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11. VUOSIKERTA ÅRGÅNG 11

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1.3.1 DISCOVERY ISSUES IN MULTI-JURISDICTIONAL CARTEL INVESTIGATIONS: THE AMERICAN VIEW

Introduction

With ever more jurisdictions expanding their sovereign antitrust enforcement efforts, and many moving toward U.S.-style civil antitrust litigation, it is now more important than ever to coordinate among counsel in multi-jurisdictional investigations. Often, procedures that are customary in one action will put a company's investigation work product at risk of discovery in a separate action. Thus, when a company knows that it is -- or even expects it may be in the future -- under investigation for antitrust violations in multiple actions or jurisdictions, these conflicting sets of rules and procedures should be considered and weighed when developing the company's investigation and response strategy. Ideally, counsel in charge of the investigations in different jurisdictions should coordinate strategies in order to best protect the client's legal rights in each jurisdiction.

The United States' ("U.S.") principal antitrust law -- known as the Sherman Act -- may be enforced both criminally and civilly by the federal government and also civilly by state attorneys general, or any private plaintiff with standing. In the case of so-called *per se* violations of the Sherman Act -- including price-fixing, bid-rigging, and customer- or market-allocation cartels -- it is not uncommon for enforcement to come in the form of a criminal action brought by the U.S. federal government *and* a private civil action. Both civil and criminal enforcement by the United States Department of Justice ("DOJ") may result in large fines based on the defendant's "*volume of affected commerce*."[1] Criminal enforcement by DOJ may also result in

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1 *See* U.S. Sentencing Guidelines Manual § 2R1.1(d).

a prison sentence for company employees involved in antitrust misconduct. In addition to these penalties, civil plaintiffs may obtain up to three times their actual damages from the same defendant in a parallel civil action. Moreover, defendants in civil antitrust cases are subject to "*joint and several*" liability, which means that each defendant potentially is liable for all damages caused by the conspiracy, not only for the overcharges on sales it made to its own customers.[2] Actions brought by DOJ and by civil plaintiffs each involve their own distinct set of rules for how the enforcer may obtain discovery, and, in some cases, these rules are in some tension with one another.

In the European Union ("EU") laws prohibiting restrictions of competition, including cartels, exist on both the Member State and the EU level, and authorities may investigate the same conduct in parallel until the EU formally initiates proceedings for the adoption of a prohibition decision.[3] The EU can impose only administrative fines, although these have reached levels that have led commentators to argue that EU procedures are of a quasi-criminal nature. A number of EU Member States also have criminal laws that sanction participation in cartels generally, while some other Member States only prosecute certain types of cartel behavior, such as bid rigging.[4] These national criminal laws apply in parallel with civil or administrative rules, and participants in a cartel may be subject to criminal prosecution in EU Member States even if the European Commission ("Commission") opens proceedings. While damage claims by injured private parties are still much less frequent than in the U.S., recent years have seen a dramatic increase in such actions in a number of EU Member States.[5]

It also is common for multinational corporations to face parallel government inquiries in the U.S. and the EU. In such a situation, the corporation should consider the differences in process between these investigations and the differences in the applicable law of attorney-client and work product privileges under each regime. For example, certain procedures typical in responding to Commission investigations can put at risk of disclosure in the U.S. material that would otherwise be protected

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2 One notable exception occurs where a company has sought and obtained leniency from DOJ. In these cases, this leniency applicant can avoid criminal prosecution, including fines and jail time for any of the company's employees who also cooperate with DOJ and are thus within the protection of the leniency application. *See Antitrust Division Leniency Program*, USDOJ, http://www.justice.gov/atr/public/criminal/leniency.html. An additional benefit of obtaining leniency from DOJ is that the defendant then also may receive relief in a related civil case. If the leniency applicant also cooperates with the civil plaintiffs, the applicant's exposure is limited to single (rather than treble) damages and no joint and several liability, if the defendant also provides appropriate cooperation to the private civil plaintiffs. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(b), 118 Stat. 661, 666 (codified as amended at 15 U.S.C. § 1 note). These benefits can provide additional leverage to the leniency recipient when negotiating a settlement with plaintiffs.

3 Article 11(6) of Regulation 1/2003 on 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L1 of 4 January 2003, p. 1.

4 This is the case, *e.g.*, in the United Kingdom and Ireland. There are also a number of other countries with criminal laws against cartels, but most have never used these statutes. Bid rigging is a criminal offense, *e.g.*, in Germany.

5 The Member States that are most frequently cited as good forums for such actions are the United Kingdom, Germany, and the Netherlands.

as attorney work product under U.S. law. Thus, there are additional considerations at work in multi-jurisdictional investigations.

In this article, we explore several avenues through which decisions related to document production that are made by the legal team in one investigation may impact the legal team's options in a parallel investigation in the U.S. It is critically important when responding to a cartel investigation -- whether criminal, civil, or both -- to consider the strategic implications of cooperating with criminal and civil enforcers in a way that provides the maximum benefit to the company and minimizes the potential pitfalls. The article will also explore particularities of the EU system to the extent they may have an effect on U.S. procedures.

Discovery in Parallel: Criminal Subpoenas and Civil Discovery

One of the key factors that should inform the U.S. legal team's strategy in responding to parallel actions involving companies that do business outside the U.S. is the difference in the scope of discovery available to criminal and private civil enforcers. As a practical matter, typically in the U.S. a criminal investigation arises first, and then civil litigation may follow once there is sufficient public information to form the basis of a complaint by a civil plaintiff. More rarely, civil antitrust litigation arises first, and a U.S. government criminal investigation commences later. When faced with such parallel criminal and civil actions, the legal team should routinely and carefully consider the effect that strategic decisions made in responding to one investigation may have in the parallel investigation. For example, as explained below, providing information to criminal enforcers (primarily DOJ) in certain formats may result in waiver of work-product privilege and work product becoming discoverable in civil cases.

Discovery Under U.S. Criminal Subpoenas

In a criminal cartel case, DOJ typically will seek to compel the production of any pre-existing business documents that are situated in the U.S. through a grand jury subpoena.[6] Even though the subpoena may, as a technical matter, also be read to call for the production of documents located outside of the U.S., as a matter of policy DOJ rarely seeks to compel production of these "extraterritorial" documents. Thus, in the typical case, such documents will be produced to DOJ only in the context of a defendant's voluntary cooperation with the DOJ's investigation. Whether a document is considered to be located in the U.S., and thus among the materials for

[6] In the U.S., criminal enforcement at the federal level is initially conducted through a grand jury. The grand jury, which consists of a panel of ordinary citizens, has the power to issue subpoenas for documents and testimony and ultimately decides whether the investigation has revealed sufficient evidence that an indictment should be issued in the case. In cases resolved through a plea agreement, it is not necessary for the grand jury to issue an indictment, although typically the grand jury will still issue an investigative subpoena. In practice, the grand jury operates under the guidance of the prosecuting attorneys, who conduct the factual investigation and decide what evidence should be presented to the grand jury.

which DOJ ordinarily would seek compulsory production, may become complicated in the event that there are electronically stored documents that nominally belong to a business unit in one country that are stored on a server located elsewhere. In the U.S., the focus tends to be on the documents' physical location. Thus, if a document is stored electronically on a server located outside of the U.S. and no physical copy of the document exists in the U.S., it would be unusual for the DOJ to treat it as within the U.S. and thus subject to compulsory production. By contrast, the Commission considers that any document that can be accessed in some way from the territory of any of the EU Member States is located in the EU irrespective of the location of the server on which it resides.

Discovery in U.S. Civil Litigation

In the U.S. civil litigation discovery context, however, if a court has personal jurisdiction over a defendant then all documents within the possession, custody, or control of that defendant, including any extraterritorial documents, are subject to compulsory production in discovery.[7] Personal jurisdiction over a defendant is determined by applying principles set forth in the United States Supreme Court's *International Shoe*[8] decision and its progeny. *International Shoe* instructs courts to determine whether a litigant has "*purposefully availed*" itself of a U.S. jurisdiction.[9] Even if a foreign defendant has no physical presence in the jurisdiction at issue, purposeful availment may be found if the defendant has in some way targeted its activities at the jurisdiction, such as by placing goods into the stream of commerce with the expectation that they would be purchased by consumers in that jurisdiction.[10] If a court finds purposeful availment by the defendant, then the court has personal jurisdiction over the defendant. A court may consider other factors, including international comity concerns, when determining whether to exercise personal jurisdiction, but generally the interests of justice are considered to weigh more heavily in favor of

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7 *See, e.g.*, In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 300 (3d Cir. 2004) ("*[A] District Court [has] jurisdiction to order, under the Federal Rules of Civil Procedure, a foreign national party to the proceeding to produce evidence physically located within [the party's] territory.*");United States v. First Nat'l City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968) ("*It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has* in personam *jurisdiction of the person in possession or control of the material.*"); Laker Airways Ltd. v. Pan Am. World Airways, 103 F.R.D. 42, 49 (D.D.C. 1984) ("*A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's use to the contrary.*" (quoting Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 81 Civ. 4463-CLB, slip op. at 10-12 (S.D.N.Y. Jan. 25, 1983))). If a court has personal jurisdiction over a party, that party must fulfill certain duties prescribed by law, including the obligation to produce relevant documents in the "*possession, custody, or control*" of the party. FED.R. CIV. P. 34(a). This is not specifically limited by the location of these documents. *See* FED. R. CIV. P. 26(b), 34.

8 Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

9 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that under *International Shoe*, there must be "*some act by which the defendant purposefully avails itself of the privilege of conducting activities within the*" state in which personal jurisdiction is sought).

10 J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

finding personal jurisdiction over a defendant.[11]

Choice of Discovery Procedure in U.S. Litigation

Once a U.S. court determines that it does possess personal jurisdiction over the defendant, document discovery typically proceeds under the Federal Rules of Civil Procedure ("FRCP"). The FRCP permit broad discovery of documents related to "*any nonprivileged matter that is relevant to any party's claim or defense*," and parties are constrained only to craft their requests to be "*reasonably calculated to lead to the discovery of admissible evidence.*"[12] The FRCP make no distinction between the discoverability of documents located in the U.S. and extraterritorial documents, although parties may argue against production of extraterritorial documents based on claims that this would place an excessive burden on the party, as discussed below.

While non-U.S. companies located in countries that are signatories to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters may argue that discovery should proceed under the Hague Convention rather than the FRCP, the U.S. Supreme Court has held that use of the Hague Convention procedures in U.S. proceedings is not mandatory. The key decision on this issue is the U.S. Supreme Court's *Aérospatiale* case.[13] In *Aérospatiale*, U.S. plaintiffs sued two corporations owned by the Republic of France.[14] The parties initially conducted discovery pursuant to the FRCP, and subsequently the French defendants moved for a protective order on the basis that discovery could only be had pursuant to the Hague Convention.[15] The French defendants argued that because "*the discovery sought [could] only be found in a foreign state*," it could not be obtained through the FRCP.[16] The defendants also argued that it would be a violation of French penal law for them to provide discovery through any process other than the Hague Convention.[17] The Court considered these arguments, but noting "*[t]he absence of any command that a contracting state must use [Hague] Convention procedures*," found that these procedures were not mandatory.[18] Thus, the Court determined that the Hague Convention procedures could be used by litigants if they would "*facilitate the*

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[11] *See, e.g.*, Pro Axess, Inc. v. Orlux Distrib., Inc., 428 F.3d 1270, 1281 (10th Cir. 2005) (explaining that a court must consider whether the exercise of personal jurisdiction would affect a foreign nation's policy interests, but concluding that this factor was not implicated in the present case); Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1133-34 (9th Cir. 2003) (finding that sovereignty concerns weighed in favor of the foreign defendant, but personal jurisdiction was appropriate based on a balancing of the reasonableness factors); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99 (2d Cir. 2000) (explaining that although the foreign defendants "*face something of a burden if they litigate here*," personal jurisdiction was not unreasonable); Ballard v. Savage, 65 F.3d 1495, 1501-02 (9th Cir. 1995) (finding that international comity weighed in the foreign defendant's favor, but ultimately concluding that personal jurisdiction was proper).

[12] FED.R. Civ. P. 26(b)(1).

[13] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522 (1987).

[14] *Id.* at 524-25.

[15] *Id.* at 525-26.

[16] *Id.*

[17] *Id.* at 526.

[18] *Id.* at 535-37.

gathering of evidence" but that they were merely "*one method of seeking evidence that a court may elect to employ.*"[19] The alternative, of course, is for litigants to seek evidence under the procedures of the FRCP.

In choosing which discovery procedures should be used, a U.S. court will weigh the advantages and disadvantages of each set of procedures in that particular case. The U.S. Supreme Court has noted its concern that "*[i]n many situations the Letter of Request procedure authorized by the [Hague] Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.*"[20] Thus, while the Hague Convention procedures may be used by litigants if those procedures will facilitate the expedient determination of a particular litigation, generally the FRCP will be the preferred discovery mechanism in U.S. civil litigation.

The U.S. Supreme Court also has noted that there are certain circumstances that may favor using Hague Convention procedures for discovery of extraterritorial documents. For example, the court instructed that trial courts "*should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.*"[21] Thus, where use of the FRCP would result in discovery that is abusive to a foreign litigant, such procedures may not be available.[22]

Finally, there are important strategic considerations that factor into a civil litigant's decision to fight for use of Hague Convention procedures. Because the Hague Convention procedures are more onerous for plaintiffs as the parties most often seeking the bulk of the discovery, the argument that they should be used can be an important negotiating tool for a defendant. U.S. courts generally prefer that plaintiffs and defendants negotiate a reasonable scope of and process for discovery on their own, and will only step in if the two sides cannot reach agreement. Thus, there is an opportunity for a foreign defendant to bargain for use of the FRCP in exchange for a narrower scope of discovery. Many plaintiffs' counsel will find this compromise to be more attractive than involving the judge in deciding which procedures should be used.

Even the FRCP, however, provide little in the way of protections for information disclosed to investigators in the U.S. or the EU from discovery in a U.S. civil action. Relying upon procedures that form the cornerstone of EU public antitrust enforcement, including guarantees that materials disclosed to investigators will be

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19 *Id.* at 541.

20 *Id.* at 542.

21 *Id.* at 546.

22 In U.S. civil litigation, courts routinely consider arguments that discovery sought by one side is overbroad and unduly burdensome and may disallow the discovery on that basis. *See, e.g.*, Vident v. Dentsply Int'l, Inc., No. SA CV 06-1141 PSG(ANx), 2008 WL 4384124, at *3 (C.D. Cal. Aug. 29, 2008) (affirming denial of motion to compel documents related to Dentsply's Canadian business because the relevant market was limited to the United States and the request was therefore overbroad); In re Domestic Air Transp. Antitrust Litig., 141 F.R.D. 556, 564 (N.D. Ga. 1992) (denying plaintiffs' motions to compel against defendant Delta as overbroad and unduly burdensome and granting Delta's narrowed counteroffer).

kept confidential, may have unintended consequences if parallel U.S. civil litigation is involved. The doctrine of international comity is often invoked in an attempt to protect EU confidential materials from disclosure to U.S. civil litigants, but this does not guarantee the materials will remain protected.[23] In order to determine whether comity concerns will protect documents from U.S. civil litigation discovery, a court typically will consider five factors: 1) How important to the litigation is the information that has been sought? 2) How specific is the discovery request? 3) Did the information originate in the U.S.? 4) Are there alternative means to obtain the information? 5) Would denial of the request undermine important U.S. interests, or undermine important foreign-sovereign interests?[24]

The fifth factor of this test, requiring a comparison of the sovereign interests at stake, usually is considered the most important, although often the debate will center around the practical issues of the importance of the requested information and its availability through alternative means.[25] Each discovery request implicating comity concerns must be considered on its individual merits.

Discovery of Extraterritorial Documents in U.S. Civil Litigation

Regardless of whether civil litigation discovery is conducted through the FRCP or Hague Convention procedures, it is clear that extraterritorial documents frequently are produced in discovery notwithstanding being located outside the U.S. This is not the case in criminal investigations conducted by DOJ. When civil discovery precedes a DOJ investigation or, more frequently, when the DOJ investigation remains ongoing after civil discovery into the same conduct has begun, disputes can arise about DOJ's ability to obtain documents brought into the U.S. for litigation purposes.

As discussed above, if a U.S. court has personal jurisdiction over a defendant in a civil action, it may order that extraterritorial documents within the defendant's control be brought into the U.S. and produced in discovery. Although it is standard for the court to enter a protective order that limits who may review confidential documents produced in the litigation and for what purposes, discovery materials may still become public if used at trial or in motion practice. Once the materials have been brought into the U.S. and made public, there will be no way to keep them from being subject to a grand jury subpoena. However, even nonpublic documents, once in the U.S., may be subject to the grand jury's subpoena powers even if the documents were produced under a protective order in litigation. Thus, even if a defendant is not cooperating with DOJ's investigation, it may be possible for DOJ to obtain such documents.

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[23] Although traditionally applicable with regard to interests of other nations, the doctrine of comity has been confirmed to extend to the EU. In re Rubber Chems., 486 F. Supp. 2d 1078, 1082 (N.D. Cal. 2007).

[24] *See Aérospatiale*, 482 U.S. at 544 n.28.

[25] *See, e.g.*, Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1476 (9th Cir. 1992).

The recent Ninth Circuit Court of Appeals case *In re Grand Jury Subpoenas*[26] illustrates this risk. In that case, civil plaintiffs commenced litigation shortly after a criminal investigation into the same conduct became public.[27] After the defendants produced extraterritorial documents in civil discovery, DOJ directed grand jury subpoenas to the parties' U.S. law firms seeking those documents.[28] The Ninth Circuit ultimately concluded that the subpoenas were enforceable, notwithstanding that the documents had only been brought into the U.S. for purposes of civil discovery and were subject to a protective order that prohibited their use outside the civil litigation.[29]

Although the documents at issue in *Grand Jury Subpoenas* had been produced to the civil plaintiffs, the court's reasoning could easily be extended to documents a defendant provides to U.S. counsel for review, whether or not they are ultimately produced in the civil litigation.[30] A defendant should thus carefully consider how its handling of extraterritorial documents in U.S. civil litigation may affect an ongoing or potential criminal investigation.[31]

Responding to a U.S. Criminal Subpoena

In a more typical case, DOJ initiates its investigation first and civil plaintiffs file suit later. In these circumstances -- or if DOJ's investigation and a civil litigation are proceeding in parallel -- it is important for counsel to consider the tension between cooperating fully with DOJ's investigation and the collateral effects of such cooperation on the civil litigation. For example, in producing documents to DOJ, counsel should always bear in mind that those documents will likely be the first documents sought and received by plaintiffs in any related civil litigation. Courts routinely grant plaintiffs discovery of these documents on the theory that they are likely to be relevant and the burden to produce them is low because they already have been produced once.

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[26] 627 F.3d 1143 (9th Cir. 2010), *cert. denied sub nom.* White & Case LLP v. United States, 131 S. Ct. 3061 (2011), Nossaman LLP v. United States, 131 S. Ct. 3062 (2011).

[27] *Id.* at 1144.

[28] *Id.*

[29] *Id.* The Ninth Circuit applied its "*per se rule that a grand jury subpoena takes precedence over a civil protective order.*" *Id.* The court reasoned: "*By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury.*" *Id.*

[30] Specifically, the *Grand Jury Subpoenas* court's reasoning was based in large part on the fact that the documents were physically present in the U.S. Under the court's reasoning, any documents physically in the U.S. could be subject to subpoena by the grand jury. *Id.* This analysis would seemingly apply to any foreign documents brought into the U.S., regardless of whether they are produced in civil litigation or merely in the possession of counsel.

[31] In addition to considerations related to U.S. civil litigation discovery, private damages actions based on cartel infringements have increased dramatically over the last few years in the EU, and some jurisdictions, such as the U.K., Germany, and the Netherlands, are positioning themselves as attractive forums for plaintiffs. Each of the twenty-seven Member States has its own rules of civil procedure governing such private actions.

Protecting Attorney Work Product

One circumstance in which this tension arises is in complying with DOJ requests to create attorney work product and present it to DOJ. Often, as part of a company's cooperation, DOJ will request the company to proffer information gathered by attorneys, including collections of important or so-called "hot" documents, identities of employees involved in a cartel, flow charts, timelines, lists of transactions or meetings, or other attorney work product that would aid in DOJ's investigation. Normally, attorney work product is protected from discovery in both civil and criminal proceedings;[32] however, this protection may be waived if the work product is disclosed to a third party, such as DOJ.[33] Savvy plaintiffs' litigation counsel will target documents produced to DOJ -- including work product -- in early document requests with the hope and expectation that these documents will provide a roadmap for their case. One strategy for avoiding waiver of work product protection is to present information to DOJ orally rather than in writing when possible. Using this method, the notes taken by DOJ attorneys, so long as they are not a verbatim transcript and contain the attorneys' mental impressions, likewise become protected work product that is not, as a general matter, discoverable. While this process can be tedious and time-consuming, it can be worthwhile in order to shield important investigation work product of the company's counsel.[34]

Any work product turned over to investigators in written form will likely be discoverable by civil plaintiffs, which can have a number of negative consequences. First, the company will have revealed some of the results of its own internal investigation, increasing plaintiffs' leverage in the case by reducing plaintiffs' need to conduct their own investigation. Compilations of documents also facilitate building a case with little effort. Outside of the context of the investigation, these compilations may lose some of the broader context of the conduct at issue that could otherwise mitigate liability in a civil case.

Similar considerations may come into play when a company seeks immunity or a fine reduction under the EU Leniency Notice,[35] during which process it is common

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[32] The U.S. work product doctrine, announced in *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947), and codified in FRCP 26(b)(3), generally protects the "*mental impressions, conclusions, opinions, or legal theories of a party's attorney*" from discovery, subject to certain exceptions. *See* Upjohn Co. v. United States, 449 U.S. 383, 397-99 (1981).

[33] *See, e.g.*, In re Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG)(RER), 2012 WL 2885367, at *3 (E.D.N.Y. July 13, 2012) (granting plaintiffs' motion to compel production of certain documents the defendant previously had produced voluntarily to DOJ, because the production to DOJ waived any work product protection).

[34] In some cases, defendants that disclosed work product to government investigators have argued that this did not constitute a waiver as to other parties. While some courts have accepted this "selective waiver" argument, others have rejected it. *Compare, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (accepting selective waiver argument), *with, e.g.*, In re Qwest Commc'ns Int'l Inc. Sec. Litig., 450 F.3d 1179, 1192 (10th Cir. 2006) (rejecting selective waiver), In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 306-07 (6th Cir. 2002) (same), *and* Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1429-30 (3d Cir. 1991) (same). Because it is often unclear in which court subsequent litigation will be filed, relying on selective waiver in negotiations with the government is a risky proposition.

[35] Commission Notice on immunity from fines and reduction of fines in cartel cases ("Leniency Notice") OJ C 298, 8.12.2006, p. 17.

to submit oral corporate statements. Corporate statements are voluntary presentations to the Commission prepared specifically for submission under the Leniency Notice and summarize the applicant's knowledge of the suspected cartel.[36] When these statements are submitted orally, the company and its counsel are not provided with copies of the recording or the transcribed statement, and this provides some protection of the statement from discovery.[37]

In practice, submitting an oral corporate statement means that the defendant's counsel must go to the Commission's offices and dictate the statement. The Commission records and transcribes the statement on its own premises.[38] The submitting defendant then has the opportunity to check the accuracy of the recording and transcript at the Commission's premises and, if necessary, dictate amendments.[39] Where the oral statement refers to evidence in the form of contemporaneous business documents, copies of these documents must be submitted in hard copy. Because physical copies of these documents are provided to the Commission and this evidence could usually also be found during a dawn raid, there are some who argue that these collections of documents should be made accessible to plaintiffs in private actions where requested.[40]

A key distinction between the typical U.S. oral proffer and the EU-style oral proffer is the existence in the EU case of the recording and transcript. This is an important distinction because under U.S. law, an attorney's notes reflecting that attorney's thought process are protected work product. This means that a DOJ attorney's notes of an oral proffer made by a defendant will then constitute DOJ's protected attorney work product under U.S. law, and thus generally would not be discoverable by private civil plaintiffs. By contrast, verbatim transcripts typically will not be protected from discovery under U.S. law. As a practical matter, because the

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36 Para.31 of the Leniency Notice. The Leniency Notice's predecessor (the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 45, 19.2.2002, p. 3), did not specifically foresee the possibility of submitting corporate statements orally but these were accepted in most cases nevertheless.

37 While the Commission has accepted such oral statements for a long time, the situation was less clear in some EU Member States. Today, the Model Leniency Programme of the European Competition Network ("ECN") also foresees the possibility to make oral applications in cases where this process is justified. *See* ¶ 28 of the ECN Model Leniency Programme; ¶ 51 of the explanatory notes to the ECN Model Leniency Programme.

38 *See* ¶ 32 of the Leniency Notice.

39 *Id.*

40 The Commission grants access to corporate statements only to the addressees of a so-called statement of objections, *i.e.*, the other companies suspected of having participated in the alleged cartel. In order to access the corporate statements, these companies -- and their legal counsel -- must commit not to copy by mechanical or electronic means any information in the corporate statement. *See* ¶ 33 of the Leniency Notice. Access is granted on condition that the information obtained from the corporate statement will be used solely for the purposes of "*judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings*." *See* ¶ 34 of the Leniency Notice. Other parties such as complainants do not get access to corporate statements during the Commission's investigation. *See* ¶ 33 of the Leniency Notice. Note that pre-existing, non-privileged business documents are subject to discovery in the U.S. so long as they are within the defendant's control, even if copies of the documents also were presented to the Commission or DOJ in support of a leniency application.

company and its counsel do not possess copies of the Commission's recordings or transcripts to produce, these statements should remain protected and confidential in the U.S. as well.

Production of Extraterritorial Documents to DOJ

Returning to the issue of extraterritorial documents, as noted above, it is unusual for DOJ to successfully compel the production of these documents in a criminal investigation. This is both because it is rare for DOJ to seek a court order to compel the documents and also because in those instances where DOJ has sought to compel production of extraterritorial documents, the case law is mixed.[41] As a matter of DOJ policy there are internal procedural requirements that DOJ attorneys must follow in the event that they do seek to compel production of extraterritorial documents under a grand jury subpoena.[42] More commonly, DOJ and its investigation target are able to reach an agreement as to what the scope of production of extraterritorial documents should be, and the investigation target will provide these documents voluntarily. This is particularly so when a company has entered a cooperative posture with DOJ's investigation, which may result in a resolution more favorable to the target.[43]

The fact that certain documents were produced to DOJ voluntarily will not, however, protect them from being turned over to plaintiffs in a related civil litigation.[44] As discussed above, courts that have personal jurisdiction over a foreign defendant possess the power to order extraterritorial documents brought into the U.S. for discovery in civil litigation, and once the documents have been produced to DOJ it is likely that a U.S. court would find that any additional burden of producing those documents in the related civil case is low. Thus, if a defendant is concerned about the

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41 *See, e.g.*, In re Grand Jury Proceedings (Bank of N.S.), 740 F.2d 817, 826-28 (11th Cir. 1985) (upholding contempt sanctions for failure to comply with subpoenas for documents located in the Cayman Islands despite argument of Cayman Islands as amicus that disclosure of the documents would have violated Cayman secrecy laws); Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1961) (modifying subpoena seeking documents held by Chase Manhattan's Panamanian subsidiary following showing that production of the documents would violate Panamanian law).

42 For example, the DOJ's U.S. Attorney Criminal Resource Manual provides that prosecutors must obtain approval from higher level officials within DOJ before issuing a subpoena for records located abroad because "*use of unilateral compulsory measures can adversely affect United States law enforcement relationship with a foreign country*." DOJ, U.S. Attorneys' Manual § 9-13.525, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.525; *see also* DOJ, Criminal Resource Manual § 267, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00267.htm.

43 For example, the U.S. Sentencing Guidelines provide for a downward adjustment in the recommended fine range for a defendant that provided "*substantial assistance*" to DOJ, which serves as a strong inventive to cooperate for any defendant that is negotiating or even seriously contemplating entering into a plea. *See* U.S. Sentencing Guidelines Manual § 8C4.1 (2012).

44 *Cf.* In re Grand Jury Investigation of Uranium Indus., Misc. 78-0173, 1978 WL 1434, at *2-3 (D.D.C. Nov. 1, 1978) (granting civil plaintiffs' requests that DOJ be ordered to produce all documents in its custody and control relating to its investigation of the uranium industry, including all documents voluntary produced); *see also* In re Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (NGG)(RER), 2012 WL 2885367, at *1 (E.D.N.Y. July 13, 2012) (holding that plaintiffs could compel discovery of documents voluntarily produced to DOJ).

effect in its civil litigation of waiving any burden arguments it may have to prevent the discovery of extraterritorial documents, it must weigh these concerns against the advantages of cooperating with DOJ's investigation.[45]

The considerations described above all assume that a target desires to enter a cooperative posture with DOJ, given the penalties and leverage DOJ has at its disposal.[46] (Even if a target does not take a cooperative stance with DOJ, however, it is still subject to compulsory production of U.S. documents.) However, if a target chooses not to cooperate beyond what is required by law, it would be unusual for DOJ to attempt to compel production of foreign located documents.[47]

Discovery of EU Leniency Materials by U.S. Civil Plaintiffs

U.S. plaintiffs have also on occasion attempted to compel production of materials produced in investigations in other jurisdictions. Particularly, over the last decade there have been many situations in which plaintiffs have sought materials treated as confidential in European antitrust proceedings, including communications and documents exchanged with the EU,[48] EU immunity and leniency statements,[49] and formal information requests by the EU and defendants' answers thereto.[50]

In order to protect the proper functioning of its leniency program, which depends on the secrecy of oral corporate statements, the Commission, represented by its

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[45] Where the defendant has entered a plea agreement or other resolution agreement with DOJ, that agreement is likely to contain general cooperation provisions. These provisions typically require "reasonable" cooperation -- which leaves some room for negotiation regarding the specifics of what the defendant will provide -- but ultimately, if DOJ pushes for extraterritorial documents it will likely be in the defendant's best interest to comply.

[46] This leverage includes potential prison sentences for employees involved in a cartel and fines ranging from 15-80% of the defendant's volume of commerce that was affected by the cartel. *See generally* U.S. SENTENCING GUIDELINES (2012). While the Sherman Act provides for a maximum fine of $100 million per offense, DOJ often obtains fines far exceeding this figure by relying on a separate law that allows fines up to twice the gross pecuniary gain by the defendant or loss to others resulting from the conspiracy. *See* 18 U.S.C. § 3571(d) (alternative fine provision); DOJ Antitrust Division, *Division Update Spring 2012: Criminal Program*, USDOJ, http://www.justice.gov/atr/public/division-update/2012/criminal-program.html (noting fines up to $470 million obtained by DOJ through its cartel enforcement program from 2011-2012).

[47] Rather than seeking to compel production of extraterritorial documents under a grand jury subpoena, DOJ attorneys may attempt to obtain such documents through the cooperation of a foreign enforcement authority via a Mutual Legal Assistance Treaty ("MLAT"), if such a treaty is in force between the U.S. and the relevant foreign nation.

[48] *See, e.g.*, In re Rubber Chems.,486 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007); In re TFT-LCD (Flat Panel) Antitrust Litig., No. M. 07-1827 SI, 2011 WL 723571, at *1 (N.D. Cal. Feb. 22, 2011).

[49] *See* In re Vitamins Antitrust Litig., Misc. No. 99-197 (TFH), 2002 WL 34499542, at *3, 8 (D.D.C. Dec. 18, 2002).

[50] *See, e.g.*, In re Flat Glass Antitrust Litig. (II), Misc. Action No. 08-mc-180, MDL No. 1942, slip op. at 1-2 (W.D. Pa. Dec. 11, 2009) (consent order on plaintiffs' motion to compel Commission's Statement of Objections and requests for information, and defendant's replies thereto); *TFT-LCD (Flat Panel)*, 2011 WL 723571, at *1; *see also* In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *3-4 (E.D.N.Y. Aug. 27, 2010)(EU Statements of Objections and recordings of Oral Hearings); In re Air Cargo Shipping Servs. Antitrust Litig., No. MD-06-1775, slip op. at 1 (E.D.N.Y. Dec. 19, 2011) (minute order on motion to compel production of confidential version of final decision of the Commission).

Directorate General for Competition, regularly intervenes in U.S. discovery proceedings.[51] The Commission closely monitors discovery motions brought to its attention by parties subject to EU investigations and generally will intervene as amicus curiae if the risk of disclosure becomes serious. We understand that the Commission's concerns regarding discovery are so strong that it has even been resistant to providing the Court of Justice of the European Union ("CJEU") with copies of transcripts of corporate statements, even though this court has jurisdiction to review the legality of the Commission's fining decisions. Its refusal may be based on the fact that the CJEU is obliged to provide access to all documents received to the other parties in the proceeding, which means that cartel participants would have these transcripts at their premises and therefore might be obliged to disclose them at the request of plaintiffs in private actions.

Recent Developments

Sanctions for Failure to Preserve Documents in the U.S.

When confronted with either a DOJ subpoena or a civil suit, one of the first steps that should be taken -- with the advice and guidance of counsel -- is to implement appropriate document preservation measures. This will include several steps such as identifying all employees who may have custody of responsive documents and issuing a preservation notice to them, suspending any automatic deletion measures taken in the ordinary course of business, and setting aside the currently existing backups and records in order to create a snapshot of the company's electronic document and data systems as they existed on the date of the subpoena or litigation. Many of these steps will require the cooperation and input of executives with knowledge of the roles of the employees of the business or information technology personnel who can explain the company's IT systems and backup procedures and then implement preservation measures. A document hold notice, which instructs relevant employees regarding what documents must be preserved, should be drafted to cover all business-related hard copy and electronic documents and data, and the first place to look for guidance on what materials must be preserved is the subpoena or complaint. Counsel should follow up with employees subject to the notice to ensure that they understand and have accepted the terms of the notice. It is also important to work with IT staff to ensure that appropriate preservation measures are taken at the enterprise level.

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[51] *See, e.g.*, *TFT-LCD (Flat Panel)*, 2011 WL 723571, at *1-3 (Commission opposed plaintiffs' motion to compel documents relating to the Commission's investigation of defendant;); *Payment Card*, 2010 WL 3420517, at *6, *10 (Commission, as amicus, argued that documents created in connection with its investigation and disclosed to it were entitled to confidentiality; plaintiffs' motion to compel was denied on that basis); *Vitamins*, 2002 WL 34499542, at *5 (plaintiffs' motion to compel documents submitted to the Commission was granted despite the court's consideration of the Commission's arguments); *Air Cargo*, No. MD-06-1775, slip op. at 1 (denying plaintiffs' motion to compel "*on grounds of comity*" following receipt of a letter from the Commission's Director General opposing the motion).

There can be severe consequences under U.S. law for destroying documents which may contain evidence of a violation. For example, in one recent case, a Japanese company, Tokai Rika, pleaded guilty to a charge for destroying documents in addition to an antitrust charge for the anticompetitive conduct.[52] According to DOJ, after the U.S. Federal Bureau of Investigation raided Tokai Rika's U.S. subsidiary, an executive in Japan instructed employees to destroy documents, and the employees did so.[53] DOJ noted in its press release that intentional destruction of documents may result in a charge for "*obstruction of justice*" and an additional criminal penalty of $500,000 per obstruction count on top of the regular antitrust penalty.[54]

Failure to preserve documents and data also may have serious adverse consequences in U.S. civil litigation. Even inadvertent failure to preserve, or destruction of documents that occurs as a result of failure to suspend automatic deletion software, may result in sanctions of varying severity according to the apparent importance of the destroyed documents and the level of culpability of the company in the destruction. A key decision on this point is *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*,[55] in which the plaintiffs committed multiple discovery failures, including failure to apply appropriate litigation holds, failure of counsel to appropriately oversee the collection of documents, and deletion of relevant documents after the litigation commenced.[56] The *Pension Committee* court analyzed the following factors in determining appropriate sanctions: (i) the level of culpability of the party (though even simple negligence is sanctionable); (ii) whether there was a duty to preserve the evidence; (iii) the burden of proof (more severe sanctions require a higher burden of proof by the party seeking the sanctions); and (iv) what remedy would restore the adverse party to the same position it would have been if had the evidence not been destroyed.[57] These sanctions may include "*further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal.*"[58]

One recent antitrust decision illustrates the severity of the sanctions that could be imposed upon a litigant found to have destroyed documents in bad faith. In *Mi-*

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[52] *See* Press Release, DOJ, Japanese Automobile Parts Manufacturer Agrees to Plead Guilty to Price Fixing and Obstruction of Justice (Oct. 30, 2012), *available at* http://www.justice.gov/opa/pr/2012/October/12-at-1298.html.

[53] *See id.*

[54] In the EU, the Commission's Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C 298, of 8 December 2006 indicates in recital 12 that cooperating genuinely, fully, on a continuous basis, and expeditiously from the time a company submits its application also means that the company must not destroy, falsify, or conceal relevant information or evidence relating to the alleged cartel. As far as the Member States are concerned, the European Competition Network's recently amended Model Leniency Programme, which aims at a soft harmonization of Member State leniency programs, specifically indicates that companies applying for immunity should not have "*destroyed evidence which falls within the scope of the application.*" ECN Model Leniency Programme § 13(3)(a) (2012), *available at* ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

[55] 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

[56] *Id.* at 463-75.

[57] *Id.* at 463-72.

[58] *Id.* at 469 (footnotes omitted).

cron Technology, Inc. v. Rambus, Inc.,[59] Micron sought sanctions against Rambus for spoliation of evidence in a patent case. Over two years prior to commencing the litigation, Rambus had consulted with counsel about a litigation strategy to assert potentially valuable patent rights against manufacturers of certain computer memory chips.[60] Shortly thereafter, Rambus also implemented a document retention policy that called for tape back-ups to be destroyed after about three months.[61] Rambus had previously kept records dating back to the early days of the company, and contemporaneous emails showed that one of the reasons for the new document retention policy was to "*purge documents . . . that might have been discoverable in litigation.*"[62] Rambus then deleted nearly all of its 1270 backup tapes, retaining a single tape that contained a document helpful to Rambus's case.[63] Rambus also organized periodic document shredding sessions in which employees shredded hundreds of boxes of hard copy documents pursuant to the new document retention policy.[64]

The court in *Rambus* determined that Rambus had acted in bad faith in order to disadvantage its anticipated litigation opponents and that the document retention policy was implemented in order to advantage Rambus in the litigation.[65] The court found that Rambus had selectively retained documents that would help its case in the litigation while destroying harmful documents.[66] Because of Rambus's bad faith in destroying the documents, the degree of prejudice potentially suffered by its opponents due to the spoliation, and the inadequacy of lesser sanctions to alleviate the prejudice and punish the misconduct, the court determined that Rambus should be barred from enforcing against Micron the patents at issue in the litigation.[67]

In cases where a company destroys, or merely fails to take all reasonable steps to preserve, documents relevant to both a criminal investigation and a civil litigation in the U.S., it should be prepared for negative consequences in both cases. As illustrated by the *Rambus* example, in civil litigation where there has been bad faith in destroying discoverable materials, sanctions for such so-called "spoliation" of evidence can be quite severe.

Recent Developments in Civil Discovery in the EU

An issue that has been discussed widely in Europe over the last several years and that could impact the understanding of what comity requires in U.S. procedures involving EU based documents, is to what extent competition authorities can refuse to grant access to their files, particularly documents and information provided in

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59 Civ. No. 00-792-SLR, 2013 WL 227630 (D. Del. Jan. 2, 2013).
60 *Id.* at *3, *5-6.
61 *Id.* at *6.
62 *Id.*
63 *Id.* at *7.
64 *Id.* at *7-9.
65 *Id.* at *11-14.
66 *Id.* at *12.
67 *Id.* at *18-21.

the context of immunity or leniency applications. In Europe, as elsewhere, plaintiffs seeking to recover damages for overcharges resulting from pricing cartels may find it difficult to obtain sufficient evidence to demonstrate all elements of their claims. Competition authorities have resisted providing private plaintiffs with documents and information acquired in the course of immunity or leniency programs because they fear that this would discourage immunity applicants from coming forward. Recent years have brought a number of judgments regarding the lawfulness of authorities' refusal to supply documents to private plaintiffs on both the Member State and the EU level.

Access to Documents Held by National Competition Authorities in EU Member States

The judgment of the CJEU that triggered discussions regarding access to authority documents throughout Europe was delivered in response to a request for a preliminary ruling by the Bonn Local Court. A private plaintiff, Pfleiderer, had sought access to the German Federal Cartel Office's ("FCO") file regarding a cartel related to décor paper, which included documents and information submitted within the framework of the German leniency system. The FCO had refused to provide the file, and Pfleiderer had appealed this decision to the Bonn Court, which ordered access to most of the documents requested but stayed enforcement pending a judgment by the CJEU. In a judgment of 14 June 2011,[68] the CJEU emphasized that both effective leniency programs and the rights of individuals to claim damages for losses caused by actions in violation of competition law strengthen the working of the Community competition rules and contribute to the maintenance of effective competition in the EU. It held that the domestic courts of the Member States should weigh, on a case-by-case basis, the respective interests for disclosure against those in favoring protection of information provided voluntarily by leniency applicants. Having considered the CJEU's judgment, the Bonn Local Court ruled in *Pfleiderer* that the effective application of the leniency program should prevail over the interests of damage claimants, and denied Pfleiderer's request.[69]

Since the CJEU's *Pfleiderer* judgment, a number of national judgments have tackled the question of discovery of documents collected in the framework of leniency programs. In another German case, a court rejected claims for access to leniency documents submitted to the FCO related to an investigation in a coffee roasters cartel.[70] Although the court acknowledged the third parties' legitimate interest in inspecting the files, it granted access only to the FCO's decision (with names and

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68 C-360/09 – *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011.

69 Amtsgericht Bonn (District Court of Bonn), decision of 18 January 2012. Case No 51 Gs 53/09, *available at* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf[accessed on 13 March 2013]. For other documents (the index of the documents seized, the procedural file, and the documents seized during the inspections) a non-confidential version had to be made available.

70 Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf), decision of 22 August 2012. Case No V-4 Kart 5 + 6/11 (OWI).

commercial information deleted) and to a summary of all documents contained in the file. The Court excluded leniency-related documents from the scope of documents to be communicated to the plaintiff. The Court held that the interest of victims of cartels generally can be satisfied adequately by the disclosure of the FCO decisions imposing fines and that providing non-confidential versions of other documents would be too time intensive. Although this solution is consistent with the findings in *Pfleiderer*,[71] the decision is broader in that it allows for the communication of substantial parts of the decision, and an index of all documents.

Application of Pfleiderer *to Documents Held by the EC*

While the CJEU's *Pfleiderer* judgment related to documents held at national competition authorities, courts in Member States also have considered its effect on documents held by the Commission. Post-*Pfleiderer*, a complaint filed before the High Court of England and Wales by National Grid sought damages from members of the Gas Insulated Switchgear cartel, which the Commission had fined 750 million Euros in 2007.[72] National Grid applied for access to the confidential version of the EU decision, certain responses to the Commission's Statement of Objections, and replies to certain requests for information, which contain or make use of leniency materials submitted to the Commission. In a preliminary judgment handed over only days after the *Pfleiderer* judgment, the High Court adjourned the issue of disclosure of the confidential version of the Commission's decision and leniency documents.[73]

At the invitation of Roth J., the Commission intervened as *amicus curiae* to the proceedings, and provided its views on (i) the jurisdiction of the High Court to order disclosure of leniency documents, (ii) the relevance of *Pfleiderer* to the case, and (iii) the application of the "*Pfleiderer principles*."[74] The Commission agreed that the High Court had jurisdiction to order the disclosure of leniency documents, provided that these documents were under the control of the parties subject to the proceedings (such as the replies to Statement of Objections or requests for information). The Commission also agreed that the *Pfleiderer* judgment was relevant to the *National Grid* proceedings.[75] After defending the purpose of the leniency program, the Commission warned that subjecting cooperating companies to increased exposure

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[71] Higher Regional Court Düsseldorf, decision of 22 August 2012, *Third-party access to leniency applications in court proceedings*; Press Release of 27 August 2012, Decision of Düsseldorf Higher Regional Court safeguards Bundeskartellamt's leniency program, *available at* http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-08-27_PR_OLG-E.pdf [accessed on 13 March 2013].

[72] COMP/38899 - *Gas insulated switchgear*, Commission decision of 24 January 2007.

[73] *National Grid Electricity Transmission Plc v ABB & ors* [2011] EWHC 1717 (Ch), judgment of 4 July 2011.

[74] Observations of 3 November 2011 of the European Commission pursuant to Article 15(3) of Regulation 1/2003 provided in respect of case HC08C03243. in *National Grid Electricity Transmission Plc v ABB & ors*, http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf.

[75] Although the *Pfleiderer* case concerned the disclosure of leniency documents submitted in the context of an investigation carried out by the FCO, the Commission noted that the FCO's decision applied European competition law rules, and that the CJEU's interpretation does not distinguish between Member States and Commission enforcement of those rules. The Commission therefore agreed to extend, by analogy, the principles laid down in *Pfleiderer* to the access of leniency documents created for the purpose of a Commission investigation and examined the application of the *Pfleiderer* rulings on the case at hand.

in private litigation would deter cooperation with the competition authorities. The Commission insisted that the High Court must balance the competing interests of effective application of competition law by competition authorities and the right of persons harmed by infringement of competition rules to seek redress.[76]

In its final judgment of 4 April 2012, Roth J. referred to the balancing test of *Pfleiderer* and applied a proportionality test ("*is the information available from other sources and what is the relevance of the information?*"). Roth J. inspected the documents in order to determine if they were potentially relevant such that disclosure should be ordered. The High Court granted access to a limited number of passages of the confidential version of the Commission decision, some replies to Commission requests for information, and one "*List of Abbreviations*."[77] The High Court rejected the application for access to leniency documents, finding that because they were not of particular relevance to the proceedings, the interest of protecting information supplied under the leniency program outweighed the interest of disclosure in this action for damages.

Access to EU Documents Under the Transparency Regulation

Plaintiffs have also tried to obtain documents from the Commission under the "Transparency Regulation,"[78] which provides that "*any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of [the European Parliament, the Council and the Commission].*"[79] The regulation permits the Commission to refuse disclosure on a number of grounds, such as "*the protection of . . . the economic policy of the Community*," "*the commercial interests of a natural or legal person,*" and the "*purpose of investigations*" carried out by the Commission,[80] which the Commission has invoked to protect from disclosure documents collected in the course of cartel investigations.[81]

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[76] In the specific case however, the Commission considered access to its confidential decision leniency documents was not relevant to the claimant's case, since the functioning and the effect of the cartel in the United Kingdom was not "*a central preoccupation of the decision.*" *See* Observations of the European Commission, p. 13.

[77] *National Grid Electricity Transmission Plc v ABB & ors* [2012] EWHC 869 (Ch), judgment of 4 April 2012.

[78] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31 May 2001, p. 43–48.

[79] Article 2 of Regulation 1049/2001.

[80] Article 4 of Regulation 1049/2001.

[81] Much of the debate on this issue relates to whether the Commission must demonstrate the presence of exceptional circumstances for each document individually or whether it can use the same argument for all documents in its file or at least sub-groups of such documents. This was first examined in a case relating to state aids (Case C-139/07 P - *Commission v Technische Glaswerke Ilmenau,* judgment of 29 June 2010, para 61) and another one relating to merger control proceedings (Case C-404/10 P - *Commission v Éditions Odile Jacob,* judgment of 28 June 2012, para 123; Case C-477/10 P - *Commission v Agrofert Holding a.s.*, judgment of 28 June 2012, para 64) where the CJEU accepted that the Commission could rely on a general presumption that disclosure of documents in its file undermines, in principle, the protection of the objectives of its investigations and/or that of the commercial interests of the companies involved. The CJEU held that the Commission is entitled to refuse access to the documents without a concrete, individual examination of each document, unless the interested parties demonstrate there is a higher public interest justifying the disclosure of the document.

Two recent judgments of the General Court in cases relating to cartel proceedings shed some light on this issue, just months after the *Pfleiderer* ruling. The first judgment concerned the claims of CDC[82] relating to the Hydrogen Peroxide cartel sanctioned by the Commission in 2006.[83] CDC requested from the Commission the index of all cartel-related documents under the Transparency Regulation. The Commission opposed the disclosure, arguing that it needed to protect commercial interests. The General Court determined that because the request concerned only the index of documents, not the documents themselves, refusing disclosure would frustrate the right to the widest possible access.[84] The most recent case relates to the *Gas Insulated Switchgear* cartel, decided by the Commission in 2007.[85] Energie Baden-Württemberg (EnBW) had requested access to all documents held by the Commission in connection with the cartel, which the Commission denied. The General Court, however, rejected the Commission's submission that disclosure would undermine the purpose of the investigation because a final decision had already been adopted.[86]

Although the judgments in CDC and EnBW do not specifically relate to leniency documents, it is worth noting that in both cases the General Court rejected the idea of a specific ban on disclosure of leniency materials.[87] The case law remains unclear, however, because in June 2012 the CJEU overturned two judgments of the General Court and restated the existence of a general presumption that disclosure of documents exchanged between the Commission and businesses in the course of merger control proceedings undermines, in principle, the protection of the purpose of the investigation and the protection of the legitimate commercial interests of the companies involved.[88] It is not yet certain what this may mean for documents held by authorities in the course of cartel investigations.

In this situation, the heads of all European national competition authorities published a joint resolution expressing their concerns on the protection of leni-

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[82] Cartel Damage Claims is an "aggregator," *i.e.*, a company pursuing damages claims of the alleged victims of cartels in national courts.

[83] COMP/F/38.620 – *Hydrogen Peroxide and Perborate*, Commission decision of 3 May 2006.

[84] Case T-437/08 - *CDC Hydrogene Peroxide v Commission*, judgment of 15 December 2011, para 44. The Commission also claimed that disclosure would undermine the purpose of the "investigation," which would have to include "*all of the Commission's policy in regard to the punishment and prevention of cartels.*" *Id.* at para 68. The General Court refused this line of argument also because a refusal of access would prevent actions for damages from making "*a significant contribution to the maintenance of effective competition in the EU.*" *Id.*, para 77. Consequently, the Court considered that the Commission had not sufficiently established that a disclosure of the index would specifically and effectively harm the purpose of the investigations.

[85] *Gas insulated switchgear*, supra n.72.

[86] Case T-344/08 - *EnBW Energie Baden-Württemberg v Commission,* judgment of 22 May 2012. A broad interpretation of what constitutes an "investigation" as encompassing finished *cases* works against the purpose of the Transparency Regulation. The General Court also rejected the claim that such disclosure of these documents would harm the companies' commercial interests since their desire is in practice "*to avoid actions for damages being brought against them before the national courts.*" Para 147.

[87] *CDC*, para 70 and *EnBW*, para 125.

[88] *Odile Jacob* and *Agrofert, supra* n.82.

ency materials in the context of civil damages actions.[89] This resolution argues that damage claimants primarily rely on public enforcement to uncover cartels and that public enforcement still is based to a significant extent on the efficient working of leniency programs. The authorities argued therefore that it would be in the interest of cartel victims to protect leniency materials against disclosure, so as to mitigate the perception that applying for leniency increases a company's exposure to damage claims. The Commission consequently proposed a legislative initiative in its Work Programme for 2012 to address the issue of actions for damages for breaches of antitrust law.[90] At this time, it is unclear what impact the recent jurisprudence of the European Courts or a legislative initiative in the EU would have in the U.S.[91]

Conclusion

When served with process in an antitrust case, it is important for the company to consider from the very beginning how to respond while maximizing the various protections it enjoys in the relevant jurisdictions. Balancing competing considerations correctly can mean the difference between privileges being waived or protected, extraterritorial documents being out of the jurisdiction or subject to compulsory process, and investigation work product being revealed or protected. Over the course of an entire investigation, these differences can be material in terms of the defendant's ability to negotiate a favorable resolution. Thus, responding intelligently and strategically and staying apprised of developments in this area in all of the relevant jurisdictions may be the key to an antitrust defendant's success.

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89 *Protection of leniency material in the context of civil damages actions*, Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, *available at* http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf [accessed on 13 March 2013].

90 The purpose of this legislative initiative would be "*to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU.*" Annex 1 to the *Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012, Delivering European Renewal*, COM(2011)777 final, *available at* http://ec.europa.eu/atwork/pdf/cwp2012_en.pdf [accessed on 13 March 2013]. The Commissioner for Competition, Joaquin Almunia, said at a conference in December 2012 he would propose legislation on damages actions "*in the coming months*," with a collective redress initiative to come later. Speech at 29th Annual AmCham EU Competition Policy Conference (Brussels) on 6 December 2012, *available at*http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm[accessed on 13 March 2013].

91 Lisa Phelan, Chief of the DOJ's National Criminal Enforcement Section, has said that DOJ will "*seek to protect leniency materials here in the U.S. and in U.S. courts if Commission documents are being sought as well.*" Quoted in Lewis Crofts and Leah Nylen, DOJ pledges support for protection of EC leniency documents in U.S. courts, *Mlex*, 22 November 2011.