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9th ASCOLA Conference Warsaw 2014 on
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Mission impossible: access to agency information in antitrust litigation

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Warsaw, 26 – 28 June 2014

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Mission impossible: access to agency information in antitrust litigation

Sebastian Peyer*

Abstract

The growth of private antitrust litigation in the courts of the Member States creates tensions between claimants seeking access to confidential records held by competition authorities and agencies trying to maintain confidentiality of those files. To encourage firms to voluntarily come forward with information, agencies promise to keep information secret in order to limit potential exposure to civil liability in subsequent 'follow-on' private damages cases. This promise conflicts with the interests of potential claimants seeking access to information to support their claims. This paper analyses two main access routes for confidential information in the files of competition agencies. It first looks at the legal standard for access under the Transparency Regulation 1049/2001 and the framework for access in the national courts laid out in *Pfleiderer*, *Donau Chemie* and the Damages Directive. This paper finds that both legal tests have converged. These access routes tend to favour the protection of agency files by creating rather high legal thresholds for disclosure. The paper argues that this raised standard for access is in line with a policy change regarding private antitrust enforcement. EU policy makers and have begun to moderate the principle of effective redress as expressed in *Courage* and *Manfredi* to reduce repercussions for public enforcement. This new policy corrects some of the flaws of private antitrust enforcement policy in Europe.

Key words: Competition law; Private antitrust enforcement; Damages Directive; damages actions; access to information; disclosure

JEL Code: K21, K40, K41

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I. Introduction

The European Commission and the national competition authorities of the Member States have developed enforcement practices that rely on cooperation with some or all firms under investigation. Settlements and amnesty procedures are used to shorten investigations and uncover concealed infringements. To encourage firms to voluntarily come forward with information, agencies promise the confidentiality of voluntarily submitted information, normally in an addition to a reduction of fines.[1] The European Commission and other agencies insist that the confidentiality of material obtained through cooperation is crucial to attract potential whistle-blowers.[2] If whistle-blowers risked an increased exposure to civil liability due to disclosure of voluntarily submitted information, it would offset the incentives created by the agency's amnesty programme or settlement procedure and, consequently, discourage companies from sharing crucial information with the law enforcers.

At the same time, victims of anticompetitive conduct seek to enforce their right to compensation, especially against companies that were previously found guilty of anticompetitive conduct by a competition authority. In these follow-on actions the competition authority has normally established the anticompetitive conduct. The infringement finding has probative value in most Member States and facilitates the bringing of follow-on claims.[3] The private party asking for compensation will still have to prove the loss suffered from the anticompetitive conduct and the causation between the breach of the competition rules and the loss. To prove loss and causation the claimant will often seek access to confidential information held by the defendants, the European Commission or national competition authorities. Claimants have made use of two major routes to gain access to, for example, leniency statements or other information collected by the European Commission.[4] They applied for disclosure of material directly from the European Commission according to the Transparency Regulation 1049/2001.[5] In some Member States victims also asked for the disclosure of documents from the defendants or national competition authorities through national procedural or disclosure rules.[6] The Court of Justice of the European Union (CEJU) has dealt with both access paths in recent decisions. In *EnBW* the CJEU interpreted Article 4 of the Transparency Regulation according to which some documents can be exempted from general public access.[7] This case also draws a line under

[1] *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, [2006] OJ C 298-17.
[2] See para 40 of the *Commission Notice on Immunity*. Joaquín Almunia, *Antitrust damages in EU law and policy* (Speech College of Europe GCLC annual conference, 07/11/2013), SPEECH/13/887.
[3] Article 9 of the proposed *Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* ((COM(2013)0404 – C7-0170/2013 –2013/0185(COD)) (Damages Directive) makes the final decision of a national competition authority effectively binding in national courts.
[4] For other potential access routes see Gianni de Stefano, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: a Fast Evolving Scenario" (2012) 5(3) Global Competition Litigation Review 95–110.
[5] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, [2001] OJ L /145- 43 (hereinafter Transparency Regulation). An alternative route to access is available through Article 15 of Regulation 1/2003. The national courts could request information from the European Commission. I will not further investigate this potential route for access.
[6] See, for example, High Court of Justice, *National Grid Electricity Transmission Plc v. ABB Limited and others* [2013] EWHC 822; Oberlandesgericht Hamm of 26 November 2013, 1 Vas 116/13 – 120/13 – 122/13.
[7] Case C-365/12 P *EnBW Energie Baden-Württemberg AG v European Commission*; for other cases under the Transparency Regulation see case T-437/08 *Hydrogene Peroxide Cartel Damage Claims v European Commission*

conflicting signals that had previously been sent from the European Courts. With regards to access through national procedure the CJEU has established a framework for the national courts to apply with its decisions in *Pfleiderer* and *Donau Chemie*.[8] This framework is to change with the adoption of the Damages Directive.[9]

This paper is going to scrutinise and compare the legal tests the CJEU has developed and the likely effects of the Antitrust Damages Directive. It will analyse these two distinct access routes and the changing policy towards access to information in private antitrust litigation. For both test the questions arises if and how documents can be accessed and what the level of protection is for documents from cooperating firms. Access to information is the crucial question in follow-on damages claims and the ease of access is likely to determine the jurisdiction for litigation against international defendants.[10] More importantly, the analysis of these different modes of access to confidential information demonstrates a policy shift regarding private enforcement in the European Union. The paper shows that the courts and the European Commission move away from an unlimited support of private follow-on actions towards a system of complementary stand-alone claims. This is evidenced by a move towards stricter requirements for access to information held by the competition authority – an issue that only occurs in follow-on actions.

The remainder of the paper is structured as follows: The next part assesses access to files under Regulation 1049/2001. Part III looks at the legal test for protection of information under national procedure (*Pfleiderer* and *Donau Chemie*), the implementation of this test in the UK, and the potential consequences of the Damages Directive. Section IV considers the policy change and its implications for EU private antitrust policy. Section V concludes.

II. Conditions for access to Commission documents under the Transparency Regulation

This section outlines the legal test for access to information developed under Article 4 of Regulation 1049/2001. It shows that the recent case law of the CJEU has raised the threshold for access to cartel-related information and that the interpretation of the Article 4 exemptions is likely to block disclosure request in competition proceedings. The Transparency Regulation grants a right to individuals to access public documents held by EU institutions. Public access to agency documents shall enable citizens to participate more closely in the decision-making process and increase the accountability of the administration:[11] "*The purpose of this Regulation is to give the fullest possible effect to the right of*

(CDC Hydrogene Peroxide) [2011] ECR II-08251; Case T‑344/08 *EnBW Energie Baden-Württemberg AG v European Commission*; Case T-380/08 *Netherlands v European Commission*.

[8] Access through national procedure: case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161; Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* [2013].

[9] Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[10] For the choice of jurisdiction in the EU see Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [2001] OJ L12.

[11] See recital 2 and 4 of Regulation 1049/2001.

public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty."[12]

The Transparency Regulation recognises a right to wide public access but it also restricts this right in situations where a prevailing public or private interest demands confidentiality.[13] These limitations determine whether or not individuals are to be granted access to confidential documents held by the European Commission. Article 4 states that institutions shall refuse access to documents where disclosure would undermine the protection of privacy and the integrity of the individual (Article 4(1)(b)) or where disclosure would undermine the protection of commercial interests, court proceedings and legal advice, or the purpose of inspections and investigations unless there is an overriding public interest (Article 4(2)).[14] These 'discretionary' exemptions require a balancing of interests.[15] In past proceedings the European Commission argued that the disclosure of files to third parties in competition law investigations would undermine the purpose of the investigation (third indent of Article 4(2)), the protection of the commercial interests of the undertakings concerned (first indent of Article 4(2)), and the institution's decision-making process (Article 4(3)).[16] The unclear scope of commercial interests and protection of the purpose of investigations has prompted the General Court (GC) and the CJEU to refine the reading of Article 4 in a number of cases, often related to competition law.[17] The CJEU had already outlined some elements of the narrow public access test under Article 4 with regards to state aid and merger proceedings.[18] In *Netherlands* and *EnBW* it clarified that these principles also apply to cartel proceedings,[19] quashing earlier decisions from the GC that had favoured a more lenient approach.[20]

The access test consists of three major elements. Firstly, documents do not need to be assessed on an individual basis with regards to disclosure.[21] The Court accepted that the Commission can define meaningful categories of documents that offer protection from disclosure for all documents that fall within a particular category. Secondly, the CJEU created a rebuttable presumption protecting all documents that fall within a particular category. It is assumed that the protection of commercial interests and the protection of the purpose of the investigation outweigh the right to public access.

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[12] Recital 4 of Regulation 1049/2001.

[13] Case C-266/05 *P Sison v Council* [2007] ECR I-1233, para 62; case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, para 53 and joined cases C-514/07 P, C-528/07 P, C-532/07 P, *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission*, [2010] ECR I-08533, para 70.

[14] For a general analysis of Article 4 see Dariusz Adamski, "How Wide is 'the Widest Possible'? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited" (2009) 46(2) Common Market Law Review 521-549.

[15] Adamski (n 14) 522,

[16] See, for example, case C-365/12 P *EnBW Energie Baden-Württemberg AG v European Commission*.

[17] Joined cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, [2008] ECR I-04723; *Technische Glaswerke Ilmenau* (n 13); case C-28/08 P *European Commission v Bavarian Lager Co Ltd*, [2010] ECR I-06055; *Sweden v API* (n 13); case C-506/08 P, *Kingdom of Sweden v European Commission and MyTravel Group plc*, [2011] ECR I-06237; case C-477/10 P, *European Commission v Agrofert Holding a.s.*; case C-404/10 P, *Commission v Éditions Odile Jacob*.

[18] *Technische Glaswerke Ilmenau* (n 13); *Éditions Odile Jacob* (n 17).

[19] *Netherlands* (n 7); *EnBW* (n 7). The request for access to information is based on Commission decision Commission Decision C(2006) 1766, *Gas Insulated Switchgear* (Case COMP/F/38.899), [2007] OJ C 75/19.

[20] The GC had made the case for a narrow reading of the Article 4 exceptions in *CDC* (n 7) and in the first instance decision in Case T-344/08, *EnBW Energie Baden-Württemberg AG v European Commission*.

[21] *Technische Glaswerke Ilmenau* (n 13), para 67; *Agrofert Holding* (n 17), para 47; *EnBW* (n 7), para 16.

Thirdly, it is for the applicant to show that the interest in disclosure outweighs the interest in protection. Thus, the court has shifted the burden of proof from the agency to the applicant. It is probably fair to say that the new test is a presumptive non-disclosure test.

The first step under the access test is to define the protected categories. The Court rejected a duty of the Commission to individually assess documents in cartel proceedings and overturned the earlier decision of the GC in *EnBW*. The General Court had held that the Commission did not assess the request "[…] *in a concrete, specific and detailed manner, the other options that might be envisaged in order to limit its workload, or the reasons which could allow it to dispense with any concrete, individual examination, instead of adopting, where appropriate, a measure less restrictive of the applicant's right of access*."[22] Interestingly, the CJEU favours a similar approach for information requests relating to internal documents in closed merger proceedings: "*[I]t is for the Commission to set out, in the decision to refuse access, the specific reasons, supported by detailed evidence, having regard to the actual content of the various documents sought, from which it may be concluded that the disclosure of those documents would seriously undermine that institution's decision-making process […].*"[23] However, with regards to cartel proceedings the CJEU opted for a stricter access rule. It allowed the Commission to assess groups of documents rather than to exam documents individually.

In light of the size of the Commission's records – in the *EnBW* case the file contained roughly 1,900 documents – the CJEU accepted the Commission's classification of documents into six groups:[24] 1) documents provided in connection with an immunity or leniency application, including statements and documents submitted by undertakings; 2) requests for information and the parties' replies; 3) documents that were obtained during inspections; 4) the statement of objections and the parties' replies to it; 5) internal documents relating to the facts, including background notes and correspondence (5a) and internal procedural documents (5b).[25] The threshold for sorting documents into these categories is a mere plausibility test.[26]

The categories as such do not protect documents from disclosure as they do not match the exceptions described in Article 4 of the Transparency Regulation. However, in a second step, the CJEU established a rebuttable presumption that documents in these categories relate to protected commercial interests or, if disclosed, may endanger the purpose of the investigation.[27] The CJEU stated that these two reasons for protection are closely related. The categories of documents and the disclosure exemptions provided for in Article 4 are outlined in **Table 1**.[28]

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[22] *EnBW* (GC) (n 20), para 107.
[23] *MyTravel*, (n 17) para 81; *Agrofert Holding* (n 17), para 76; see also *Éditions Odile Jacob* (n 17) para 129.
[24] The CJEU approved of different categories in merger proceedings (communications between Commission, notifying parties and third parties, on the one hand, and internal documents), see *Agrofert Holdings* (n 17), para 47.
[25] *EnBW* (n 7), para 16.
[26] The CJEU states that "[a]s a consequence, since it found that it was 'plausible', in the light of the explanations provided by the Commission before it, that many of the documents fell within category 5(a) in the file in question, it was not possible for the General Court, without erring in law, to criticise the Commission for failing to show specifically how those documents were covered by the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001." *EnBW* (n 7), para 115.
[27] *EnBW* (n 7), para 78.
[28] This table is based on *EnBW* (n 7).

[Insert **Table 1** about here]

All categories in **Table 1**, apart from category 5b, are protected from disclosure by at least two exemptions. Commercial interests and the risk that disclosure would undermine the purpose of the investigation are presumed to outweigh the applicant's interest for categories 1 to 4. The most powerful exemption for rejecting access to documents is arguably that the release of information would undermine the purpose of the investigation. This exception applies to all classes of documents. In the past, the GC and the CJEU disagreed on how to interpret the purpose of the investigation. The GC preferred a narrow reading in two earlier decisions,[29] referring to the particular investigation in question. It held that once a decision is handed down, the purpose of this investigation can no longer be compromised by, for example, making a confidential version of the contents of the file accessible.[30] The General Court held that the purpose of this exemption is not to protect the investigation as such but the purpose of a specific investigation into anticompetitive conduct.[31] These arguments did not convince the CJEU.[32] Documents can be accessed only when the decision is final and all appeals have been dealt with:

"Contrary to the General Court's finding […], a proceeding under Article 81 EC cannot be regarded as closed once the Commission's final decision has been adopted irrespective of any possible future judgment by the EU judicature annulling that decision. [T]he annulment of such a decision may lead the Commission to resume its investigations with a view to adopting, if appropriate, a new decision on the application of Article 81 EC […], and may therefore lead that institution to reuse information in the file relating to the annulled decision or to supplement the file with other information in the exercise of the powers conferred on it by Regulation No 1/2003. Consequently, investigations relating to a proceeding under Article 81 EC may be regarded as completed only when the decision adopted by the Commission in connection with that proceeding is final."[33]

Consequently, all categories outlined in Table 1 are presumed to fall under the protection of Article 4(2) third indent, according to which a disclosure of documents would undermine the purpose of the investigation *for the entire time span* of any potential appeal proceedings. A typical cartel case in the European Union takes about a decade from the time the investigation starts until the end of the appellate process.[34] Unless the period of limitation for bringing a claim in the national court is suspended, this would bar follow-on damages actions against cartels in most Member States.

If applicants successfully disprove the purpose of investigation concern, they will have to rebut the presumption that documents contained in categories 1 to 4 protect commercial interests. Commercial interests are defined broadly, including information such as "[…] *the commercial strategies of the*

[29] *CDC* (n 7); *EnBW* (GC) (n 20).
[30] *CDC* (n 7) para 62; *EnBW* (GC) (n 20), para 119.
[31] *CDC* (n 7) para 59.
[32] *EnBW* (n 7), para 98.
[33] *EnBW* (n 7), para 99.
[34] Christopher Harding, Alun Gibbs, "Why Go to Court in Europe? An Analysis of Cartel Appeals 1995-2004" 30(3) 2005 European Law Review 349, 364.

undertakings concerned, their sales figures, their market shares or their business relations […]."[35] The Court further states that "[…] *the exceptions relating to the protection of commercial interests and the protection of the purpose of investigations are, in such a procedure, closely connected* […]."[36] The Commission argued for an even wider interpretation of commercial interest excluding documents from the applicants reach that contain "[…] *information on the commercial activities of the undertakings concerned, to which those undertakings would not have granted access in that form outside cartel proceedings."*[37] In essence, the Court declared all information 'commercially sensitive' that would be relevant to prove a potential damages claim against the firms under investigation. The close connection between commercial interests and information that could undermine the purpose of the investigation strengthen the presumption of non-disclosure.

Finally, the applicant has to demonstrate that a specific document is not covered by the presumptions, or that there is an overriding public interest in disclosure of the document, rebutting the presumptions.[38] The applicant's interest outweigh the presumption of protection if he can show that it is *necessary* to access the Commission's file. The case law does not specify what is deemed necessary in order to access the information in the Commission's records. The mere fact that the applicant intends to initiate litigation for the loss suffered from breaches of Article 101 TFEU or an interest in obtaining compensation does not constitute an overriding public interest.[39] The necessity test lacks contour and probably works in favour of the authority because, in the words of the Court, "[…] *there is no need for every document relating to a proceeding under Article 81 EC to be disclosed to that claimant on the ground that that party is intending to bring an action for damages, as it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to that proceeding* […]."[40] The Court had made this statement earlier in *Donau Chemie*, a case dealing with access to confidential information in national disclosure procedures.[41] The CJEU finds no inconsistency between this statement and the right to compensation for the violation of EU competition law it had expressed in *Courage* and *Manfredi*.[42] In these case it was stressed that every individual has an effective right to redress in the national courts.

This reading of Article 4 of the Transparency Regulation is likely to reduce the appetite for the contents of the Commission's file and, consequently, the incentives to bring follow-on damages actions. The Court justifies the broad reading of the exceptions with the need to consistently apply Regulation 1049/2001 with Regulations 1/2003 and 773/2004.[43] The latter two instruments provide for specific access rights during competition law investigations. The Court made clear that there is no ranking between the Regulations. However, the CJEU tied the interpretation of Regulation 1049/2001 to the reading of the more specific access rights laid out in Regulations 1/2003 and 773/2004.[44] It would have

[35] *EnBW* (n 7), para 79. See also *Netherlands* (n 7), para 34.
[36] *EnBW* (n 7), para 79.
[37] *EnBW* (n 7), para 53.
[38] *EnBW* (n 7), para 100; *Technische Glaswerke Ilmenau* (n 13), para 62; *Éditions Odile Jacob* (n 13), para 126; case C-477/10 P, *Agrofert Holding* (n 17), para 68.
[39] *EnBW* (n 7), para 108.
[40] *EnBW* (n 7), para 106.
[41] *Donau Chemie* (n 8), para 33. See also subsection III.
[42] *Courage Limited v Bernard Crehan*, C-453/99, [2001] ECR I-06297; *Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECR I-6619.
[43] This argument was also brought forward in earlier cases. *Éditions Odile Jacob* (n 13); *Agrofert Holding* (n 17).
[44] *EnBW* (n 7), para 86.

been more helpful, if the CJEU had made a distinction between closed investigations to which the Transparency Regulation applies and open investigations and appeal proceedings that are affected by the provisions in Regulations 1/2003 and 773/2004. Article 27(2) of the Modernisation Regulation 1/2003 allows firms under investigation to access the Commission's files without business secrets of other companies and internal documents. Information received during investigations must not be disclosed according to Article 28 of the Modernisation Regulation. Articles 6, 8, 15 and 16 of Regulation 773/2004 govern the complainant's access to information as well as access for those parties issued with a statement of objections. Similarly to Article 27(2) of the Modernisation Regulation, business secrets, internal documents and communication between the competition authorities are to be protected from disclosure. From those provisions the CJEU draws the conclusion that parties involved in antitrust proceedings generally enjoy restricted access rights and that the Transparency Regulation has to be interpreted accordingly. It concludes that "*[i]f persons other than those with a right of access under Regulations Nos 1/2003 and 773/2004, or those who enjoy such a right in principle but have not used it or have been refused access, were able to obtain access to documents on the basis of Regulation No 1049/2001, the access system introduced by Regulations Nos 1/2003 and 773/2004 would be undermined […]*".[45] The CJEU's misses the point though. The competition-specific Regulations deal with proceedings that are on-going, i.e. proceedings in which the Commission has not yet handed down a decision or, at the very least, an appeal is still pending. A simple way of avoiding an imbalance of access rights would have been to grant access under the Transparency Regulation when an investigation has been closed with a decision. The CJEU acknowledges that the right to access under the Transparency Regulation is legally distinct from the other access rights. But it claims that these are comparable situations from a functional point of view.[46] This is a rather daring statement given that these Regulation govern entirely different situations.

It is also interesting to note that the Court disburdens the Commission from an individual assessment of documents under Article 4 of the Transparency Regulation, at least with respect to those group of documents that are protected by commercial interests and the purpose of the investigation.[47] For reasons of practicability this makes sense. Sensible categories allow the EU institutions to effectively and swiftly deal with requests for information without the need to explain why every single document contained in the request cannot be disclosed. The CJEU rightly rejected the GC's suggestion of an individual assessment of each document. This would have been unworkable in practice considering the size of the Commission's record. The problem is that the Court creates categories of documents *and* a presumption in favour of the protection of those documents. The former is not necessarily related to the latter. Given the Commission is allowed to create meaningful categories of documents, it is not inherent that a presumption of protection should be created at the same time. Furthermore, the width of the categories implies that there are not many documents left in the file the fall outside one of the document classes and that would be of interest to the claimant. The categories become meaningless if they cover almost the entire file.

The problem with these categories is not only that they are rather broad, this author submits that the categorisation of documents is also flawed. The CJEU should have divided the files into three groups

[45] *EnBW* (n 7), para 88.
[46] *EnBW* (n 7), para 89.
[47] This may differ for internal documents. See *MyTravel*, (n 17) para 81; *Agrofert Holding* (n 17), para 76; see also *Éditions Odile Jacob* (n 17) para 129.

depending on the type of submission. The first group should relate to documents that are submitted voluntarily. The second group should consist of files that are submitted by firms under investigation exercising the right to defend themselves, i.e. mainly responses to the statement of objections. Finally, the last bracket of files are those that are retrieved via compulsory process, e.g. dawn raids, or that relate to situations where the companies are obliged to respond, e.g. requests for information. The first group of documents does not deserve protection whereas for the latter two groups protection should be mandatory. Voluntary submissions are based on a cost-benefit analysis. Companies willing to submit information will normally take into account the possibility of disclosure and potential exposure to civil liability in follow-on damages actions. As successful leniency applicants receive a discount on the fine of up to 100 per cent, they do not deserve further protection. If, on the other hand, firms are either obliged to hand over documents or exercise their right of defence, information should be protected. Firms have less control over these documents and they will not be able to make a decision regarding submission of information based on a cost-benefit analysis. It is not apparent why voluntarily submitted information should obtain the same level of protection as information that had to be handed over to the Commission. The former is part of a bargain and firms should take private actions into account before offering information.

Overall, the CJEU's interpretation of Article 4 of the Transparency Regulation has effectively reversed the burden of proof as it is now for the applicant to show that access to a particular document is needed. The shifting of the burden from the Commission to the applicant makes it unlikely that documents will be revealed. In earlier cases the Commission had to demonstrate that the disclosure would, for example, seriously undermine its decision-making process.[48] In *EnBW* the CJEU made clear that this burden is now reversed and it is for the applicant to show that access is *necessary*.

III. Access to documents in the national courts

National disclosure provides an alternative path for access to documents held by the competition authorities. National rules in the EU Member States differ widely and cannot be exhaustively described in this article. This section focuses on the EU rules governing access to leniency documents in the national courts. It analyses the framework that the CJEU has created in the *Pfleiderer* and *Donau Chemie* rulings, and it will look at the application of the *Pfleiderer* test in the United Kingdom. Finally, this section is analysing the new Directive on Antitrust Damages because the Directive is going to alter the framework for access to documents in the courts of the Member States.

1. The framework

The CJEU laid out the rules governing access to confidential information in *Pfleiderer* and *Donau Chemie*, two preliminary reference made by a German and an Austrian court respectively. In the former case, the German court dealt with a national rule that permitted 'aggrieved parties' to access

[48] *Agrofert Holding* (n 17), para 76.

documents held by the German competition authority.[49] After the Federal Cartel Office partly denied the initial application, the national court dealing with the complaint asked the CJEU whether access based on the German rule was compatible with Articles 11 and 12 of Regulation 1/2003.[50] Articles 11 and 12 provide for close cooperation and the mutual exchange of information between the Commission and the national competition authorities of the Member States.[51] The CJEU held that leniency programmes serve the objective of effective application of Articles 101 and 102 TFEU.[52] The disclosure of leniency documents would undermine the effective application of EU competition rules. However, every individual has the right to claim compensation for harm suffered from a violation of EU competition rules.[53] This principles trumps an outright refusal to access leniency documents. Instead, national courts must weigh the arguments in favour and against a release of leniency documents and decide on a case by case basis whether access should be granted. While weighing the different interests the national courts must respect the principles of equivalence and effectiveness.[54] The principle of equivalence states that the rules governing the enforcement of the EU right to damages must not be less favourable than the rules governing the enforcement of a similar national right. The standard of effectiveness requires that a national rules must not make it practically impossible or excessively difficult to enforce a right.

In *Donau Chemie* the Court confirmed the case by case approach and, once more, rejected a presumption in favour of or against disclosure. This time a provision of the Austrian Cartel Law prohibited third-party access to the case files of the Cartel Court, containing *inter alia* leniency documents, without the consent of the parties concerned.[55] This provision overrode a more lenient access regime according to general civil procedural rules.[56] In fact, the Cartel Law created a *de facto* exclusion of disclosure in follow-on litigation. Parties to competition law investigations are unlikely to consent to a disclosure of documents that would increase their exposure to civil liability. The CJEU rejected the rigid Austrian rule because it is liable to make the exercise of the right to compensation excessively difficult.[57] The Court confirmed its earlier decision in *Pfleiderer* that the national court must weigh the different interests regarding disclosure.[58] A strict rule either prohibiting or granting access would undermine the effective application of the EU competition law rules.[59]

In these two decisions the CJEU has set out a weighing framework for national courts to apply. First, the Member States court must appraise the interest in obtaining access to the documents in

[49] Section 406e of the German Code of Criminal Procedure (Strafprozessordnung) permits access to documents held by a court. Section 46(1) of the Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten) applies these principles to administrative procedures, including *inter alia* proceedings before the German competition authority.
[50] The German court also sought advice on the compatibility with Articles 10(2) and 3(1)(g) of the Treaty establishing the European Community, [2002] OJ C325/1.
[51] *Pfleiderer* (n 8), para 17.
[52] *Pfleiderer* (n 8), para 25.
[53] *Courage* (n 42); *Manfredi* (n 42).
[54] *Courage* (n 42) para 47; *Manfredi* (n 42) para 62. See also joined cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1995] ICR 722, para 43.
[55] Section 39(2) of the Austrian Cartel Law.
[56] Section 219 of the Austrian Code of Civil Procedure.
[57] *Donau Chemie* (n 8), para 39
[58] *Donau Chemie* (n 8), para 30.
[59] *Donau Chemie* (n 8), para 31.

question.[60] Second, the potential harm that can be caused by access must be considered, especially with regards to opposing 'public interests' or the 'legitimate interests' of other parties.[61] It will not suffice to reject access due to "*[…] a risk that access to evidence […] may undermine the effectiveness of a leniency programme […].*"[62] On the other hand, the CJEU found that a refusal to access may be justified if access may 'actually undermine' the public interest relating to the effectiveness of the national leniency programme.[63] Competition authorities or opposing parties must show that there is more than risk of undermining effective public enforcement. Disclosure should be barred if it actually undermines public interests. Overall, the Court seems to skew the test in favour of access seeking third parties:[64]

> "[…] *the fact that such a refusal is liable to prevent those actions from being brought, by giving the undertakings concerned, who may have already benefited from immunity,[…] 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.*"[65]

In essence, national courts have to assess requests for disclosure on a case-by-case basis. The access seeking party will have to demonstrate that there is an (compensation) interest in obtaining access to the documents. Disclosure can be denied if the national court is satisfied that there is a legitimate interest in protection or, at the very least, a risk that actually undermines a public interest. The CJEU appears to impose a duty on the national courts to evaluate documents individually rather than to appraise categories of documents. The Court does not exactly specify what the legitimate interests are or what constitutes a public interest. It points out that EU law confers other rights on individuals worth protecting, including the right to protection of professional secrecy or of business secrets, or the right to the protection of personal data. While these are actual rights, the CJEU also considers pure interests as worthy of protection. In *Donau Chemie* it defines the protection of public enforcement, especially through cooperation with firms, as a public interest.[66] Ultimately, the Court has attempted to square the circle and in doing so replaced rather clear national rules with a harder to handle case-by-case approach.[67] It is left to the national courts to specify the requirements for access to documents. In the next section, I will look at the UK High Court and how it applied this ambiguous framework in the *National Grid* case.

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[60] *Donau Chemie* (n 8), para 44; *Pfleiderer* (n 8), para 30.
[61] *Donau Chemie* (n 8), para 45; *Pfleiderer* (n 8), para 30.
[62] *Donau Chemie* (n 8), para 46.
[63] *Donau Chemie* (n 8), para 49.
[64] See also Francesco Rizzuto, "The Procedural Implication of Pfleiderer for the Private Enforcement of European Union Competition Law in Follow-up Actions for Damages" (2011) 4(3) Global Competition Litigation Review 116-124.
[65] *Donau Chemie* (n 8), para 47.
[66] *Donau Chemie* (n 8), para 33.
[67] Amit Kumar Singh, "Pfleiderer: Assessing its Impact on the Effectiveness of the European Leniency Programme" (2014) 35(3) European Competition Law Review 110, 122.

2. The *Pfleiderer/Donau Chemie* test applied

One of the first national courts to apply the Pfleiderer framework, after the German court that had made the preliminary reference, was the UK High Court in the *National Grid* litigation. The claimant, National Grid, sought access to documents using civil discovery.[68] Claimants in the UK courts benefit from disclosure in the High Court of Justice and the Competition Appeal Tribunal (CAT).[69] Parties must disclose documents to each other which are or have been in their possession and that are material to the case (standard disclosure). Rule 31 of the UK Civil Procedure Rules (CPR) includes documents the claimant or defendant has inspected or has had the right to inspect.[70] The disclosing party is to reveal information that is both supportive of its case and potentially damaging.[71] General standard disclosure is broad but can be limited by, for example, more targeted disclosure relating to individual allegations or issues.[72] The scope of disclosure is also reduced by privileges the defendant can invoke. However, material that has been submitted to a competition authority for leniency or settlement purposes is not privileged under UK law. Privileges – mainly the legal advice and the litigation privilege – exclude only some information from being revealed, especially verbal or written messages exchanged between lawyer and client, and communication for the preparation of litigation.[73] Documents that competition authorities deem confidential such as responses to statement of objections, leniency and settlement statements or the confidential version of the decision are unlikely to benefit from these privileges. Thus, the courts must use *Pfleiderer* and *Donau Chemie* to determine the scope of disclosure.

In *National Grid* the High Court applied the *Pfleiderer* weighing test. National Grid Electricity Transmission operates the UK electricity network and claims to have suffered losses from the gas insulated switchgear cartel.[74] National Grid sought disclosure of confidential material from four corporate groups, including Areva, Alstom, Siemens and the leniency applicant ABB. The request included the confidential version of the Commission's decision, the responses to the Commission's statement of objections and the responses to information requests.[75] Justice Roth applied the CJEU's framework laid out in *Pfleiderer*. He found that this test applies to both documents held by the national competition authorities – as it was held in the CJEU's decision – and the European Commission, extending the scope of *Pfleiderer*.[76]

[68] *National Grid Electricity Transmission Plc v. ABB Ltd and others* [2012] EWCA 869 (National Grid II).
[69] The Competition Appeal Tribunal is a specialist court with currently limited jurisdictions for monetary follow-on claims. Section 19 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372) enables the CAT to order the production of documents.
[70] CPR 31.8(2).
[71] CPR 31.6.
[72] See the limited disclosure ordered by Justice Roth in *Infederation Ltd v Google Inc* [2013] EWHC 2295 (Ch).
[73] See also section 30 of the Competition Act 1998. The legal advice privilege does not cover in-house communication. Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR I-08301.
[74] *Gas Insulated Switchgear* (n 19).
[75] *National Grid II* (n 68).
[76] *National Grid II* (n 68), para 26.

The High Court developed a number of criteria that formed part of the weighing exercise.[77] It first asked whether the disclosure would increase the leniency applicant's exposure to liability compared to non-cooperating parties. Secondly, the High Court sought to determine whether the gravity and duration of the infringement outweigh the concerns about the deterrence of potential leniency applicants. Finally, the court stipulated that disclosure must be proportionate. For the proportionality test, Justice Roth took into account the relevance of the requested documents and whether the requested documents were available from other sources. He concluded that access to some redacted documents should be granted and ordered the release of information within a confidentiality ring. Justice Roth argued that all cartelists were co-defendants. Consequently, there was no risk that the leniency applicant would potentially be liable for the entire harm. If the release of documents would single out the leniency applicant as the only defendant and enable non-cooperating co-defendants to escape liability, this may argue against the disclosure of confidential files.[78] The serious nature of the cartel and its duration of almost 16 years also constituted factors in favour of disclosure.[79] The court was convinced that the information could not be obtained from another source without excessive difficulties for the claimant.[80] Mr Justice Roth inspected the material in question and decided that not all documents were relevant for a fair disposal of the claim. He ruled that the claimant is to gain partial access to the confidential version of the Commission's decision and limited access to ABB's response to the Commission's information request. The court did not find the other documents relevant or relevant enough to outweigh the confidentiality concerns. It was also held that the public enforcement proceedings were no longer ongoing despite pending appeals. For his rather access-friendly interpretation, Justice Roth relied on earlier Commission documents, in particular the Commission's White Paper on Damages Actions in which the Commission strongly support follow-on damages actions.[81]

The High Court's interpretation of the weighing test is interesting because it provides a clearer outline of factors that judges may take into account. The *National Grid* decision improved the vague standard provided for in *Pfleiderer* and *Donau Chemie*. Elements such as potential exposure to civil liability, the gravity of the infringement and the availability of evidence resemble something akin to a checklist that could be used to determine the strength of the access request. This test is more specific and provides some useful guidelines for access seeking parties and it is easier to judge the chance of success regarding access to documents. However, the clearer but also more lenient approach in the UK may soon be a thing of the past as the Damages Directive is going to impose a stricter regime on access seeking parties as we shall see in the next subsection.

3. The Directive on Antitrust Damages

[77] Roth J. dismissed the 'legitimate expectation of protection' as a factor to be taken into account. *National Grid II* (n 68), para 34.
[78] *National Grid II* (n 68), para 35.
[79] *National Grid II* (n 68), para 37.
[80] *National Grid II* (n 68), para 44.
[81] European Commission, "White Paper on Damages Actions for Breach of the EC Antitrust Rules" (Brussels 2008).

The Directive on Antitrust Damages that was recently adopted by the European Parliament will fundamentally change the framework for access to documents in the national courts.[82] The objective of the Damages Directive is to ensure more effective private enforcement actions by strengthening the right to compensation. It also aims at coordinating effective public and private enforcement.[83] The two main aims of the Directive are inconsistent with each other. Effective coordination of public and private enforcement is a euphemism for curtailing private enforcement when it interferes with agency activity.[84] Thus, the objective of effective compensation cannot be achieved without comprising the other objective, the effective coordination of both enforcement modes, and *vice versa*. This conflict becomes obvious regarding access to information – one of the main concerns of this piece of legislation.

Pursuant to the Damages Directive, the Member States are to introduce disclosure procedures in national laws specifically designed to alleviate civil enforcement of EU competition law rules.[85] National courts shall be given the powers to order the disclosure of evidence upon request of the claimant if the claimant has presented a reasonable justification for the request, the required documents are relevant, precisely defined (as much as possible) and the disclosure satisfies the proportionality test laid out in Article 5(3) of the Directive.[86] The proportionality test shall ensure that the disclosure of documents is reasonably limited. National courts must *inter alia* take into account the degree to which the claims is supported by available facts and evidence justifying the request. They must also weigh the scope and cost of disclosure, especially regarding non-specific searches for information (fishing expeditions). Finally, judges must consider whether or not the evidence "*[...] contains confidential information [...] and the arrangements for protecting such confidential information [...]*".[87]

Unlike general disclosure, the Directive severely limits discovery of material in the files of the competition authority according to Articles 6 and 7 of the Directive. Article 6 devises a more restrictive proportionality test for evidence held by the competition agency. The national courts must consider whether the access request has been specifically formulated with regards to the nature, object or content of the documents submitted to a competition authority, Article 6(4)(a). It must also factor in whether the access seeking party is claiming damages before a national court, Article 6(4)(b).[88] Finally, the test requires that the need to safeguard the effectiveness of public enforcement is taken into account, Article 6(4)(b). Article 6 of the Damages Directive also blacklists certain categories of documents from disclosure. It temporarily precludes access to information that is specifically prepared for the proceedings of a competition authority (Article 6(5)(a)), information the competition authority has drawn up and sent to the parties in the course of the proceedings (Article 6(5)((b)), and withdrawn settlement submissions. It is interesting to note that these categories are rather wide and are likely to incorporate most documents in the file of the competition authority that are relevant for would-be claimants. These categories also differ from the categories the European Commission had defined for

[82] The European Parliament adopted the proposal on 17 April 2014 and is expected to be approved by the EU Council of Ministers.
[83] Damages Directive, recital 6 and Article 1.
[84] See recital 6 of the Damages Directive.
[85] Article 5(1) Damages Directive.
[86] See Article 5 Damages Directive.
[87] Article 5(3)(c) Damages Directive.
[88] Article 6(4)(b) Damages Directive.

access requests under the Transparency Regulation 1049/2001.[89] The temporary protection is lifted when the competition authority's investigation is terminated with a decision or otherwise irrespective of appeals.[90] Once the temporary ban on disclosure is lifted, access seeking parties have to satisfy the strict proportionality test of Article 6(4)(a). Settlement submissions and leniency information enjoy absolute protection. These documents are permanently excluded from disclosure.[91] The Directive does not specify whether this level of protection applies to successful leniency applications only. Article 7 extends the protection to agency documents that are in the hands of third parties. It declares documents inadmissible in actions for damages that were gained from the competition agency through access to file requests.

Although it is quite speculative how this new test will pan out in the Member States, it is probably fair to say that it will shake up many civil law jurisdictions. It will also reduce the scope of access request due to the blacklists and strict proportionality requirements. In fact, the Directive creates a three tier test for the disclosure of agency documents in follow-on damages litigation: The courts will check the permanent blacklist first. Leniency documents and (successful) settlement submissions will never be revealed. If the access seeking party is interested in, for example, the statement of objections, the court will move on to the second stage, checking the temporary blacklist. If the investigation has been closed or the documents requested are not banned from disclosure, the court will finally apply the specific proportionality test for confidential information.

[Insert **Table 2** about here]

The changes outlined above are likely to raise the bar for future claimants regarding access to information. However, the protection of document is inconsistent as **Table 2** demonstrates. Most categories of documents will benefit from, at least, temporary protection (see group (2), (3) and withdrawn settlements in **Table 2**). The weakest protection is offered for internal document. They are drawn up by the competition authority but they are not normally being sent to the parties – a requirement for temporary protection. Consequently, they do not fall within the temporary protection category of Article 6(5)((b). The lack of temporary protection must be a mistake as these documents can reveal strategies of the competition authorities and should not be revealed. It seems reasonable that claimants should await the decision of the competition authority before internal records are released. It is even more surprising that documents gathered during inspections are not blacklisted. This type of material should be afforded greater protection because companies under investigation are forced to surrender these documents.[92] With respect to other confidential material, such as responses to the statement of objections and information requests, the Directive and the High Court have both adopted a temporary protection approach. As long as the investigation has not been concluded, access will be temporarily barred. The temporary exclusion of material from disclosure is sensible to avoid interferences between private and public cases. It should be noted that withdrawn

[89] See subsection II above.
[90] Recital 23 Damages Directive.
[91] Article 6(6) Damages Directive.
[92] See also my argument in subsection II.

settlement submissions are only temporarily protected. This puts pressure on companies to stick to their settlement proposals or otherwise fear the revelation of incriminating material. It poses some serious issues regarding the leverage the competition authorities gain in investigations.

The permanent blacklist approach regarding leniency and settlement documents seems to conflict with the case by case approach adopted by the CJEU and the High Court.[93] The CJEU clearly rejected any hard rule either in favour or against disclosure. It remains to be seen whether the Court is willing to acquiesce in the restrictions imposed by the Directive and the interference with judicial discretion. The CJEU may overrule this part of the Directive based on the rather clear wording in *Donau Chemie* and *Pfleiderer*. The Austrian rule in Donau Chemie effectively prevent access to documents and was declared incompatible with the principle of effectiveness and the right to compensation. This rule resembles Article 6(6) of the Directive which effectively prevents any disclosure of leniency documents. However, the CJEU may have left a loophole for stricter rules stating that "*[i]n the absence of EU rules governing the matter […]*" it is for the Member States to govern procedural rules.[94] This could be interpreted as an invitation to enact EU legislation in this area.

Other material that falls outside the first two columns in **Table 2** should be discoverable in civil proceedings. This will mainly apply to pre-existing documents. However, the Commission encourages the courts not to order the disclosure of information that has been supplied to the competition authority even if it relates to pre-existing information. If firms were forced to release those documents it could reveal the strategy of the competition authority and diminish incentives for the firms to cooperate. The Commission considers broad disclosure requests aiming at these materials disproportionate. In its recent *Google* decision the High Court did not share the Commission's assessment.[95] It preliminarily limited discovery to the pre-existing documents Google had gathered for the Commission's investigation. It argued that limiting discovery to these documents would be easier and less resource-intensive than wide standard discovery.[96] The planned restrictions on disclosure restrictions will reduce the scope of discovery for claimants in UK follow-on actions. Few government documents would be available unless the investigation has been closed. The unclear scope of the leniency and settlement document categories would further impede an assessment of what documents would still be available for disclosure. Under the current proposals, claimants in follow-on suits would be worse off compared to the existing discovery rules but it may create more legal certainty for firms that cooperate with competition authorities. Overall, the Draft Directive clearly limits the disclosure of documents in follow-on damages actions. In the next section I will show that this indicates a change in private antitrust enforcement policy.

IV. Policy change in the EU

Section II and III have documented a move towards a more restrictive framework for access to leniency documents and other agency information. The CJEU has heightened the standards for access under

[93] See section III.1.
[94] *Donau Chemie* (n 8), para 25.
[95] *Infederation Ltd v Google Inc* (n 72).
[96] *Infederation Ltd v Google Inc* (n 72).

the Transparency Regulation. The Damages Directive will expand the requirements for access to documents in the national courts. Consequently, claimants will struggle to obtain documents from the competition authorities in follow-on litigation. The restrictions outlined above apply to follow-on damages actions only. However, they stand for a broader change of policy, and their implications go beyond the access to information issue. This section will show that EU private antitrust policy has secretly modified its objective from an unlimited and undifferentiated support for private damages actions to a more nuanced support of private antitrust litigation.

For more than a decade, the CJEU and the European Commission have promoted private damages actions to enforce the EU and national competition law rules. The CJEU established an EU right to claim damages for the infringement of EU competition law in the *Courage* decision and maintained this principle in *Manfredi*.[97] Every individual should be able to claim compensation for loss caused by the breach of EU competition rules in the courts of the Member States.[98] The European Commission was particularly active in promoting (follow-on) damages actions as evidenced by the Commission's Green and White papers on damages actions.[99] Until recently this policy pursued a pure compensation aim. It argued that every individual should have access to effective remedies securing compensation in competition law cases. However, this policy was flawed. It ignored that damages are only one remedy that is available in civil litigation and, thus, against breaches of competition law. Litigation data and anecdotal evidence suggests that claimants make use of other remedies too.[100] Claimants in the Member States have sought primarily injunctions and invoked nullity against offenders. These remedies do not serve the aim of compensation but are nevertheless useful in stand-alone claims to prevent, for example, anticompetitive exclusionary conduct.[101] The focus on damages actions also led to a second problem. Antitrust damages actions are more often than not follow-on cases, i.e. cases that are brought after the competition authority has unearthed potential evidence about wrongdoing.[102] Follow-on actions increase the fine that is imposed on culpable firms but do not increase the detection rate by a great deal as they rely on known infringements.[103] On the other hand, follow-on actions create multiple issues regarding access to information that is in the files of competition authorities.

The CJEU and the Commission have implicitly acknowledged this problem. They have silently shifted the focus of antitrust damages actions. The new framework appears to favour stand-alone litigation rather than follow-on cases. It increases the obstacles for follow-on claimants to obtain evidence from competition authorities in the courts but, at the same time, eases the access regime for evidence that

[97] *Courage* (n 42); *Manfredi* (n 42).
[98] *Courage* (n 42); *Manfredi* (n 42).
[99] White Paper (n 81). European Commission, 'Green Paper - Damages Actions for Breach of the EC Antitrust Rules' (Brussels 2005) http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html#greenpaper accessed 26 May 2011.
[100] Sebastian Peyer, "Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence" (2012) 8 Journal of Competition Law and Economics 331–359. See generally for litigation patterns Barry J Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law International, Alphen aan den Rijn 2014).
[101] See, for example, the injunction granted by the High Court of Justice in *Purple Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987.
[102] Peyer (n 100); Rodger (n 100).
[103] For a different view on private damages actions see Robert H Lande and Joshua P Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 U.S.F.L.Rev. 879–918.

does not relate to government investigations. This change has not been made explicit but it can be documented with recent decisions and the Damages Directive. The new, stricter regime pays lip service to the *Manfredi* and *Courage* doctrine that every individual should be able to sue for damages in the courts of the Member States.[104] But the *EnBW* case and the Damages Directive restrict the principle of effectiveness and the right to damages in follow-on cases. As it was shown above, the new rules make it more difficult to pursue damages actions that piggyback on government investigations. **Table 3** shows that the crucial elements of both access tests are aligned and, overall, appear to make it more difficult to gain access to, for example, leniency documents. While access to information through national disclosure rules appears to give more discretion to judges, the very specific proportionality test sets high standards for future access requests in the Member State courts.

[Insert **Table 3** about here]

This change of policy was long overdue. Early competition cases under the Transparency Regulation 1049/2001 proved the difficulties of keeping files confidential. Furthermore, the justification for rules that support follow-on damages actions is weak. Follow-on actions contribute to deterrence of anticompetitive conduct as they increase the fine companies face when breaching the law.[105] It may also be regards as a tool to compensate for public law enforcement deficits. Public fines are said to be below the optimal deterrence threshold.[106] However, private enforcement is a rather uncertain and ineffective means to augment the fines imposed on companies. Instead, competition authorities should revise their fining guidelines and set fines at the appropriate deterrence level. Private enforcement is better suited to pick up smaller infringements and detect violations that the competition authorities cannot deal with or may not be aware of. The true value of private enforcement lies in the increase of the rate of detection. Stand-alone actions increase the rate of detection and claimants in those actions do not access government files. The stricter approach to access to information will, to a certain extent, discourage follow-on actions and, consequently, correct a flawed antitrust policy that was likely to raise litigation costs without adding much to the enforcement of competition law. This does not mean that compensation is not a valid goal of private enforcement but it means that the private antitrust policy in the EU had until recently paid too much attention to the compensatory objective.

V. Conclusions

Access to evidence held by the competition authorities is said to be crucial in follow-on damages litigation. This article has shown that the two major routes for access to agency information, access

[104] See, for instance, recitals 3 and 4 of the Damages Directive; *EnBW* (n 7), para 104.
[105] The CJEU recognises the deterrence effect in *Donau Chemie* (n 8), para 23.
[106] Emmanuel Combe and Constance Monnier, "Fines against Hardcore Cartels in Europe: The Myth of Overenforcement" (2011) 56(2) Antitrust Bulletin 235-275.

under the Transparency Directive and disclosure in national courts according to Pfleiderer and Donau Chemie, create significant hurdles for access seeking parties. The two tests have converged to a substantial degree and they also place confidential material, especially leniency documents, legally or factually out of the claimant's reach. This restrictive approach towards disclosure will only affect follow-on damages claims. These limitations stand for an overdue change of EU policy. The European Commission and the CJEU almost unreservedly supported competition law damages actions in the last decade. Imposing stricter requirements for evidence in the hands of the competition authorities represents a change towards a more nuanced private enforcement approach. The CJEU and the European Commission have begun to reduce the wide scope of the *Courage* and *Manfredi* principle, i.e. limiting the 'effective redress for every victim' approach. This cautious change is to be welcomed. However, more honesty in the policy making process would reduce misunderstandings and lower the expectations regarding access to information and compensation. The European Commission, for example, still claims that the Directive will remove "[...] practical difficulties which victims frequently face when they try to receive a fair compensation [...]"[107] when, at the same time, imposing more restrictions on follow-on claims. The Damages Directive and the CJEU have quietly adopted a new approach in recent years but it is clear that both the Court and the Commission have recognised the pitfalls of a principle that unreservedly encourages individuals to seek compensation in the courts, especially when it interferes with public enforcement.

[107] European Commission, "Antitrust: Commission proposes legislation to facilitate damages claims by victims of antitrust violations" (IP/13/525) Press Release of 11 June 2013.

Appendix

Table 1

Table 1 - Commission's classification of documents in EnBW and protection rules under Article 4 of Regulation 1049/2001

Classification	Presumption of protection		
	Commercial interest (Art 4(2), 1st indent)	Purpose of inspections (Art 4(2), 3rd indent)	Internal use/decision-making process (Art 4(3))
Leniency documents (1)	Yes	Yes	No
Requests for information (2)	Yes	Yes	No
Documents obtained during inspection (3)	Yes	Yes	No
SO and replies (4)	Yes	Yes	No
Internal documents (5)			
-relating to facts (5a)	No	Yes	Yes
-Procedural documents (5b)	No	Yes	No

Table 2

Table 2 Document classification under Regulation 1049/2001 and protection under Damages Directive

Classification	Absolute Protection	Temporary protection if		Weighing process
		Specifically prepared for proceedings by parties	Drawn up by authority and sent to parties	Specific proportionality test applies
Leniency documents (1)*	Yes	Yes	No	No
Settlement submissions	Yes	Yes	No	No
Withdrawn settlement submissions	No	Yes	No	No
Requests for information and replies (2)	No	Yes	Yes	No
Documents obtained during inspection (3)	No	No	No	Yes
SO and replies (4)	No	Yes	Yes	No
Internal documents (5)	No	No	No	Yes
-relating to facts (5a)	No	No	No	Yes
-Procedural documents (5b)	No	No	No	Yes

Table 3

Table 3 Comparing access standards

	Transparency Regulation 1049/2001	Pfleiderer & Damages Directive
Period of absolute protection	Appeal period	Investigation period
Protection of categories	Yes	Yes
Presumption of protection	Yes	Yes (blacklist for some files)
Width of access	Individual documents	Individual document
Burden of proof/demonstration	Applicant	Applicant
Case by case approach	Yes	Partly