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The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court

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Treaty on the Functioning of the European Union

***E.C.L.R. 116 Introduction**

The first EU Leniency Notice formed the basis for the Commission's renewed vigour in cartel enforcement in the late 1990s.¹ However, it was only shortly after the entry into effect of the second Leniency Notice in 2002² that the Commission's ability to maintain its leniency system as its most effective weapon in cartel enforcement began to be severely tested.

In the *Vitamins* case,³ private plaintiffs for the first time sought discovery of corporate statements submitted by a leniency applicant to the EU Commission in the context of a claim for treble damages before a US federal court. Since the *Vitamins* case, plaintiffs have continued to seek access to EU corporate statements and related Commission materials in support of damages actions.⁴ The Commission has sought to resist and limit discovery in US proceedings through the submission of letters and amicus curiae briefs, and more recently has intervened as a party in a US proceeding. In essence, the Commission has argued that discovery of corporate statements and related Commission materials would undermine its leniency programme and the effective enforcement of EU competition law because companies would be deterred from submitting leniency applications if they run the risk that the self-incriminating information they supply in order to obtain immunity would be handed over to private plaintiffs suing them for damages.⁵ Similar considerations would apply in relation to the new EU settlement regime.

After the *Vitamins* case, the Commission modified its practice, and subsequently its Leniency Notice, to strengthen the legal basis for preventing the disclosure of corporate statements and related materials in the Commission's files to private plaintiffs.⁶ Although the Commission's leniency programme is a critical component of the Commission's anti-cartel enforcement efforts, the Commission's endeavours to protect the confidentiality of its records have met with mixed results in US court proceedings to date.

With increasing frequency, private plaintiffs are now also initiating actions in EU Member State courts for damages incurred as a result of cartel conduct. As in the United States, these plaintiffs are actively seeking access to Commission file materials to support their damage claims, including corporate statements. In response, the Commission in its draft Directive on private damage actions provided for the automatic protection of the confidentiality of corporate and settlement statements in EU Member State court proceedings which would arguably have settled this issue, at least within the European Union.⁷ However, now that the draft Directive has been put on hold pending agreement on, "common principles that can be applied in various areas, beyond competition",⁸ the question of the confidentiality of the Commission's records is in the hands of the courts, also in the European Union.

This article will first summarise the EU legal framework protecting the confidentiality of Commission materials. It will then examine the Commission's attempts to protect the confidentiality of its records in cartel cases in the context of US treble damages proceedings. Last, it will review the means available to private plaintiffs in the European Union to obtain access to those materials. While this issue has

reached a level of relative stability in the United States with courts generally appearing to recognise principles of comity to protect the confidentiality of the Commission's cartel records in certain circumstances, in the European Union the issue ***E.C.L.R. 117** of access to Commission materials relating to a cartel proceeding is still undecided. The issue will have to be resolved by the EU Court of Justice by balancing the relative importance within the European Union's legal order of ensuring the confidentiality of the Commission's records against the rights of private plaintiffs to pursue damage claims. The entry into force of the Lisbon Treaty, which introduces the Charter on Fundamental Rights of the European Union into the European primary law may complicate and significantly affect attempts by the Court of Justice to balance the rights and interests of the Commission, private plaintiffs and immunity applicants in the context of private plaintiffs' requests for access to leniency applications and related Commission materials.⁹ The rulings of the Court of Justice on this issue will invariably impact the US courts' assessment of the confidentiality protection to be provided to Commission materials either by undercutting or reinforcing the comity considerations that so far have lead US courts to deny access to those materials to private plaintiffs.

The legal framework concerning the confidentiality of EU Commission records

The Commission's cartel files include, inter alia, documents seized from or provided by leniency applicants and other firms under investigation, correspondence between the Commission and the firms concerned or their counsel, corporate statements from leniency applicants, the statement of objections and responses to the statement of objections. The Commission's oral procedure enables applicants to make an immunity application without producing a written copy of their corporate statement, but instead read their corporate statement into the Commission's record. The Commission then produces a written transcript of the tape recording for its own records.

The Commission's files and records are considered confidential under EU law, subject to specific exceptions. Regulation 1/2003 [2003] OJ L1/1 art.28 provides that the officials of the Commission will not,

"disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy"

and that the information collected can be used only for the purpose for which it was acquired. Access to the Commission's file is provided, upon request, to "the persons, undertakings or associations of undertakings, as the case may be, to which the Commission addresses its objections"¹⁰ --in other words, to the defendants themselves--subject to an exception for confidential information which is redacted.¹¹ Access to file is granted, "to enable the effective exercise of the rights of defence against the objections brought forward by the Commission". Moreover, access to file is granted only on the condition that the documents obtained are:

"[U]sed only for the purposes of judicial or administrative proceedings for the application of Articles 81 [now 101] and 82 [now 102] of the Treaty."

The latter provision affirmatively permits the use of materials to which access has been granted to the defendants in collateral national court proceedings in the European Union brought to enforce arts 101 and 102 TFEU, including private damage actions brought by plaintiffs who have been harmed by a cartel.

Regulation 1/2003 arts 11-12 and 15 further provide for the exchange of confidential information between the Commission and the competition authorities and courts of the EU Member States. The Co-operation Notice,¹² further details the obligations that flow from these provisions, and expressly provides that, "the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant" (art.26).

The position of the US courts on the confidentiality of EU Commission records

It is not surprising that private plaintiffs made the first serious attempts to force access to EU corporate statements and other confidential Commission materials ***E.C.L.R. 118** in the context of US damage actions. In addition to the strong incentive provided by the trebling of damages, US private plaintiffs benefit from broad US discovery rules, allowing them to seek the production of any relevant, non-privileged document within their adversary's possession, custody, or control.¹³

To date, the attempts by private plaintiffs to compel production of EU corporate statements or related

Commission materials have met with varying degrees of success in the US courts. The relevant issues have been addressed with reasoned opinions in four illustrative cases: *Vitamins Antitrust Litigation, Re ("Vitamins")*,¹⁴ *Methionine Antitrust Litigation, Re ("Methionine")*,¹⁵ *Rubber Chemicals Antitrust Litigation, Re ("Rubber Chemicals")*,¹⁶ and *Flat Glass (II) Antitrust Litigation, Re ("Flat Glass II")*.¹⁷ In each of these cases, the EU Commission has either filed an amicus curiae brief, submitted a letter to the court, or actively intervened to oppose the production of Commission materials relevant to its cartel infringement decisions. The arguments have evolved over time, from *Vitamins* in 2002 to *Flat Glass II* in 2009, but the considerations of international comity have always constituted the backbone of the Commission's argument. Other legal bases, such as the act of state doctrine, investigatory privilege, and attorney work-product protection have met with more or less success through the years.

International comity

Comity arguments have been the European Union's primary tool to protect the confidentiality of corporate statements and related Commission materials. In US jurisprudence, comity:

"[I]s the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."¹⁸

The comity analysis requires a balancing test which weighs the competing interests of the United States against those of a foreign state (viz. EU protection of its leniency programme).¹⁹ Because the application of comity by US courts is neither an "absolute obligation" nor a "mere courtesy",²⁰ judicial assessments have sometimes yielded inconsistent results.

In *Vitamins*, the special master found, and the district judge affirmed, that the interests of the European Union did not outweigh the interests of the United States in obtaining full discovery of corporate statements made to the EU Commission.²¹ As a result of this decision, the EU Commission submitted an amicus curiae brief arguing for a reconsideration that would take into account the principle of international comity and (as discussed in more detail below) the investigatory privilege. The Commission argued that allowing discovery of corporate statements would greatly undermine the effectiveness of its leniency programme.²² The Commission also noted the possibility that impairment of the EU leniency programme would equally damage the US amnesty programme, a consideration that was subsequently echoed by the US Department of Justice in *Flat Glass II*.²³ Largely side-stepping the arguments put forward by the Commission, the district judge in *Vitamins* ruled that intervening conditions had not changed sufficiently to allow a reconsideration of the earlier decision.²⁴

Also in 2002, the Commission sent a letter to the court in the *Methionine* case, incorporating by reference the same amicus curiae brief it had submitted in *Vitamins*. This time, however, the court agreed with the Commission's comity arguments, concluding that, "the balance tips strongly in favor of" respecting the Commission's interests in confidentiality. The court found that the European Union's interests in protecting the leniency programme outweighed the plaintiffs' needs in discovery, in particular because in this case the plaintiffs had already obtained the requested materials from a source that was not a defendant in the US private action.²⁵

Following the conflicting outcomes in *Vitamins* and *Methionine*, the district court of the Northern District of California undertook a more comprehensive analysis of the comity issue in the 2007 decision in *Rubber Chemicals*. During discovery, *Rubber Chemicals* defendant Flexsys had already produced to the plaintiffs all documents relevant to the cartel investigations of the US Department of Justice ("DOJ") and the Canadian *E.C.L.R. 119 Competition Bureau and all pre-existing business documents that had been produced to the European Union.²⁶ However, Flexsys invoked comity considerations as the basis for its refusal to produce its corporate statement or communications between itself and the Commission relating to leniency.²⁷

In reaching its conclusion, the court sought to balance protection of the European Union's leniency programme against the access to evidence provided by US discovery rules. Applying the Supreme Court's five factor balancing test articulated in *Aerospatiale*, the court considered:

- (1) the importance to the litigation of the documents or other information requested;
- (2) the degree of specificity of the request;
- (3) whether the information originated in the United States;

(4) the availability of alternate means of securing the information; and

(5) “the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located”.²⁸

Having weighed these factors, the court concluded that the principles of comity outweighed the requests of the plaintiffs.²⁹

However, the next time the issue came up, in the *Flat Glass II* litigation in 2009, in relation to a request for materials that became accessible to the defendant through access to the Commission's file, the district court re-assessed these same comity principles and concluded that the interest in full discovery should prevail, especially because the plaintiffs possessed most of the documents requested, the EC investigation was finished, and the defendant already had provided plaintiffs an unredacted copy of the EC decision. This time, the EU Commission intervened and reinforced its arguments with the addition of a supporting letter from the DOJ. In that letter, the DOJ noted that the interests of the European Union and the US executive branch in protecting the confidentiality of materials provided by leniency applicants were aligned and asked the court to refuse discovery. Although the *Flat Glass II* court never ruled following the Commission's intervention, its original order was later vacated by consent between the plaintiffs and defendants, and a new order was put into place respecting the Commission's concerns.

The most recent application of comity principles to confidential EU materials--involving a production request for a statement of objections and Commission oral hearing transcript, although not a leniency corporate statement--came out of the Eastern District of New York in 2010. In *Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, Re (“Interchange”)* the district court found that compelling production of confidential EU materials would be “contrary to the law of international comity”, mandating an exception, “to the usual rule that all relevant information is discoverable”.³⁰ Also in this case, the court referenced the *Aerospatiale* balancing test, noting that the plaintiffs had other means of obtaining information about the defendants' activities in Europe and already had access to one of the defendants' submissions to the Commission.

Act of state doctrine

In both its *Flat Glass II* and *Interchange* briefs, the European Union raised the potential applicability of the act of state doctrine. A creature of US jurisprudence, the act of state doctrine is a seldom used judicial device designed to prevent US courts from overstepping their boundaries and impinging on acts of a governmental character by a foreign state within its own territory.³¹

In *Flat Glass II*, the Commission argued that the Commission, acting as a sovereign, provided private parties with assurances of confidentiality that are legally binding under EU law. In that case, however, there was no ruling by the court relating to the issue. In *Interchange*, the court disposed of the argument in a single footnote, observing that the act of state doctrine was “inapposite” because the plaintiffs were asking the court not to rule on the validity of the European Union's confidentiality protections but rather to resolve a conflict between a valid EU law and a valid US law. In addition, the court observed that use of the doctrine should not displace the comity balancing test the Supreme Court has prescribed, “for discovery requests that conflict with a foreign sovereign's asserted interests”.³²

***E.C.L.R. 120 Investigatory privilege**

In the earlier *Vitamins* and *Methionine* cases, the European Union also sought, in parallel to its comity arguments, to invoke investigatory privilege as an independent means of protection.³³ The law enforcement or investigatory privilege is a qualified, judicially-created privilege which requires the court to balance the government's need for secrecy against the claimant's need for access to the allegedly privileged information.³⁴ In some--but not all--US federal circuits, governments enjoy a “strong presumption” against lifting the privilege,³⁵ and plaintiffs must show a “compelling need” to overcome this presumption, including an inability to discover the information sought from other sources.³⁶

In the circuits applying this approach, disclosure is required only if the plaintiffs' compelling need “outweighs the public interest in nondisclosure”.³⁷ This balancing test often involves a litany of considerations including, *inter alia*, “the extent to which disclosure will thwart governmental processes

by discouraging citizens from giving the government information”, “the importance of the information sought to the plaintiff’s case”, and--in jurisdictions which do not apply a presumption against lifting the privilege--consideration of, “whether the information sought is available through other discovery or from other sources”.³⁸

In the *Vitamins* case, application of the privilege was rejected on the basis that the privilege can only apply to documents within the control of an investigative body and specified as privileged by the head of that body. The application of the investigatory privilege thus critically rests on the privileged information being within the sole control of an investigative body, and not being in the possession of a private party, such as the defendant (or co-defendants) in a cartel case.³⁹ In *Methionine*, the court seemed favourably disposed to the invocation of investigatory privilege, but based its ruling primarily on considerations of comity.⁴⁰ In this context, it should be noted that the Commission’s oral procedure enables applicants to make an immunity application without producing a written copy of their corporate statement. While in the current practice the Commission does produce a written transcript of the corporate statement, this transcript remains in its exclusive possession. Neither the other defendants nor the leniency applicant receive copies of this transcript, although other defendants (and the leniency applicant should it wish to do so) are permitted to prepare their own transcriptions of the tapes on which the corporate statement has been recorded as part of their access to the Commission’s file (see above). A plaintiff seeking discovery of the Commission’s tapes or transcripts would arguably be blocked by the investigatory privilege. While this has not been ruled on by US courts (for example in *Flat Glass II*), the availability to defendants of the contents of the tapes through the access to file procedure should not in and of itself place the tapes themselves outside the control of the Commission for purposes of application of the privilege given the limited conditions under which access to file is granted. However, the privilege would arguably not apply to protect against discovery of the content of corporate statements from a defendant who had prepared its own transcript. In addition, in theory private plaintiffs could make the argument, and US judges may require, that a leniency applicant make a “good faith effort” to comply with a discovery request by asking the Commission to produce a transcript of its corporate statement.⁴¹

A 2004 Supreme Court judgment identifying the Commission as a “foreign court or tribunal” may have had some impact on the Commission’s ability to protect the confidentiality of its records on the basis of the investigatory privilege.⁴² In *Intel v Advanced Micro Devices Inc*,⁴³ AMD sought discovery of US materials to support a complaint before the EU Commission on the basis of s.1782(a) of title 28 of the United States Code, which empowers federal courts to compel persons within its jurisdiction to produce evidence for, “use in a proceeding in a foreign or international tribunal”. The case was ultimately brought before the Supreme Court. The Commission submitted an amicus curiae brief in the proceeding, arguing that a finding equating the Commission to a “foreign court or tribunal”—as required by s.1782(a)—could jeopardise its ability to, “protect its prosecutorial and law enforcement prerogatives in other proceedings”.⁴⁴ The Commission noted specifically that it had already been forced:

***E.C.L.R. 121** “[T]o invoke the law enforcement investigative privilege in civil actions in the United States to protect from disclosure documents that it gathers in its antitrust law enforcement capacity.”⁴⁵

However, the Supreme Court found that s.1782 discoverability extended to materials to be produced in support of procedures before “quasi-judicial agencies” such as the Commission, and that to the extent to which it acts as a “first-instance decision maker” the Commission could be deemed to be a foreign court or tribunal within the ambit of s.1782.⁴⁶ While US courts have not expressly ruled on whether the characterisation of the Commission as a foreign court or tribunal would prevent the Commission from invoking the investigative privilege,⁴⁷ the Commission has chosen not to rely on the investigatory privilege defence in its submissions in *Rubber Chemicals* and *Flat Glass II*.

The attorney work-product privilege

Some early attempts were also made, primarily on the behalf of defendants’ counsel, to preserve the confidentiality of EU corporate statements by use of the attorney work-product protection. To the degree that corporate statements are documents prepared by or at the direction of counsel in anticipation of investigation or litigation, they constitute attorney work-product, which is ordinarily excepted from discovery in US courts. The Supreme Court has recognised (and the Rules of Civil Procedure have since enshrined) the idea that materials prepared by attorneys for a party in anticipation of litigation are deserving of protection from production absent a showing of “substantial need” by the party seeking the information and an inability to obtain their “substantial equivalent” through other discovery.⁴⁸

The issue of whether disclosure of the work product to the Commission destroys its privileged nature has received inconsistent treatment in the US courts. Thus, whereas some US courts have found that disclosure of attorney work-product to a third party tends to destroy the document's confidentiality and thereby invalidate its protection as against all other parties, others take the narrower view that waiver of the work-product doctrine, "will be found only where the work product was voluntarily disclosed such that it may become readily accessible to an adversary".⁴⁹ Under the latter approach, the mere disclosure to the Commission, which has an interest in the information but should not reasonably be viewed as a conduit to a potential adversary, should not be deemed to constitute a waiver of the protection of the privilege.⁵⁰

Moreover, some US courts have found persuasive the argument that disclosure to a government entity pursuant to a confidentiality agreement (such as would be the case in a leniency application to the European Union) is fundamentally different from disclosure to a private third party, and where that disclosure has "resulted in significant benefits to the government", the court has found that sharing of such statements does not waive the protection.⁵¹ However, the court in *Vitamins* explicitly found that--where delivery of the documents was not strictly compelled by the Commission--the attorney work-product protection would be waived as to all parties, including plaintiffs.⁵² The Commission's oral leniency procedure, while avoiding the need for a written submission by allowing the immunity applicant to read a corporate statement into the Commission's record, does not, however, necessarily protect the applicant against a claim for production of the written materials in the possession of the immunity applicant or its counsel that form the basis of the oral statement.⁵³

The confidentiality of EU Commission records in the EU courts

Because until now private plaintiffs have generally sought compensation for damages in the plaintiff-friendly surroundings of US civil litigation procedures, the issues relating to the protection of the confidentiality of EU corporate statements and related Commission materials have been litigated largely in the context of the Commission's attempts to protect its records from the application of US discovery rules. However, both plaintiff law firms and damages claims groups are now becoming increasingly active in seeking compensation in EU Member State courts for damages arising from cartels. Plaintiffs in the European Union can have recourse to various channels for obtaining copies of relevant Commission materials.

First, access could be requested through application of discovery rules applicable in the relevant national courts. While a discussion of EU Member State discovery rules is beyond the scope of this article, it is worth noting that in addition to using Member State discovery rules, private plaintiffs could also in certain cases attempt to use the US legal system to compel production of file access *E.C.L.R. 122 documents from art.101 TFEU defendants for use in an EU Member State proceeding. As indicated in above, s.1782(a) of title 28 of the United States Code empowers US district courts to compel persons within its jurisdiction to produce evidence for, "use in a proceeding in a foreign or international tribunal".⁵⁴ A plaintiff seeking private damages in a court in an EU Member State (or any "foreign or international tribunal") could, therefore, petition a US court to use s.1782(a) to require defendants with a US presence to produce confidential documents located in the United States.⁵⁵ In such a case, the question of access would be resolved by the US legal system on a broader basis than the compatibility of access with the EU legal order.

In addition to the application of national discovery rules, private plaintiffs can request access to relevant materials from the Commission on the basis of transparency laws, including the EU transparency regulation Regulation 1049/2001 [2001] OJ L145/43.⁵⁶ In parallel or in the alternative, they can also request national courts to obtain relevant Commission materials through the application of arts 11-12 and 15 of Regulation 1/2003 and the provisions on co-operation between the Commission and the national courts. Issues of discovery or access to the administrative files of Member State competition authorities, and the Commission's decisions to deny access to materials or co-operation to the national courts can be brought for review before the EU General Court and/or before the Court of Justice on appeal or on a reference for a preliminary ruling (collectively hereinafter "the EU courts").

If, as expected, damages actions in EU national courts expand in the coming years, these avenues for access to Commission materials will be increasingly tested. A key case raising these issues is already pending before the Court of Justice on a reference for a preliminary ruling from a German court, and in other cases the scope of these provisions is currently being tested directly before the EU courts. The views of the EU courts on such requests will be of great significance for the development

of private damages actions in the European Union, and for the Commission's policies and practices in relation to cartel enforcement. They will invariably also impact the application to Commission records of US discovery rules by US courts.

Regulation 1049/2001

Recital 11 to Regulation 1049/2001 states that:

"In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions".

Article 4 of Regulation 1049/2001 goes on to enumerate several such exceptions, including the protection of the purpose of inspections, investigations and audits, and the protection of internal documents where disclosure would undermine the institution's decision-making process.

So far, the General Court's jurisprudence has not been highly supportive of the Commission's attempts to protect the confidentiality of its files under Regulation 1049/2001. In its April 13, 2005 judgment in *Verein fus Konsumentinformation*, the General Court annulled the Commission's decision refusing access to its administrative file in the Austrian banks case to the Austrian consumer organisation Verein fus Konsumentinformation ("VKI").⁵⁷ The VKI had requested access to the Commission's file in support of specific claims regarding the illegality of the conduct concerned and its effects, in order to secure damages for the consumers on whose behalf it was acting. The VKI had based its request, *inter alia*, on the provisions of Regulation 1049/2001 and art.42 of the Charter of Fundamental Rights of the European Union.⁵⁸ While not commenting on the merit of the Commission's claim that a large number of the documents in the file were provided pursuant to the Leniency Notice, and that access to those documents would deter undertakings from co-operating with the Commission, the Court found that the Commission was not entitled to reach its conclusion denying access with respect to all of the documents in the file without having first carried out a concrete and individual examination of each of the documents concerned.⁵⁹

The recent June 2010 judgment in *éditions Odile Jacob SAS v Commission*, while concerning a review pursuant to the EU Merger Regulation, indicates that the General Court continues to apply Regulation 1049/2001 strictly to require detailed individual justifications for the application of art.4 exceptions.⁶⁰ The Commission has appealed the judgment to the Court of Justice.⁶¹

***E.C.L.R. 123** The General Court had similarly rejected the Commission's claims for confidentiality in response to a request for access pursuant to Regulation 1049/2001 in the 2006 state aid judgment *Technische Glaswerke Ilmenau v Commission* ("TGI").⁶² In July 2010, however, the Court of Justice overturned the General Court's judgment and provided some useful guidance, even if its relevance to private damage actions may be uncertain given the unique nature of the Commission's state aid proceedings.⁶³ In the original judgment, the General Court had, as it did in *éditions Odile*, required the Commission to undertake a "concrete, individual assessment" of the requested documents to ascertain whether access would "specifically and actually undermine the protected interest", in line with its prior case law. On appeal, however, the Court of Justice clarified that "in principle", an institution could, "base its decisions [explaining application of an art.4 exception] on general presumptions which apply to certain categories of documents".⁶⁴ The Court held that such a general presumption may stem from, *inter alia*, the "case law concerning the right to consult documents on the Commission's administrative file" and which:

"[D]o not lay down any right of access to documents in the Commission's administrative file for interested parties in the context of the review procedure opened in accordance with Article 88(2) EC [the state aid rules]."⁶⁵

The Court found that the provision of third parties with access to the materials in the Commission's files, pursuant to Regulation 1049/2001, could, "call into question the system for the review of state aid". While agreeing that the access to file procedure is different from transparency obligations under Regulation 1049/2001, the Court considered that the end result would be the same if access to the documents in question were provided. The Court drew a distinction with cases in which the Commission may be acting in a more legislative capacity, where access under Regulation 1049/2001 might be appropriate, as opposed to here, where the Commission operated in a strictly administrative function, without excluding the possibility that applicants may demonstrate a higher public interest justifying disclosure.⁶⁶ In so ruling, the Court of Justice appears to have created a basis for significantly restricting the scope of access under Regulation 1049/2001, taking the view that the

Regulation should not be applied to provide access to Commission materials where access to such materials would not be permitted under specific rules applicable to specific Commission administrative proceedings, absent showing of a “higher public interest”.

As mentioned above, because *TGI* involved a state aid investigation, the ruling may not be directly translatable to a cartel case. However, given the apparent breadth of the distinction between administrative and legislative activities established in *TGI* and the fact that Commission materials in state aid proceedings may similarly be relevant in subsequent damages cases,⁶⁷ it can be argued that the distinctions drawn by the Court of Justice may presage the Court's likely analysis of requests for access to corporate statements and related Commission materials pursuant to Regulation 1049/2001. When the Commission receives corporate statements pursuant to its Leniency Notice, it is clearly acting in a strictly administrative capacity. Moreover, carefully defined (and extensively debated) procedures for access to the file have been set up for Commission investigations pursuant to arts 101 and 102 TFEU. As was suggested by the Court in *TGI*, it would seem undesirable for private plaintiffs to be able to obtain all or part of corporate statements or related Commission materials on the basis of Regulation 1049/2001 when they are not granted such access on the basis of the provisions governing access to the Commission's file. The question remains what in the Court's view would qualify as a “higher public interest”.

Although the ultimate success of these attempts remains to be determined, it is clear that Regulation 1049/2001 has become an increasingly popular vehicle for seeking access to Commission materials in support of private damages claims, and a number of appeals against Commission decisions denying access based on Regulation 1049/2001 are pending before the EU courts. For example, on August 25, 2008, a German utility appealed the Commission's decision denying access to its administrative file relating to the gas insulated *E.C.L.R. 124 switchgear cartel pursuant to Regulation 1049/2001.⁶⁸ On September 9, 2008, the Dutch government appealed the Commission's decision to refuse access under Regulation 1049/2001 to the complete unredacted version of the Commission's bitumen cartel decision.⁶⁹ And on October 6, 2008, CDC HP brought an action before the General Court challenging the Commission's refusal to grant it access to the case file index relating to the bleaching agents cartel case in order to preserve the attractiveness of its leniency programme.⁷⁰ This may be only a handful of the cases currently pending before the EU courts concerning the application of Regulation 1049/2001 to Commission materials in cartel proceedings.⁷¹

Article 4a(3) TFEU and articles 11-12 and 15 of Regulation 1/2003

Article 4a(3) TFEU (formerly art.10 EC), provides that:

“[P]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”

Articles 11-12 and 15 of the Regulation provide for the exchange of confidential information between the Commission and the competition authorities and courts of the EU Member States.

In its 1996 *Postbank* judgment, the General Court confirmed that the Commission may refuse to disclose documents to national courts only where, “the disclosure of the information would be capable of interfering with the functioning and independence of the Community”.⁷² The case concerned the release to a Dutch court of the Commission's statement of objections in relation to the Dutch banks case by two Dutch public utilities who were given copies of the statement of objections by the Commission in anticipation of their attendance of the Commission oral hearing. The Commission had stated to Postbank that the utilities concerned could not be prevented from producing the documents to a national court. The General Court found that the Commission did not violate the Treaty by failing to prohibit disclosure of the documents to the national court. In fact, the Court found that an interpretation of the Commission's obligations of confidentiality that would require the Commission to prohibit undertakings from producing to national courts any documents they received in the course of the administrative procedure:

“[M]ight compromise cooperation between the judicial authorities and the Community institutions and above all detract from the right of economic agents to effective judicial protection.”⁷³

In that respect, the Court referred to the fact that a prohibition on the Commission from disclosing documents to Member State Court would deprive undertakings:

“[O]f the protection, afforded by national courts, of the rights conferred on them by virtue of the direct effect of Articles 85 and 86 of the Treaty.”⁷⁴

The Court found that the Commission only failed in its obligation of professional secrecy by not allowing Postbank to comment on the existence of confidential information or business secrets in the statement of objections.

In his declaration in support of the Commission's intervention in *Flat Glass II*, then Director General of DG Competition, Philip Lowe, also referring to the *Postbank* case, noted that:

"[I]n the EC legal system, these documents [referring to the Commission's statement of objections, replies to the statement of objections, requests for information and other documents] can be disclosed to the EC courts, at their request, for the purpose of controlling the legality of the European Commission decision".⁷⁵

While the Commission's 2004 Co-operation Notice expressly excludes corporate statements from the obligation of co-operation with EU courts, it will be interesting to see whether the Court of Justice will agree with the Commission's interpretation and find that those disclosures would interfere with the functioning and independence of the Community, in particular taking into account the rights of third parties, as referred to by the Court in *Postbank*, to benefit from the direct effect of arts 101 and 102 before a national court. In this regard, it should be noted that the President of the General Court, Judge Jaeger, expressed a need to view the Commission's practice, including in particular the protection of the confidentiality of corporate statements in the context of the upcoming accession to the Charter of Fundamental Rights of the European Union. In this context, Judge Jaeger identified competing interests, such as the right to property, which need to be balanced against the protection of the Commission's leniency programme and its cartel enforcement policies and practices, and indicated that in his view, "any limitation of a fundamental right such as *E.C.L.R. 125 the right to property must now be provided for in law", noting that, "law was a concept that causes interpretive problems in the EU context".⁷⁶

The case currently pending before the Court of Justice on the basis of a prejudicial question from a German court will address the issue raised by Judge Jaeger and will thus be highly determinative of the level of protection afforded to corporate statements in the European Union. In this case, a reference for a preliminary ruling was made to the European Court of Justice asking whether arts 11 (co-operation between the Commission and the competition authorities of member states) and 12 (exchange of information) of Regulation 1/2003 and art.10(2) EC (art.4(a)3 TFEU) in conjunction with art.3(1)(g) EC (art.3 and Protocol 27 TFEU) should be interpreted to mean that parties adversely affected by a cartel may not, for the purpose of bringing private damages actions, receive access to leniency corporate statements which a Member State competition authority has received pursuant to a national leniency programme within the framework of proceedings for the imposition of fines which are intended also to enforce art.101 TFEU.⁷⁷

The Advocate General in his Opinion issued on December 16, 2010, proposed that "access to voluntary self-incriminating statements made by a leniency applicant should not, in principle, be granted", but that:

"[A]lleged injured parties should have access to all other pre-existing documents submitted by a leniency applicant which would assist those parties in the establishment [...] of an illegal act in breach of Article 101 TFEU, damage to those parties and a causal link between the damage and the breach",

finding that the interference with the allegedly injured party's fundamental right to an effective remedy and a fair trial guaranteed by the Charter of Fundamental Rights of the European Union was justified by the legitimate aim of effective cartel enforcement.⁷⁸ The Advocate General distinguished Pfleiderer's right of access from that granted pursuant to Regulation 1049/2001 as Pfleiderer, as an allegedly injured party pursuing a civil claim, was viewed as entitled to a more extensive right of access. It remains to be seen whether the Court of Justice will adopt the Advocate General's proposal.

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- Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.
2. Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.
3. See *Vitamins Antitrust Litigation, Re, Rep. of Special Master* (99-197) (TFH), 2002 U.S. Dist. LEXIS 26490 January 23, 2002 D.D.C. (hereinafter "Vitamins"), denying motion to reconsider at *Vitamins Antitrust Litigation, Re* (99-197) (TFH), 2002 U.S. Dist. LEXIS 25815 December 18, 2002 D.D.C.
4. See *Methionine Antitrust Litig., Re* (C99-3491), Rep. of Special Master June 17, 2002 N.D. Cal.; *Rubber Chemicals Antitrust Litig., Re*, 486 F. Supp. 2d 1078 2007 N.D. Cal.; *Flat Glass Antitrust Litig., Re* (08-180) (Doc. 185) July 29, 2009 W.D. Pa.; *Static Random Access Memory Antitrust Litigation, Re* (M:07-CV-01819CW) (MDL 1819), docket entry 624 at 3 January 5, 2009 N.D. Cal.
5. See *Vitamins Antitrust Litigation, Re* (Misc. No.99-197) (TFH) September 17, 2002 D.D.C., Brief of the Commission of the European Communities appearing as amicus curiae, II.A(6). See also Submission by Philip Lowe, Director General DG-COMP, to Andrew Heimert, Executive Director, Antitrust Modernization Comm'n, COMP A/4 D(2006) 83, p.2, n.2 (April 4, 2006), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060406_DGComp_Intl.pdf [Accessed January 4, 2011].
6. See, e.g. Bertus Van Barlingen, DG-COMP E-1, "The European Commission's 2002 Leniency Notice after one year of operation" (Summer 2003) 2 *Competition Policy Newsletter* 20; Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 (formalising Commission acceptance of oral proffers by leniency applicants).
7. White Paper on Damages actions for breach of the EC antitrust rules s.2.9 p.10, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT> [Accessed January 4, 2011].
8. See speech of J. Almunia of June 10, 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/305&format=HTML&aged=1&language=EN&guiLanguage=en>. [Accessed January 19, 2011]. A new draft Directive on antitrust damages actions will be proposed in the second half of 2011.
9. In the US, this issue does not arise to the same extent. This is because, in addition to the use of oral statements in the US: (i) current law recognises that the records of interviews made by the staff of the Antitrust Division of the US Department of Justice and related materials are protected from disclosure under the law enforcement privilege, a privilege not automatically deemed applicable to the materials of the EU Commission (as more fully discussed below), see *Micron Technology Inc Securities Litig., Re* (09-mc-00609) Unreported; and (ii) the immunity programme in the US limits the immunity applicant's potential civil exposure to single damages if the defendant co-operates with private plaintiffs. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (Pub. L. No.108-237) ss.213, 118 Stat. 661, 666-67 (2004) (codified at 15 U.S.C. s.1, Note).
10. See art.15 of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 and art.7 of the Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (hereinafter "Access to File Notice").
11. Access to file does not extend to business secrets and other confidential information and internal documents of the Commission or of the competition authorities of the Member States, or to correspondence between the latter and the Commission. (See art.15.2 of Regulation 773/2004.) The concepts of business secrets and other confidential information are further defined in the Access to File Notice. As indicated below, the tapes containing the corporate statement read into the Commission's record by an immunity or leniency applicant are made available in full to defendants who can prepare their own notes and transcripts on the basis thereof.
12. Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ("the Co-operation Notice") [2004] OJ C101/54.
13. See Fed. R. Civ. P. 34(1)(A), (B) ("A party may serve on any other party a request ... to produce ... the following items in the responding party's possession, custody, or control: any designated documents ...; or any designated tangible things"). The scope of what may be requested under Fed. R. Civ. P. 34 is governed by Fed. R. Civ. P. 26, which permits discovery of "any non-privileged matter that is relevant to any party's claim or defense". See, e.g. *Cooper Tire & Rubber Co, Re*, 568 F.3d 1180 at 1188-90 2009 10th Cir. (describing discovery as a process that focuses on information related to a party's claim or defence while recognising that a court may, for good cause, order discovery of materials related to the broader subject matter of the legal action).
14. *Vitamins* (Misc. 99-197) (TFH), 2002 U.S. Dist. LEXIS 25815 at *26 December 18, 2002 D.D.C.
15. *Methionine* (C99-3491), Rep. of Special Master June 17, 2002 N.D. Cal.
16. *Rubber Chemicals*, 486 F. Supp. 2d 1078 2007 N.D. Cal. The Northern District of California again considered the issue in 2009 in the *Static Random Access Memory Antitrust Litigation, Re* ("SRAM"), but followed the reasoning set forth in *Methionine* (C99-3491), Rep. of Special Master June 17, 2002 N.D. Cal. and *Rubber Chemicals* without elaboration. See *SRAM* (M:07-CV-01819CW) (MDL 1819), Docket entry 624 at 3 January 5, 2009 N.D. Cal.
17. *Flat Glass II* (08-180) (Doc.185) July 29, 2009 W.D. Pa. See also more recently *Payment Card Interchange Fee and Merchant Discount*

Antitrust Litigation, Re (05-MD-1720) (JG)(JO), docket 1418 August 27, 2010 E.D.N.Y. discussed below.

- 18. *Société Nationale Industrielle Aerospatiale v United States District Court for the Southern District of Iowa*, 482 U.S. 522 at 544 (1987) (hereinafter "Aerospatiale").
- 19. See *Aerospatiale*, 482 U.S. at 544, citing Restatement (Third) of the Foreign Relations Law of the United States s.442 (1987).
- 20. *Aerospatiale*, 482 U.S. at 544.
- 21. *Vitamins*, 2002 U.S. Dist. LEXIS 26490 at *126-28.
- 22. *Vitamins*, Brief of the EU Commission, p.5.
- 23. See *Flat Glass II* (08-180) (Doc. 185) July 29, 2009 W.D. Pa., submission of the DOJ, discussed below.
- 24. See *Vitamins*, 2002 U.S. Dist. LEXIS 25815 at *26.
- 25. *Methionine* (MDL 00-1311 CRB) June 17, 2002 N.D. Cal.; see also *Rubber Chemicals*, 486 F. Supp. 2d 1078, 1081 fn.2 2007 N.D. Cal.
- 26. *Rubber Chemicals*, 486 F. Supp. 2d at 1080-81.
- 27. *Rubber Chemicals*, 486 F. Supp. 2d at 1080-81. The EU Commission submitted a letter to the court encompassing the Submission by Philip Lowe, Director General DG-COMP, to Andrew Heimert, Executive Director, Antitrust Modernization Comm'n, COMP A/4 D(2006) 83 (April 4, 2006).
- 28. *Rubber Chemicals*, 486 F. Supp. 2d at 1082 (citing *Aerospatiale*, 482 U.S. at 544, also citing Restatement (Third) of the Foreign Relations Law of the United States (1987) §442).
- 29. The court was not convinced that the defendant's communications and submissions relating specifically to a European investigation were relevant to a US cause of action, especially where the plaintiffs had already acquired documents relating to the domestic US Department of Justice investigation: *Rubber Chemicals*, 486 F. Supp. 2d at 1082-83. The existence of alternate access to the same information, through production of documents from the US and Canadian investigations, pre-existing business documents, and the EU decision itself was a material factor in the court's assessment: *Rubber Chemicals* at 1083. The most important factor was the Commission itself taking a strong position before the court that the documents were, "indispensable to ensure the viability and efficiency of the Leniency Programme": *Rubber Chemicals* at 1084.
- 30. *Interchange* (05-MD-1720) (JG)(JO), docket 1418 August 27, 2010 E.D.N.Y. at 2-3. After plaintiffs' initial request for production, defendants Visa and MasterCard had asked the Commission for permission to produce the documents, which the Commission refused on the basis that the materials were not public and that their disclosure, "may seriously undermine the effectiveness of public antitrust enforcement". The Commission was subsequently invited to submit its views to the court and ultimately filed an amicus curiae brief.
- 31. See, e.g. *Underhill v Hernandez*, 168 U.S. 250 at 252 (1897); see also *Banco Nacional Cuba v Sabbatino*, 376 U.S. 398 at 401 (1964).
- 32. *Interchange* (05-MD-1720) (JG)(JO) Docket 1418 August 27, 2010 E.D.N.Y. at 11 fn.10.
- 33. *Vitamins* (Misc. 99-197) (TFH), 2002 U.S. Dist. LEXIS 25815 at *26 December 18, 2002 D.D.C.; see also Samuel Miller, Kristina Nordlander and James Owens, "U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials" (2010) 1 *The CPI Antitrust Journal* 11.
- 34. See, e.g. *The City of New York Hacer Dinler, Re* (10-0237-op) 2010 U.S. App. LEXIS 11784 June 9, 2010 2d Cir.; *Sealed Case, Re*, 856 F.2d 268, 271 1988 D.C. Cir.; *Micron Technology Inc Sec. Litig., Re* (09-mc-00609) (GK) 2010 U.S. Dist. LEXIS 7966 February 1, 2010 D.D.C.; *Polypropylene Carpet Antitr. Litig., Re*, 181 F.R.D. 680 1998 N.D. Ga.
- 35. The second and seventh circuits have declared that there is a "strong presumption against lifting the privilege" where the documents contain, "information that would seriously impair the ability of a law enforcement agency to conduct future investigations". See *City of New York*, 2010 U.S. App. LEXIS 11784 at *52-53; *Dellwood Farms v Cargill Inc*, 128 F.3d 1122 at 1125 1997 7th Cir., per Posner; but see *US Dep't of Homeland Security, Re*, 459 F.3d 565 at 571 2006 5th Cir. (applying the law enforcement privilege in the Fifth Circuit only to present investigations, stating that the privilege, "lapses either at the close of an investigation or at a reasonable time thereafter based on a particularized assessment of the document").
- 36. *City of New York*, 2010 U.S. App. LEXIS 11784 at *52-53.
- 37.

City of New York, 2010 U.S. App. LEXIS 11784 at *54.

- 38. See, e.g. *Sealed Case, Re*, 856 F.2d 268 at 272 1988 D.C. Cir.; *Micron*, 2010 U.S. Dist. LEXIS 7966 *10-*11.
- 39. See, e.g. *Vitamins* (99-197) (TFH), 2002 U.S. Dist. LEXIS 26490 January 23, 2002 D.D.C. Rep. of Special Master at *99-100.
- 40. See S. Miller, K. Nordlander and J. Owens, "US Discovery of European Union and US Leniency Applications and Other Confidential Investigatory Materials" March 2010(1) *The CPI Antitrust Journal* 11.
- 41. See, e.g. Kristina Nordlander, "Discovering Discovery -- U.S. Discovery of EC Leniency Statements" (2004) E.C.L.R 646, 656-57.
- 42. Nordlander, "Discovering Discovery" (2004) E.C.L.R 646, 656-57.
- 43. *Intel v Advanced Micro Devices Inc*, 542 U.S. 241 (2004).
- 44. See *Intel v Advanced Micro Devices Inc* (2-572), Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, 2002 U.S. Briefs 572 December 23, 2003.
- 45. *Intel v Advanced Micro Devices Inc* (2-572), Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, 2002 U.S. Briefs 572 December 23, 2003.
- 46. *Intel*, 542 U.S. 241 at 246-47.
- 47. *Interchange*, the most recent case involving discovery of confidential EU materials, did not even refer to the Supreme Court's finding in *Intel*, 542 U.S. 241, instead stating that "[t]he European Commission is the EU's executive and administrative branch": *Interchange* (05-MD-1720) (JG)(JO) (Docket 1418) August 27, 2010 E.D.N.Y. at 5.
- 48. Fed. R. Civ. P. 26(b)(3)(A). See also *Upjohn v United States*, 449 U.S. 383 at 399-401 1981; *Hickman v Taylor*, 329 U.S. 495 at 510 (1947).
- 49. See *McKesson HBOC Inc Sec. Litig., Re* (C-99-20743) (RMW) 2005 U.S. Dist. LEXIS 7098 at *30-31 March 31, 2005 N.D. Cal.; *United States v Stewart*, 287 F. Supp. 2d 461 at 469 (S.D.N.Y. 2003); *Samuels v Mitchell*, 155 F.R.D. 195 at 200 1994 N.D. Cal.
- 50. See *McKesson HBOC, Re* (C-99-20743) (RMW) 2005 U.S. Dist. LEXIS 7098 at *31.
- 51. *McKesson HBOC, Re* (C-99-20743) (RMW) 2005 U.S. Dist. LEXIS 7098 at *45-47. Of course, in the EU the issue is further complicated by the fact that, as a result of the EU file access requirements, the Commission does provide co-defendants, who may be adverse to the immunity applicant, with access to a recording of the corporate statement and all file documents.
- 52. See, e.g. *Vitamins* (99-197) (TFH), 2002 U.S. Dist. LEXIS 26490 January 23, 2002 D.D.C. Rep. of Special Master at *115-16.
- 53. See also Nordlander, "Discovering Discovery -- U.S. Discovery of EC Lenience Statements" (2004) E.C.L.R 646.
- 54. 28 U.S.C. s.1782(a).
- 55. See Fed. R. Civ. P. 34.
- 56. A discussion of Member State transparency or file access laws is outside the scope of this article.
- 57. See *Verein fü Konsumentinformation v Commission of the European Communities* (T-2/03) [2005] E.C.R. II-1121; [2005] 4 C.M.L.R. 21.
- 58. Charter of fundamental rights of the European Union [2000] OJ C364/1.
- 59. A different view is generally taken when the application concerns access to internal Commission documents for use in proceedings against the Community. See *Donnici v Parliament* (C-9/08) [2009] E.C.R. I-3679 at [22]. See also *MyTravel Group Plc v Commission of the European Communities* (T-403/05) [2008] E.C.R. II-2027; [2008] 3 C.M.L.R. 49 where the General Court found the applicant's argument that the Commission's internal records (including a report prepared by a Commission working group, the document relating to its preparation, notes from the Director General of DG Competition to the Commissioner, notes from DG Competition to other services, notes in reply from the other services, the report from the Hearing Officer, the note from DG Competition to the Advisory Committee, and

a note to file on a site visit to First Choice) would allow it to better argue its action for damages against the Commission in itself did not constitute an overriding public interest within the meaning of Regulation 1049/2001. The Swedish government appealed the General Court's judgment on November 14, 2008 arguing, inter alia, that "MyTravel's claims could quite plausibly constitute such a public interest and cannot be dismissed without further examination--as the Court of First Instance has done--solely with reference to the applicant's private interests". (C-506/08 P: Appeal brought by the Kingdom of Sweden against the judgment of the Court of First Instance in (T-403/05) [2009] OJ C55/6, still pending).

- 60. *éditions Odile Jacob SAS v Commission of the European Communities* (T-237/05) Unreported June 9, 2010 at [68].
- 61. *Commission v Odile Jacob* (C-404/10 P) [2010] OJ C274/19.
- 62. *Technische Glaswerke Ilmenau GmbH v Commission of the European Communities* (T-237/02) [2006] E.C.R. II-5131; [2007] 1 C.M.L.R. 39.
- 63. See *European Commission v Technische Glaswerke Ilmenau ("TGI")* (C-139/07 P) [2011] 1 C.M.L.R. 3. See also more recently *Kingdom of Sweden v API and Commission API v Commission Commission v API* (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P) September 21, 2010, [94] (not yet published) where the Court of Justice found that it was appropriate to allow a "general presumption that the disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings", without the need for the Commission to undertake a concrete assessment of each document requested.
- 64. *European Commission v Technische Glaswerke Ilmenau* [2011] 1 C.M.L.R. 3 at [54].
- 65. *European Commission v Technische Glaswerke Ilmenau* [2011] 1 C.M.L.R. 3 at [56].
- 66. *European Commission v Technische Glaswerke Ilmenau* [2011] 1 C.M.L.R. 3 at [56]-[61]. As an alternative to a proceeding before the EU courts, third parties could also apply to the European Ombudsman for access to documents in the Commission's file on the basis of Regulation 1049/2001 and allegations of maladministration. A July 27, 2010 decision of the Ombudsman indicates that the Ombudsman is likely to accept from the Commission that disclosure of its records to third parties is likely to jeopardise its investigations, at least pending a final resolution of the case. (Case 2953/2008/FOR at <http://www.ombudsman.europa.eu/en/cases/summary.faces/en/n5416/html>.) In this decision, relating to the Commission investigation of E.On's alleged abuse of its dominant position in electricity wholesale and balancing markets, the Ombudsman found that no maladministration was committed by the Commission when it refused to make available its preliminary assessment to a third party who had requested access to the Commission's files on the basis of Regulation 1049/2001 to assess whether the commitments offered were sufficient to address the competition law issues identified. The Ombudsman agreed with the Commission that disclosing the preliminary assessment before a final agreement had been reached and was made binding could have negatively affected the procedure, by negatively impacting the willingness of E.On to co-operate with the Commission. The Ombudsman in his decision made a reference to the TGI judgment and the criteria used by the Court that access to file would "modify the nature of the proceeding": *TGI* [2011] 1 C.M.L.R. 3 at [46]-[48]. Both cases involved instances where a settlement-like solution was envisaged by the Commission and the defendant concerned, and the Ombudsman referenced the fact that the European Courts had, "not yet had the opportunity to provide an interpretation on a case concerned public access to documents relating to a commitments procedure": at [50].
- 67. See in this respect the Notice on the enforcement of state aid law by national courts [2009] OJ C85/1, which informs national courts and third parties about the remedies available in the event of a breach of state aid rules.
- 68. Action brought on August 25, 2008--*EnBW Energie Baden-Württemberg v Commission of the European Communities* (T-344/08) [2008] OJ C272/42.
- 69. Action brought on September 9, 2008--*Netherlands v Commission of the European Communities* (T-380/08) [2008] OJ C285/51.
- 70. See pending *CDC Hydrogène Peroxide v Commission of the European Communities* (T-437/08) [2008] OJ C313/48.
- 71. In October 2010, Basell, having settled its damage claims, dropped its application for access to Commission documentation gathered as part of its investigation into the organic peroxide cartel based on Regulation 1049/2001 as well as art.6(2) of the EU Treaty in conjunction with art.42 the EU Charter of Fundamental Rights (*Basell Polyolefine v Commission* (T-399/07) [2007] OJ C315/43).
- 72. *Postbank NV v Commission of the European Communities* (T-353/94) [1996] E.C.R. II-921; [1997] 4 C.M.L.R. 33 at [93]. The Court refers to the orders issued in *Zwartveld, Re* (C-2/88) [1990] E.C.R. I-3365; [1990] 3 C.M.L.R. 457.
- 73. *Zwartveld, Re* (C-2/88) [1990] E.C.R. I-3365; [1990] 3 C.M.L.R. 457 at [89].
- 74. *Zwartveld, Re* (C-2/88) [1990] E.C.R. I-3365; [1990] 3 C.M.L.R. 457.
- 75. See *Flat Glass II* (08-180) (Doc. 185) July 29, 2009 W.D. Pa.
- 76. See Judge Marc Jaeger, "The impact of the Lisbon Treaty", speech of March 5, 2010 at Brussels, Belgium, reported in MLex, "EU court's Jaeger predicts tussle over fundamental rights, leniency policy under new EU treaty", March 5, 2010, available at

<http://www.mlex.com/content.aspx?ID=91790&print=true> [Accessed January 4, 2011].

77.

See Reference for a preliminary ruling from the Amtsgericht Bonn (Germany) lodged on 9 September 2009 -- *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2009] OJ C207/18.

78.

See *Pfleiderer AG v Bundeskartellamt* (C-360/09), Opinion of Advocate General Mazak delivered on December 16, 2010 (not yet published), paras 46-49. The Advocate General excluded access to evidence or documents disclosed in the course of the leniency procedure where "private litigants can rely on the final decision of the national competition authority or by a review court in order to establish an infringement", as they were not deemed "necessary to give effect to the right to an effective remedy and a fair trial". (See footnote 75.) The Advocate General's conclusion was based on the greater importance of "the role of the EU Commission and national competition authorities" compared to "private actions for damages in ensuring compliance with Articles 101 and 102 TFEU" and the fact that leniency programs benefit private parties by enabling the detection of cartels and the adoption of formal decisions which can in turn assist injured parties in bringing civil actions, as well as the existence of a legitimate expectation on the part of leniency applicants that their voluntary self-incriminating statements would not be disclosed. (See [40]-[41].)

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