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## **Cartels & Leniency 2019**

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# Navigating the Tensions Between Leniency Cooperation and the Risk of Private Follow-On Damage Claims in Cartel Cases

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### Introduction

The number and scale of private damages actions following on from European Commission decisions in cartel cases have increased significantly in recent years. This uptick is likely not just the result of legislative changes, such as the European Commission's Damages Directive and national implementing laws,<sup>1</sup> but driven by a multitude of factors. Corporate culture has changed; there is greater willingness today to bring these claims, and in some cases even an expectation from shareholders that boards of directors of companies do so, as part of their fiduciary duties. There are new players on the scene in Europe doing their share to bring the potential for claims to the attention of customers that may have suffered losses at the hands of a cartel and facilitate the bringing of such claims. This includes US plaintiffs' law firms that have set up shop in major European cities, as well as litigation funders who bring to the table solutions that help reduce the financial exposure claimants may otherwise face, in particular when bringing larger, more complex cases.

Whatever the reasons, the result is that for any company faced with the discovery that it may have taken part in illegal cartel conduct in Europe, the decision on whether or not to cooperate with the European Commission under its Leniency Notice (and potentially the Settlement Notice) is now significantly more complex than it was a decade ago.

Companies cooperating under the EU Leniency Notice<sup>2</sup> are likely to become more obvious and attractive targets for any follow-on claims. They may face damages claims considerably sooner than companies who have not cooperated.

First, seeking immunity invariably involves an admission of guilt. Companies seeking a reduction in the regulatory fines may try to cooperate by submitting only factual evidence and avoiding statements qualifying or explaining those facts, but the reality is that these companies cannot expect to obtain significant cooperation credit if they sit on the fence as regards their role in the alleged cartel. And settling with the European Commission requires an explicit acknowledgment of the infringement.<sup>3</sup> The consequence is a significantly reduced prospect of these companies subsequently challenging the Commission decision in the General Court, at least as regards to the finding of an infringement.

Second, claimants will expect companies that have cooperated under the EU Leniency Notice to have collated a file of contemporaneous documents and corporate statements which they have submitted to the European Commission. This makes them an easier target for discovery, allowing claimants to quickly access important evidence which in turn allows them to build their case against other companies, including those who have not cooperated.

At the same time, the benefits of cooperating under the EU Leniency Notice (and the Settlement Notice) can be very significant indeed, potentially outweighing any concern about increased exposure to follow-on litigation. Acknowledging this, and given how powerful an investigative tool leniency is, the European Commission has gone to great lengths to protect and maintain the attractiveness of its leniency policy.

Finally, in follow-on litigation (i.e. damages litigation brought against the addressees of an adverse cartel decision) the question typically is not whether damages will be paid, but how much and when. Unless a company expects that by fighting the Commission's investigation it may be able to avoid an adverse finding against it altogether, the company needs to weigh the potential negative impact that cooperating may have on the timing and scope of follow-on claims against the potential upside from cooperating. For an immunity applicant, in our experience, this balancing is still, in most cases, likely to favour cooperation. It is for companies who may be second, third or fourth through the door that the answer becomes less obvious.

This chapter discusses a few of the key considerations to bear in mind for this balancing, drawing on recent developments in legislation and case law.

### The EU Damages Directive

The EU Damages Directive has been adopted in an effort to reduce the practical obstacles to seeking compensation for victims of infringements of EU antitrust law. In practice, the Directive is likely to play the most significant role in relation to cartel follow-on claims for damages.

The deadline for transposing the Directive into Member States' national legal systems expired on 27 December 2016. Although some Member States failed to meet this deadline, all Member States have now transposed the rules of the Directive. Under the Directive, substantive rules may not be applied with retroactive effect, while for procedural provisions the same rule does not apply, and they may be effective as of the date of publication of the Directive (26 December 2014).<sup>4</sup> Member States have adopted varying approaches, ironically leading to less rather than more consistency during at least the interim period. For example, in the UK the substantive rules (and some procedural rules) only apply to those cases which concern conduct that occurred and harm that arose after the entry into force of the national law transposing the Directive on 9 March 2017. Therefore, there is still a potentially significant number of cases to which the substantive rules of the Directive and implementing legislation will not apply.

Where the Directive does apply, for companies allegedly involved in cartel conduct and considering whether to cooperate with a European Commission investigation, the following provisions which the Directive includes are likely to be of the most practical relevance.

**No joint and several liability for the successful immunity applicant.** Most (if not all) European Member States recognise joint and several liability for the participants in a cartel. For the (successful) immunity applicant in particular, that can be significant. If it is the only company not appealing a decision by the Commission, it runs a higher risk of facing a final court judgment awarding the total damages caused by the cartel, because the courts cannot issue a judgment against any cartel member during the pendency of its appeals on the substance of a Commission decision in the European courts. Even if the claimant chooses to issue proceedings against all of the cartelists, or the non-appealing cartelists bring contribution proceedings against those who are appealing in the European courts, claimants may gain significant leverage in extracting an early settlement from the immunity recipient.

For claims falling under the rules implementing the Damages Directive, the leverage over the immunity recipient is in principle significantly reduced. The immunity recipient is jointly and severally liable to its own direct and indirect customers only, but not towards other injured parties (unless they cannot obtain full compensation from the other co-infringers).<sup>5</sup>

During the transitional period, full joint and several liability for the entire damage remains a risk for the immunity applicant. See also in this regard the discussion below regarding staying litigation against others pending an appeal of the Commission decision.

**Leniency statements and settlement submissions are protected from discovery.** One of the primary concerns of any company cooperating with the Commission is likely to be whether claimants can force disclosure of corporate statements submitted under the Leniency Notice.

Prior to the adoption of the Directive, the question was dealt with by the European Court of Justice in *Pfleiderer*.<sup>6</sup> The Court acknowledged that potential leniency applicants might be “deterred” from submitting evidence of the cartel under the existing leniency programmes if they were faced with the possibility of disclosure of that evidence to persons wishing to bring an action for damages. On the other hand, Member States should not make implementation of EU law impossible or excessively difficult which means they “must not make it practically impossible or excessively difficult to obtain [...] compensation” for violations of competition law. The balancing of these opposing interests must be conducted by the national courts “on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case”.<sup>7</sup>

After *Pfleiderer*, it appeared that access for claimants to leniency documents was not necessarily precluded, and a case-by-case assessment was required. In practice, national courts have in fact been very careful not to undermine the incentive to seek leniency by ordering (broad) disclosure of these sensitive materials.

The Directive does away with this uncertainty. It introduces a blanket protection against the discovery of leniency materials. It extends the same protection to submissions under the Settlement Notice, with the exception of submissions subsequently withdrawn.<sup>8</sup> In our view, this is a procedural provision. In the UK, it binds the courts as of the entry into effect of the implementing rules on 9 March 2017.<sup>9</sup> Other Member States like Italy have implemented these provisions with effect from the date of publication of the Directive.

**Disclosure of documents, but not fishing expeditions.** Discovery is not a feature of litigation in most continental European jurisdictions. Claimants may seek disclosure, but generally need to specify the

evidence they seek to obtain. In relation to cartels, which by their very nature are secret, this presents a potentially significant obstacle for claimants. The Directive seeks to remedy this, by providing that national courts should be able to order the disclosure of specified items of evidence or categories of evidence upon request of a party. The Directive, however, also requires national courts to consider such requests in light of proportionality and necessity.

For parties cooperating under the Leniency Notice, an obvious target for disclosure is the evidence submitted to the Commission. The Directive provides that disclosure of a category of evidence is permissible only where that category a) is defined as precisely and narrowly as possible, and b) is identified by reference to common features such as the nature, object or content of the documents, or the time when they were prepared.

As we discuss below, courts will need to decide how to apply this standard in practice. At least in jurisdictions with a stronger tradition of discovery, such as the UK and Ireland, courts may be critical of requirements to detail evidence produced to the Commission to any significant extent, and in fact these requirements do not appear in the UK’s implementing legislation and UK cases have proceeded without any such requirements being imposed.<sup>10</sup>

## Commission Procedure

In managing individual cases, the European Commission’s DG Competition seeks to strike a similar balance between the interest in protecting its leniency policy and facilitating the claimants’ access to compensation for losses caused by cartel conduct.

**Paperless procedure.** An important feature of the procedure for companies cooperating with the Commission under the Leniency Notice is the ability to submit corporate statements orally. The parties do not hold transcripts of the statements. These are instead maintained by the Commission only, who will not disclose them to claimants.<sup>11</sup> And while incriminated parties will, during the administrative proceedings, have access to the Commission file in order to defend themselves, with regard to oral corporate statements, only outside counsel to incriminated parties have access to the transcripts and even then they cannot copy these statements by mechanical or electronic means.

In addition to oral leniency statements, parties can opt to consult requests for information and other communications from the case team on site, rather than receiving written copies, and replies can be made orally. Also, the settlement procedure can be conducted in an entirely paperless fashion.

Finally, while contemporaneous documents that cooperating parties submit do become part of the Commission’s file accessible to other companies under investigation, those companies must commit to not disclosing or using the documents outside the administrative investigation.

**Disclosure in the Commission decision.** A significant source of information for claimants is the Commission decision itself. Two principal considerations come into play in this regard, when considering a company’s position as a result of cooperating under the Leniency Notice and the potential increased exposure to litigation that may bring: first, what details from the cooperation are included in the confidential version of the decision; and, second, what details can cooperating parties expect to be redacted from the non-confidential version of the decision before publication?

The confidential decision is likely to include references to and quotes from contemporaneous documents submitted to the Commission. It is likely to include references to leniency statements, and may also include quotes from leniency statements.

The European Court of Justice has had the opportunity to consider the extent to which these details can be included in the published non-confidential version of the Commission decision. In its ruling in *Evonik Degussa v. Commission*,<sup>12</sup> the Court applied a distinction between the publication of *verbatim* quotations “from documents provided by an undertaking in support of a statement made in order to obtain leniency” and “the publication of *verbatim* quotations from that statement itself”.<sup>13</sup> It held that the first type of quotations can be published “subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information”, but that publication of the latter “is not permitted in any circumstances”.<sup>14</sup>

Similarly, the European Court of Justice’s judgment in *Pergan* established the principle that confidentiality should be maintained with respect to references to the conduct of non-addressees in a Commission decision, and references to conduct of the addressees that did not form part of the basis for the “operative part” of the Commission decision.<sup>15</sup> The English Court of Appeal considered how these principles should be applied in the long-running *Air Cargo* litigation, in the context of the disclosure into a confidentiality ring of a confidential version of the Commission decision. The Court concluded that the *Pergan* material should be redacted and protected from disclosure to the claimants.<sup>16</sup>

Where the Commission does refer to and quote from contemporaneous documents supplied in support of leniency statements, in practice it is conscious not to place cooperating parties at a material disadvantage compared to companies who have not applied for leniency. In discussions with the parties, case teams are generally willing to balance the parties’ interests to ensure that details are not published which would serve as a roadmap for discovery (e.g. document names, authors and dates, and indeed *verbatim* quotes), with the broader interest in ensuring that the published decision provides an effective basis for claimants to seek compensation.

That said, claimants will routinely approach the Commission, pushing for broader and faster publication. This can make it a difficult dance to have with the case team. The Commission appears to place significant emphasis on facilitating private enforcement where possible, sometimes leading to disputes which cannot be resolved. In this regard, there is now consistent case law from the Community courts that companies threatened with the publication of details they believe amount to confidential information or business secrets can seek interim relief pending a ruling on the substance.<sup>17</sup>

Decisions in settlement decisions are significantly shorter and contain significantly less detail. They are therefore of far less assistance to claimants seeking damages caused by the cartel. Settlement decisions are a relatively recent phenomenon and it remains to be seen the extent to which discovery will be allowed in damages cases relying on them.

## The Approach of National Courts

**Stay of proceedings pending an appeal.** During the interim period, until rules implementing the Damages Directive take full effect, immunity recipients face the risk that they become the defendant of choice in follow-on proceedings, with the extra burden of joint and several liability.

Indeed, a successful immunity applicant is highly unlikely to challenge the substance of the Commission decision, which then becomes final against it when the two-month deadline for appeal expires.

As regards other addressees of the Commission decision, if they appeal the decision and challenge it on substance, the national court

may be forced to stay the proceedings as against those companies. Indeed, under the *Masterfoods* judgment of the Court of Justice,<sup>18</sup> national courts are prevented from passing a judgment that conflicts with a Commission decision that is not yet final. In the worst case, this may mean that proceedings continue against the immunity applicant only.

However, national courts, for example in the Netherlands and the UK, recognise that the need to avoid conflicting rulings does not prevent them from letting preparation for trial proceed against all members of the cartel even pending the outcome of an appeal on the finding of an infringement. In the UK, the favoured position now appears to be that damages actions can be allowed to proceed – also against parties who appealed the Commission decision – through at least the preliminary stages, such as serving of the defence, requiring some targeted disclosure and, potentially, service of witness statements and expert reports.<sup>19</sup> The Dutch courts have adopted a similar approach, even going so far as imposing on the defendant a requirement to justify that a conflict is in fact likely to arise.<sup>20</sup>

These are pragmatic solutions, and suggest that the exposure which *Masterfoods* adds for a company that considers cooperating and seeking immunity may be limited overall.

**Disclosure risks – European Commission decision.** Another area where national courts, notably in the UK, have adopted pragmatic solutions is access to the full confidential version of the Commission decision.

Working out confidentiality claims in relation to full-length Commission decisions has in some cases taken years. In the interim, the Commission now follows a practice of publishing summary decisions and preliminary non-confidential decisions, to speed up access and facilitate private claims. With the amount of information redacted, claimants, however, continue to push for access to a fuller non-confidential version of the decision, or indeed the full confidential version.

In *Pilkington*,<sup>21</sup> the European Court of Justice held that the publication by the Commission of a fuller non-confidential version of the decision in the *Car Glass* cartel would cause serious and irreparable harm to Pilkington’s interests, as customers would gain access to confidential information for the purpose of bringing claims for damages before the national courts.

Before the UK courts, the Commission has taken the position that when faced with a request to disclose the full confidential version of the decision it is for the national court to balance the interests of the claimants and defendants, as long as adequate protection is given to business secrets and other confidential information.<sup>22</sup> The courts have acceded to those concerns by ordering disclosure within a confidentiality ring and subject to restrictions, e.g., on use by the claimants of the information and redaction of certain information. Where the decision contains *verbatim* quotes from leniency statements, the UK courts have both allowed disclosure<sup>23</sup> and ordered redaction prior to disclosure.<sup>24</sup>

**Disclosure risks – European Commission file.** In the extensive litigation following on from the European Commission decision in the *Trucks* cartel, the High Court of England and Wales has had to consider in more detail the implications of requirements in the Damages Directive that claimants must identify “as precisely and as narrowly as possible” what evidence they seek from defendants and must provide a “reasoned justification” in support of their request.

In a UK litigation launched by Royal Mail against DAF, Ms. Justice Vivien Rose<sup>25</sup> first ordered DAF to disclose to Royal Mail redacted information from the European Commission’s *Trucks* case file. In subsequent proceedings brought by various distribution, logistics and utility companies, claimants asked for access to the confidential

Commission decision and access to many thousands of documents from the Royal Mail litigation.

This very broad request has prompted the European Commission to issue a letter to the English court, raising concern that the requirements of the Damages Directive were not being complied with. Defence counsel have raised similar concerns, and further concerns that if the court were to allow the request for broad disclosure this would force defendants to disclose a “considerable amount” of information that is “irrelevant and unnecessary” to the damages claim.<sup>26</sup>

Mr. Justice Roth ultimately ordered Iveco and DAF to hand over the European Commission’s confidential decision and related documents from the Royal Mail litigation, subject to redaction of irrelevant material. His ruling ordering broad disclosure of documents appears to have been influenced by the fact that there was a parallel procedure against Royal Mail essentially pleading the same facts and consequences, and in that proceeding the documents in question had already been disclosed. Disclosure in the subsequent cases would add very little burden or cost.

The ruling is nevertheless noteworthy, as there was some doubt as to whether the Royal Mail litigation was in fact covered by the Directive (UK implementing rules were only adopted after that claim was filed), and as Mr. Justice Roth took the view that the Damages Directive does not impose a “straight jacket” on the court that prevented him from ordering disclosure. He reasoned that if claimants were required to specify categories of documents, they might not obtain the information they needed, while in his view a number of broad categories of documents would indeed be relevant.

**Disclosure risks – leniency materials.** As discussed above, under the Damages Directive, disclosure cannot be ordered for leniency materials or settlement submissions (unless withdrawn). National courts are bound by this provision as of the entry into effect of the implementing rules.

The issue was tested in a litigation, following on from the European Commission’s decision in the *Foam* cartel, brought by bankrupt mattress maker Silent Night against Reticel. Reticel had cooperated with the European Commission investigation and provided oral leniency statements. Claimants sought access to the transcripts, as well as to drafts and notes held by counsel to Reticel.

Ms. Justice Vivien Rose refused to order disclosure of those documents. Regarding the oral statements, she referred to the blanket ban in the Damages Directive and the careful procedure followed by the European Commission to ensure that oral statements or transcripts it holds do not fall into the hands of third parties. Regarding draft statements and notes of questions asked by the Commission, Ms. Justice Rose held that ordering disclosure would “not be appropriate”.<sup>27</sup>

## Concluding Thoughts

The decision to apply to the Commission for leniency or to agree to a settlement involves a complicated balancing of interests. In the present environment where follow-on damages claims must be expected to ensue from any finding by the Commission of cartel conduct, the company concerned must weigh the benefits of avoiding or reducing substantially a large fine from the Commission, with the risks of potentially accelerating follow-on litigation. There is no “one size fits all” solution to this dilemma, the answer to which will depend on the particular circumstances of the company concerned.

For companies who believe the Commission’s case against them is weak, there is increased incentive not to cooperate, and so to keep open the potential of avoiding an expensive follow-on damages

litigation. For companies who are in a position to seek immunity, the possibility to avoid a fine by the European Commission is, we suspect, most often going to weigh more than any potential downside from a litigation standpoint, in particular with the (procedural) guarantees introduced by the Damages Directive. It is for the companies that consider cooperating but fall into neither of these categories that the balancing of pros and cons has become particularly complex. In all cases, companies drawn into this assessment will also need to consider the impact that their approach is likely to have on ongoing commercial relations with those of their customers who may have been adversely impacted by the alleged cartel.

Finally, looking at future trends, one development worth mentioning is the draft ECN+ Directive.<sup>28</sup> This proposed Directive attempts to harmonise the leniency systems of the EU Member States and increase the incentives of cartel participants to come forward and cooperate. The Directive would harmonise the conditions for granting immunity and reduction from fines, largely mirroring the core principles of the European Commission’s leniency programme, and make the system of summary applications, already enshrined in the ECN Model Leniency Programme, binding upon the Member States. It also would grant leniency applications and settlement submissions the same protection from disclosure as in Commission proceedings.<sup>29</sup> Lastly, the proposed Directive would ensure that directors, managers and employees of immunity applicants are protected, under certain conditions, against individual (criminal and administrative) sanctions if they cooperate. On balance, all this may add to the scales in favour of cooperating.

## Endnotes

1. 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, O.J. 2014 L 349/1.
2. Commission Notice on immunity from fines and reduction of fines in cartel cases, O.J. C 298/17, 8 December 2006.
3. Leniency Notice, para. 20.
4. Article 22(1) of the Damages Directive provides that Member States should ensure that the substantive provisions of the Damages Directive do not apply retroactively. Procedural provisions are not subject to the same rule. The Directive, however, does not set out what provisions in the Directive should be considered substantive and therefore fall within the scope of the prohibition.
5. See Directive 2014/104/EU, Article 11(4)(b).
6. Judgment of the Court (Grand Chamber) of 14 June 2011 in Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*.
7. *Pfleiderer*, para. 31.
8. This mechanism acts as a strong incentive for companies entering the settlement process to remain committed to the process.
9. Or, indeed, arguably as of the deadline for transposition of the Directive, where Member States fail to introduce the appropriate implementing measures in time.
10. The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, section 4.
11. This position is clear from various policy statements as well as concrete cases. For example, the Commission in the Leniency Notice stresses in general terms that corporate statements “have proved to be useful for the effective investigation and termination of cartel infringements and

- they should not be discouraged by discovery orders issued in civil litigation”. See Commission Notice on immunity from fines and reduction of fines in cartel cases, para. 6.
12. Judgment of the Court (Grand Chamber) of 14 March 2017 in Case C-162/15 P, *Evonik Degussa GmbH v. European Commission* (“*Evonik Degussa v. Commission*”).
  13. *Evonik Degussa v. Commission*, para. 87.
  14. *Evonik Degussa v. Commission*, para. 87.
  15. Judgment of the Court of First Instance (Third Chamber) of 12 October 2007 in Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission of the European Communities*.
  16. *British Airways PLC v. Emerald Supplies Limited* [2015] EWCA Civ 1024 (“*Emerald Supplies*”).
  17. Order of the Vice-President of the Court of 14 January 2016 in Case C-517/15P, *AGC Glass Europe and Others v. European Commission*, Order of 2 March 2016 in Case C-162/15 P-R, *Evonik Degussa v. Commission* and Order of the President of the General Court of the European Union of 11 March 2013 in Case T-462/12 R, *Pilkington Group v. Commission*. For a detailed discussion of these actions, see Fountoukakos and Puech-Baron in “Interim relief and protection of confidential information in EU cartel decisions: a new love story?”, published by Lexology.
  18. Judgment of the Court of 14 December 2000 in Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd* (“*Masterfoods*”).
  19. See, e.g., *National Grid Electricity Transmission Plc v. ABB Ltd* [2012] EWHC 869 (Ch) (4 April 2012) (“*National Grid*”).
  20. District Court Den Haag, 1 May 2013 (*CDC v. Shell et al.*), ECLI:NL:RBDHA:2014:15722, and Court of Appeal Amsterdam, 24 September 2013, (*Equilib/KLM*), ECLI:NL:GHAMS:2013:3013.
  21. Judgment of the General Court (Third Chamber) of 15 July 2015 in Case T-462/12, *Pilkington Group and Others v. Commission* (“*Pilkington*”).
  22. *Emerald Supplies and Wm Morrison Supermarkets Plc v. Mastercard Inc* [2013] EWHC 2500 (Comm) (1 August 2013).
  23. *National Grid*.
  24. *Emerald Supplies*.
  25. As of 1 January 2019, Ms. Justice Rose will take the title of Lady Justice Rose, having been appointed to the Court of Appeal.
  26. Tom Webb, “English judge agrees to DG Comp trucks disclosure”, *Global Competition Review*, 8 December 2017.
  27. Tom Webb, “English judge refuses to order disclosure of foam leniency documents”, *Global Competition Review*, 4 October 2017.
  28. Draft Directive (EU) of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, 2017/0063(COD). The EP and Council have reached a compromise on the draft Directive, which is expected to be adopted into law by the end of 2018.
  29. Whilst the scope of the Directive is limited to the enforcement of Articles 101 and 102 TFEU and national competition law provisions applied in parallel to Articles 101 and 102 TFEU to the same case, the protection of leniency statements and settlement submissions extends exceptionally to cases where national competition law is applied on a stand-alone basis.

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