultimately from any form of judiciary control. In this situation, one may question the coherence of the provision with the right to compensation, which derives directly from the Treaty. This right should be effective. Having no access to evidence can mean that victims of a competition law infringement, who are seeking compensation for harm suffered, are prevented from bringing actions before national judges. The right to compensation appears far from being effective in that situation.

In other words, Article 6(6) of the Directive raises an issue in terms of the right to access to justice if it is, in specific situations, tantamount to making a judicial action practically impossible or fair compensation excessively difficult to achieve. What if, in a concrete situation, this absolute protection for those two types of documents, which is definitely biased in favour of the public interest, negates the individual's legitimate claim for compensation? What if, in other words, access to all other documents in the course of an antitrust procedure does not suffice for the victims to establish, for the purposes of a private action for damages, the existence of an illegal act in breach of competition law, the damage caused to those victims or the casual link between the damage and the breach? Would that normative solution not run counter to the fundamental right to an effective remedy? An absolute privilege may cause harm to the rights of persons who claim compensation but have no others means to obtain the related evidence. Preventing disclosure under any circumstances may, in some specific cases, entail a sort of immunity from judicial control over competition infringements, affecting access to justice, which is an integral part of the rule of law principle on which the Union is founded (Article 2 TEU).

This is not to say that some protection of documents relating to leniency statements and settlements submissions is not an important tool for ensuring the proper functioning of the public enforcement of competition rules. It is a legitimate objective being pursued by the EU legal order. The problem is whether an absolute denial of disclosure is proportionate; or in other words, whether this strong protection from disclosure does not restrict or reduce the access to justice for individuals in such a way or to such an extent that the very essence of the same right is impaired. The right to effective judicial protection is laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, as well as under Article 6 of the ECHR. Access to justice, as a fundamental right of the EU legal order, as well as of the ECHR, should not be theoretical or illusory, but practical and effective, as is routinely underscored. Therefore, it is questionable whether the Directive's approach would stand up to challenges on the grounds of EU fundamental rights, whenever parties to litigation are prevented from obtaining documents which are critical to their capacity to bring a case and which they would, absent the Directive, otherwise have been entitled to pursue under domestic law.

To conclude, I personally would have felt more comfortable with a more nuanced normative

solution still based on the protection of public interests, but within a legal framework providing for either a judicial decision taken on a case by case basis and grounded on a balancing of different interests in the concrete situation, as the ECJ has suggested in its settled case law; or offering *alternative means*, such as for instance instructing experts to produce summaries of the protected information or perhaps reversing the burden of proof against the defendants profiting from a black-list, in order to effectively protect the legitimate rights of individuals claiming damages for loss caused to them by conduct liable to restrict or distort EU competition rules.