

Survey

EU Competition Law Procedural Issues

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I. Introduction

In this overview of recent developments in EU competition law procedure, we will focus on noteworthy case law by the European Courts in relation to the disclosure of leniency documents as well as the significance and likely impact of the European Commission's (the 'Commission') proposed Directive on private damages actions. We also discuss recent findings in relation to the Commission's powers with respect to on-site inspections, and the Commission's updated explanatory note on such inspections. Last, we will also comment on contentious issues relating to the scope of legal professional privilege in light of recent developments.

II. Disclosure of leniency documents post-*Pfleiderer*

A. Case C-536-11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, judgment of 6 June 2013

In *Pfleiderer*,¹ the Court of Justice held that the scope of access for third parties (essentially damage claimants) to documents voluntarily submitted by leniency applicants,² was to be determined by national courts on a case-by-case basis and according to national law. The Court determined that it is for national courts to conduct a 'weighing exercise', that is, to weigh the 'respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.'³ However, the *Pfleiderer* judgment left a number of issues unresolved, including whether and to what extent the national legislature, rather than national courts, could determine the extent of disclosure of leniency materials. This issue was resolved by a preliminary ruling of 6 June 2013 in the *Donau Chemie*⁴ case, which clarified that national law must not make it impossible for national

Key Points

- The European Commission's proposal for a Directive on rules governing private antitrust damages, if adopted in its current form, will introduce bright-line rules defining categories of documents and corresponding levels of confidentiality protection, thereby addressing the gap left by the lack of clear guidance in the *Pfleiderer* and *Donau Chemie* judgments as to the application of the balancing exercise proposed by the Court to determine permissible disclosures.
- Developments in the last 12 months brought helpful clarification in relation to the European Commission's powers to conduct on-site inspections in the form of judgments by the General Court in *Nexans*, *Prysmian*, and *Deutsche Bahn*, as well as the issuance of a revised explanatory note on the European Commission's inspection powers under Article 20(4) of Regulation 1/2003.
- Recent developments have also highlighted issues raised by the limited nature of Legal Professional Privilege in EU competition law.

courts to conduct the weighing exercise on a case-by-case basis.

The preliminary ruling in *Donau Chemie* concerned the compatibility with EU law of an Austrian law provision pursuant to which persons who are not parties to cartel proceedings can obtain access to the files of the cartel court only with the consent of the parties, that is, including the defendant. In other words, under this provision, the national court cannot grant access to documents without the consent of the defendant even if the party requesting file access can demonstrate a legitimate interest. In the case at issue, the request for access to the

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1 Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.

2 We use the term 'leniency applicant' as comprising immunity and leniency applicants.

3 *Pfleiderer*, at paras 30 and 31.

4 Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, judgment of 6 June 2013.

cartel court's file was made by the requesting third party in order to gather evidence which would enable an assessment of harm suffered due to a cartel infringement committed by the defendants, and to determine whether it was appropriate to bring a damages action against them.

In its assessment, the Court first reiterated the statements already made in *Pfleiderer* that '*in the absence of EU rules governing the matter*', it is for the national legal systems to lay down the relevant procedural rules on file access,⁵ and that the national courts must '*weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information*'.⁶ The Court went on to clarify the *Pfleiderer* ruling holding that the weighing exercise is necessary because '*any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents*' would undermine the effective application of Article 101 TFEU and the rights that provision confers on individuals.⁷ The Court concluded that although the weighing exercise must be conducted in the national legal context, national law must not '*preclude any possibility for the national court to conduct that weighing-up on a case-by-case basis*'.⁸ Specifically related to access to leniency documents, the Court held that while the protection of leniency material '*may justify*' a refusal to grant access to '*certain documents*', this would not necessarily mean that access may be '*systematically refused*' since any request for access '*must be assessed on a case-by-case basis, taking into account all the relevant factors in the case*'.⁹

As a consequence, while the case has been remanded back to the national court, it seems clear that following the Court's findings in *Donau Chemie*, the Austrian provision at issue does not comply with EU law as it precludes the conduct of a weighing exercise to be conducted by the national court on a case-by-case basis.

Interestingly enough, less than a week after the *Donau Chemie* judgment, the Commission issued a proposal for a Directive on rules governing private antitrust damages actions which includes, amongst a number of other provisions, absolute protection against disclosure of corporate statements. If adopted in its current form, the Proposed Directive will put up clear boundaries for a national court's decision-making on questions of disclosure.

B. Disclosure rules under the Commission's proposal for a Directive on rules governing private antitrust damages actions of 11 June 2013

On 11 June 2013, the Commission issued a package of measures relating to private damages actions consisting of: (i) a proposal for a Directive on rules governing private antitrust damages actions (the 'Proposed Directive'¹⁰); (ii) a non-binding practical guide for national courts on the quantification of harm in private antitrust damages actions; and (iii) a non-binding Recommendation on collective redress mechanisms, which applies to antitrust damages claims as well as civil claims in other areas, including data protection, environment, and financial services.

The centerpiece of the Commission's legislative package is the long-awaited Proposed Directive which follows almost ten years of internal considerations and a public debate that started with the 2005 Green Paper and the subsequent 2008 White Paper and public consultation. The Explanatory Memorandum to the Proposed Directive refers to the diversity between national legal systems and the resulting uncertainty, which in turn leads to ineffective private enforcement of competition rules. The Proposed Directive seeks to address these shortcomings by establishing a minimum standard for private damages actions throughout the EU in order to address this diversity. Key elements of these proposals concern: (i) the disclosure and protection of evidence; (ii) the effect of decisions issued by national competition authorities; (iii) limitation periods; (iv) joint and several liability; (v) the passing-on defence; and (vi) proof of harm. The Proposed Directive does not address collective redress which is dealt with separately in the non-binding Recommendation. For the purposes of this article on competition law procedure, we will focus on the proposed disclosure rules set out in the Proposed Directive.

One of the objectives and guiding principles identified in the Proposed Directive is '*optimising the interaction*'¹¹ between public and private enforcement of competition law. With respect to the disclosure of leniency documents, the Proposed Directive sets out the following compromise solution:

- *Minimum requirements for a disclosure request:* Disclosure should only be ordered by the national court

5 Ibid., para. 25; see also *Pfleiderer*, at para. 23: '*it is, in the absence of binding regulation under European Union law on the subject, for Member States to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures*'.

6 *Donau Chemie*, at para. 30.

7 Ibid., at para. 31.

8 Ibid., at para. 35.

9 Ibid., at para. 43.

10 Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>> accessed 28 October 2013.

11 Proposed Directive, Explanatory Memorandum, at p. 3.

when the claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant, and where the claimant has shown that the evidence is relevant, defined precisely and narrowly, and the disclosure is proportional. The Proposed Directive provides that this condition requires the national court to consider the 'legitimate interests of all parties'.¹² In this respect, the proportionality test requires national courts to assess: (i) the likelihood of the alleged infringement; (ii) the scope and cost of the requested disclosure; (iii) whether the evidence to be disclosed contains confidential information; and (iv) whether the disclosure request is sufficiently specific.¹³ Thus, a non-specific request for all documents submitted to a competition authority would arguably be deemed disproportionate under the Proposed Directive's approach.¹⁴

- *Levels of protection against disclosure:* The Proposed Directive provides for different levels of protection based on pre-defined categories of documents.
- *Absolute protection:* The Proposed Directive accords absolute protection against disclosure to: (i) leniency corporate statements; and (ii) settlement submissions.¹⁵ This means that national courts cannot at any time order a defendant to disclose these two categories of documents. This absolute protection is supplemented with an absolute use restriction: if a claimant has obtained access to the protected documents 'solely' through access to the file of a competition authority, these documents are not admissible in private damages actions.¹⁶
- *Temporary protection:* Temporary protection is accorded to information that was (i) prepared by the parties specifically for the proceedings of the competition authority (eg, responses to requests for information), or (ii) drawn up by a competition authority in the course of its proceedings (eg, the Statement of Objections).¹⁷ This means that national courts can order disclosure of these documents only after the administrative proceedings are closed. Similarly, a temporary use restriction applies, that is, that a claimant cannot use these documents in private damages actions prior to the closure of the proceedings of the competition authority, if it ob-

tained access to the documents solely through access to the file.¹⁸

- *No specific protection:* Any other documents are not granted any protection and the disclosure of those documents can be granted by national courts at any time¹⁹ in accordance with the requirements set out in the Proposed Directive, including in particular the proportionality test. These documents include all pre-existing documents that a party has submitted to a competition authority, even if those documents were submitted in the context of an immunity or leniency application. However, in the Explanatory Memorandum to the Proposed Directive, the Commission indicates that national courts 'should refrain from ordering the disclosure of evidence by reference to information supplied to a competition authority for the purpose of its proceedings' adding that this would include pre-existing documents that parties are invited to supply by the competition authority in view of their cooperation obligation under leniency programmes.²⁰ The Commission explains further that the 'willingness of undertakings' to submit pre-existing documents when cooperating with competition authorities 'may be hindered' by disclosure requests that identify a category of documents by reference to their presence in the file 'rather than their type, nature or object'. Such global disclosure requests should therefore 'normally be deemed by the court as disproportionate and not complying with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible'.²¹

The Proposed Directive's bright-line rules defining categories of documents and corresponding levels of protection are probably best viewed as a response to the general balancing approach presented in the *Pfleiderer* judgment. In the Explanatory Memorandum to the Proposed Directive, the Commission mentions the approach taken in the *Pfleiderer* judgment as potentially leading to discrepancies 'between and even within Member States' and the concern that an undertaking 'cannot know at the time of its cooperation whether victims of the competition law infringement will have access to the information it has voluntarily supplied to the competition authority', which could influence an undertaking's choice 'whether or not to cooperate' under a

12 Proposed Directive, Article 5(3).

13 Ibid.

14 This underlines the continued importance of a claimant obtaining access to the statement of contents in a competition authority's file in order to specify disclosure requests. See to that effect Case T-437/08 *CDC Hydrogene Peroxide* [2011] ECR II-8251.

15 Proposed Directive, Article 6(1).

16 Proposed Directive, Article 7(1).

17 Proposed Directive, Article 6(2).

18 Proposed Directive, Article 7(2).

19 Proposed Directive, Article 6(3).

20 Proposed Directive, Explanatory Memorandum, at p. 15.

21 Ibid.

leniency programme.²² The Proposed Directive's choice of an absolute protection of corporate statements also appears to reflect the resolution of the Heads of the European Competition Authorities of 23 May 2012, which committed to protect leniency materials against disclosure indicating that '*if the incentives to cooperate under the leniency programmes are not preserved, the victims of currently hidden and future cartels are unlikely to learn about those cartels in the first place and would be deprived of exercising their rights to an effective remedy.*'²³

Interestingly, the approach adopted in the Proposed Directive essentially follows the solution proposed by Advocate General Mazák in his opinion in *Pfleiderer*, which distinguished between corporate statements that would enjoy absolute protection against disclosure, and pre-existing documents which would not be accorded any protection.²⁴ This approach was eventually not followed by the Court in its *Pfleiderer* judgment. It also appears to run counter to the Court's findings in *Donau Chemie* which dismissed '*any rule that is rigid*' including '*by providing for absolute refusal to grant access to the documents in question.*'²⁵

The question arises whether an absolute protection of corporate statements against disclosure, as set out in the Proposed Directive, is reconcilable with the Court's findings in *Pfleiderer* and *Donau Chemie*, which require national courts to carry out a balancing exercise in relation to *all* materials that are part of the Commission's file and to conduct a weighing exercise on a '*case-by-case basis*'. However, both the *Pfleiderer* and the *Donau Chemie* judgments formulated the requirement for a weighing exercise by national courts expressly in light of the '*absence of EU rules governing the matter*',²⁶ which the Proposed Directive may be deemed to provide, and only in the context of EU Member States' obligation to comply with the EU principle of effectiveness when applying purely national law.²⁷

Former Advocate General Mazák, the author of the opinion in *Pfleiderer*, considered in a recent interview that in his view the disclosure rules under the Proposed Directive reflect '*perhaps the only manner of underlining the crucial importance of protecting whistleblowers and*

safeguarding the purpose of leniency procedures' adding that the Proposed Directive is a '*good response to the Court of Justice's repeated refusal to intervene more definitively in the sector.*'²⁸

The Proposed Directive is subject to adoption by the EU Parliament and the Council, and thus may be modified in the course of further discussions at these institutions. EU Member States then have two years from adoption to implement the Directive. If adopted in its current form, the Proposed Directive will introduce bright-line rules defining categories of documents and corresponding levels of confidentiality protection, thereby addressing the gap left by the lack of clear guidance in the *Pfleiderer* and *Donau Chemie* judgments as to the application of the balancing exercise proposed by the Court to determine permissible disclosures.

III. On-site inspections

Developments in the last 12 months also brought helpful clarification in relation to the Commission's powers to conduct on-site inspections in the form of judgments by the General Court in *Nexans*, *Prysmian*, and *Deutsche Bahn*, as well as the issuance of a revised explanatory note on the Commission's inspection powers under Article 20(4) of Regulation 1/2003.

Case T-135/09 *Nexans v Commission*; T-140/09 *Prysmian v Commission*; and Joint Cases T-289/11, T-290-11, and T-521-11 *Deutsche Bahn AG and others v Commission*

The *Nexans*²⁹ and *Prysmian*³⁰ judgments concerned various legal issues arising from on-site inspections conducted by the Commission in the context of the Commission's *Power Cables* cartel investigation (Case COMP/39.610) relating to, *inter alia*, (i) the scope of the Commission's inspection decision; (ii) the taking of forensic copies of computer hard-drives and the use of the 'sealed envelope' procedure in this context; and (iii) with respect to *Nexans*, the right to pose questions to a company employee during the inspections.

22 Ibid., at p. 3.

23 Accessible at <http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf> accessed 28 October 2013.

24 Opinion of AG Mazák in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, at para. 46: '*access to voluntary self-incriminating statements made by a leniency applicant should not, in principle, be granted*', and para. 4: '*aside from such self-incriminating statements, alleged injured parties should have access to all other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure*'.

25 *Donau Chemie*, at para. 31.

26 Ibid., at para. 25. See also *Pfleiderer*, at para. 23: '*in the absence of binding regulation under European Union law on the subject*'.

27 See *Pfleiderer*, at para. 24; *Donau Chemie*, at para. 27 (last accessed 28 October 2013).

28 See <<http://www.mlex.com/EU/Content.aspx?ID=419411>> accessed 4 September 2013.

29 Case T-135/09 *Nexans v Commission*, judgment of 14 November 2012, not yet reported.

30 Case T-140/09 *Prysmian v Commission*, judgment of 14 November 2012, not yet reported.

The inspections were triggered by information received by the Commission from an immunity applicant relating to high voltage electric cables. The Commission's inspection decision pursuant to Article 20(4) of Regulation 1/2003 was phrased in broad(er) terms specifying the subject matter of the investigation as '*the supply of electric cables and material associated with such supply, including, amongst others, high voltage underwater electric cables, and, in certain cases, high voltage underground electric cables*'.³¹

In the course of the inspections, the Commission took forensic copies of the undertakings' hard-drives and placed copies of the files, that is, the data-recording devices or DRDs, in a sealed envelope for inspection at the Commission's premises in the presence of the undertakings' representatives rather than on-site, and—with respect to *Nexans*—questioned a company employee during the inspections.

1. Scope of the inspection decision

With respect to the undertakings' challenge as to the scope of the inspection decision, the Court first recalled settled case law whereby the specification in the inspection decision of the '*subject matter and purpose of the inspection*' constitutes a '*fundamental requirement*' in order to enable the undertakings concerned '*to assess the scope of their duty to cooperate and to safeguards their rights of defence*'³² and held that this requirement also reflects a general principle of EU law as set out in Article 7 of the EU Charter of Fundamental Rights relating to the '*protection against arbitrary or disproportionate intervention by public authorities*'.³³ The Court then clarified that the inspection decision must state the '*essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected*'.³⁴

On the facts at issue, the Court concluded that the inspection decision covered '*all*' electric cables, that is was not limited to high voltage cables only, and did not further specify the products which might fall within the category of '*materials associated with such supply*'. In particular, the Court noted that the use of expressions such as '*including amongst others*' and '*in certain cases*' showed that the reference to high voltage cables was made only by way of example.³⁵ The Court nonetheless held that the Commission met its obligation to specify the subject matter of its investigation as the scope of the inspection

decision '*enabled the applicants to assess the scope of their duty to cooperate*'.³⁶

However, the Court annulled the inspection decision in so far as it concerned electric cables other than high voltage cables. The Court held that the Commission is required to '*restrict its searches to the activities . . . relating to the sectors indicated in the decision ordering the inspection*' and unambiguously noted that if during the inspection the Commission finds information that does not relate to the activities specified in the inspection decision, the Commission is required '*to refrain from using that document or item of information for the purposes of its investigation*'.³⁷ Any broader powers would be '*incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society*'.³⁸ The Court expressly rejected the Commission's argument that its '*powers of investigation would serve no useful purpose if it could do no more than ask for documents which it was able to identify with precision in advance*' and held that in order to adopt the inspection decision the Commission must have '*reasonable grounds to justify an inspection*'.³⁹ Based on an assessment of the information which the Commission had at its disposal at the time of the adoption of the inspection decision, including the information provided to the Commission by the immunity applicant, the Court considered that the Commission did not demonstrate that it had reasonable grounds for ordering an inspection that covered all electric cables.⁴⁰

The Court rejected as manifestly inadmissible the undertakings' additional request to order the Commission to return documents that were illegally obtained on the basis of the inspection decision, that is, all documents unrelated to high voltage cables, based on the Court's lack of jurisdiction to issue declaratory judgments.

2. Commission acts during the inspections

With respect to the contested Commission acts during the inspections, (i) the taking of a forensic copy of hard drives and the use of the sealed envelope procedure for the DRDs; and (ii) the questioning of a company employee during the inspection, the Court considered the applications for annulment as inadmissible.

The Court held that the contested acts constitute mere '*intermediate measures*' which implement the inspection decision and thus do not produce '*binding legal effects capable of affecting the applicant's legal interest by*

31 See, eg, *Nexans*, at para. 3 (emphasis added).

32 *Ibid.*, at para. 39.

33 *Ibid.*, at para. 40.

34 *Ibid.*, at para. 44.

35 *Ibid.*, at para. 50.

36 *Ibid.*, at para. 54.

37 *Ibid.*, at para. 64.

38 *Ibid.*, at para. 65.

39 *Ibid.*, at para. 67.

40 *Ibid.*, at para. 91.

bringing about a legal change in his legal position' which alone could be challenged according to settled case law.⁴¹ In this context the Court noted that the undertakings did not claim that the documents copied by the Commission or the information obtained by the Commission on the basis of the contested acts would be eligible for protection that was similar to the protection of legal professional privilege which the Court previously held would allow for an independent challenge of those acts.⁴²

As a consequence, according to the Court, the contested acts could only be legally challenged in the context of (i) an application for annulment against the final decision; (ii) a decision imposing a fine on the undertakings on the basis of Article 23(1)(c) of Regulation 1/2003 (in case of a company's refusal to provide the requested documents during an inspection) or Article 23(1)(d) of Regulation 1/2003 (in case of a failure or refusal to provide a complete answer to questions during an inspection); and (iii) an action against the Commission for non-contractual liability.⁴³

The Court's partial annulment of the Commission's inspection decision in *Nexans* and *Prysmian* is a clear signal that the Court will not shy away from reviewing and critically assessing Commission inspection decisions but also confirms the Commission's broad powers under Article 20(4) of Regulation 1/2003.

Indeed, in its *Deutsche Bahn* judgment,⁴⁴ concerning the appeal against three Commission inspection decisions, the General Court engaged in a comprehensive analysis of the Commission's decisions and conduct during the inspections, eventually confirming the Commission's broad powers and discretion when conducting on-site inspections. In particular, the Court confirmed that fundamental rights pursuant to Articles 7 and 47 of the EU Charter and Articles 6 and 8 ECHR do not necessitate the issuance of a national search warrant and judicial supervision prior to the inspections because according to the Court, EU law, namely Regulation 1/2003, provides sufficient safeguards and comprehensive judicial review would be available *ex post*. The Court also held that the Commission enjoys broad discretion when deciding whether an on-site inspection should be ordered and which offices or files be searched during the inspection. With respect to the latter, the Court expressly held that the Commission has the right to thoroughly

search offices and files of certain employees even if there was no clear⁴⁵ indication that the information contained therein would be relevant to the investigation. The Court engaged in a comprehensive review of the facts at issue, however, and concluded that there were valid⁴⁶ reasons that justified the Commission's inspection of the offices and files concerned.

3. Revised explanatory note relating to on-site inspections under Article 20(4) of Regulation 1/2003

On 18 March 2003, the Commission issued a revised explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 (the 'Explanatory Note').⁴⁷ A copy of the Explanatory Note will be given to the undertaking's representative at the beginning of every inspection. While not legally binding and being without prejudice to the interpretation of the Commission's inspection powers by the Court, the Explanatory Note provides very helpful insight into the Commission's methodology in relation to IT searches conducted during inspections.

The main revisions to the Explanatory Note concern the following:

- First, the revision includes a clarification that the IT environment and storage media that can be searched during inspections include laptops, desktops, tablets, mobile phones, CD-Roms, DVDs, USB-keys, etc. It indicates that the Commission is not restricted to the use of built-in search tool (ie for a keyword search) but may also use—and this has actually been the new practice of the Commission's inspectors for some months—their own forensic IT tools to copy, search, and recover information on the undertaking's IT systems and storage media (Explanatory Note, point 10). Applying this method, potentially relevant data will be extracted from electronic media, often using a keyword search, and processed on a mobile server. Inspection officials will then review the material on-site and remove from the premises only documents considered to be relevant; the Commission's extraction tools, including the mobile server, are cleansed of all other data. In circumstances where the Commission cannot finish its inspection on the undertaking's premises during the day, it can follow

41 *Ibid.*, at paras 115 *et seq.*

42 See Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575; and Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akros Chemicals v Commission* [2007] ECR II-3523.

43 *Nexans*, at paras 126, 132, and 133.

44 Joint Cases T-289/11, T-290-11, and T-521-11 *Deutsche Bahn AG and others v Commission*, judgment of 6 September 2013, not yet reported.

45 'Clairément' in the French version, 'eindeutig' in the German version of the judgment. See *Deutsche Bahn*, para. 139. There is no English version of the judgment available.³

46 'Raisons valables' in the French version, 'stichhaltige' or 'triftige Gründe' in the German version of the judgment. See *Deutsche Bahn*, paras 141 and 151.

47 Available at <http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf> accessed 28 October 2013.

the ‘continued inspection’ or ‘sealed envelope’ procedure whereby the data are placed onto an encrypted storage device and sealed in an envelope (Explanatory Note, point 12). The undertaking’s representatives are entitled to be present when the envelope is opened and the content reviewed either at the undertaking’s or the Commission’s premises.

- The revision also includes a detailed description of the undertaking’s obligation to cooperate fully and actively with the inspection, specifically in relation to IT searches. Point 11 of the Explanatory Note clarifies that the undertaking may be required to provide appropriate representatives or members of staff to assist the Commission, including for ‘*specific tasks such as the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing “administrator access rights”-support*’ adding that when such actions are taken, ‘*the undertaking must not interfere in any way with these measures and it is the undertaking’s responsibility to inform the employees affected accordingly.*’

The Explanatory Note provides very helpful guidance and transparency to undertakings. As alluded to in point 11 of the Explanatory Note, the undertaking must not interfere with the Commission’s measures relating to IT inspections, which can attract significant fines as exemplified by the *EPH* case. On 28 March 2012, the Commission imposed a fine of €2.5 million on Czech company EPH for obstructing the Commission’s on-site inspections in relation to electronic documents. The company’s IT department—contrary to the Commission’s orders—had unblocked email accounts and diverted incoming emails to an independent server during the inspection.⁴⁸

The guidance provided by the Explanatory Note is also timely as it coincides with the Commission’s new practice of systematically taking only electronic copies, rather than paper copies, of electronic documents during on-site inspections. According to the Commission, it can be expected that at some point in the future, electronic copies may also be taken of paper documents. These developments show that companies are well advised to update internal guidance to extend to the treatment of electronic documents in the context of an inspection.

IV. Contentious issues relating to Legal Professional Privilege

Two recent developments have also highlighted issues raised by the limited nature of Legal Professional Privilege (LPP) in European competition law. First, as discussed above, the Commission’s on-site inspections increasingly involve electronic document searches. These searches can extend to documents located outside the EU. The broadening of the Commission’s inspection powers has resulted in a potential for increased conflicts with LPP rights under foreign laws which may be broader than the protection granted under EU law. Conversely, the Commission’s narrow interpretation of LPP also affects effective LPP in other areas of the law. For example, the Commission has taken the position that advice provided by IP counsel (internal or external) does not benefit from the LPP protection granted to external counsel in the context of a competition law investigation. These developments show that the scope of LPP in European competition law has legal implications that extend beyond the narrow boundaries of EU law and EU competition law advice.

In relation to electronic document searches, it is the Commission’s view that during on-site inspections its inspectors can search all electronic documents that are available at or from the premises of the undertaking, which includes documents located on a foreign server, for example in the United States.

This broad power may result in the production of documents which, while not privileged under EU law, may be privileged under foreign laws. For example, under US law advice by in-house counsel is legally privileged whereas it is not under EU law. Also, based on the *AM&S* judgment, legal advice by outside legal counsel not entitled to practise in the EU may not be privileged under EU law.⁴⁹

The question therefore arises whether in the context of a Commission inspection, the disclosure of documents that are protected by US LPP would be considered a ‘*voluntary*’ disclosure of those documents that would jeopardize US privilege protection. In the *US Vitamin* litigation, a US District Court considered that information provided in response to a request for information would not be ‘*voluntary*’ if the disclosure

48 See Case COMP/39.793 – *EPH and others*. Available at <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39793/39793_489_4.pdf> accessed 28 October 2013.

49 See Case 155/79 *Australian Mining and Smelting Europe Limited v Commission* (‘AM&S’) [1982] ECR 1575, at para. 25, indicating that LPP

extends to ‘*written communications between lawyer and client must apply without distinction to any lawyer entitled to practice his profession in one of the Member States.*’

was made ‘in response to a court order or subpoena or the demand of the governmental authority backed by sanctions for non-compliance’ adding that the privilege ‘must be asserted’.⁵⁰ In respect of information provided to the Commission in response to a request for information, the Court concluded that the disclosure was not compelled and thus privilege was waived given that (i) the documents were provided without a court order; (ii) the defendants did not provide evidence that a failure to respond would have subjected them to penalties or sanctions; and (iii) the defendants did not demonstrate that they had objected to the documents’ disclosure.⁵¹

The *Vitamin* precedent did not specifically address the question whether the disclosure of US privileged documents in the context of a Commission on-site inspection would also risk waiving US privilege but one could easily identify similarities. While an undertaking’s failure to provide documents during an inspection may lead to a fine decision under Article 23(1)(c) of Regulation 1/2003, the fact remains that the Commission cannot compel an undertaking to provide the documents, that is to say, it lacks the ‘true powers of “search and seizure”’.⁵² Therefore, an undertaking may be well advised to also identify and analyse implications of

disclosure in the context of an inspection and identify broad claims for protection, particularly when the disclosure or production extends to foreign documents.

Moreover, the Commission’s position is that LPP does not apply to IP counsel advice, on the basis that legal advice from outside counsel is legally privileged only when ‘made for the purposes and in the interests of the client’s rights of defence’ within the meaning of the *AM&S* judgment.⁵³ The Commission’s position is that this is not the case for advice provided in relation to the strength of an IP infringement or validity issue.

However, as, for example, the Commission’s investigations with respect to reverse payment settlement agreements have shown, outside IP counsel’s advice on patent validity and/or infringement, and consequential patent litigation or litigation avoidance strategies may be directly relevant for the competition law assessment of an undertaking’s behaviour. The Commission’s unwillingness to recognise LPP for IP advice may, and should, lead undertakings to also treat IP counsel advice—whether internal or external—with the same degree of care that so far was reserved for communications with in-house counsel.

doi:10.1093/jeclap/lpt063

50 *In re Vitamin Antitrust Litigation*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. 23 Jan. 2002), at 105.

51 *Ibid.*, at 116.

52 See Gippini-Fournier, ‘Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance’ 28 (2004) *Fordham Int’l L. J.* 967, at 1034.

53 See *AM&S*, at para. 21.