Access to leniency documents and actions for damages – an uneasy match

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1. Introduction

Directive 2014/104 of the European Parliament and the Council of 26 November 2014¹ (hereinafter Damages Directive) constitutes a first attempt to harmonize the actions for damages for infringements of competition law provisions both at national and European level. The divergence between national rules of procedural law were particularly visible in the *Pfleiderer* case,² where depending on the national provisions applicants might have been granted or refused access to leniency files in possession of competition authorities for the purpose of leading private enforcement actions.

Private enforcement of competition rules should be mainly exercised by the national courts that apply articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) and/or national competition rules. In order to apply those rules for damage actions, the courts need evidence on the infringement causing damages. One of the (seemingly) perfect sources of such evidence are leniency documents, confirming the infringement. They are self-incriminating statements that can be used for disadvantage of their author in case of damage actions. In parallel, in the case of leniency statements competition authorities can detect and punish cartel infringements in a much faster way, without the risk of being questioned. But if the companies believe that their self-incriminatory statements may become public, they might be less inclined to cooperate with the authorities in the future. This

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¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, 1-19.

² Judgment of 14 June 2011, *Pfleiderer AG v. Bundeskartellamt*, C360/09, ECLI:EU:C:2011:389.

would be very detrimental to effective public enforcement. To avoid this, it is the aim of the Damages Directive to fully protect leniency statements and settlement submissions from being disclosed or used in damage actions.³ But the solutions introduced by the Damages Directive in response to the *Pfleiderer* judgment cover only one of the possible scenarios of access to such statements and do not fully eliminate the possibility of using such evidence in private enforcement. As will be further shown, the Directive does not cover all the jurisprudence of the Court of Justice of the European Union on this issue, seemingly leaving some doors “not fully closed”.⁴

Such a “leaking” access to leniency files in private enforcement actions might lead to hindrance of effective public enforcement by competition authorities. As both tools (public and private enforcement) are required to interact in order to ensure a maximal effectiveness of the competition rules, this mismatch is of great importance. It is though necessary to find a balance between the need of effective public enforcement (possible mainly with the use of leniency programmes) and the drive to introduce effective private enforcement. Thus the arrangements for access to documents held by competition authorities, including the leniency documents, are to be coherent and coordinated throughout the European Union. Any lack of coordination might lead to divergence of applicable rules of access, which can jeopardize the proper functioning of competition law in the European Union. Allowing access to leniency documents may enable all victims to claim follow-on damages but, at the same time, it might reduce the numbers of leniency applications.

Therefore, a certain trade-off is necessary between damages payment and optimal leniency incentives. There is still a certain misbalance between public and private enforcement. The Damages Directive tries to make a complementary model out of it. Even if in practice, private enforcement faces important obstacles, it still should follow a rule: the more you enforce publicly, the more you should be able to enforce privately. Otherwise, the truncated solution on the access to leniency documents might prove to be a problematic issue for the fulfilment of aims of the Directive.

³ Anneli Howard, “Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive”, *Journal of European Competition Law & Practice* 6, 4 (2015): 256-259.

⁴ Cf. broader: Philipp Kirst and Roger Van den Bergh, “The European Directives on Damages Actions: A missed opportunity to reconcile compensation of victims and leniency incentives”, *Journal of Competition Law and Economics* 12, 1 (2016): 1-30.

2. The CJEU jurisprudence on access to leniency files

The jurisprudence of the Court of Justice of the European Union (CJEU) on the access to leniency files failed to solve the conflict between the leniency programmes and the right to damages. It was based on case-by-case balance, with an uncertain outcome.

The insecurity was opened by CJEU *Pfleiderer* judgment of 2011. The CJEU stated that in the absence of binding EU rules on the topic of access to national leniency documents, it is up to the national courts, on the basis of national law and on a case-by-case basis, to establish whether or not leniency documents can be disclosed in actions for damages. Because of this, national courts had to carry out a balancing exercise between the interest of the victims in exercising their Treaty rights to full compensation and the public interest in effective public enforcement of competition law. They should however “exercise their competence in accordance with European Union law”,⁵ so as not to “render the implementation of European Union law impossible or excessively difficult”⁶ and in particular to “not jeopardize the effective application” of articles 101 and 102 TFEU.⁷ This judgment led to a great insecurity: companies cooperating with competition authorities in the framework of leniency programmes or settlement procedures did not know in advance whether their self-incriminating statements might later be used to their disadvantage in a damages action.

This state of uncertainty was in a way confirmed in 2013 by another CJEU judgment in case *Donau Chemie*,⁸ The Austrian legal provisions made no allowance for the court to authorize access to the judicial case file in competition cases without the consent of the parties, even where the party seeking access could demonstrate a legitimate legal interest in having access. Under the Austrian system it turned out that the legislature itself made the weighing up between the general interest of public enforcement of competition

⁵ *Pfleiderer*, *op. cit.*, paragraph 24; Judgment of 12 November 2009, *Commission v. Spain*, C154/08, EU:C:2009:695, paragraph 121.

⁶ *Pfleiderer*, *op. cit.*, paragraph 24; Judgment of 16 July 1998, *Oelmühle and Schmidt Söhne*, C298/96, EU:C:1998:372, paragraphs 23 and 24.

⁷ *Pfleiderer*, *op. cit.*, paragraph 24; Judgment of 07 December 2010, *VEBIC*, C-439/08, EU:C:2010:739, paragraph 57.

⁸ Judgment of 06 June 2013, *Bundeswettbewerbsbehörde v. Donau Chemie AG, Donauchem GmbH, DC Druck-Chemie Süd GmbH & Co KG, Brenntag Austria Holding GmbH, Brenntag CEE GmbH, ASK Chemicals GmbH, formerly Ashland-Südchemie-Kernfest GmbH, ASK Chemicals Austria GmbH, formerly Ashland Südchemie Hantos GmbH*, C536/11, EU:C:2013:366.

law and the particular interests of third parties claiming access to leniency files in order to bring actions for damages.

The CJEU found that this legislative solution is inadmissible, stating that the principle of effectiveness “precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved”.⁹

In the *Pfleiderer* case¹⁰ the CJEU has stated that in the absence of binding EU rules it is up to the national courts to establish if leniency documents can be disclosed in actions for damages. This naturally introduced a great insecurity for the leniency applicants throughout the European Union. In the following judgment, the CJEU turned out to be even more radical, stating that the systemic refusal by Member States to grant access to leniency documents is contrary to the principle of effectiveness of EU law.¹¹ Thus the principle of efficiency precluded a national law provision that the leniency documents might be granted only with the consent of all the parties concerned. In this way, the CJEU clearly signalled that in the balancing exercise between the protection of leniency applicants and damage claimants, the primacy goes to the right to claim damages. Those two judgments caused a legislative reaction in form of Damages Directive to counter the position of the CJEU and to provide much broader protection to leniency files in the context of damage claims. But first it was also questioned by different policy instruments issued both at national and EU level.

3. Policy on access to leniency files of different non-judicial institutions

Already from the very first case of CJEU concerning the possible access of damage claimants to leniency files, there has been a strong protective reaction at both national and European institutional levels. In the resolution of the Heads of National Competition Authorities from 23 May 2012,

⁹ *Bundeszweibewerbsbehörde v. Donau Chemie*, *op. cit.*, paragraph 49.

¹⁰ *Pfleiderer*, *op. cit.*

¹¹ *Bundeszweibewerbsbehörde v. Donau Chemie*, *op. cit.*

the importance of appropriate protection of leniency material was underlined.¹² It is understood that the most important incentive for leniency programmes is to guarantee the immunity from penalties. For this reason, the leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes. In the initial soft law of the European Commission a very similar policy was followed. In both the notice on the co-operation between the Commission and the Courts of the EU and the notice on cooperation within the network of Competition authorities, there is an assurance that the “Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant”.¹³ In 2015 the European Commission amended its leniency Notice, by introducing a point 35 a, clearly stating that: “the Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of those Treaty provisions [101 and 102]”.¹⁴ However reassuring this soft law might seem, it is not binding for the authorities of Member States.¹⁵ As it was uncertain, it would most probably not be followed by the Member States, so the practice might be diverse. This uncertainty was amplified with the mentioned jurisprudence of the Court of Justice.

4. Damages Directive’s disclosure regime

The Damages Directive, apart from having an ambition to harmonize the national procedures governing private damage actions, while applied to 101 or 102 TFEU and/or parallelly national law, aims also at adopting a common disclosure regime. This solution is introduced to counter an information asymmetry in enforcement. There is a delicate balance between the goals of compensation to victims and detection (deterrence) of cartel agreements. A too easy access to leniency documents might hinder an effective enforcement via leniency programmes.

¹² Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 – Protection of leniency material in the context of civil damages action.

¹³ Respectively, para. 26 of the Notice on the cooperation between the Commission and the Court of the Member States and para. 40 of the Notice on cooperation within the Network of Competition Authorities.

¹⁴ Communication from the Commission – amendments to the Commission Notice on Immunity of fines and reduction of fines in cartel cases. Communication 2015/C 256/01, OJ 2015 C 256/1.

¹⁵ *Pfleiderer*, *op. cit.*, paragraph 23; Judgment of 20 January 2016, *DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del Mercato*, C428/14, EU:C:2016:27, paragraph 33.

In principle there are different routes to access cartel evidence. The Damages Directive aims at making the evidential issues for claimants of damages as easy as possible, mainly by introducing two solutions: a presumption of harm and a strict disclosure regime, both very favourable to damage claimants. They were introduced to fight information asymmetry, the main hindrance of effective private enforcement. Quite naturally, evidence is an important element for bringing actions for damages for infringement of Union or national competition law. The Damages Directive aims mainly at solving the problem of access to such evidence and the disbalance between the claimants and the infringers as to the possibility of using it.

First, the Directive introduces in its article 17 (2) a rebuttable presumption that cartel infringements cause harm. The infringer has the right to rebut this presumption, but it implies a burden of proving that no harm actually occurred. Due to the Damages Directive we have presumption of harm, which is safeguarding the right to compensation rather than protecting the leniency applicant.

Second, the Directive introduces the regime of disclosure of evidence that ensures that the claimants are afforded the right to obtain the disclosure of evidence relevant to their claim. However, as competition law litigation is characterized by an information asymmetry, the claimants should be afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. Because of this, the Directive provides that any natural or legal person that obtains evidence through access to the file of a competition authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, other legal persons belonging to the same undertaking should also be able to use that evidence. However, the preamble of the Directive clearly states that such “use of evidence obtained through access to the file of a competition authority should not unduly detract from the effective enforcement of competition law by a competition authority”. The possibility of using evidence that was obtained solely

through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors. That limitation to avoid trading of evidence does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

5. Disclosure and leniency documents

A leniency application is a “perfectly self-incriminating statement”.¹⁶ Even if leniency is foremost a main pillar of public enforcement of EU competition law, such self-incriminating statements can be used for disadvantage of their author in case of damages actions. If companies presume that such statements might, even much later, go public, they are less willing to cooperate. It is very tempting to introduce follow-on actions if leniency is in play – but in a longer perspective an easy access to leniency documents might dissuade applicants.¹⁷ Undertakings which cooperate with competition authorities under a leniency programme play a key role in exposing secret cartel infringements and in bringing them to an end. Therefore, the Directive provides that the undertakings which have received immunity from fines from a competition authority under a leniency programme should be protected from undue exposure to damages claims. The protection is even more necessary if one considers that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity, which makes the immunity recipient a presumably “preferential target of litigation”. It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers does not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. To the extent that a cartel has caused harm to those other than the customers or providers of the infringers, the contribution of the immunity

¹⁶ Judgment of 28 January 2015, *Akzo Nobel*, T-345/12, EU:T:2015:50, paragraph 83. Cf. Martina Repas, “Taking leniency documents as evidence in damages actions in cases of competition law infringement”, in *Evidence in contemporary civil procedure*, ed. Cornelis Hendrik van Rhee and Alan Uzelac, 105-124 (Intersentia, 2015).

¹⁷ *Donau Chemie*, *op. cit.*, paragraph 42.

recipient should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.

On the other hand, the Damages Directive in its article 5 provides that national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, with the guarantee that the Legal Professional Privilege (LPP) should be protected (Article 5 paragraph 6) and that the right to be heard from whom disclosure is sought should also be protected (Article 5 paragraph 7). To this policy of openness the Damages Directive provides a set of limits in its article 6. There is a principle of disclosure of evidence included in the file of competition authority but there are two types of exceptions: black and grey lists. For the purpose of actions for damages national courts cannot at any time order a party or a third party to disclose any of those: leniency statements or settlement submissions. This black list has as its aim to achieve an effective public enforcement. According to para. 7 of article 6 there is as well an absolute restriction on use – such documents are not admissible in private damage actions.

The Directive also introduces rules to protect competition authorities' ongoing investigations. Documents specifically created for the purpose of an investigation by the parties, or by the competition authorities and sent to the parties, can only be disclosed in damage actions after the proceedings are terminated.

Full protection of leniency statements and settlement submissions and temporary protection of documents prepared for public enforcement may ensure that infringers are willing to cooperate with the competition authorities. At the same time, the victims still have access to the evidence they need to prove their claim. The Directive clearly stipulates that all pre-existing information – i.e. information existing independently of competition authorities' investigations – can be disclosed at any time. In practice, this will mean that victims will have wider access to relevant evidence than is currently the case.¹⁸

¹⁸ Anneli Howard, "Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive", *Journal of European Competition Law & Practice* 6, 4 (2015): 256-259.

6. The Transparency Regulation

Apart from some incertitude as to the general policy for access to files, some complications stemmed also, before the adoption of the Damages Directive, from the application of the Transparency Regulation.¹⁹ CJEU granted access to leniency files under the Transparency Regulation in a cautious manner. In *EnBW Energie-Baden-Württemberg v. Commission*²⁰ and *CDC Hydrogene Peroxide Cartel*²¹ cases, the General Court judged that the initial refusal of the European Commission should not have been upheld and granted access to leniency files. It was nuanced by the Court of Justice which, in the *Commission v. EnBW* case,²² stated that the Commission can apply a general presumption against public disclosure unless there is an overriding public interest. Commercial interests of parties to proceedings relating to a cartel are placed in jeopardy where the statements of applicants for leniency are made public.²³ Parallely to this jurisprudence, in the *Netherlands v. Commission* case²⁴ the General Court stated that the disclosure of leniency documents could deter potential leniency applicants. There is therefore a general presumption that disclosure of leniency documents under the Transparency Regulation can be detrimental to commercial interests of undertakings involved.

This however does not exclude the possibility of proving that due to an overriding public interest, the leniency documents might, in a particular

¹⁹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, 43-48. Cf. Xavier Groussot and Justin Pierce, “Transparency and liability in leniency programmes: a question of balancing?”, in *Harmonising EU Competition Litigation: the New Directive and beyond*, ed. Maria Bergström, Marios C. Iacovides, Magnus Strand (Hart Publishing, 2016), 143-164.

²⁰ Judgment of 22 May 2012, *EnBW Energie Baden-Württemberg v. Commission*, T-344/08, EU:T:2012:242.

²¹ Judgment of 15 December 2011, *CDC Hydrogene Peroxide v. Commission*, T-437/08, EU:T:2011:752.

²² Judgment of 27 February 2014, *European Commission v. EnBW Energie Baden-Württemberg AG*, C-365/12 P, EU:C:2014:112.

²³ In Judgment of 12 May 2015, *Unión de Almacenistas de Hierros de España v. Commission*, T-623/13, EU:T:2015:268, the General Court stated that the documents exchanged between the European Commission and a National Competition Authority for enforcement of EU antitrust law benefit from a general presumption that they should not be accessible to the public – art. 4 (2) 1-3 – as the disclosure can undermine the protection of commercial interests of natural and legal persons or the purpose of investigation. Cf. Virgílio Pereira, Jeroen Capiu and Ailsa Sinclair, “Unión de Almacenistas de Hierros de España v. Commission: Strengthening a Climate of Trust within the European Competition Network”, *Journal of European Competition Law & Practice* 7, 2 (2016): 117-119.

²⁴ Judgment of 13 September 2013, *Kingdom of the Netherlands v. European Commission*, T-380/08, EU:T:2013:480.

proceeding, be accessible. The Damages Directive does not exclude this possibility. In the paragraph 20 of its preamble, the Directive states that this Directive should be “without prejudice” to the Transparency Regulation. Thus the Directive indirectly provides that the victims might still access leniency documents under the Transparency Regulation, when there is an overriding public interest in disclosure.

7. Republishing of decisions in fuller version

A different practice of the European Commission might reveal the content of leniency applications. Namely, the recently used practice of publishing “full” or “extended” decisions (versions of decisions) of the European Commission might lead to an identical effect as an open access to leniency documents.²⁵ As decisions have a probative effect in subsequent actions for damages, a decision containing the same/identical information as the one contained in leniency documents might prove to be a better source of proofs in infringement than the leniency documents accessed.

Already in the *Pilkington* case²⁶ a non-leniency applicant was raising the rights to be protected after the European Commission took a decision finding an infringement, once the Commission wanted to publish a non-confidential version of that decision. The General Court gave a judicial permission to re-publish the decision with more detail. It could be read as a clear support for private enforcement. In the *Evonik Degussa v. Commission* case²⁷ the leniency applicant was faced with the same policy. Evonik has fully cooperated with the Commission under leniency notice of 2002. In 2007 the European Commission published a first version of its decision, whereas in 2011 it published a new, more complete version. In the pending appeal from this judgment – case C-162/15 P²⁸ – the publication was suspended by order of March 2016. In the *Akzo Nobel et al v. European Commission* case²⁹ the General Court did not annul a Commission deci-

²⁵ It is mainly analysed from the perspective of protection of confidentiality, cf. Javier Guillén Caramés, “Leniency programmes, inquiries and the problematic use of confidential information”, in *The fight against hard core cartels in Europe. Trends, challenges and best international practices*, ed. José María Beneyto Pérez and Jerónimo Mailló González-Orús 73-101 (Bruyant, 2016).

²⁶ Judgment of 15 July 2015, *Pilkington v. European Commission*, T-462/12, EU:T:2015:508; cf. Jacquelyn MacLennan, “Fundamental Rights: Pilkington and the Right to Confidentiality in Published Decisions”, *Journal of European Competition Law & Practice* 7, 3 (2016): 194-196.

²⁷ Judgment of 28 January 2015, *Evonik Degussa v. Commission*, T-341/12, EU:T:2015:51.

²⁸ Pending case C-162/15 P, *Evonik Degussa v. Commission*.

²⁹ *Akzo Nobel et al. v. European Commission*, *op. cit.*

sion rejecting a request for confidential treatment. In *Akzo*, in 2007, a first non-confidential version of the decision in question was published on the website of the Commission's Directorate-General for Competition. Then, in 2011 the Commission informed the applicants of its intention to publish a new, more detailed, non-confidential version of the decision, containing the full content of the decision with the exception of any confidential information. On that occasion, the Commission asked the applicants to identify the information in the decision that they wished to be treated as confidential. The Commission informed the applicants that it accepted their request for the omission of all information which would allow direct or indirect tracing of the sources of the information submitted under the 2002 Leniency Notice from the new non-confidential version that was to be published. By contrast, the Commission took the view that there was no justification to treat as confidential the other information in respect of which the applicants had requested confidential treatment. The applicants applied to the hearing officer, asking him to exclude from the non-confidential version that was to be published all the information which they had provided under the 2002 Leniency Notice. By the contested decision, the hearing officer rejected, on behalf of the Commission, the requests for confidential treatment submitted by the applicants and consequently authorised the publication of information which the applicants had provided to the Commission in order to benefit from the Commission's leniency programme.

In this case the General Court explained that there are three cumulative conditions that have to be met in order for information to fall within the ambit of the obligation of professional secrecy and thus to enjoy protection against disclosure to the public. First, the information should be known only to a limited number of persons. Second, its disclosure is liable to cause serious harm to the person who has provided it or to third parties. Third, the interests liable to be harmed by disclosure are, objectively, worthy of protection.³⁰ In the same judgment the General Court has stated that the corporate statements submitted under a leniency programme are not covered by confidentiality in terms of publication.³¹ Therefore it seems that the CJEU allows for a relatively broad disclosure framework, regardless of the provisions of the Damages Directive.

³⁰ *Akzo Nobel et al. v. European Commission*, *op. cit.*, paragraph 65. In the same way: *Bank Austria Creditanstalt v. Commission*, paragraph 59 above, paragraph 71, and *Pergan Hilfsstoffe für industrielle Prozesse v. Commission*, paragraph 62 above, paragraph 65.

³¹ *Akzo Nobel et al. v. European Commission*, *op. cit.*, paragraph 111.

8. Conclusions – balancing exercise?

The Damages Directive was a legislative reaction against the jurisprudence of the CJEU in the *Pfleiderer* and *Donau Chemie* cases. It assured more harmonization of disclosure, more certainty for parties involved and excluded the possibility of forum shopping. In result it seems that leniency applications might be tempted to misuse this possibility to block access to files (even the applications that were unsuccessful are blocked). But as shown, this blockade, despite the general policy to protect leniency applicants, might turn out ineffective.

Therefore, a matching exercise between the effective leniency programmes and effective private enforcement is still an open question. There is a general obligation of disclosure of all materials gathered by the competition authorities. As far as the leniency materials are concerned, the Directive introduces a prohibition of disclosure. Thus it might be presumed that at least some undertakings might use the leniency applications as a strategy to avoid private enforcement. The appropriate balance between attractiveness of leniency applications and effectiveness of private damage actions is still not achieved. It seems that the Directive is treating the leniency programmes as the most important tool of effective public enforcement and no sacrifice for private enforcement is envisaged. But the system is not waterproof. Due to the possibility to either use the Transparency Regulation or to publish an extended version of decisions by the European Commission, some information coming from leniency files might, accidentally, fall into the hands of private damage claimants. The EU legislator has not reacted in full way to the development of CJEU jurisprudence, which might lead to a further search of balance between public and private enforcement methods.

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