Leniency material unveiled?
Access by cartel victims to Commission and NMa files from a perspective of EU fundamental rights and cartel enforcement.

M.G. Nielen
Onder begeleiding van mr. A. Gerbrandy
Abstract

An ongoing debate in European competition law is whether or not cartel victims, in order to prepare a damages claim against cartelists, should be granted access to leniency material. This paper investigates, in the light of the European Court of Justice ruling in Pfleiderer v Bundeskartellamt, which EU fundamental rights and competition enforcement interests are relevant for national courts deciding on disclosure (or not) of leniency material. Furthermore, it compares the legal bases in the European and Dutch legal systems for third party access to leniency material. It is argued that Article 47 of the Charter of EU Fundamental Rights provides a common basis for access to evidence as well as access to a court for cartel victims in the determination of their civil rights. National civil courts acting within the scope of EU law are therefore well placed to weigh on a case-by-case basis whether the requested leniency material is necessary for the claimant in evidence and, if so, whether access is proportionate in the light of the confidential and self-incriminating character of leniency material.

Er wordt een debat gevoerd in het Europese mededingingsrecht over de vraag of gedupeerden toegang tot clementiemateriaal moeten krijgen om een schadevergoedingsactie tegen kartellisten voor te bereiden. Deze scriptie onderzoekt naar aanleiding van de uitspraak van het Europees Hof van Justitie in Pfleiderer tegen Bundeskartellamt welke EU grondrechten en belangen van mededingingshandhaving relevant zijn voor nationale rechters bij de beslissing over wel of geen toegang tot clementiemateriaal. Vervolgens worden de wettelijke mogelijkheden in het Europese en Nederlandse rechtssysteem voor toegang tot clementiemateriaal door derden vergeleken. Beargumenteerd zal worden dat artikel 47 van het Handvest van de Grondrechten van de EU een gemeenschappelijke basis biedt voor toegang tot bewijs en toegang tot de rechter bij het vaststellen van de burgerlijke rechten van gedupeerde. De nationale civiele rechter is daarom in een geschikte positie om per individueel geval af te wegen of het gevraagde clementiemateriaal noodzakelijk is als bewijs voor de gedupeerde en, zo ja, of toegang proportioneel is in het licht van het vertrouwelijke en zelfincriminerende karakter van clementiemateriaal.
Preface

As a student of Law I have always been attracted by issues of due process, the relationship between law and economics, European integration and foreign languages. The Utrecht University European law LL.M programme with a focus on competition law was therefore a logical choice.

Sometimes it all comes together. The subject of access to leniency material turned out to be an all-inclusive package of clashing fundamental rights, economic interests of consumer welfare and leniency as an important public enforcement tool. Furthermore, the topic permitted me to carry out a comparative research in which I examined how Dutch competition process influences the European level and vice versa. In the last couple of months a lot of interaction has taken place regarding the debate of access to competition files. The Luxembourg courts, the European Court of Human Rights, the Commission, national legislators, competition lawyers and legal scholars have all pronounced on the issue. Preparing a file of all relevant documentation for this paper has been an intriguing task in itself.

I was fortunate enough to write this thesis as part of my internship with the legal service of the Dutch Competition Authority (Nederlandse Mededingingsautoriteit – “NMa”). It has been an extremely interesting opportunity of gaining practical experience in the field of competition law. I would like to thank Anke Prompers for her enthusiastic supervision of my internship and comments on earlier versions of this paper. My thanks also go to Pablo Amadór Sanchez and Lidwyn Brokx for sharing their thoughts on this paper when it was still in process.

1 It should be noted that the NMa is in a merger with two other Dutch regulators (the Independent Post and Telecommunications Authority (OPTA) and the Dutch Consumer Authority (CA)). The merged authorities will be called “Consumer and Market Authority” (Autoriteit Consument en Markt – ACM). The Dutch second chamber has announced to vote on the Parliamentary Act establishing the ACM after the summerbreak 2012: Kamerstukken II, 2011-2012, 33 186 (Instellingswet Autoriteit Consument en Markt), lange termijnagenda incl stemmingslijst week 27 (29/06/2012).
## Content

Abstract ................................................................................................................................. 2

Preface ................................................................................................................................. 3

1. Introduction ..................................................................................................................... 5

2. Legal framework ............................................................................................................. 7

   2.1. Enforcement interests ................................................................................................. 8

       2.1.1. The relationship between public and private enforcement of Article 101 TFEU ..... 8

       2.1.2. Leniency programmes as complementary public enforcement tools ................. 9

       2.1.3. Disclosure of leniency material and private enforcement goals ....................... 14

       2.1.4. Disclosure of leniency material and effective cooperation within the ECN ...... 17

       2.1.5. Conclusion: enforcement interests ................................................................... 21

   2.2. Fundamental rights ...................................................................................................... 22

       2.2.1. The importance of the Charter for access to leniency material ......................... 23

       2.2.2. The right to an effective remedy and a fair trial ............................................... 25

       2.2.3. The right of access to documents as part of the principle of transparency ...... 29

       2.2.4. Privacy and confidentiality ............................................................................... 30

       2.2.5. Privilege against self-incrimination ................................................................... 31

       2.2.6. Conclusion: fundamental rights ...................................................................... 34

3. Comparative analysis ....................................................................................................... 34

   3.1. Access to leniency material acquired by the European Commission ....................... 35

       3.1.1. Access via administrative competition proceedings ............................................ 35

       3.1.2. Access via transparency requests ..................................................................... 38

       3.1.3. Access via civil proceedings ............................................................................ 43

   3.2. Access to leniency material acquired by the NMa ..................................................... 48

       3.2.1. Access via administrative competition proceedings ............................................ 48

       3.2.2. Access via transparency requests ..................................................................... 51

       3.2.3. Access via civil proceedings ............................................................................ 55

   3.3. Comparison and explanation ..................................................................................... 59

       3.3.1. Access via administrative competition proceedings ............................................ 59

       3.3.2. Access via transparency requests ..................................................................... 60

       3.3.3. Access via civil proceedings ............................................................................ 61

4. Evaluation: harmonisation or case-by-case analysis? .................................................... 62

5. List of sources .................................................................................................................. 65
1. Introduction

Whistleblowers are crucial for detecting and punishing cartels. As former competition commissioner Neelie Kroes stated: 'My message to companies is clear; the European Commission will not tolerate cartels. If you take part in cartels you will face very substantial fines…if you are already in a cartel, then blow the whistle to the Commission to gain immunity before someone else blows the whistle on you.'

Not only the European Commission (“the Commission”) but also the competition authorities of the EU Member States (“NCAs”) have a leniency policy under which cartelists may submit self-incriminating statements in return for full immunity from a fine or fine reduction.

‘Leniency material’ includes documents that can exist independently of the leniency programme (“pre-existing documents”) and self-incriminating corporate statements that are exclusively submitted for the purpose of leniency (“corporate statements”). Leniency material is kept in the internal file of competition authorities.

After the judgments in Courage and Manfredi it has become clear that the EU cartel prohibition not only aims at detecting and punishing cartels, but also at compensating customers or consumers of the cartel who claim to have been overcharged. These “cartel victims” or “follow-on claimants” often have evidential problems in proving causation (between the breach of competition law and their loss) and quantifying the overcharge. Access to leniency material, in which cartelists incriminate themselves, serves as an important source of evidence in this respect. At the same time, disclosure of leniency material to cartel victims increases the risk of civil liability of leniency applicants. Competition authorities fear that future leniency applicants will be deterred from cooperating, which in turn will result in fewer cartels being detected. A current problem of EU competition enforcement is: how to protect leniency programmes, while at the same time ensuring full compensation of cartel victims?

In Pfleiderer v Bundeskartellamt the European Court of Justice (“ECJ”) for the first time dealt with the question whether a national competition authority (rather than the Commission) should...

---

2 EU Focus 2007, 209, p. 4-5.
3 Commission Notice on Immunity from fines and reduction of fines in cartel cases (“Leniency Notice”), OJ 2006/C 298/17.
4 Hereafter also referred to as “the undertakings concerned” or “the suspected undertakings”.
5 In the absence of a harmonised EU definition of leniency material, this thesis adheres to the definition in the 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 actions” of 23/05/2012, p. 1 (accessible via the website of the European Commission), which is:
   “Statements by leniency applicants submitted under the leniency programme and witness statements made by employees and directors of the undertaking cooperating under the leniency programme material (whether oral or written). Depending on the protection in the relevant jurisdictions, other information submitted to the CA by a leniency applicant (including pre-existing documents) will also qualify for protection as leniency material.”
8 This paper is limited to the cartel prohibition of Article 101 of the Functioning Treaty of the European Union (“TFEU”). The leniency policies of the Commission and the NMAs, as well as the ECN Model Leniency Programme do not extend to abuse of dominance (Article 102 TFEU).
9 Hereafter also referred to as “third parties” or “injured parties”. In reading the term “cartel victim” it must be borne in mind that the undertaking concerned claims to be injured and is thus an “alleged cartel victim” until compensation is granted.
allow a cartel victim access to leniency material. Pfleiderer is a worldwide producer of laminate flooring. It sought access to the competition file of the German Bundeskartellamt in order to prepare its follow-on action for overcharge from a cartel in décor paper (which is used to cover the top layer of engineered wood). The ECJ held that: “Article 101 TFEU and Regulation 1/2003 do not preclude access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is for the national courts and tribunals on the basis of their national law to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.” Pfleiderer has reheated the debate of how to strike a balance between effective leniency programmes and private enforcement. Referring to the judgment, the Commission has announced a proposal for legislation at the end of 2012. An earlier attempt to harmonise the rules for access to leniency material failed in 2009. This shows that an EU solution to the problem is not clear-cut.

In the absence of harmonisation, Pfleiderer confirmed the procedural autonomy of the Member States regarding access to leniency material, subject to the relevant EU law. The ECJ did not provide the national courts with guidance on how to draw the balance between ‘access versus confidentiality of leniency material’. The first purpose of this paper is, therefore, to trace the EU law interests relevant to the Pfleiderer test from an enforcement as well as a fundamental rights perspective. The Charter of Fundamental Rights of the EU (“the Charter”) is an important source in this respect. It contains safeguards protecting the leniency applicant against the unnecessary use in evidence of self-incriminating statements as well as the right of access to the file of at least those who have been charged.

The second aim of this paper is to compare the bases under the European and the Dutch legal system for access to leniency material by cartel victims. Regulation 1/2003 leaves it to the Member States to regulate their own competition procedure. It is both interesting and functional to see how the two legal systems influence each other with a view to possible harmonisation of access to leniency material.

In both legal systems cartel victims are regarded as “third parties”. Therefore, contrary to the investigated undertakings, cartel victims cannot rely on a right of access to the file based on their rights of defence in administrative competition procedure. It is argued that the corresponding Articles 47 of the Charter and Article 6 of the European Convention of Human Rights protect the rights of access. Therefore, contrary to the investigated undertakings, cartel victims cannot rely on a right of access to the file based on their rights of defence. It is argued that the corresponding Articles 47 of the Charter and Article 6 of the European Convention of Human Rights protect the rights of access.

---

11 Judgment of 14 June 2011, Case C-360/09, Pfleiderer AG v Bundeskartellamt, para 32.
12 Speech by Joaquin Almunia (Vice President of the European Commission responsible for Competition Policy) of 8 June 2012, “Antitrust enforcement: challenges old and new”, 19th international competition law forum St Gallen. Reference: SPEECH/12/428.
13 Speech by A. Italianer (Director-General of DG Competition at the European Commission) of 17 February 2012, 5th international competition conference Brussels, ‘Public and private enforcement of competition law’, p. 6-8. (see list of sources for hyperlink)
14 Draft Directive on damages for breaches of competition law (the text was withdrawn just before being published and is therefore not available). See for comments: I. Vandenborre, ‘The confidentiality of EU Commission Cartel records in civil litigation: the ball is in the EU Court’, European Competition Law Review 2011, 116. On 2 February 2012 the European Parliament adopted a resolution on the Annual Report on EU Competition Policy (2011/2094(INI)), also in relation to the topic of access evidence in private enforcement (see list of sources for hyperlink).
Rights (“ECHR”) form a fundamental rights basis for access to evidence by cartel victims in the determination of their civil rights and obligations. This leads to the following question:

What are the similarities and differences between the European legal system and the Dutch legal system regarding access to leniency material by cartel victims and what recommendations for EU harmonisation of third party access to leniency material can be traced from this comparison?

This paper is organised as follows. Chapter 2 adopts a framework of EU law interests, from a perspective of cartel enforcement and EU fundamental rights, which are relevant for national courts to weigh under the Pfleiderer test of ‘access versus confidentiality of leniency material’. Chapter 3 contains the comparative analysis. It describes and compares three legal bases for access to leniency material, namely via administrative competition procedure, via transparency requests to the Commission or NMa and via national civil procedure. Chapter 4 evaluates which of the three legal routes is most tailored to the framework of EU fundamental rights and enforcement interests established in the first chapter. This paper concludes with some recommendations for harmonisation of access to leniency material by cartel victims.

2. Legal framework

This chapter aims to trace the relevant EU law interests for national courts deciding on the question of disclosure of leniency material from an enforcement and fundamental rights perspective. It must be borne in mind that apart from these two fields, there are three ‘overarching’ procedural constraints which bind the actors of the Member States in exercising EU law. Actors of the Member States are national courts as well as public administrations (including competition authorities). According to the ECJ, Member States in their procedural autonomy are bound by the principles of equivalence, effectiveness and judicial protection.

Equivalence means that national rules applicable to an EU law claim may not be less favourable than the rules relating to similar purely domestic actions. According to the principle of effectiveness, national rules must not render it virtually impossible or excessively difficult to exercise rights conferred by EU law. The principle of judicial protection means that Member States must safeguard procedural guarantees such as access to a court, the rights of defence and effective remedies.

---

18 Although this paper is confined to damages actions following from a breach of Article 101 TFEU, it could be argued that national courts also act within the scope of EU law when cartel victims claim damages as a consequence of purely national cartels, as the right to compensation was ‘Europeanised’ by the ECJ in Courage and Manfredi.
19 National administrative courts may raise EU law of their own motion if domestic proceedings do not offer sufficient possibilities for the parties to invoke EU law in relation to the validity of national law, see Judgment of 7 June 2007, C-222/05 Van der Weerd [2007] ECR I-04233. With regard to national civil proceedings, domestic courts do not have to raise EU law of their own motion if this would interfere with their passive role under national law, Judgment of 14 December 2005 C-430/93 Van Schijndel and Van Veen [1995] ECR I-04705.
2.1. Enforcement interests

Under Regulation 1/2003 the Commission and the NCAs, together forming the European Competition Network (“ECN”), have the power to enforce Article 101 TFEU.\textsuperscript{20} The first part of this legal framework shows how disclosure of leniency material can both promote and frustrate enforcement of competition law. It aims to trace enforcement based criteria for national courts to take into account in deciding whether or not to disclose leniency material.

2.1.1. The relationship between public and private enforcement of Article 101 TFEU

Both the EU Treaties and Regulation 1/2003 are silent on what is optimal enforcement. Member States have the procedural autonomy to enforce Article 101 TFEU in a way which serves the effectiveness of EU law and furthermore treats national cartels in an equivalent way to EU cartels.\textsuperscript{21} In order to ensure that undertakings comply with Article 101 TFEU, Member States may impose administrative or criminal sanctions on the infringers of competition law (public enforcement systems\textsuperscript{22}). This means that competition authorities have the competence to detect, investigate and punish cartels. Private enforcement systems, however, aim to compensate customers or consumers who have been affected by a cartel. This paper is limited to private enforcement via ‘follow-on’ actions, where customers claim damages arguing that they have been overcharged as a consequence of a cartel.\textsuperscript{23} Follow-on claims are dependent on a finding of an infringement of competition law under a public enforcement system.\textsuperscript{24} It must be noted that there is a debate as to whether ‘private enforcement’ really is ‘enforcement’ in its meaning of ensuring that the law is obeyed.\textsuperscript{25} Private enforcement does not have the classic enforcement element of sanctioning those who do not comply with the law, but rather compensates the victims of the infringements. However, a counter argument is that compensation of cartel victims may in turn lead to more compliance with competition law. This is because undertakings may be deterred from forming cartels if they know that this leads to civil liability. Therefore, this paper regards interests of corrective justice and consumer welfare as ‘enforcement interests’.

From an economic perspective, an ideal enforcement system strikes a balance between the administrative costs of punishing cartels and the benefits of terminating artificial price levels. Competition authorities have the task to establish their enforcement policy in such a way that it becomes less profitable for undertakings to infringe the cartel prohibition.\textsuperscript{26} In the case law of the EU courts various broad enforcement objectives have been identified, namely punishment\textsuperscript{27},

\textsuperscript{20} According to Article 3(1) of Regulation 1/2003 NCAs and national courts applying national competition law to agreements within the meaning of Article 101 TFEU that may affect trade between Member States, must also apply Article 101 TFEU.
\textsuperscript{21} Wils 2011, p. 9.
\textsuperscript{22} Geradin, EU Competition law and economics, Oxford: OUP 2012, p. 321.
\textsuperscript{23} This thesis does not discuss private enforcement via ‘stand-alone’ actions, in which a breach of competition law is invoked to support a completely independent civil claim for example in contract or tort.
\textsuperscript{24} W. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, World Competition 2009 (32) (1), 3-26. P.5. This thesis does not discuss private enforcement via ‘stand-alone’ actions, in which a breach of competition law is invoked to support a completely independent civil claim for example in contract or tort.
\textsuperscript{26} Wils 2009, p. 9.
deterrence and compensation. The question arises how these goals can be attained by public and private enforcement. Legal and economic literature has advanced different approaches in this respect. A well supported view is the ‘separate tasks approach’, which argues ‘that public antitrust enforcement aims at clarification and development of the law and at deterrence and punishment, while private actions for damages aim at compensation.’

The separate tasks approach is an allocation of enforcement interests, but does not create a hierarchy when public and private enforcement interests clash. This happens when competition authorities have to decide on disclosure of leniency material to follow-on claimants. On the one hand, the useful effect of Article 101 TFEU demands that cartels are detected and adequately punished. Leniency programmes have proved to be successful to this aim. On the other hand, as held by the ECJ in *Courage* and *Manfredi* and confirmed by the Commission, “the practical effect of the prohibition in Article 101 TFEU would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”

The *Pfleiderer* judgment implies that national courts, in deciding whether or not to disclose their leniency files, will have to weigh deterrence and punishment interests on the one scale, and compensation interests on the other scale. Not only courts, but also competition authorities as administrative organs of the Member States must take these interests into account in establishing their policy on access to their files. This follows from the obligation of Member States to preserve the useful effect of Article 101 TFEU. The ECJ in *Pfleiderer* did not provide explicit criteria for this balancing exercise. This confirms that there is at present no hierarchy in EU law between public and private enforcement objectives of Article 101 TFEU. The heads of the NCAs have expressed in a joint declaration that the protection of leniency programmes in the interest of public enforcement outweighs the compensation of cartel victims. It seems, therefore, that competition policy ranks public enforcement higher than private enforcement.

### 2.1.2. Leniency programmes as complementary public enforcement tools

Undertakings participating in European cartels may decide to cooperate with the Commission and the national authorities in return for immunity from fines or fine reduction. There is no explicit legal basis in EU law for a leniency policy. However, the ECJ has approved of the instrument since Article 23(2) of Regulation 1/2003 does not impose an exhaustive list on the

---

28 Idem.
29 * Joined cases C-295/04 to C-298/04, Manfredi, para 60, in which the ECJ confirmed its judgment in Case C-453/99, *Courage* and *Crehan*, para 26.
30 * Wils 2009, p. 15. Another approach would be the deterrence approach, as employed by the US Sherman Act.
31 * Beumer & Karpetas 2012, p. 123.
32 * Manfredi, para 60, confirming *Courage* and *Crehan*, para 26.
34 * See also the Opinion of Advocate-General Mazák in *Pfleiderer*, para 23: ‘In my view, in accordance, inter alia, with Article 4(3) TEU and Regulation 1/2003 the Member States must ensure the effective enforcement of Articles 101 and 102 TFEU in their territory’.
35 * 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 actions”.

---
basis of which fines may be imposed. Consequently, a harmonised EU leniency programme is absent, which means that differences continue to exist between national leniency policies. However, the ECN has drafted a model leniency programme which ‘aims to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN’. In the absence of a one-stop-shop system, undertakings involved in European cartels often apply for leniency at different authorities at the same time (‘multiple leniency applications’, see section 2.1.4). Another principal objective of the Model Leniency Programme is ‘to trigger soft-harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few NCAs that do not have one.’ At present, only Malta has no formal leniency policy.

The ECN Model Leniency Programme was drafted in order to encourage cooperation in the European fight against secret cartels. This refers to collusive conduct between undertakings aimed at restricting competition through fixing prices, allocating production or sales quotas, sharing markets or banning imports or exports. In order to receive full immunity, an undertaking must be the first to submit evidence which at that moment enables the competition authority (hereafter also “CA”) to carry out targeted inspections in connection with an alleged cartel. Furthermore, if the CA has already conducted an inspection, it may grant full immunity to a whistleblower who enables the finding of an infringement of Article 101 TFEU. If an undertaking does not qualify for immunity, it may be eligible for fine reduction in return for providing the CA with evidence of an alleged cartel which represents significant added value. In other words: the undertaking in question ‘helps’ the authority with completing the jigsaw of loose pieces of evidence for the alleged cartel that was already in the competition authority’s possession. Leniency programmes are effective investigation mechanisms for competition authorities. This is because the foresight of immunity from fines for the first leniency applicant is an economic incentive for cartelists to cooperate rather than continue their cartel. Leniency only works as a complement to other means of investigation, since undertakings will blow the whistle if they fear for being detected by the competition authorities themselves or that one of their co-cartelists will apply for leniency earlier.

In general, leniency material forms a more detailed and reliable source of evidence compared to other means of investigation. Targeted inspections on the basis of a complaint by a competitor or customer of the alleged cartel are not always possible, as the information lacks the precision that a whistleblower as an inside cartelist is able to provide. The cartelists who do not benefit from the leniency programme are under a duty to cooperate, but do not have to provide self-incriminating evidence which is for the competition authority to prove. On the contrary, a

37 ECN Model Leniency Programme of 29 September 2006 (ECN website, see list of sources), para 2.
40 ECN Model Leniency Programme para 4, 11–15.
41 ECN Model Leniency Programme paras 5–6, explanations 16–21.
42 ECN Model Leniency Programme paras 7–8, explanations 16–21
45 Wils 2007, p. 22.
46 Wils 2007, p. 20.
corporate statement by a leniency applicant often bridges the gap between the missing evidence. However, the economic incentive that leniency programmes create is in some cases precisely a defect. Leniency material is not always reliable in evidence. For instance, a whistleblower may have an interest in making ‘over-confessions’ to harm its competitors on the market.\textsuperscript{47} Case law of the EU Courts points out that the probative value of leniency material in establishing an infringement of Article 101 TFEU is limited. If the statements of the leniency applicant are contended by the other alleged cartelists, the Commission must support its finding of an infringement with evidence independent from the leniency material.\textsuperscript{48}

The Commission’s Leniency Notice as well as the NMa’s Leniency Guidelines are, to a large extent, equal to the ECN Model. However, it must be noted that in the Netherlands natural persons may also apply for leniency. Furthermore, the definition of the cartel prohibition under national law (for example: does it include vertical agreements?) varies between Member States and leads to divergent conditions for leniency applications.

If they operate efficiently leniency policies will lead to deterrence from the continuation or even the formation of cartels. Ultimately the detection of cartels may lead to protection of the structure of the market and consumer welfare.\textsuperscript{49} Competition authorities regard disclosure of leniency material as reducing the effectiveness of leniency programmes. This is often referred to as “the chilling effect of disclosure”. Below, two objections to disclosure are addressed from a public enforcement perspective (which aims at deterrence and punishment of cartels through the effective operation of leniency programmes).

**Deterrent effect of disclosure on the attractiveness of leniency programmes**

First, it is a general assumption that disclosure of leniency material to cartel victims has a chilling effect on the incentive to apply for leniency.\textsuperscript{50} Arguments for this position are (I) that disclosure would facilitate civil damages actions and (II) that disclosure of material voluntarily submitted by the leniency applicant would place the latter in a worse position compared to his fellow cartelists who do not cooperate.\textsuperscript{51} This would undermine the purpose of a leniency programme to reward the whistleblower for cooperation.\textsuperscript{52}


\textsuperscript{48} Siemens, paras 63-160. The Commission carries the burden to submit supporting evidence if a cartel infringement is predominantly established on the basis of leniency material, of which the truth is denied by one of the other cartelists in the proceedings. See e.g. Judgment of 16 June 2011, T-186/06, Solvay v European Commission [2011] I-00000, discussed in R. Stijnen, ‘Menarini en KME: marginale of volle toetsing van mededingingsboetes door de rechter?’, \textit{INTER} 2012-4, p. 121.


\textsuperscript{50} Commission leniency notice, point 12(a); ECN Model Leniency Programme point 13; Wils 2007, p.19-22; Cauffman argues that in order to resolve the clash between leniency and damages actions the law may interfere at two stages: 1) it can prevent disclosure of leniency applications and 2) it can decrease the risk or the amount of damages to be paid by leniency recipients. (C. Cauffman, ‘The interaction of leniency programmes and actions for damages’, \textit{The Competition Law Review} 2011 (7) (2) 181-220).

\textsuperscript{51} Commission’s White paper on damages actions for breach of the EC antitrust rules, p. 10.

The chilling effect of disclosure is an assumption rather than a proven fact, since the decision to apply for leniency comes down to an overall risk analysis of economic risks and benefits.\(^53\) A cartelist will apply for leniency when cooperation with the authorities is more profitable than continuing the cartel – or when it is simply a reduction of loss because other cartelists might decide to blow the whistle earlier. It seems that the question whether a potential leniency applicant is scared off by damages claims does not solely depend on whether or not his self-incriminating statements are disclosed, but also on the probative value of leniency material in civil actions. While leniency material often helps a competition authority to complete the evidence for an infringement of the cartel prohibition, it does not necessarily provide the follow-on claimant with proof for a causal link between the breach and the damage or the quantification of loss. This is further discussed in section 2.1.3. Furthermore, the question whether disclosure places the leniency applicant in a worse position than non-cooperating cartelists depends on how national law allocates civil responsibility among the cartelists. The Model Leniency Programme provides for immunity from fines, but does not protect the whistleblower from the civil law consequences of the cartel. There is a risk that it is easier for cartel victims to recover from leniency applicants as they have already incriminated themselves, while the other cartelists may still contest their participation in the cartel before national or EU courts. The Hungarian leniency programme mitigates this risk. Follow-on proceedings are stayed until the fining decision of the competition authority becomes binding (so that it is not quicker for the follow-on claimant to address the leniency applicant who has already incriminated himself). Furthermore, the leniency applicant does not face civil liability if the claimant can recover from the other cartelists.\(^54\)

However, the Commission has argued that, even though the actual usefulness of leniency material as evidence in follow-on claims is not proven, the general perception amongst potential leniency applicants that disclosure may lead to increased civil liability is enough for protection of leniency material.\(^55\) This raises the question of which leniency material should be protected in order to maintain the incentive to apply for leniency. Various positions have been taken in this respect.

The heads of the NCAs have expressed a joint intention to protect all material submitted under a leniency programme from disclosure.\(^56\) Slightly more nuanced, A-G Mazák in Pfleiderer argues that access to pre-existing documents is justified on a document-by-document analysis of access versus confidentiality, whereas self-incriminating corporate statements should remain confidential per se.\(^57\) The Commission takes the same position as Mazák: pre-existing documents may be disclosed on a case-by-case basis whereas corporate statements need per se protection.\(^58\) However, the distinction between voluntary corporate statements and pre-existing documents does not appear in the Court’s judgment in Pfleiderer. The Court’s ruling is that in dealing with disclosure requests, national courts should apply the access versus confidentiality test on a document-by-document basis, irrespective of their self-incriminating status.

\(^{53}\) See also O. Heinisch and E. Cochrane, ‘Access to leniency documents. Pfleiderer applied in the English High Court’, Competition Law Insight 16 May 2012, p. 3. The authors argue that, while for the first leniency applicant the benefits of immunity may still outweigh the costs of disclosure of leniency material, the second or third leniency applicant may be less incentivised to cooperate if they can expect disclosure to follow-on claimants.

\(^{54}\) Beumer 2012, p. 148-149.

\(^{55}\) Judgment of the General Court of 22 May 2012, Case T-344/08 ENBW, paras 72-73 and 124-125 in relation to defending the non-disclosure of leniency under Transparency Regulation 1049/2001 (discussed in section 3.1.2.).

\(^{56}\) 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 actions”.

\(^{57}\) Pfleiderer, A-G Opinion, paras 44-47.

\(^{58}\) Speech Italianer 17 February 2012, p. 5; Commission’s opinion in Pfleiderer; Commission’s amicus curiae opinion to the English High Court in NGET (see section 3.1.3.)
What is the rationale of distinguishing between pre-existing documents and corporate statements? The concept of pre-existing documents does not appear in the Model Leniency Programme. Mazák refers to documents which exist – at least in theory – independently of the leniency programme. This could be information such as minutes of meetings, e-mails and receipts. ‘At least in theory’ they exist independently of the leniency programme, because they are not created for the purpose of leniency. Corporate statements, however, are prepared orally or written for the competition authority with the goal of being kept exclusively in the internal competition file. Arguably there is no reason why the disclosure of pre-existing documents is less deterrent to future leniency applicants compared to the disclosure of corporate statements. Pre-existing documents are often handed as supporting evidence for the corporate statements. Although at least in theory pre-existing documents have an independent existence, they will in practice be difficult to trace without the indications of their existence in corporate statements. Lawyers point at the time and costs it takes for employees to find for instance supporting e-mails.

**Deterrent effect of exchange of leniency material in the ECN**

A second deterrent effect on the operation of leniency programmes is that leniency material may become subject to a less favourable system of disclosure when it is exchanged between competition authorities within the ECN. This is further discussed in section 2.1.4.

The ECN Model Leniency Programme mitigates these chilling effects. In the first place a leniency applicant may, on request, orally submit its corporate statement to the competition authority. Some competition authorities make transcripts of oral statements, which are kept exclusively in the competition file. The leniency applicant is not provided with a copy, so that the exchange of oral statements in discovery proceedings, notably in the US, becomes fictitious. When a US civil court has jurisdiction over a follow-on claim which concerns leniency material acquired in the EU, there is a danger of discovery orders of this material. The Commission has recently interfered successfully in US proceedings in order to prevent disclosure of leniency material on the basis of the argument of ‘international comity’. By creating ‘oral statements’ a leniency applicant hands over self-incriminating evidence to the competition authority exclusively for the purpose of leniency, after which the evidence ‘disappears’. Arguably, leniency programmes providing for the possibility of oral statements create a legitimate expectation that they will not be disclosed to third parties. Indeed, the leniency policies of the Commission and the NMa are instruments that bind themselves and create legitimate expectations to its addressees (leniency applicants). Furthermore, the Model Leniency Programme provides that oral statements may only be exchanged within the ECN if the conditions of disclosure in the receiving state are equal to those in the transmitting state. (see section 2.1.4.).

In summary, there are valid arguments from a public enforcement perspective to protect leniency material. The ECN Model Leniency Programme explicitly protects oral corporate

60 ECN Model Leniency Programme paragraphs 28-30 and explanatory notes 47-49.
62 See also: Vandenborre 2011, p. 116.
63 See also A-G Mazák in Pfleiderer, paras 44-47.
statements from discovery, but it does not grant a confidential status to pre-existing documents. However, the position of the ECN seems to have changed as the heads of the NCAs in May 2012 expressed their intention to protect all material submitted under a leniency programme. Arguably the ECN Model, as well as the Commission’s and the NMAs’ leniency policies create legitimate expectations of confidentiality of at least oral statements. From a public enforcement perspective this is sufficient to presume a chilling effect if corporate statements were disclosed.

2.1.3. Disclosure of leniency material and private enforcement goals

Having established the public enforcement interests in confidentiality, the question arises to what extent disclosure of leniency material is necessary in the interest of private enforcement. This is addressed in the first place from the perspective of evidential difficulties of cartel victims in follow-on claims. Secondly, an issue is whether there is a duty under EU law for competition authorities to promote private enforcement and whether this implies disclosure of leniency material to cartel victims.

The evidential problems of cartel victims

According to the ECJ in Courage and Manfredi, the useful effect of Article 101 TFEU requires full compensation of those who have suffered loss as a consequence of a cartel. This includes reparation of actual harm as well as loss of profits and payment of interests.64 EU law does not regulate the substantive and procedural conditions for claimants to obtain compensation. This belongs to the procedural autonomy of national law, constrained by the EU law principles of equivalence and effectiveness. The Commission identified in its Green Paper65 and White Paper66 that the limited access to evidence by cartel victims in the Member States is one of the main procedural hurdles to obtaining full compensation.67 The White Paper proposes to introduce a minimum level of inter partes disclosure of evidence before national civil courts. However, the national courts should strictly review the plausibility of the claim and the proportionality of the disclosure request in relation to other available evidence. It is for the claimant to specify the documents needed in evidence. The White Paper shows a clash of interests: on the one hand it aims to facilitate access to evidence via civil courts, while on the other hand it underlines the importance of adequately protecting corporate statements submitted under leniency programmes.68

The Commission has announced a harmonising instrument to draw an adequate balance between the protection of leniency programmes and the victims’ rights to obtain compensation, while referring to the Pfleiderer judgment.69

64 Courage, para 29; Manfredi, para 62.
67 Green Paper, p. 5; White Paper, p. 4-5.
68 White Paper, p. 5.
69 Speech of J. Almunia of 8 June 2012 SPEECH 12/428. The Draft Directive that was withdrawn aimed to protect corporate statements (VandenBorre 2011, p. 116).
As long as the harmonising instrument is in process, national courts have the task to carry out the Pfleiderer test of ‘access versus confidentiality of leniency material’ on a case by case basis, subject to the relevant EU law interests.

In the light of the importance of the right to compensation of cartel victims in the EU, a relevant factor in the Pfleiderer test seems the evidential value of leniency material in a follow-on claim. The follow-on claimant is often a customer in a lower level of the production chain of the product supplied by the cartelists. For example, Pfleiderer – one of the world’s biggest producers of laminate floors – was a customer from undertakings in a décor paper cartel.

The legal basis for claiming damages as a consequence of an interstate cartel depends on the applicable law and the competent court. In The Netherlands the elements of a follow-on claim are: 1) the cartel was a breach of an obligation established by law; 2) the breach was attributable to the defendant cartelist; 3) the claimant has suffered loss which is both quantifiable and attributable to the defendant cartelist; 4) of which the cartel was both the factual and the legal cause.

As to the element of breach, it follows from the principle of sincere cooperation that NCAs and national courts are bound by the Commission’s fining decision until it is set aside by a European court. A breach is therefore established if the damages claim concerns a cartel which the Commission has dealt with. If an NCA has issued the fining decision, it will depend on the binding status of that decision in the legal system of the competent civil court whether it is sufficient to prove breach. Arguably, the principle of sincere cooperation also requires a national court to regard the decision of another NCA as legally binding if all administrative remedies have been exhausted.

Therefore, access to leniency material will in general not be needed to prove a breach. The same holds for the question of whether the breach was committed by the fault of the addressed cartelist. This will depend on how national law allocates responsibility in the law of tort amongst the cartelists and not on the factual information provided by leniency material. However, the main evidential problems for cartel victims lies in quantifying the suffered damage and establishing a causal link between the infringement of competition law and the loss. In order to quantify the alleged overcharge, claimants have to compare the price they actually paid for the product while the cartel was active to the price they should have paid in a hypothetical competitive market. The precise quantification of an overcharge is not easy to establish for competition economists. For instance, it is in many Member States a defence for cartelists faced with a damages claim to argue that the follow-on claimant did not bear (all) loss from the price-increase, as it was ‘passed-on’ via the production chain to the claimant’s

---

70 Regulation 864/2007 (“Rome II regulation”) determines the applicable law.
71 Regulation 44/2001 (“Brussels I Regulation”) applies in determining the competent court.
72 Article 6:98 DCC. See also: Joined cases C-295/04 to C-298/04, Manfredi, para 61
73 Masterfoods, paras 53-60; Article 16(1) Regulation 1/2003 explained in Commission’s White Paper on Damages Actions, p. 19.
74 Völcker 2012, p. 714.
75 Commission’s White Paper on Damages Actions, p. 6.
customers or end-consumers. In this respect, documents in the possession of the cartelist, such as minutes from meetings or exchanged e-mails could be useful if they show the amount of the agreed price-increase. Corporate statements of the leniency applicant may refer to the relevant ‘pre-existing’ evidence on the overcharge. However, arguably the actual need of leniency material in quantifying harm is overstated and will, amongst other things, depend on the type of cartel. As to causation, it is hard to prove that the behaviour of this defendant within the cartel caused damage to this customer. If the leniency applicant is also the defendant cartelist in a follow-on claim, corporate statements could shed light on the link between the breach and the damage. It is worth noting, however, that the evidence submitted under a leniency programme is tailored to the finding of an infringement and its severity for the purposes of calculating a fine. This information does not necessarily coincide with the information that a cartel victim needs to establish the exact link between the defendant’s behaviour and the damage of this specific customer of the cartel.

A duty for competition authorities to promote private enforcement? The question arises whether competition authorities in ensuring the useful effect of Article 101 TFEU (which requires full compensation of cartel victims) have to support the success of follow-on actions by providing claimants with evidence. This debate is topical given that competition law does not only aim at punishment and deterrence, but also at enhancing consumer welfare. It is the consumer who ultimately benefits from fierce competition, and, by the same token, suffers from anti-competitive agreements.

There is no binding obligation or ‘duty’ under EU law on competition authorities to disclose leniency material to cartel victims. It must be noted in this respect that from an enforcement perspective there is no legal relationship between a competition authority and an injured customer of a cartel. Although the direct effect of Article 101 TFEU has been established in relations between individuals, this does not mean that an individual can invoke Article 101 TFEU against a competition authority in order to get access to leniency material. However, it follows from the EU principle of effectiveness (which not only binds national courts, but also administrative authorities applying EU law) that competition authorities must not make the right to compensation unduly difficult. Competition authorities have the task to ensure the goals of deterrence and punishment of cartels. The ECN’s argument for keeping leniency material confidential is that private enforcement should be regarded as a complementary tool to enforce competition rules. The reasoning is that private litigants have no claim until a fine has been established, for which leniency applications are necessary. The Pfleiderer judgment does not support this reasoning, since it does not establish a hierarchy

---

78 Commission’s White Paper on Damages Actions, p. 6. In US antitrust enforcement this defence was denied by the Supreme Court in order to facilitate follow-on claims, see J. Basedow, Private Enforcement of EC Competition Law, Kluwer Law International: Alphen aan den Rijn 2007, p. 123.
79 Kuijper 2011, p. 192 argues that the evidential support of leniency material will be more significant in bid-rigging cartels where the public procurement decisions do not indicate the projects in which the agreements were made.
80 Kuijper 2011, p. 192. However, others argue that there is a correlation between the evidence that a competition authority needs and the evidence sought by a cartel victim: C. Canenbley and T. Steinworth, ‘Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?’, Journal of European Competition Law & Practice 2011 (2) (4), p. 324.
81 See e.g. Joined cases C-295/04 to C-298/04, Manfredi, para 39.
82 ECN Resolution on the Protection of leniency material in the context of civil damages actions, 23 May 2012.
83 See e.g. the A-G opinion in Pfleiderer, para 41.
84 Beumer and Karpetas 2012, p. 128.
between public and private enforcement. Indeed, the ECJ in *Courage* held that damages actions in turn can have a deterrent effect on the continuation or the formation of cartels.\(^85\)

Arguably competition authorities are in addition to public enforcers of competition law also to be regarded as facilitators of damages actions. Legal scholars have proposed to render competition authorities responsible for ordering adequate compensation of cartel victims in addition to their task of imposing fines. The argument is that fining secret cartels (for which leniency applications are open) on the basis of the duration and severity of the infringement, which is precisely the ‘hardcore’ element that affects the consumer. Competition authorities would therefore be suitable to return the benefit that they removed from the cartelist to the affected consumer. The idea is innovative in that it integrates public and private enforcement goals.\(^86\) However, intertwining investigation tasks with quantifying compensation has important drawbacks. In the first place it may reduce the credibility and objectivity of competition authorities as public investigation organs. Furthermore, the automatic use of evidence from the suspected undertakings for compensating victims would remove the incentive to apply for leniency. There should be other ways to facilitate follow-on claims which respect the separate tasks approach (that public enforcement aims at punishment and deterrence while private enforcement aims at compensation). For instance, national courts could in confidence offset the evidential value of each leniency document against its confidential status.

### 2.1.4. Disclosure of leniency material and effective cooperation within the ECN

Public enforcement of Article 101 TFEU not only aims at punishing and deterring cartels, but also has an integrationist objective of eliminating barriers in trade between Member States. Articles 11 and 12 of Regulation 1/2003 establish a regime of effective cooperation between the Commission and the NCAs, which together form the ECN (European Competition Network).\(^87\) Article 15 is another expression of the principle of loyal cooperation between the Union and the Member States of Article 4(3) of the Treaty on European Union (“TEU”). It provides for cooperation between the Commission and national courts. How Article 15 works in practice is illustrated by the judgment of the English High Court in National Grid, which will be discussed at the end of this section and in chapter 3.1.3.

It should be noted that the ECN is a rather informal system of cooperation, since its legal status neither established in the Treaties, nor explicitly in Regulation 1/2003. The functioning of the ECN is clarified in the Commission Notice on cooperation within the Network of Competition Authorities (“Network Notice”)\(^89\) and an accompanying joint statement of the Council and the Commission.\(^90\) Although the Network Notice does not officially bind the Member States\(^91\), the ECN members have committed themselves to complying with its principles.

---

\(^85\) A-G opinion in *Pfleiderer*, footnote 53, referring to: Courage and Crehan, para 27 and the Commission’s White Paper on damages, point 1.2.
\(^86\) Canenbley and Steinvorth 2011, p. 324-325.
\(^87\) See also Caruso 2010, p. 462.
\(^88\) Commission Notice on cooperation within the Network of Competition Authorities (“Network Notice”) and an accompanying joint statement of the Council and the Commission.
\(^89\) Joint statement of the Council and the Commission on the functioning of the Network of Competition Authorities. Available on the website of the European Commission > ECN
\(^90\) Which the ECJ confirmed in *Pfleiderer*, para 21.
In cases with an interstate effect, whistleblowers may apply for leniency at more than one authority. There is no one-stop-shop system in the ECN, which creates a risk of forum shopping and a possible run for the authority with the most favourable leniency conditions. In the case of multiple leniency applications (i.e. the same leniency applicant has reported the same cartel to more than one authority), the ECN members will consider which authority is ‘well placed’. The allocation of cases does not only have practical purposes, but is also necessary in the light of the EU fundamental right of ne bis in idem, which provides that no one shall be tried twice for the same offence.

Although the members have a discretion to decide on the division of work on a case-by-case basis, there are some rules of thumb. A single NCA is usually well placed if the agreement or practice is mainly felt in its territory. The situations in which the Commission will be ‘particularly well placed’ include where more than three Member States are substantially affected by the conduct or where a new issue of competition policy in the EU arises.

Article 12(1) of Regulation 1/2003 provides for a general rule of exchange of evidence in the ECN: “For the purpose of applying Articles 101 and 102 TFEU the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or law, including confidential information.” Article 12(1) does not exclude the exchange of leniency material between ECN members. In Pfleiderer the ECJ accepted that the exchange of voluntarily submitted leniency material within the ECN may deter future leniency applicants from cooperating. This begs the question to what extent ECN practice (as there is no ‘hard’ EU law in this respect) protects the confidential nature of evidence such as leniency material.

First, according to the Network Notice information voluntarily submitted by the leniency applicant may only be exchanged within the ECN if the leniency applicant consents. However, consent is not required when the authority receiving the information is one of the authorities at which the leniency application was filed. In that case, the leniency applicant must accept that effective cooperation between ECN members outweighs the confidentiality of leniency material. The ECN Model Leniency Programme also provides for another confidentiality safeguard with regard to oral corporate statements. The transcripts of these statements may only be exchanged between competition authorities if the conditions in the Network Notice are met and provided that the protection against disclosure granted by the receiving CA is equivalent to the one conferred by the transmitting CA.

---

93 See the principles of allocation in paragraphs 5-15 of the Network Notice.
95 Network notice, para 10; Joint statement, para 16.
96 Network Notice, para 14; Joint statement, para 19.
97 Judgment in Pfleiderer, para 27.
98 Network Notice, paragraph 40(1).
99 Network Notice, paragraph 41.
100 Network Notice, paragraph 41(1). See also Caruso 2010, p. 463.
101 ECN Model Leniency Programme, para. 30, see also the explanatory notes paras 47-49.
The second way in which the Model Leniency Programme protects leniency material relates to the question how the receiving authority may use the transmitted information in evidence. Article 12(2) of Regulation 1/2003 provides that exchanged information may only be used in evidence for the purpose of applying Article 101 TFEU and in respect of the subject-matter for which it was collected by the transmitting authority. In some Member States individuals may be sanctioned for their conduct in cartels. The transmitted information may only be used to punish natural persons if the law of the sending and receiving authorities imposes a similar type of sanctions or when at least the information was collected with a similar protection of the rights of defence. In *Pfleiderer* the ECJ held that Articles 11 and 12 of Regulation 1/2003 do not preclude access by follow-on claimants to leniency material acquired under a national leniency programmes. Therefore, Article 12(2) does not completely harmonise the use of exchanged leniency material as according to *Pfleiderer* it is open to the possibility of access by at least follow-on claimants.

Thus, according to *Pfleiderer*, Articles 11 and 12 of Regulation 1/2003 do not prohibit disclosure of leniency material to follow-on claimants. In the absence of harmonisation, national courts will have to apply the test of access versus confidentiality of leniency material on case by case basis. Accordingly, leniency material may be safer in some Member States than in others. The Bonn Court (Amtsgericht Bonn) in its final decision in *Pfleiderer* held that corporate statements need protection. The German court did not balance the relevant interests of EU law on a document-by-document basis. According to commentators, it is not entirely clear from the judgment whether pre-existing documents submitted under the leniency programme may be disclosed. However, the German legislator has drafted a legislative proposal according to which all material submitted under a leniency programme may not be disclosed to cartel victims. This is an exception to the rule of German Criminal Procedure that the lawyer of a victim in a criminal or administrative offence may be granted access to the files that are before the court if he proves a legitimate interest.

While Germany seems determined to protect leniency material, there is a debate ongoing in Austria whether national competition law and civil procedure complies with the *Pfleiderer* ruling. Under Austrian cartel law, the court may only grant third party access to files subject to the consent of the parties in the competition proceedings. This is an exception to general Austrian civil procedure, which provides that third parties may access the files either when the parties to the proceedings consent or, in the absence thereof, when the third party proves a legal

---

102 See also the duty of professional secrecy in Article 28 of Regulation 1/2003.
103 The exchanged information may not be used to impose custodial sanctions on natural persons, see Article 12(3) and recital 16 of Regulation 1/2003.
104 As A-G Mazák noted in para 29 of his opinion, in *Pfleiderer* the reference in the preliminary question to Articles 11 and 12 was hypothetical since the leniency application was filed only at the Bundeskartellamt. However, the wording of the preliminary question is understandable in the light of the Postbank case in which General Court ruled 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. See Vandenborre 2011, p. 8.
105 Amtsgericht Bonn, Beschluss of 18 January 2012, case 51 Gs 53/09.
107 Referentenentwurf BMWi, Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, new paragraph 81b: “Vertraulichkeit von Aufklärungsbeiträgen”.
108 See the comments of Polley and Zagrosek, p. 7 on paragraph 406e of the German Strafprozessordnung.
In the case of Donau Chemie, where an Austrian organisation of printers (Verband Druck&Medientechnik) claimed damages as a consequence of a cartel in industrial chemicals, the Oberlandesgericht has asked the ECJ to clarify Pfleiderer. The question is whether the Pfleiderer ruling allows a national provision which makes disclosure of leniency material to cartel victims dependent on the consent of all parties to the proceedings and which does not allow a national court to determine on a case-by-case basis whether access should be granted. Furthermore, the Oberlandesgericht asks whether the distinction in access to evidence between ordinary civil claimants and follow-on claimants under Austrian civil procedure is in conformity with EU law.

Whistleblowers may fear for disclosure of leniency material under the rules of English civil procedure, which are strongly focused on equality of arms. In National Grid Electricity Transmission v. ABB and others (“NGET”) the English High Court dealt with a disclosure request of National Grid. The owner of the British electricity network is claiming damages as a consequence of the GIS cartel, which the Commission had fined in 2007 by an amount of €750 million. The fining decision has been confirmed by the General Court, but is still under appeal before the ECJ. As long as a Commission decision is not definitive under EU law, national courts must stay the proceedings which may run counter to it (‘the Masterfoods rule’). Therefore, the High Court could not yet decide on the follow-on claim, which depends on an infringement of Article 101 TFEU, but decided to rule already on the question of access to evidence. The High Court was the first national court applying the Pfleiderer test of access versus confidentiality of leniency material. Mr Justice Roth examined the requested documents in confidence and one-by-one. He ordered ABB (the defendant/leniency applicant) on the basis of English civil procedure to disclose certain redactions in the non-confidential version of the Commission’s Decision, some of which referred to leniency material. Access was granted within a confidentiality ring. The implications of NGET for access to leniency material collected by the Commission (while Pfleiderer concerned leniency material obtained by an NCA) is discussed in section 3.1.3.

The different interpretations of Pfleiderer in Germany, Austria and the UK illustrate the legal uncertainty for leniency applicants as to whether or not leniency material may be disclosed in civil proceedings. In this respect it is recalled that according to the joint position of ECN Members leniency material should not be disclosed to cartel victims. However, this problem is unconnected to information exchange between ECN members when, as in NGET, the leniency material subject to disclosure is in the possession of the defendant. It seems hypothetical that a civil court would order disclosure of leniency material which is exclusively in the possession of an NCA – and which that NCA has obtained from another ECN member via Article 12. It is recalled in this respect the exchange of oral statements within the ECN is unlikely, as there are often no transcripts (see section 2.1.2.).

109 Paragraph 219 of the Austrian Zivilprozessordnung.
111 National Grid Electricity Transmission Plc vs. ABB Ltd and Others,[2012] EWHC 869 (Ch).
113 Under Article 15(1) of Regulation 1/2003 a national court may ask the Commission to transmit information, which the High Court did in NGET. This is discussed in paragraph 3.1.3.
Contrary to civil proceedings, where the claimant seeks disclosure from the defendant, competition authorities may also be faced with direct disclosure requests by members of the public. In many legal systems competition authorities in their role of public administrations have transparency obligations. In the European legal system, Regulation 1049/2001 (“Transparency Regulation”) confers EU citizens a general democratic right of access to documents of EU institutions. The Commission has consistently denied access to leniency material on the basis of this Regulation. Similarly, the NMa’s practice is to refuse disclosure of leniency material on the basis of Dutch Act on Access to Administrative Information (Wet Openbaarheid van Bestuur – “Wob”). These instruments are further discussed in section 3.1.2. for the Commission and in section 3.2.2. for the NMa. At this stage, it is important to note that transparency requests may contain leniency material which a competition authority has obtained from another ECN member. National administrative courts reviewing an NCA’s denial of access to leniency material under transparency requests are subject to the Pfleiderer test just as much as national civil courts. At present there is no example of an administrative court applying Pfleiderer. Although the ECJ held that the ECN notices do not create rights to individuals, they are examples of administrative practice which create legitimate expectations to leniency applicants. In the ECN, leniency material is in principle not exchanged unless the whistleblower consents or – in the absence of consent – where it is necessary for effective cooperation in multiple leniency applications. Furthermore, a competition authority may only use the received material for the purposes for which it was sent (i.e. for establishing an infringement of Article 101 TFEU). It is submitted, therefore, that the ‘ECN interest’ in the Pfleiderer test for administrative courts would be the legitimate expectation of whistleblowers that leniency material exchanged within the ECN is only used by the receiving authority to establish an infringement and that it is not disclosed to the public.

2.1.5. Conclusion: enforcement interests

The question in this part of the legal framework was to what extent enforcement interests militate for either access or disclosure of leniency material. While the public enforcement interests of deterrence, punishment and effective cooperation are in favour of keeping leniency material confidential, the right of follow-on claimants to full compensation requires access to supportive evidence. According to Pfleiderer, these interests must be balanced on a case-by-case basis by national courts. It is submitted that the following criteria are to be considered:

I) The need to keep leniency material confidential in order to protect the functioning of a leniency system.

An interest advocating for per se confidentiality of leniency material is the general presumption that disclosure deters future leniency applicants (see the position of the ECN members). However, in the light of the case-by-case analysis of Pfleiderer, it needs to be considered whether the benefits of the leniency programme of the legal system at hand outweigh the chilling effect of disclosure. It is relevant whether disclosure of leniency material places the whistleblower in a worse position compared to non-cooperating cartelists. This depends on how the legal system of the competent civil court allocates civil law responsibility among the cartelists.
II) The necessity of access to leniency material to support the follow-on claim in comparison to other non-confidential sources of evidence.

With regard to proving a breach of competition law, it will be relevant whether the competent civil court accords a binding status to the fining decision (which is always the case for Commission decisions, but not necessarily for decisions of NCAs). As to proving causation and the extent of the suffered loss, it must be considered whether leniency material offers more proof than other non-confidential sources of evidence (such as the non-confidential version of the fining decision or the statement of objections).

III) The legitimate expectation of leniency applicants, on the basis of ECN practice, that leniency material which a competition authority receives from another ECN member is only used for the purpose for which it was transmitted (that is: to establish an infringement of Article 101 TFEU subject to the confidentiality safeguards of the ECN).

Here it should be taken into account that leniency material may become subject to transparency requests in the legal system of the receiving ECN member. The legitimate expectation of whistleblowers seems that leniency material is only used for establishing an infringement and not for being disclosed to the public. Furthermore, oral statements have a special status of confidentiality, since they are created by the competition authority rather than the whistleblower himself. The very reason why statements are made orally is to keep them out of the records of the leniency-applicant, so that the latter cannot be forced to disclose.

2.2. Fundamental rights

The preceding section has formulated enforcement based criteria as a guidance for national courts applying the Pfleiderer test of access versus confidentiality of leniency material. This section supplements the Pfleiderer test with the rights of defence, which form a counterbalance to the enforcement powers of competition authorities. Regulation 1/2003 does not harmonise the rights of defence, so that the protection of undertakings against competition authorities is regulated by national law. The law of the Member States is, however, constrained by fundamental rights flowing from the Charter of fundamental rights of the European Union (“the Charter”) and the European Convention of Human Rights (“ECHR”). The corresponding Articles 47 Charter and 6 ECHR contain several rights on the side of cartel victims seeking evidence for the determination of their civil rights and obligations, namely the right of access to a court and the right of equality of arms. This leads to a clash with the right to privacy and the privilege against self-incrimination protecting the leniency applicant.
2.2.1. The importance of the Charter for access to leniency material

The question arises by which sources of fundamental rights enforcers of European and national competition law are bound in their decision on access to leniency documents. Before going into the substance of the EU safeguards on access and confidentiality, some words are needed on, first, the Charter’s scope of application and its addressees, and, secondly, what type of safeguards the Charter contains and who is entitled to invoke them.

The Charter’s scope of application and its addressees

According to Article 6(1) TEU the Charter has the same legal value as the EU Treaties. This Article also provides that the scope of the Charter and the interpretation of its rights have to be viewed in the light of Title VII of the Charter and the Charter Explanations. The Charter does not create other competences for the Union than those conferred upon it on the basis of the Treaties. The provisions of the Charter are mainly addressed to the institutions of the EU, while it binds the Member States only when they are implementing Union law. The ECJ in its case law has interpreted ‘implementing Union law’ broadly as ‘acting within the scope of EU law’.

In competition law cases, this means that the Commission and the CJEU are fully bound by the Charter. It is also clear from Regulation 1/2003 that NCAs and national courts have to enforce European competition law on their territories in accordance with EU fundamental rights.

However, the question is whether purely national cartel cases are subject to the Charter safeguards because they might come ‘within the scope of EU law’ in another way than via Article 101 TFEU. For example, a national cartel case might come within the scope of EU law when procedural rules from national administrative law have to be interpreted in accordance with EU fundamental rights. In Cicala the ECJ was asked to interpret an Italian law on access to administrative documents in the light of Article 296(2) TFEU and Article 41(2)(c) Charter (the obligation to motivate administrative decisions). The Court considered that its competence to interpret provisions of EU law in purely internal situations is justified if EU law is made applicable by national law in a direct and unconditional way.

Cicala was an application of the Court’s preliminary ruling in the Dutch merger case of Leur-Bloem. In that case, the Court confirmed that it had jurisdiction in situations where an EU directive does not apply, but where the national legislature intended to treat purely internal situations in the same way as where the directive would apply. When an explicit connection with Union law is lacking, as in the Cicala case itself, parties have to fall back on national procedural safeguards and the

---

115 At the European level: the European Commission, the General Court and the ECJ. At the national level: NCAs and national courts.

116 Article 51(2) Charter.

117 Article 51(1) Charter.

118 See for example Case C-260/89 ERT [1991] ECR I-2925 (application of the Charter to a derogation from the fundamental freedom to provide services); Case C-309/96 Annibaldi [1997] ECR I-7493. See also Charter Explanation on Article 51.

119 Recital 37 of the Preamble to Regulation 1/2003: “This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.”

120 Case C-482/10 Cicala, Judgment of 21 December 2011 (not yet published), para 19. See for commentary PahladSingh and Van Roosmalen, Het Handvest van de grondrechten van de Europese Unie twee jaar juridisch bindend: rechtspraak in beweging?, NvEr 2012-2, p. 58. The case concerned an administrative decision to reduce Ms Cicala’s pension and to recover the allegedly unduly paid sums of pension. In Cicala itself Union law did not apply, since Italian law did not specifically refer to it.

121 Case C-289/5 Leur-Bloem [1997] ECR I-4161, paragraph 27 and 34.
international human rights treaties to the extent that they are applicable in the national legal order.

**What type of safeguards does the Charter contain and who is entitled to invoke them?**

Article 51(1) of the Charter obliges Union institutions and Member States to ‘respect’ the rights and to ‘observe’ the general principles which it contains. These rights and general principles are not newly created, but rather a confirmation of the safeguards from an array of sources. First, the Charter is based on the safeguards contained in the EU Treaties. Secondly, the ECJ in interpreting provisions of the Charter is bound by the corresponding provisions of the ECHR and the case law of the Strasbourg court as a minimum standard. Article 6(2) TEU provides that the Union shall accede to the ECHR. Accession will make it possible for the European Court of Human Rights (“Strasbourg Court”, “Strasbourg” or “ECtHR”) to review decisions of the institutions of the EU in the light of the Convention. Thirdly, some provisions in the Charter stem from the constitutional traditions of the Member States and national laws and practices. Cartel victims may want to rely on the Charter safeguards militating for access to evidence and access to a court against a leniency applicant, who in turn will invoke fundamental rights of confidentiality. This raises two issues, namely, first, who are the beneficiaries of the Charter, and secondly, which Charter provisions have (horizontal) direct effect. Leniency applicants are generally undertakings. However, in the Netherlands natural persons may also apply for leniency. Whether, in addition to individuals, undertakings can invoke a Charter provision will depend on the wording of the safeguard at hand. For example, in DEB the ECJ interpreted the wording ‘everyone (...) has the right to an effective remedy’ in Article 47 Charter as not excluding undertakings. Also the ECtHR has recognised that Article 8 of the Convention (right to private life and confidentiality) does not exclude professional or business activities.

The direct effect of Charter provisions is a currently debated issue. Given that the Charter has the same legal value as the Treaties, it seems logical to adhere to the conditions for direct effect of Treaty provisions. Thus, a Charter provision must be sufficiently clear, precise and unconditional in order to be judicially cognisable, in other words ‘suitable’ for enforcement before national courts. Arguably it follows from the ECJ’s case law that Articles 47 (effective remedy and fair trial) and 8 (private life and confidentiality) create individual rights before

---

122 Article 52(2) Charter.
123 It follows from Article 52(3) Charter that Union law may provide more extensive protection than the ECHR. The Charter Explanation on Article 52 sets out which Articles of the Charter have the same meaning and scope as corresponding ECHR rights.
126 See the Dutch leniency policy: Beleidsregels van de Minister van Economische Zaken van 11 september 2009 tot vermindering van bestuurlijke boetes betreffende kartels, *Staatscourant* 2009, 14079, article 1.
127 Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, paras. 37-40 and 52. See for commentary Pahladsingh and Van Roosmalen 2012, p. 57.
128 ECtHR 16 December 1992, Niemietz, application number 13710/88.
129 Case C-26/62 Van Gend en Loos, [1963] ECR 1. See for commentary on the current position of direct effect of Treaty Provisions, Craig&De Búrca 2011, p. 188.
national courts. The ECJ does not provide much explanation on why these articles fulfil the Van Gend en Loos criteria.

2.2.2. The right to an effective remedy and a fair trial

Article 47 of the Charter provides for the right to an effective remedy before a tribunal and a fair trial to everyone whose rights and freedoms guaranteed by the law of the Union are violated. The first paragraph of Article 47 corresponds to Article 13 ECHR (effective remedy), while the second paragraph equates Article 6(1) ECHR (fair trial). National courts acting within the scope of EU law are bound by the Charter. It seems that national courts applying the Pfleiderer test on access to leniency material must take into account Article 47 of the Charter, as the right to compensation of cartel victims follows from the useful effect of Article 101 TFEU. The safeguards of Article 6 ECHR then apply via Article 47 of the Charter.

According to its text, Article 6(1) ECHR is applicable to the determination of a claimant’s civil rights and obligations or of any criminal charge against him. This begs the question to what extent Article 6(1) applies to European competition law proceedings, which can be criminal, civil and administrative in nature. The ECtHR has interpreted the concept of a criminal charge broadly. In Menarini it held that, although under national law competition proceedings were administrative in nature, the imposed fine qualified as a criminal charge by reason of its punitive nature and its severity. Therefore, Article 6(1) applied.

The question is whether cartel victims seeking access to leniency material may invoke the safeguards of the corresponding Articles 47 of the Charter. In this respect, a distinction must be made between the right of access to the file and the right of access to a court.

The right of access to the file

The notion of a fair trial includes the right of access to the file of at least the suspected undertaking in order to defend itself against inculpating evidence. The ECJ has repeatedly held that the rights of defence are fundamental rights ‘forming an integral part of the general principles of law whose observance the Court ensures’. Furthermore the right to be heard and the right to access to the file, subject to the legitimate exceptions of confidentiality and business secrecy, are laid down in Article 41(2)(a) and (c) of the Charter.

It seems that the Charter has accorded the rights of defence a firmer position in EU law. It is illustrative that the ECJ in its Solvay judgment directly applied the Charter right everyone to...

---

130 Article 47 Charter: Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, e.g. paras 40, 45, 60-62. Article 8 Charter: Case C-543/09 Deutsche Telekom AG v Bundesrepublik Deutschland [2011] ECR I-00000, paras 49-67.
131 Nauta 2012, p. 23.
132 Charter Explanation on Article 47, confirmed by the ECJ in Case C-279/09, DEB, paragraph 32.
133 As discussed above in section 2.2.1., the Charter applies when the Treaties apply (Article 6(1) TEU).
134 ECtHR, Menarini, paras 38-42. The Court stressed that the criteria from its Engel judgment (Judgment of 8 June 1976, Engel and others v The Netherlands, 1 EHRR 706) for the qualification of proceedings as criminal are alternative rather than cumulative. The criteria are: 1) the qualification of the proceedings in national law; 2) the character and the objective of the proceedings; 3) the intensity and nature of the imposed sanctions.
136 C-110/10, Solvay SA, para 48. Chalmers 2010, p. 408-409 notes that the rights of defence increasingly subsumed within a new right, namely the EU fundamental right to good administration.
access his file, without referring to the ECHR. The question arises to what extent this affects the rights of defence of the Member States, given that Regulation 1/2003 allows for procedural autonomy in this respect. The Dutch court finds the rights of defence in Article 6 ECHR.

Possibly, the Solvay judgment introduces a tendency of Luxembourg to develop its own rights of defence, tailored to EU competition law, which may be followed by the national courts.

The right of the investigated undertaking to access the Commission’s file forms part of the EU rights of defence as procedural safeguards in competition law enforcement. This means that the Commission must provide the investigated undertakings with the opportunity to examine the documents that could be useful for their defence against the administrative fine. This includes especially a right to view exculpatory documents. The standard for access to evidence is therefore low. The undertaking concerned does not have to prove an evidential necessity to view the documents. It does not have to specify the documents either. The rights of defence of anyone who has been charged is also laid down in Article 48(2) of the Charter, which corresponds to Article 6(3) ECHR.

While parties in administrative competition law proceedings may invoke the rights of defence in order to claim access to the file, the same does not apply to cartel victims in national civil proceedings. Given the adversarial nature of national civil proceedings, protection of the rights of defence against the imposition of a penalty by a public authority is not warranted.

It can be understood that third parties do not have the same legal interest as the investigated undertakings in viewing the file of the Commission, since they do not have to defend themselves against the fine. However, third parties claiming damages as a consequence of a cartel arguably have a particular position. They are adversely affected by the competition fine and the evidence contained in the file with a view to preparing their civil damage case. The fair trial aspect of access to evidence arguably also protect follow-on claimants. This is because the corresponding Articles 47 Charter and 6 ECHR do not only provide for a right of a fair trial of those subject to an (administrative) charge, but also in the determination of one’s civil rights and obligations. Therefore, it is argued, the EU rights of defence provide a European legal basis for according cartel victims a right of access to the file to the extent that this is necessary to prove their civil case. This right of access to civil evidence could be realised by integrating cartel victims as third parties into administrative competition proceedings. Alternatively, civil courts could order disclosure of the documents that are relevant to prove the follow-on claim. It seems that the standard of access to the file for follow-on claimants should be higher than the standard for the investigated undertakings. This is because the legal relationship between

---

139 Rechtbank Rotterdam 26 November 2002, Nederlands Elektriciteits Administratiekantoor BV /NMa (Norsk Hydro), LJN: AR4219, para 2.3.2.
140 See also A.Gerbrandy, Convergentie in het mededingingsrecht; de invloed van het EG-recht op materiële toepassing, toegang, bewijs en toetsing bij de Nederlandse mededingingsbestuursrechter in het licht van effectieve rechtsbescherming (diss. Universiteit Utrecht). Den Haag: Boom Juridische uitgevers 2009, p. 299.
143 Again, the Charter’s scope of protection is widened to anyone who has been charged, whereas Article 6(3) ECHR only applies to those charged with a criminal offence. See Charter Explanation on Article 48.
follow-on claimants and the defendant they address is adversarial in nature. Differently, the investigated undertakings are charged by a public authority with an administrative offence.  

**An effective remedy when access to the file has been denied**

When a third party has been denied access to the file, the ‘effective remedy’ limb of Article 47 Charter comes into play. The question is whether the right of access to a court requires immediate judicial review of a competition authority’s decision to deny access. This would add a purely procedural ‘intervention’ to the main proceedings, where the court reviews whether the evidence supported the finding of a prohibited cartel.

The court in Luxembourg gives another answer to this question than the Strasbourg court. The decision of a hearing officer on disclosure of documents is not necessarily subject to immediate review by the General Court. However, the ECtHR has held that a fair procedure demands that the interested parties be allowed access to the evidence retained by the authorities in accordance with equality of arms. In the case of public interest restrictions on the right to obtain evidence there must be additional procedural safeguards to make the proceedings in accordance with Article 6 of the Convention. In particular, there must be ‘continuous judicial supervision of any measure restricting access to evidence.’

One can wonder whether, after the accession of the EU to the European Convention on Human Rights, Strasbourg would hold the EU liable for not complying with Article 6 ECHR given the absence of a separate procedure to review the Commission’s decision on access to its file. The answer to this is not clear-cut. On the one hand, it must be borne in mind that the Strasbourg court assesses the overall fairness of the proceedings in the particular case at hand when it determining whether or not Article 6 ECHR has been violated. In this respect, the possibility to effectively challenge the denial of disclosure in the main proceedings, which also deal with the material infringement of competition law, could be ‘Article 6 ECHR proof’. However, on the other hand, the wording of the ECtHR of ‘continuous judicial supervision’ seems to indicate the need for an immediate procedural intervention when access is denied. The implications of such a procedure in a procedure would be huge. It would require a judicial review of the access versus confidentiality test applied by the competition authority per document.

**The right of access to a court**

The ECJ and the ECtHR concur in that the right of access to a court is inherent in the fair trial limb of Articles 47 Charter and 6(1) ECHR. This guarantees judicial review to both follow-on

---

145 E.g. C-110/10 Solvay SA, para 48.
146 See for the argument that in Dutch law the decision of the NMa to refuse access to the file should be subject to judicial review: Gerbrandy 2009, p. 193 and 203.
151 Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, para 45. The ECJ refers to jurisprudence of the ECtHR.
claimants and parties to the administrative proceedings who have been denied access to leniency material. Article 47 of the Charter provides for a right to an effective remedy before a tribunal, which is an extra judicial safeguard in comparison to Article 13 ECHR which ensures an effective remedy before a national authority.

In competition law proceedings the hearing on the Statement of Objections and the administrative appeal against the fining decision takes place before the legal service of the Commission and the NCAs. In *Menarini*, the European Court of Human Rights held that the right of the Italian pharmaceutical company in question to an effective remedy before a court was sufficiently guaranteed. This was because the Italian administrative tribunal had the competence to review both the Italian competition authority’s decision finding an infringement of the cartel prohibition and the proportionality of the imposed fine. In line with Menarini, but without referring to it, the ECJ ruled two months later in *KME* that the competence of the European courts to both review the legality of the Commission’s decision and the amount of the fine, complied with the general principle of effective judicial protection expressed by Article 47 Charter. Strasbourg and Luxembourg thus agree that the right to effective judicial review does not require a Court to substitute its judgment for the Competition authority’s assessment of the case. As Burnside notes, neither Menarini nor *KME* clarifies whether competition law proceedings are ‘soft’ or ‘hard’ criminal in nature. A qualification as hard criminality requires, according to Strasbourg’s ruling in *Jussila v Finland*, extra procedural safeguards.

It was argued above that the rights of defence contained in the fair trial aspect of Articles 47 Charter and 6 ECHR could be a fundamental rights basis for third parties to get access to evidence contained in the competition law file. This right of (partial) access to the file could be realised by either integrating cartel victims into administrative proceedings or by disclosure requests via national civil courts.

Another fundamental rights basis for access to evidence by cartel victims in follow-on proceedings is the right of access to a civil court. The right to judicial review only comes at stake if another EU right has been violated. As A-G Mazák argued in *Pfleiderer*, the denial of access to leniency material by a competition authority could be a violation of the cartel prohibition itself. In the absence of an overriding legitimate reason non-disclosure could amount to breach of the right of an effective remedy. The underlying reasoning seems to be: 1) Article 101 TFEU contains the right of cartel victims to compensation of their damages as a

\[\text{157 See paragraph 3 of the A-G Opinion: “(…) a national competition authority should not, in the absence of overriding legitimate reasons of public or private necessity, deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim against a member of a cartel for breach of Article 101 TFEU, as this could de facto interfere with and diminish that party’s fundamental right to an effective remedy which is guaranteed by Article 101 TFEU and Article 47 in conjunction with Article 51 of the Charter and Article 6(1) ECHR.”}\]
consequence of the cartel; 2) this is a right guaranteed by EU law within the meaning of Article 47(1) Charter; 3) a denial of access to leniency material – in the absence of overriding reasons – violates the right to compensation; 4) this means that the right of (effective) access to justice of the follow-on litigant has been frustrated.

As Völcker comments, the right to compensation follows from the *Courage* and *Manfredi* judgments. However, whether or not this amounts to a frustration of the claimant’s access to justice depends on more than just a denial of access to leniency documents. It seems to follow from *Courage* and *Manfredi* that the right to compensation is only infringed by national procedural rules that make it excessively difficult or practically impossible to obtain compensation. This could be the case if, for example, a legal system does not accord a binding status to the fining decision of the competition authority (see section 2.1.3.). In such a case leniency material could be the only source available to establish a breach. Therefore, it remains to be seen whether the ECJ in later case law will accept Mazák’s reasoning. In *Pfleiderer* the Court did not explicitly address the relevance of Article 47 of the Charter as one of the ‘relevant interests of EU law’ for national courts to weigh. However, as explained in section 2.2.1., it seems from the ECJ’s judgment in DEB that Article 47 of the Charter has direct effect. Consequently, national courts acting within the scope of EU law (which is the case when they decide on the right to compensation of cartel victims inherent in Article 101 TFEU) will have to take into account the claimant’s right of access to evidence and access to a court. It must be noted that the right of access to a court is not absolute.

Restrictions on the basis of confidentiality may be justified if necessary and proportionate.

### 2.2.3. The right of access to documents as part of the principle of transparency

The right of access to the file has been discussed as being part of the fundamental right to a fair trial. Parties to administrative competition proceedings have the right to know the evidence on the basis of which the judge decides. The right of access to the file is therefore linked to the legal interest to the proceedings of the party invoking it. It was argued in the preceding paragraph that the fair trial aspect of Article 6 ECHR and Article 47 Charter does not only protect the investigated undertakings who are the subject of an administrative charge, but also follow-on claimants ‘in the determination of their civil rights and obligations’.

Whether or not follow-on claimants are admitted to administrative proceedings, belongs to the procedural autonomy of the Member States. Therefore, it is important to describe an overarching legal basis for access to documents in the competition file, which is not based on the applicant’s standing as legally interested. This is the democratic right of citizens to access information kept by public institutions. The foundation of the right of access to documents lies

---


160 *Case C-360/09, *Pfleiderer AG* v Bundeskartellamt*, para 32.

161 C-279/09, DEB, para 45. The ECJ refers to ECHR case law, confirming that the right of access to a court is not absolute.
in the democratic relationship between citizens and public administrations. In EU law, it also has a basis in the general principle of transparency. As Buijze notes, general principles do not impose a legal obligation but rather indicate a legal interest which is a factor in a balancing exercise by courts or public authorities. The extent of transparency will therefore depend on the objective of the policy area in which it is used. Both the European Commission and the NMa are bound as public institutions to secure a widest possible citizens’ access to documents. This means that a request for access to leniency material under transparency obligations must be dealt with in a democracy based framework in which access is the standard and confidentiality exceptions are only limited.

2.2.4. Privacy and confidentiality

Article 7 of the Charter provides: ‘everyone has the right to respect for his or her private and family life, home and communications.’ Its meaning, scope and possible limitations correspond to Article 8 ECHR and the interpretation thereof by the European Court of Human Rights. The question arises whether this right confers a confidential status to certain leniency material, especially the corporate statements, which protects it from access by third parties. In procedural competition law the right to private life and correspondence is frequently invoked by an undertaking against the competition authority. The undertaking subject to investigation in such a situation claims that the powers of the competition authority interfere with the undertaking’s privacy. Two well known examples are the protection of business premises in dawn raids and the qualification as legal professional privilege of correspondence between an undertaking and his lawyer.

As to the first situation, the ECtHR and later also the ECJ have held that Article 8 does not only protect the homes of natural persons, but extends to business premises. The Courts agree that in the context of dawn raids the right to privacy should be viewed as a limited exception to the investigation powers of the competition authorities. In other words, a competition authority does not need to ‘justify’ its investigation powers by establishing that it is a necessary and proportionate interference with the fundamental right to privacy.

Secondly, competition authorities may not use in evidence correspondence between the suspected undertaking and its lawyer that qualifies as legal professional privilege (“LPP”). LPP gained a legal basis in EU law in the AM&S judgment, where the ECJ held it to be a general

---

162 C-260/04, Commission v Italy.
165 Article 110 of the Dutch constitution, Wet openbaarheid van Bestuur.
167 Charter Explanation on Article 7; Charter Explanation on Article 52.
169 Colas Est was confirmed by the ECJ in Case C-94/00, Roquette Freres v DGCCRF, [2002] ECR I-9011, para 29.
170 This was a revision of Joined Cases 46/87 and 227/88 Hoechst v Commission, [1989] ECR 2829, para 18, in which the ECJ was still of the opinion that ‘The protective scope of [Article 8 ECHR] is concerned with the development of man’s personal freedom and may not therefore be extended to business premises’.
171 ECtHR 16 December 1991, Niemitz v Germany, Series A no. 251-B, para 31. Confirmed by the ECJ in Roquette Freres.
principle of EU law, based on the laws of the Member States.\textsuperscript{171} The Court’s reasoning is interesting in the light of balancing privacy against effective enforcement interests. As with the situation of dawn raids, LPP was regarded as a limitation on the Commission’s investigatory powers.\textsuperscript{172} The undertaking concerned has the burden to prove to the Commission that the communications actually qualify as privileged.\textsuperscript{173}

In the situations of dawn raids and LPP confidentiality and investigation interests are thus competing interests. A competition authority cannot use documents in evidence that it has acquired by infringing the privacy of the suspect. However, confidentiality of leniency material is aimed at promoting the attractiveness of leniency programmes and is thus in the interest of effective investigation. What could be the human rights basis for not disclosing leniency material to third parties? There is no basis in EU law conferring secrecy per se on leniency material (unlike legal privilege). Indeed, a leniency applicant has agreed to submit confidential statements because his interest lies in fine immunity or reduction.\textsuperscript{174} It could be argued that this ‘waiver of confidentiality’ is only made for the purpose of effective investigation by the competition authority. In this context it must be noted that the Commission has an obligation of professional secrecy with regard to confidential information about undertakings.\textsuperscript{175} This implies that the information that the Commission acquires can only be used for the purpose for which it was gathered.\textsuperscript{176} However, it is unclear whether in the EU a leniency agreement qualifies as a ‘confidentiality agreement’.\textsuperscript{177}

It seems that leniency material does not qualify as confidential per se. Therefore, it is argued, the criterion should be whether access to leniency material serves the purpose for which it was submitted, namely effective investigation. This would imply a right of access to administrative parties in as far as leniency material serves the rights of defence. The question remains whether private enforcement also serves effective public enforcement, so that the need to support a compensation claim with confidential leniency material indirectly belongs to the purpose for which it was submitted.

2.2.5. Privilege against self-incrimination

In competition law ‘the privilege against self-incrimination’ means that competition authorities may not force suspected undertakings to disclose evidence against themselves. The privilege forms, next to the right to privacy, another right of defence against the investigation powers of the authorities.\textsuperscript{178} It is nowhere explicitly laid down, but developed as a judge-made product by first the ECJ in \textit{Orkem} (in the context of competition law)\textsuperscript{179} and later also the ECtHR in the

\textsuperscript{172} Akzo, para 172.
\textsuperscript{173} (…)although it is not bound to reveal the contents of the correspondence’, see AM&S, para 29.
\textsuperscript{174} See also AM&S, para 28, where the Court considered that the principle of confidentiality does not prevent an undertaking from disclosing written communications which qualify as LPP if it considers it to be in its interest to do so.
\textsuperscript{175} Article 339 TFEU and Article 28 Regulation 1/2003.
\textsuperscript{176} Caruso 2010, p. 459.
\textsuperscript{177} Vandenborre 2011, p. 121 speaks of a ‘confidentiality agreement’ between the government and a leniency applicant in the US.
\textsuperscript{179} The ECJ declared it to be a general principle of EU law in Case C-374/87 Orkem v Commission [1989] ECR 3343, para 28. This thesis adheres to the wording ‘privilege against self-discrimination’ which is used by the ECtHR.
cases of Funke\textsuperscript{180} and Saunders\textsuperscript{181} (in the context of criminal law). The rationale is that the suspect is presumed to be innocent until the contrary has been proven.

The privilege against self-incrimination prohibits competition authorities from using in evidence inculpating information which they have forced undertakings to submit.\textsuperscript{182} Leniency programmes are special in this regard. Indeed, it is the very purpose of whistleblowers to inculpate themselves in as far as this leads to immunity or reduction from sanctions. The ECJ has held that the voluntary submission of self-incriminating evidence for the purpose of benefitting of leniency does not interfere with the undertaking’s rights of defence.\textsuperscript{183} Then, to what extent does the privilege play a role in the balancing exercise on disclosure of leniency documents?

In order to answer this question a description of the similarities and differences between the Orkem and the Saunders concept of self-incrimination is necessary.

In Orkem the undertakings of alleged cartels in the thermoplastics industry complained that the Commission had by-passed its investigation powers by forcing them to give evidence against themselves. The Court considered that while the Commission is entitled to oblige an undertaking to provide all necessary information during the preliminary investigation stage, it may not undermine the rights of defence.\textsuperscript{184} This meant that ‘the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.’\textsuperscript{185} It was held that the Commission could validly use in evidence the factual information on the circumstances in which the meetings were held, even though this information had been gained by investigative coercion. However, the Commission was prohibited from using the answers to questions on the purpose of the measures taken in order to maintain the price levels satisfactory to all the participants in the meeting.

The leading ECtHR case on self-incrimination came after Orkem in Saunders v United Kingdom.\textsuperscript{186} Mr Saunders complained that he had been forced to make statements in an administrative investigation by inspectors of the department of Trade and Industry, which were later used as evidence against him in criminal fraud proceedings. The ECtHR made it clear that the rationale of the right to silence and the right not to incriminate oneself lies ‘in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ECHR.’\textsuperscript{187} Therefore, the authorities may not force the suspect to interfere with his will to remain silent.

\textsuperscript{180} Funke v. France, Series A, No. 256-A, (1993) 16 EHRR 297, para 44, the ECtHR ruled that the privilege follows from Article 6(1) ECHR and applies when there is a criminal charge.

\textsuperscript{181} Saunders v United Kingdom (1997) 23 EHRR 313 (the now leading ECtHR case on self-incrimination).


\textsuperscript{184} Orkem, paras 33-34. In Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2829 it was held that the rights of defence must be observed in administrative procedures which may lead to the imposition of penalties.

\textsuperscript{185} Orkem, para 35.

\textsuperscript{186} Saunders v United Kingdom (1997) 23 EHRR 313. The ECtHR first pronounced on the privilege against self-incrimination as part of Article 6(1) ECHR in Funke v. France, para 44. However, in the light of Saunders, Funke is probably no longer good law, since in Funke the privilege was held to extend to pre-existing documents.

\textsuperscript{187} Saunders, para 68.
However, the privilege does not extend to pre-existing evidence which exists independently of the will of the accused, such as blood samples.\footnote{Saunders, para 69.}

After Saunders, both the General Court\footnote{Case T-112/98 Mannesmannrohren-Werke v Commission [2001] ECR II-729, para 66} and the ECJ\footnote{Joined Cases C-238/99 P, Limburgse Vinyl Maatschappij NV and others v. Commission [2002] ECR I 8375, paras 273-276.} have confirmed Orkem as being in accordance with Article 6 ECHR. The ECtHR and the ECJ agree that the privilege against self-incrimination protects the suspect from submitting information to investigation authorities which 1) has been traced by coercion and 2) is used against the accused in subsequent proceedings. However, the Saunders definition is explicitly linked to the will of the suspect to remain silent. It protects the autonomy of the accused not to give self-inculpating information which he does not want to tell the authorities, unless that information is pre-existent. Under Orkem a suspected undertaking could be forced to give factual, but nevertheless sensitive (business) information of a self-incriminatory nature. Arguably the Saunders definition offers a wider protection than the Orkem concept of the privilege.\footnote{Wils 2003, p. 11.} The Saunders concept of the privilege against self-incrimination is more privacy based.\footnote{Andreangeli 2008, p. 126.}

Secondly, if one adopts this privacy based concept of self-incrimination, then arguably corporate statements submitted under leniency programmes should not be disclosed to follow-on claimants. This is because the whistleblower has consented to the use in evidence of its self-incriminating statements by competition authorities, but not by cartel victims (see the argument in section 2.2.4. that the confidential nature of leniency material means that it should only be used for the purpose for which it was collected). A-G Mazák’s advice in Pfleiderer to disclose pre-existent documents on a case by case basis, while corporate statements should be confidential per se, seems to be based on Saunders. Corporate statements are dependent on the autonomy of the whistleblower to ‘control’ what inculpating material he discloses. However, the counter argument of follow-on claimants could be that the full redress of cartel victims indirectly belongs to the purpose for which competition authorities acquire leniency material. Arguably the whistleblower has therefore indirectly consented to disclosure, to the extent that self-incriminating statements are necessary as evidence in follow-on proceedings. full redress of cartel victims indirectly falls under the purpose of leniency programmes.

The difference between Orkem and Saunders is not merely of an academic nature, but has practical consequences. In the first place, it bears the risk that EU law diverges from Article 6 ECHR.\footnote{Although Article 47 of the Charter is supposed to correspond to Article 6 ECHR, we do not know the status of the privilege against self-incrimination within this correspondence. If it is still a general principle of EU law, this would mean that without implementing acts it is not sufficiently clear and precise to be invoked before national courts. See Article 52(5) of the Charter.} The incoherence between these sources on the scope of the privilege against self-incrimination leads to divergence in standard of protection between Member States as Regulation 1/2003 does not harmonise the rights of defence. This is undesirable in the light of the circulation of evidential documents within the ECN (see section 2.1.4.).\footnote{Recital 16 to Regulation 1/2003.}
2.2.6. Conclusion: fundamental rights

This section has aimed to trace the interests of access and confidentiality from fundamental rights sources. The following fundamental rights based criteria for the Pfleiderer test are proposed:

I) **The possibility for judicial review of the decision to deny access to leniency material.**

It will be relevant whether the main proceedings allow a party to effectively challenge the decision to deny access. If this is not the case, an immediate review of the decision by way of a ‘procedure in a procedure’ is necessary in the light of Article 6 ECHR.

II) **The extent to which a denial of access interferes with the right of access to a court of the follow-on claimant.**

It will be relevant whether or not leniency material is crucial to support a civil damages claim (see criterion II of the conclusion on enforcement interests in section 2.1.5.)

III) **The legitimate expectation of the leniency applicant that corporate statements (whether oral or written), which are self-incriminating, are only used for the purpose of benefiting of leniency.**

This argument can be based on the Saunders concept of self-incrimination, which is more privacy based than the Orkem concept. A leniency applicant has consented to create corporate statements for the purposes of the leniency programme, but not for being disclosed to alleged cartel victims preparing follow-on claims.

IV) **The factual, rather than self-incriminating character of pre-existing documents.**

Pre-existing documents are not created for the purpose of a leniency programme, but at least in theory exist independently of it. However, pre-existing documents are often referred to in corporate statements and bridge the gaps in evidence of the cartel. Without the corporate statements, their pre-existence was probably unknown.

3. **Comparative analysis**

Chapter 2 has enquired which interests based on cartel enforcement and EU fundamental rights are relevant for national courts applying the Pfleiderer test of “access versus confidentiality of leniency material”. One of the conclusions based on the balance between public and private enforcement was that the need for access to leniency material must be offset against the possibility to obtain sufficient evidence for a cartel damages claim from other (non-confidential) sources. It has also been pointed out that there are two EU fundamental safeguards advocating for access, namely the right of access to documents as part of the democratic principle of transparency and the right of access to the file as part of the rights of defence.
In this comparative analysis the question is how the EU and Dutch legal systems functionally reflect the conclusions from the legal framework. Three possible legal ‘routes’ for access by cartel victims to leniency material are described, namely: I) access via administrative competition proceedings, II) access via transparency requests to the competition authority, III) access via national civil courts competent in follow-on claims.

The legal systems are analysed in turn. Section 3.1. examines the three routes in relation to leniency material from the file of the Directorate-General for Competition of the European Commission (shortly referred to as: “the Commission file”). Section 3.2. addresses the possibilities for access to leniency material from the file of the NMa. Section 3.3. presents an overview of the similarities and differences between the bases for access to leniency material at the European level and at the Dutch level.

3.1. Access to leniency material acquired by the European Commission

3.1.1. Access via administrative competition proceedings

The relevant issue for this paper is whether other parties than the suspected undertakings, often called ‘third parties’, have a right of access to the file within competition proceedings. EU law does not harmonise the criteria for admissibility of third parties to competition proceedings. It also belongs to the procedural autonomy of the Member States what procedural rights (such as access to the file or documents from it) the admitted parties subsequently enjoy. EU law does, however, lay down rules of competition proceedings before the Commission. The right of access to the file is governed by Regulation 1/2003, Regulation 773/2004 (“the Implementing Regulation”) and the Commission Notice on Access to the file (“the Access Notice”).

EU competition proceedings take place at an administrative and judicial level. The first stage takes place before the Hearing Officer of the Commission, who is responsible for safeguarding procedural rights throughout the administrative proceedings. The undertakings concerned may contest the Statement of Objections or lodge an appeal against the Commission’s fining decision. If the Commission rejects the administrative appeal, the suspected undertakings may start proceedings to annul the fining decision before the General Court (at first instance) and the ECJ (in appeal).

Legitimate interest and access to file or documents in proceedings before the Commission

Regulation 1/2003 and the Implementing Regulation use the terminology of ‘file’ and ‘documents’ in relation to the right to equality of arms of the undertakings concerned.

---

195 Örücü 2006, p. 448-451 speaks of ‘conceptualisation’ of the notions to be compared.
196 The suspected undertakings are those subject to the Commission cartel investigation. This paper uses the terminology “suspected undertakings”, “addressees of the Statement of Objections (SO)” and “the undertakings concerned” interchangeably.
complainants and other interested parties. However, the Access Notice only uses the wording “access to the file” to mean the access granted to the addressees of the Statement of Objections (“SO”).

Addresses of a notified SO have a right to access the Commission’s file if they so request. The file for this purpose means ‘all documents which have been obtained, produced, and/or assembled by the Commission Directorate General for Competition during the investigation.’ The addressee of an SO may only use its right of access for the purpose of judicial or administrative proceedings which apply Articles 101 and 102 TFEU. The abovementioned definition of the file in principle includes leniency material. According to the Leniency Notice the addressees will get access to corporate statements of the leniency applicant provided that they commit not to make any copy. Furthermore, the information from the corporate statements may only be used for the purposes of administrative or judicial proceedings for the application of the EU competition rules. However, no access is granted to the replies of the other cartelists to the Commission’s statement of objections.

Leniency material may include confidential information to which the right of access to a file does not extend, namely, business secrets, ECN correspondence on the basis of Article 12 of Regulation 1/2003, internal documents of the Commission or NCAs or information covered by the obligation of professional secrecy. In such a case, the Commission will weigh, amongst others, the evidential relevance of the information for the alleged cartelist against the sensitivity of the information. In this respect, it must be remarked that the Commission has the discretion to disclose and use information falling under the confidentiality exceptions, if they are necessary to prove an infringement. On the basis of this rule, addressees of an SO could get access to confidential leniency material which proves or disproves their guilt as cartelists.

Cartel victims start follow-on proceedings after the competition proceedings before the Commission have ended and the fine has been imposed. The question is, therefore, which ‘identity’ injured parties could have during the competition proceedings. It is possible that the follow-on claimant is the same injured consumer or customer as the one who has issued a complaint asking the Commission to declare that Article 101 TFEU has been infringed. The Commission admits complaints of undertakings and natural persons who show a legitimate interest. The General Court has held that an end-customer who shows that “his economic interests have (likely) been harmed has a legitimate interest in making a complaint.” Although complainants are closely associated to the proceedings, their right of access to the file is far more limited than that of the undertakings concerned. If a complaint is accepted,

---

200 Access Notice, para 3.
201 Article 27(2) Regulation 1/2003; Article 15(1) Regulation 773/2004.
202 Access Notice, para 8.
204 Leniency Notice, paras 33-34.
205 Access Notice, para 58.
207 Access Notice, para 24.
208 Article 27(2) Regulation 1/2003; Article 15(3) and recital 14 Regulation 773/2004.
209 Article 7(2) of Regulation 1/2003. See also Commission Notice on the Handling of Complaints by the Commission under Article 81 and 82 of the EC Treaty [2004] OJ C101/65.
212 Access Notice, para 30.
the complainant is entitled to a non-confidential version of the SO\textsuperscript{214}, without business secrets and other confidential information.\textsuperscript{215} However, a complainant will not get hold of leniency material.\textsuperscript{216}

Other parties than the investigated undertakings and complainants, which can demonstrate a sufficient interest, may be heard if the Hearing Officer considers this necessary.\textsuperscript{217} A sufficient interest means that the third party’s interests may be affected by the Commission’s decision.\textsuperscript{218} Under this definition, it can be imagined that injured customers or consumers have a right to be heard. Furthermore, the Hearing Officer generally regards consumer organisations as sufficiently interested, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input in such products or services.\textsuperscript{219} Interested third parties must be informed about the nature and the subject matter of the proceedings and may make a request to the Hearing Officer for access to documents if they have reasons to believe that they have not been adequately informed.\textsuperscript{220} However, interested third parties are not as closely linked to the proceedings as the undertakings concerned and – to a lesser extent – complainants. Thus, access to documents by third parties is granted in order to inform them. This ‘information’ rationale of the right of third parties to access documents is different from the reason for which the undertakings concerned get access to the file (rights of defence).\textsuperscript{221} It can be concluded that in competition proceedings before the Commission, only the undertakings concerned have access to leniency material.

**Legitimate interest and access to file or documents in proceedings before the EU Courts**

It has been seen that cartel victims may have a legitimate interest in the proceedings before the Commission. If an injured customer is admitted as a complainant, he has a right to access the non-confidential version of the SO. Alternatively, in the role of a third party with a legitimate interest, a cartel victim has a right to be heard and to be informed on the nature of the cartel (if necessary with documents).

In the second stage of competition proceedings the suspected undertakings seek annulment of the Commission’s finding of infringement of Article 101 TFEU before the EU Courts. Complainants or other affected undertakings may want to be admitted to these proceedings. For instance, if the Hearing Officer has denied a third party access to file or documents, that decision is only subject to review by the EU courts in the main proceedings.\textsuperscript{222} Under Article 263 TFEU parties to which a decision of the Commission is not addressed, may nevertheless

\textsuperscript{213} An unsuccessful complainant may request access to the documents on which the Commission has based its decision to reject a complaint. Access Notice, para 31; Article 7 Regulation 773/2004.

\textsuperscript{214} Article 6(1) Regulation 773/2004.

\textsuperscript{215} Access Notice, para 32.

\textsuperscript{216} The Regulations, as well as the Access Notice and the Leniency Notice, are silent on this.

\textsuperscript{217} Regulation 1/2003, para 27(3); recitals 10-12 Regulation 773/2004; Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] OJ C 308/6, para 105; recital 13 Hearing Officer Decision 2011/695/EU

\textsuperscript{218} Recital 32 Regulation 1/2003.

\textsuperscript{219} Recital 11 Regulation 773/2004; recital 12 Hearing Officer Decision 2011/695/EU.

\textsuperscript{220} Article 7(2)(d) Decision 2011/695/EU; Article 13(1) Regulation 773/2004.

\textsuperscript{221} Article 27(2) of Regulation 1/2003 refers to ‘the rights of defence of the parties concerned’, which seems to mean the investigated undertakings. The Access Notice, para 1 refers to the right of access to the file of investigated undertakings as part of their right to equality of arms and their rights of defence.

\textsuperscript{222} W. Wils, ‘The Role of the Hearing Officer in Competition Proceedings before the European Commission’, forthcoming in World Competition 2012 (35)(3), available online (see list of sources), p. 16.
request judicial review of that act if it is of direct and individual concern to them. A cartel victim will generally be directly concerned if he is an (end-) customer operating in the same market as the cartel. However, in EU law it is difficult for a customer to prove that an act affects him individually, that is, in short, over and above other operators in the market. However, the EU Courts have been more lenient in interpreting individual concern in competition proceedings than in other administrative proceedings. As mentioned earlier in this section, the General Court approved of the Commission’s admission of an end-customer operating in the market of the cartel as a complainant. It remains to be seen whether injured customers, not complainants, with legal interest before the Commission (for which the threshold is quite low, namely that the third party’s interest may be affected by the Commission’s decision), will equally survive the test of ‘individual concern’ before the General Court.

If third parties are admitted before the EU Courts, the question arises to which documents produced for the purposes of the proceedings they have access. Pursuant to its Rules of Procedure the General Court may ask the parties to submit documents relating to the case. In Hitachi the General Court ordered the Commission to produce leniency material by way of a measure of inquiry. The Commission had initially refused to submit the requested material. However, the parties that got access to leniency material – under specific conditions – were the addressees of the Commission’s decision rather than third parties. There is no case law to my knowledge in which third parties got access to the Commission’s file or documents thereof under the Rules of Procedure of the EU Courts.

3.1.2. Access via transparency requests

Article 15(3) TFEU and Article 42 of the Charter provide for the citizens’ right of access to documents of EU institutions. Regulation 1049/2001 (“the Transparency regulation”) implements this right. Citizens have frequently invoked the Transparency regulation for disclosure of the Commission’s competition files, notably in merger and cartel cases. The purpose of the Regulation is to define the principles, conditions and limits on grounds of public or private interest in order to ensure the widest possible access to documents. In the light of this objective, access to documents is the standard, is subject to limited confidentiality exceptions. Any EU citizen or resident (whether a natural person or an undertaking) is eligible for making a transparency request. In order to make an access request, the applicant does not

223 The test for direct concern is that the measure must directly affect the situation of an individual, see Order of the General Court of 6 September 2011 (inadmissibility), Case T-18/10 Inuit and Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union, para 71 and the case law cited therein.


225 Jones&Sufrin 2011, p. 1180 refer to the standing of a complainant whose complaint has been rejected by the Commission; Gerbrandy 2009, p. 142 mentions that the fact that the Hearing Officer admitted a complainant or customer to the proceedings is a circumstance for the General Court in determining individual concern in the judicial proceedings.


228 Judgment of 12 July 2011 Case T-112/07, Hitachi Ltd and others v European Commission, para 19.

229 Article 1(a) Regulation 1049/2001.

have to prove a legal or any other interest in viewing the documents.\textsuperscript{232} The criterion for indicating the requested documents is low: the application must be sufficiently precise to enable the institution to identify the document.\textsuperscript{233} This raises the question of how the Commission deals with requests for disclosure of its competition file by cartel victims, taking the ‘identity’ of members of the public.

The Commission’s practice is to consistently deny access to leniency material on the basis of the exceptions provided in Article 4 of the Transparency Regulation.\textsuperscript{234} More specifically, the Commission’s position is that disclosure of leniency material would undermine the protection of 1) commercial interests of a natural or legal person; 2) the purpose of inspections, investigations and audits.\textsuperscript{235} Both exceptions are relative. This means that they may only be relied upon if there is no overriding public interest in disclosure.\textsuperscript{236} Furthermore, the exceptions only apply for the period during which protection is justified.\textsuperscript{237}

If the Commission rejects a transparency request, the applicant may appeal before the EU Courts on the basis of the limitative grounds for annulment of a decision under Article 263 TFEU. This has consequences for the procedural debate on the balance between access and confidentiality. In an appeal against a denial of access the Courts examine whether the Commission committed an error of law or procedure in drawing the balance between access and confidentiality. The Transparency Regulation protects the general public interest of access versus limited exceptions of confidentiality.\textsuperscript{238} The EU Courts will therefore not take into account the personal evidential difficulties of a cartel victim who invokes the Transparency regulation for preparing a follow-on action. The rest of this paragraph presents an overview of case law on cartel victims claiming access to documents on the basis of the Transparency Regulation.\textsuperscript{239} It distinguishes between procedural and substantive grounds of annulment. This paragraph concludes with issues that still have to be clarified by pending case law.

**Procedural grounds of annulment**

- **Standard: document-by-document analysis**

  The EU Courts have repeatedly held that the Commission must carry out a transparency request on a document-by-document examination.\textsuperscript{240} In general, it is not sufficient that the activity to which the document relates falls within one of the exceptions. The institution must also motivate how access to the requested document could ‘specifically and actually undermine the interest protected by the exception’.\textsuperscript{241}

---

\textsuperscript{232} Article 6(1) Regulation 1049/2001.

\textsuperscript{233} Article 6(1) and (2) Regulation 1049/2001.

\textsuperscript{234} Leniency Notice, para 40.

\textsuperscript{235} Article 4(2) first indent (commercial interests) and third indent (inspections) Regulation 1049/2001.

\textsuperscript{236} Article 4, third paragraph Regulation 1049/2001.

\textsuperscript{237} Article 4(7) Regulation 1049/2001.


\textsuperscript{241} ENBW, para 40 and the case law cited therein.
**Exception to document-by-document analysis: manifestly covered by an exception (or not)**

In its VKI judgment, in which an Austrian consumer organisation sought access to the files of the Commission in the Austrian Banks case for preparing a damages action, the ECJ formulated an exception to the one-by-one examination. Such individual analysis is not necessary when it is manifestly clear that a group of requested documents must be either disclosed or falls within the exceptions.\(^{242}\) In VKI the Court however concluded that a specific and individual examination could not be avoided.

The ENBW judgment confirms that it is not easy for the Commission to avoid a specific and individual examination. The General Court annulled a Commission decision denying a follow-on claimant access to its file, including leniency documents. The request was made by the German company ENBW Energie-Baden-Württemberg AG that claimed to have been affected as a customer of the GIS cartel.\(^{243}\) The Commission had dealt with the request by dividing its file into five categories namely 1) leniency material; 2) answers to information requests; 3) documents obtained during inspections; 4) the Statements of Objections and the replies thereto and 5) internal documents. The Commission considered that access to any category would undermine the protection of the purpose of inspections. On top of that, the first four categories were also kept confidential in order to protect the commercial interests of the undertakings concerned. The Commission argued that there was no overriding public interest in disclosure.

The General Court found that the Commission had denied access to categories 1, 2, 4 and 5 on the basis of the same argument that disclosure of leniency material contained in these categories would deter future potential leniency applicants from cooperating with the Commission. Therefore, the division into categories served no useful purpose, so that the Commission should have applied both exceptions document-by-document. In relation to category 3, the inspections exception was lawfully applied to the category as a whole, as the documents had been obtained during unannounced inspections at the premises of the undertakings against their will and without legal advice. However, the documents in this category should have been examined individually in as far as the Commission invoked the protection of commercial interests.\(^{244}\)

**Exception to document-by-document analysis: the useful effect of Regulation 1/2003 and Regulation 773/2004**

The Commission has also argued that disclosure to third parties on the basis of the Transparency Regulation would undermine the useful effect of the specific competition rules on access to the file. Pursuant to Regulation 1/2003 and Regulation 773/2004 only the investigated undertaking, and not third parties, have a right to access the Commission’s file (see section 3.1.1.). In ENBW the Commission raised this argument in support for “a general presumption of no-access”, so that an individual and specific examination of the documents was not necessary. The Commission drew an analogy with the TGI judgment. In TGI the Court of Justice had held that the system of access to documents specific to the state aid procedure – which confers a right of access to the Commission’s file to the Member State

---

\(^{242}\) Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, para 75. See also ENBW, para 45.

\(^{243}\) The plea that the Commission decision should be annulled because it was not carried out on a one-by-one examination of the requested documents was not explicitly raised by ENBW itself, but by Sweden as an intervening party.

\(^{244}\) ENBW, para 172.
responsible for the aid, but not to third parties – prevails over the general system of access to documents under the Transparency Regulation.\textsuperscript{245}

The General Court in ENBW dismissed the argument that, on an analogous interpretation of TGI, Regulation 1/2003 should be regarded as a lex specialis of the Transparency Regulation. It held that the TGI reasoning of ‘a documents access system specific to a procedure prevails over the general system of the Transparency regulation’ did not apply to the ENBW situation, as the procedure in ENBW had already been terminated with a fining decision.\textsuperscript{246}

In a later paragraph in ENBW, the General Court touches on the relationship between the right of access to a file under Regulation 1/2003 and the right of access to documents under the Transparency regulation. The Commission in that part of the judgment argued that it had already decided which documents in its file qualified as confidential in the context of granting access to its file to the investigated undertakings during the administrative proceedings.\textsuperscript{247} Therefore, it was not necessary to carry out another one-by-one examination of the documents requested under Regulation 1049/2001. The Court dismissed this argumentation. It held that the right of access to the file within the context of Regulation 1/2003 serves the fundamental rights of defence of the investigated undertakings. However, Regulation 1049/2001 has a different purpose, namely to guarantee the democratic right of public access to documents of the institutions. Therefore, a denial of access within the proceedings leading to the fine does not automatically mean that the Commission can also justify confidentiality under the exceptions of the public access regime.\textsuperscript{248}

**Substantive grounds of annulment**

- **Article 4(2) first indent: denial would undermine the protection of commercial interests of a natural or legal person, including intellectual property**

In its CDC judgment\textsuperscript{249}, the General Court interpreted this exception ground in relation to an application for annulment of a Commission decision denying access to a statement of contents of its case file relating to the hydrogen peroxide cartel. The transparency request was made by CDC Hydrogen Peroxide Cartel Damage Claims defending the collective interests of the cartel victims. The General Court held that the Commission could not have refused access to the contents page on the basis of commercial interests, as the interest of the cartelist in avoiding damages does not qualify as commercial.\textsuperscript{250}

In ENBW the General Court confirmed that the commercial interests exception does not protect the interest of a cartelist in avoiding follow-on actions. This time the transparency request did not concern something trivial as a contents page, but related to the entire file of the Commission in the GIS cartel. Notably, the Court ruled that the interest in avoiding liability does not deserve protection in any event, given the right of individuals to claim compensation of cartel loss.\textsuperscript{251} Furthermore, it was considered that certain information


\textsuperscript{246} ENBW, para 58.

\textsuperscript{247} Article 27 Regulation 1/2003.

\textsuperscript{248} ENBW, paras 143-145.

\textsuperscript{249} Judgment of 15 December 2011, T-437/08 CDC Hydrogene Peroxide v European Commission.

\textsuperscript{250} Hempel 2012, p. 7.

\textsuperscript{251} ENBW, para 147-148.
concerning commercial activities may lose its qualification as confidential with the passage of time.252

- Article 4(2) third indent: disclosure would undermine the protection of the purpose of inspections, investigations and audits

According to the Commission, third party access to leniency material under the Transparency Regulation would undermine certain public and private interests such as the protection of the purpose of inspections and investigations.253

In ENBW the Commission argued that the concept of ‘investigations’ is not limited to the proceedings leading to a fining decision in a cartel case, but should be regarded as an integral part of the Commission’s task of public enforcement of competition law. In order to ensure effective public enforcement, it is essential that the documents that cooperating undertakings submit are kept confidential. If they were disclosed, undertakings would in the future be deterred from applying for leniency.254

The Court rejected this argument. It held that the possible adverse impact of disclosure on the functioning of leniency programmes depends not only on disclosure, but on a number of uncertain factors in the future. These factors were held to include 1) the use that cartel victims will make of the documents 2) the success of their follow-on actions; 3) the amounts of damages that cartel victims will obtain before a national court; 4) how future cartelists will react on possible disclosure.255

These considerations show that the Court interprets the Article 4 exceptions narrowly, in order to serve the purpose of Regulation 1049/2001, which is to guarantee a widest possible right of access.256 The Court does not in this respect make a distinction between documents in the context of competition policy and documents from other EU policies for which a transparency request is made.257 It was also stressed that enforcement of competition law is not only served by leniency programmes, but also by an effective private enforcement of competition law. The Court, however, did not pronounce on the question whether public enforcement should go above private enforcement in case of a clash.258

- Article 4(2), third paragraph: ‘unless there is an overriding public interest in disclosure’

The exceptions in Article 4(2) of the Transparency Regulation apply if there is no overriding public interest in disclosure. The view of the Commission is that the need to support private enforcement of competition law by disclosing leniency material is not a public interest.259 Even if it was a public interest, it could not override the interest in preventing a potential deterrent effect of disclosure on future leniency applicants. After ENBW, it seems that this argument will no longer hold in general. The Commission will have to establish a not merely hypothetical260 deterrent effect of disclosure per document.

252 ENBW, para 142.
253 Leniency Notice, para 40. See also Goddin 2011, p. 15.
254 ENBW, para 124.
255 ENBW, para 125.
256 ENBW, para 126.
257 ENBW, para 127.
258 ENBW, para 128.
259 Hempel 2012, p. 3.
260 VKI, para 69.
Issues to be clarified by pending case law

ENBW shows that the procedural debate of access versus confidentiality of leniency material takes place within the democratic rationale of the Transparency Regulation. The EU Courts offset the general right of access to documents against the limited exceptions. The main message of ENBW seems that the Commission must determine on a case-by-case basis whether the requested documents fall under the exceptions. The General Court interpreted the investigations exception narrowly. The implications of this would be that the Commission can no longer protect leniency material as a category by arguing that disclosure has a chilling effect on potential leniency applicants. Furthermore, the argument that in the case of a clash, public enforcement should prevail over private enforcement because damages actions would be impossible without cartels being uncovered, does not hold in general according to the ENBW case. It remains to be seen whether the Court of Justice will uphold the General Court’s interpretation of the investigations exception. Given its interests in protecting leniency material an appeal by the Commission would not surprise. The ECJ’s judgment in TGI arguably requires a broader interpretation of the investigations exception. A pending case in which the General Court will again pronounce on the Article 4 exceptions in relation to a transparency request by a follow-on claimant is the case of Netherlands v Commission. The Dutch government seeks access to the complete non-confidential version of the Commission’s decision in the bitumen cartel case in order to prepare a damages claim for being overcharged in purchasing bitumen.

3.1.3. Access via civil proceedings

EU law does neither harmonise the substantive, nor the procedural rules for follow-on actions. In order to realise their EU right to compensation, cartel victims must rely on the civil law and procedure rules of the applicable legal system and the competent court. According to Pfleiderer, it is for national civil courts to decide on a case-by-case basis whether or not leniency material acquired by NCAs should be disclosed to injured customers or consumers. However, in NGET the English High Court applied the Pfleiderer test to documents relating to an investigation by the Commission. This section describes the EU rules on transmission of evidence between the Commission and national courts. It analyses pieces of the English High Court judgment in NGET by way of an illustration of the relevant EU rules. The facts of the case are briefly recalled (see also section 2.1.4.):

NGET, the owner of the British electricity network sought access to, amongst others, leniency material from the undertakings fined by the Commission in the GIS cartel. NGET made a disclosure request to the High Court on the basis of English civil procedure in order to prepare a follow-on action for being overcharged as a customer of GIS.

---

261 This argument was made in the literature after the TGI judgment, but before the ENBW decision: G. Goddin, ‘Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where does the Court of Justice of the EU strike the Balance?’, Journal of European Competition Law & Practice 2011 (2)(1), p.17 and. 23.
262 Goddin 2011, p. 22-23.
Transmission of leniency material by the Commission to national courts

Article 15 of Regulation 1/2003 governs the cooperation between the Commission and national courts. It is an expression of the duty of loyal cooperation between the Member States and the Union.\(^{264}\) Pursuant to Article 15(1) national courts applying the EU cartel prohibition may ask the Commission to transmit information in its possession or its opinion on questions concerning the application of European competition law. The Commission in its Cooperation Notice\(^{265}\), formulates Article 15(1) as an “obligation for the Commission to transmit information it holds, both during and after the investigation.” Pursuant to the Notice, the Commission shall not transmit to national courts information voluntarily submitted by a leniency applicant without the latter’s consent.\(^{266}\) However, as will be seen below, one of the defendants in NGET argues that the Commission’s transmission of information to the High Court amounted to sending pieces of leniency material.

The High Court had initially sent a request to the Commission pursuant to Article 15(1) of Regulation 1/2003 in which it asked for production of the responses of Alstom and Areva to the Statement of Objections.\(^{267}\) In accordance with the Cooperation Notice, corporate statements were expressly excluded from the request.\(^{268}\) The Commission provided the requested documents. The Commission expressly remarked that two elements were relevant in its disclosure decision, namely I) the fining decision in GIS had already been taken and II) a disclosure order under English law from Alstom and Areva itself was very difficult if not impossible, as French law prohibited Alstom and Areva to disclose the requested documents.\(^{269}\) A few months after the High Court judgment, Alstom issued an appeal before the General Court against the decision of the Commission to transmit the documents.\(^{270}\) It argues amongst others that the Commission has breached the duty of loyal cooperation because its decision amounts to transmitting leniency material (contained in the requested statement of objections) without the consent of the companies concerned.

As mentioned in section 3.1.1., the undertakings concerned are not granted access to the replies of the other cartelists to the SO during the proceedings before the Commission.\(^{271}\) It is remarkable that the Commission did send these replies to the High Court pursuant to its obligation of cooperation with national courts. The Alstom appeal touches on the relationship between the Commission’s duty of loyal cooperation with national courts and its obligation to use documents from undertakings only for the purpose for which they were acquired (‘professional secrecy’).\(^{272}\)

---

\(^{264}\) Article 4(3) TEU.

\(^{265}\) Which only binds the Commission itself, but neither binds the courts nor creates direct rights for individuals. See Notice on the cooperation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC [2004] OJ C101, para 42.

\(^{266}\) Cooperation Notice, para 26.

\(^{267}\) On 4 July 2007 the High Court had ordered ABB and Siemens to provide their responses to the SO, with a redaction of leniency material. However, ABB and Siemens did not have copies of the responses by Alstom and Areva to the SO. Therefore, the Commission’s file was the only source of these documents, see NGET, para 11.

\(^{268}\) Para 26 of the Notice on Cooperation with national courts.

\(^{269}\) NGET, para 13.

\(^{270}\) Pending Case T-164/12, Alstom and others v Commission, OJ 2012 C165/32-33.

\(^{271}\) Commission’s Leniency Notice, paras 33-44.

\(^{272}\) Article 28 Regulation 1/2003, Article 339 TFEU.
In *Postbank* the General Court held that professional secrecy is not an absolute obligation. It constrains the Commission in disclosing its file to third parties involved in the administrative competition proceedings, but it does not mean that the Commission should impede the collection of evidence by third parties via national civil courts.\(^{273}\) However, the Commission must take precautions to prevent damage to the undertakings concerned by giving the undertakings concerned the opportunity of expressing their view on the transmission of business secrets.\(^{274}\) The EU Courts have held that in two situations the Commission may legitimately refuse transmission, namely: 1) where disclosure would unduly interfere with the interests of third parties and 2) where disclosure would interfere with the functioning of the EU.\(^{275}\) These situations are narrowly interpreted. After the Commission has informed the national courts on the secret nature of certain documents, the responsibility to ensure confidentiality is also ‘transmitted’ to the latter.\(^{276}\) The Commission has brought its policy not to transmit leniency material without the consent of the leniency applicant in the scope of situation 1.\(^{277}\)

**Applying the *Pfleiderer* test to leniency material in the possession of the defendant**

As discussed above, Article 15(1) governs the situation where national courts ask for transmission of information within the possession of the Commission. In order to guarantee the interests of the cartelists, the Commission has a policy not to transmit leniency material without the consent of the applicant (although this is questioned by the Alstom appeal). Article 15(1) is not a legal basis for cartel victims to seek disclosure of the Commission’s file.

However, follow-on claimants may request disclosure of evidence in the possession of the defendant on the basis of national civil procedure. According to *Pfleiderer* such requests include leniency material, as long as the national court balances the relevant EU law interests for access and confidentiality before ordering disclosure. However, *Pfleiderer* related to leniency material submitted under a national leniency programme. Does the judgment also mean that a national court on the basis of national civil procedure may order disclosure of documents in the possession of the defendant, but submitted under the Commission’s leniency policy? In deciding on disclosure, should the national court apply the *Pfleiderer* test of EU law interests militating for access and confidentiality on a document-by-document basis? Two times yes, according to the High Court and the Commission’s interpretation of *Pfleiderer* in *NGET*.

Before the High Court received the Article 15(1) transmission from the Commission, the ECJ delivered its judgment in *Pfleiderer*. In the light of the judgment, *NGET* now also access to leniency material – which it had initially excluded from its disclosure request. This was not via the Commission’s file, but directly from ABB and/or Siemens on the basis of English civil procedure.\(^{278}\)


\(\text{\[^{274}\text{Article 28 Regulation 1/2003, Notice on Cooperation between the Commission and National Courts paras 23-25. See also E.-J. Zippro, Privaatrechtelijke handhaving van het mededingingsrecht, Deventer: Kluwer 2009, p. 552 and 554.}\]

\(\text{\[^{275}\text{Postbank, para 90.}\]

\(\text{\[^{276}\text{Cooperation Notice, para 26.}\]

\(\text{\[^{277}\text{NGET now sought access to: 1) the confidential version of the Decision; 2) the responses to the SO by the ABB defendant group; 3) the responses by the investigated undertakings in the ABB defendant group to information requests by the Commission, explaining the meaning of pre-existing documents in relation to the operation of the}\]

45
Pursuant to Article 15(3) the Commission may submit written observations to national courts for the coherent application of Article 101 TFEU, whether on its own initiative or on the invitation of the courts. In NGET the High Court invited the Commission under Article 15(3) to present its amicus curiae observations on its interpretation of Pfleiderer.  

The Commission considered that Pfleiderer also confers the task on national courts to decide on disclosure of leniency material collected under its own, rather than a national leniency policy. This means that the national court has the task to apply the Pfleiderer test to leniency material submitted under the Commission’s programme but in the possession of the defendant party. According to the Commission, the fact that Article 15(1) of Regulation 1/2003 excludes the transmission of corporate statements does not oust the national court’s jurisdiction to order disclosure on the basis of Pfleiderer. Furthermore, the Commission considered two criteria particularly relevant in the ‘EU law interests of access and confidentiality’ that the national court should weigh according to Pfleiderer. These are: 1) whether disclosure would increase the leniency applicant’s exposure to liability compared to the non-cooperating parties and 2) whether disclosure is proportionate in the light of its possible interference with leniency programmes. According to the Commission, the first criterion would militate against disclosure. Although in the case at hand the risk of ABB facing greater liability was low, the chilling effect of disclosure on future leniency applicants is enough for the Commission not to disclose leniency material. Under the second criterion, the Court should assess whether the requested documents are at all relevant for the claim and whether there are other available sources. The Commission concluded that the requested documents would not provide NGET with the evidence it sought. To the extent that the requested documents concerned leniency material, the Commission stated that the possible deterrent effect of disclosure advocates for per se confidentiality. The Commission did not say whether the relevance of leniency material in evidence could outweigh the deterrent effect.

Article 15(3) is again an expression of loyal cooperation between the Commission and the national courts for the coherent application of EU law. In applying EU law national courts, as well as the Commission, are bound by the Treaties and the Luxembourg Courts’ interpretation thereof. Both the Commission in its opinion, and the national court in its final decision, must apply EU law in accordance with those binding sources. In NGET, the High Court interpreted Pfleiderer in the same way as the Commission. According to the High Court, it is an ‘acte clair’ that the Pfleiderer test applies to leniency material in the possession of the Defendant,

cartel and 4) the same responses by the investigated companies in the Alstom and Areva defendant groups. (NGET, para 16) Roth J remarked that ‘it is common ground that these documents will or may include leniency material’ (at 17).

279 Regulation 1/2003 does not establish a procedural framework for the submission of amicus curiae observations. Therefore, this is determined by national law. See Cooperation Notice, paras 34-35.

280 Observations of the European Commission pursuant to Article 15(3) Regulation 1/2003 of 3 November 2011. The amicus curiae opinion can be found on: http://ec.europa.eu/competition/court/antitrust_requests.html

281 Amicus curiae opinion, paras 17-21.

282 As the High Court will decide on the damages claim substantively after the ECJ has dealt with the appeal by some of the cartelists.

283 The Commission has published on its website an overview of its amicus curiae observations under articles 15(1) and 15(3) of Regulation 1/2003 (list of sources).


whether submitted under an NCA programme or under the Commission’s leniency policy.\textsuperscript{286} Therefore, it did not consider it necessary to ask the ECJ for a preliminary ruling on the issue.

The High Court then examined the documents requested by \textit{NGET} one-by-one while weighing the interests militating for access and those for confidentiality. It held, like the Commission, that the relevant criteria are: 1) whether the leniency applicant would face greater liability compared to non-cooperating cartelists and 2) whether disclosure is proportionate. As to the first criterion, the High Court considered that the legitimate expectations of leniency applicants that their statements would remain confidential\textsuperscript{287} does not apply, as the ECJ did not accept the legitimate expectations argument in \textit{Pfleiderer}. Furthermore, the Commission’s leniency programme grants immunity from fines, but not from civil law suits.\textsuperscript{288} As regards the second criterion of proportionality of disclosure, the High Court acknowledged the evidential difficulty of follow-on claimants in proving causation and harm.\textsuperscript{289} It was concluded that \textit{NGET} could reasonably not trace the requested information from other sources such as from employees’ statements.\textsuperscript{290} Furthermore, the information that was sought was held to be relevant for the damages claim. Importance was attached to the ability of the assistance of the requested documents in determining what the price would have been in a hypothetical competitive market.\textsuperscript{291} It was held that the criterion of relevance required a one-by-one examination of every document. The general objection to disclosure on the grounds that it might compromise the Commission’s leniency programme was rejected (as that argument would impede disclosure in general).\textsuperscript{292} Finally, the High Court considered the judgment of the Amtsgericht Bonn, ruling against disclosure, of little assistance, as the \textit{Pfleiderer}-test is fact-sensitive.\textsuperscript{293}

The High Court ordered ABB and Siemens to disclose some of the pieces that were redacted in the non-confidential version of the Decision. The redacted pieces related to commercial confidentiality or reflected the Commission’s policy not to disclose the sources of evidence from corporate statements. However, these confidentiality concerns would be respected as disclosure was only granted within the confidentiality ring.\textsuperscript{294} Roth J remarked that the redacted pieces to be disclosed were not necessarily the same as those indicated by \textit{NGET} as potentially relevant. \textit{NGET} could not guess beforehand what evidence it was searching for as it was marked in black.\textsuperscript{295} As to the answer by the cartelists to the Commission’s information requests, only one answer by Areva – the unsuccessful second leniency applicant - was disclosed. The other leniency material was kept confidential.\textsuperscript{296}

The \textit{NGET} judgment shows that the balancing exercise of ‘relevant EU law interests’ on a case-by-case basis, without a harmonising instrument, works in practice. The application of \textit{Pfleiderer} to leniency material acquired by the Commission does not mean that the Commission’s file is disclosed to third parties. On the basis of national civil procedure, courts

\textsuperscript{286} Judgment, paras 25-26. The High Court also ruled that Article 15(1) of Regulation 1/2003 does not oust the task of national courts to decide on the basis of civil procedure whether or not leniency material should be disclosed. See \textit{NGET}, paras 27-29.

\textsuperscript{287} Based on Leniency Notice, para 31; Cooperation Notice, para 26. See \textit{NGET}, para 32.

\textsuperscript{288} Leniency Notice, para 39. \textit{NGET}, para 34.

\textsuperscript{289} \textit{NGET}, para 40. Mr Justice Roth referred to para 89 of the Commission’s Staff Working Paper accompanying its White Paper.

\textsuperscript{290} \textit{NGET}, para 43; (…) “Although the Commission suggested that \textit{NGET} might be able to get instead appropriate evidence by way of witness statements from employees of the participants in the cartel that supplied the UK market, none of the defendants suggested that such individuals are likely to provide \textit{NGET} with statements.”

\textsuperscript{291} \textit{NGET}, paras 48-49.

\textsuperscript{292} \textit{NGET}, para 52.

\textsuperscript{293} \textit{NGET}, para 60.

\textsuperscript{294} \textit{NGET}, paras 56-57.

\textsuperscript{295} \textit{NGET}, para 58.

\textsuperscript{296} \textit{NGET}, para 59.
are only able to order disclosure of leniency material in the possession of the defendant. The judgment also shows that an examination of the requested documents by the judge alone can be a procedural safeguard for the leniency applicant. It will be interesting to see how the General Court in Alstom rules on the relationship between loyal cooperation between the Commission and national courts and the protection of leniency material.

3.2. Access to leniency material acquired by the NMa

3.2.1. Access via administrative competition proceedings

In the absence of harmonisation, the question whether third parties (such as cartel victims) are admissible in competition proceedings and what procedural rights they enjoy belongs to the procedural autonomy of the Member States (see section 3.1.1.). In the Dutch legal system, the admissibility of parties and the right of access to the file or documents are governed by the general administrative law regime of the General Administrative Act (Algemene Wet Bestuursrecht, hereafter: “Awb”) and the specific competition rules of the Competition Act (Mededingingswet, hereafter: “Mw”).

Dutch competition proceedings take place at an administrative and judicial level. In the administrative phase before the NMa itself, the undertakings concerned may express their views on the Dutch equivalent of the Statement of Objections (in Dutch: rapport, hereafter: “report”) and lodge an administrative appeal against a decision finding an infringement and the decision finding an infringement may be contested before the legal service. If the NMa rejects the administrative appeal, the undertakings may file a judicial appeal before the competition administrative court of Rotterdam in first instance, and before the Court of Trade and Industry in second instance.

Legitimate interest and access to file or documents in proceedings before the NMa

Under Dutch administrative law natural or legal persons that wish to be integrated in the proceedings must be legitimately interested (belanghebbendheid) in relation to a decision (besluit) of the administration in question.

It is clear that the undertakings or individuals subject to the NMa investigation are legitimately interested in relation to the decisions of which they are the addressees. The undertakings concerned have a right of access to the file. In Norsk Hydro, the Rotterdam court held that on the basis of the directly effective rights of defence of Article 6 ECHR, the alleged cartelists have a right to view all documents on which the evidence for the sanction, as well as the amount of

---

297 Article 59(3) Mw and Article 5:53(3) Awb. The investigation department of the NMa drafts a report when after termination of the investigation it reasonably suspects an infringement of competition law (Articles 59 and 56 Mw). A report is not a ‘decision’ subject to administrative and judicial appeal within the meaning of Article 1:3 Awb, but rather a preparatory act within the meaning of Article 6:3 Awb. See CBB 17 November 2004, Glasgarage Rotterdam BV en Carglass BV tegen NMa, LJN: AR6034, para 8.1.

298 Article 7:1 Awb.

299 Article 8:1 Awb.

300 Article 93(1) Mw.

301 Article 59(1) Mw; according to Article 5:48(1) Awb an administrative institution ‘can’ draft a report. However it is obliged to draft a report in the case of an administrative fine of more than €350,-- (see Article 5:53(1) and (2) Awb).

302 Article 5:49(1) Awb.
the fine is based.\textsuperscript{303} Under the Dutch leniency policy guidelines, the addressees of the report may also consult the transcript of oral statements of the leniency applicant. However, they must commit not to make any copies other than by handwritten notes and to use the oral statements exclusively for the purposes of the administrative competition proceedings.\textsuperscript{304}

The interest of third parties is subject to a case-by-case approach of the Dutch administrative courts on the basis of the five abovementioned criteria for legitimate interest.\textsuperscript{305} It was the intention of the Dutch legislator to constrain the number of those entitled to appeal under general administrative law.\textsuperscript{306} The administrative competition court confirmed that there are no “policy reasons” (redenen van strategische aard) for a wider interpretation of “interested parties” in competition law.\textsuperscript{307}

According to settled case law, there are five cumulative criteria to prove a legitimate interest in relation to a certain decision. First, the applicant may exclusively invoke his own interest (not that of another). Secondly, the interest must be personal, which means over and above the general interest. The other three criteria are that the interest must be objectively proven, present (a future and potential adverse effect will not suffice) and directly related to the decision.\textsuperscript{308} Third parties such as cartel victims will not be able to prove a direct and individual interest relating to the decision finding an infringement. Therefore, individual third parties do not have a right of access to the file.

It must be noted that the NMa when preparing fining decisions is bound by the principles of good administration.\textsuperscript{309} Third parties have a right to be heard if it can reasonably be expected that they will object against a decision of the administration and if that decision is founded on facts or interests of that third party.\textsuperscript{310} However, these principles of good administration do not include a right of access to the file to third parties.

It has become clear that the Dutch definition of ‘a legitimate interest to a decision’ prevents individual consumers from being integrated in competition proceedings. However, since 2007 the Dutch Competition Act explicitly recognises consumer organisations as legitimately interested to decisions taken on the basis of the Act.\textsuperscript{311} The definition of a consumer organisation is “a foundation or association with full legal personality, that, on the basis of its mission statement (statuten) has the task to serve the collective interests of consumers”.\textsuperscript{312} In the absence of case law, it remains to be seen whether cartel victims may be admitted to the administrative proceedings via consumer organisations and to what extent they enjoy procedural rights such as access to the file.

\textsuperscript{303} Rechtbank Rotterdam 26 November 2002, Norsk Hydro, LJN: AR4219, para 2.3.2. Although this judgment related to an infringement of Article 24 Mw (prohibition on abuse of dominance), the procedural rights of defence will apply equally to the cartel prohibition.

\textsuperscript{304} Dutch leniency policy guidelines, Article 27 and the explanation thereto.

\textsuperscript{305} Zippro 2009, p. 136-139.

\textsuperscript{306} MvT, PG Awb I, p. 148.

\textsuperscript{307} Rechtbank Rotterdam 9 August 2001, Postbussen I, LJN: AB6588.

\textsuperscript{308} Article 1:2 Awb provides that ‘interested parties’ are those whose interest is directly related to the decision. The five criteria follow from settled general administrative and competition case law, see e.g. Rechtbank Rotterdam 9 August 2001, Postbussen I, LJN: AB6588.

\textsuperscript{309} Title 4.1.2. Awb.

\textsuperscript{310} Article 4:8 Awb.

\textsuperscript{311} Article 93(3) Mw.

\textsuperscript{312} Article 1(n) Mw.
Section 3.2.1. has discussed the possibilities for complainants (including injured end-customers) to become closely associated to Commission proceedings. Under Dutch administrative law the position of a cartel victim as a complainant is weaker. Unlike European competition proceedings, the legitimate interest of a complainant is not proven by an economic harm following from the alleged cartel. Under the Awb system, a complainant must have a legitimate interest related to an NMa decision declaring that the conduct complained of is an infringement of competition law. In the absence of a legitimate interest, the complainant will not be regarded as an applicant requesting the NMa to take an infringement decision. Conversely, if the complainant has a legitimate interest, the NMa has a discretion whether to accept or reject the complaint. In Carglass, a direct competitor of the undertakings concerned was held to have a legitimate interest fulfilling the five abovementioned criteria. A complaining cartel victim will have difficulties in proving an individual interest (relating to an infringement decision) which exists over and above the interest of other customers or consumers of the alleged cartel. Furthermore, a successful complainant under Dutch law does not have a right of access to documents from the competition file. Lodging a complaint is therefore not a fruitful way for cartel victims to be granted access to NMa documents.

Legitimate interest and access to file or documents in administrative court proceedings
In order to have standing before the administrative competition court, a party must prove a legitimate interest in contesting the infringement decision as well as a legitimate interest in the proceedings (procesbelang). Given the closed class of legitimately interested parties under the Awb, only the undertakings concerned and perhaps consumer organisations have standing before the court. A complainant will only be allowed to appeal against a decision in which the complaint is rejected. An individual customer or consumer seems unsuccessful in proving the required individual and direct interest to the infringement decision. Given that the infringement decision is addressed to multiple undertakings, the question arises which parties have access to confidential information from the competition law file during administrative court proceedings.

The Dutch administrative court is bound by the safeguards of a fair trial of Article 6 ECHR, and when EU law is involved, also by Article 47 Charter. An aspect of the right to a fair trial, following from the rights of defence, is that the court may in general only base its decision on the documents of which the parties have taken notice. Article 8:29 Awb is an exception to this rule. It establishes a procedure in which the court examines how confidential information should

313 Gerbrandy 2009, p. 159.
314 Gerbrandy 2009, p. 135. A complainant ‘requests’ the NMa to take a decision within the meaning of Article 56 Mw.
315 E.g. CBB 11 November 2005, VVR v. Judgment of the Rotterdam Court in VVR/NMa, LJN: AU6574. Article 4:7 Awb provides for a right to be heard of the person whose request for an administrative decision has been rejected. Applying this to competition law, a complainant has a right to be heard if the complaint is rejected and the rejection is based on facts and interests that affect the complainant.
316 CBB 17 November 2004, Glasgarage Rotterdam BV en Carglass BV tegen NMa, LJN: AR6034. See also Gerbrandy 2009, p. 145.
317 The CBB has confirmed the decision of the Rotterdam Court that the NMa was entitled to deny the legitimate interest of an individual traveller complaining about alleged abuse of dominance by KLM, see CBB 20 February 2004, LJN AO5968.
318 However, in relation to abuse of dominance proceedings the Rotterdam Court has admitted the supposed contractee (Norsk Hydro) of the fined undertaking (SEP) as a third party with a legitimate interest in the fining decision. The procedural interest of Norsk Hydro was held to lie in starting civil proceedings for recovering the damage as a consequence of the envisaged transport contract with SEP. See Rechtbank Rotterdam 26 November 2002, Norsk Hydro, LJN: AR4219. See also Pietermaat&De Poorter 2004, p. 45.
be treated *inter partes*. In general, parties to administrative proceedings must produce the documents relating to the case. However, according to Article 8:29(1) the parties may refuse to do so in case of noteworthy reasons. Alternatively, the court may be requested to examine the documents in confidentiality, after which it decides whether non-disclosure or limited disclosure is justified.

The question arises whether the NMa may refuse to produce leniency material to the parties involved in the court proceedings (that is, to date: the suspected undertakings) on the basis of the ‘noteworthy reasons’ exception. This issue has not arisen in case law. Perhaps not surprisingly so, as the undertakings concerned in principle have access to leniency material during the competition proceedings. However, there may be a reason for the NMa to deny production of leniency material when it contains information covered by the obligation of professional secrecy.

If the Court accepts that there are noteworthy reasons for non-disclosure, the confidential documents may not be used in evidence for the infringement of competition law or for establishing the sanction. This rule shows that Article 8:29 needs interpretation in the light of the rights of defence.

### 3.2.2. Access via transparency requests

According to Article 110 of the Dutch Constitution the Dutch government shall observe the democratic right of public access to information in the exercise of its tasks. Under the Transparency Act (*Wet Openbaarheid van Bestuur*, hereafter: “Wob”) any member of the public may request access to documents, without having to show a specific and individual interest.

Public administrations are subject to the transparency system of the Wob, unless a *lex specialis* derogates from it. It has been held that the duty of professional secrecy of the Dutch Competition Act does not override the Wob system. Therefore, the NMa is subject to the Wob when it applies Dutch competition law or when it applies Article 101 TFEU independently from the Commission.

---

320 According to Article 8:42(1) Awb the parties concerned have an obligation to produce the documents relating to the case (‘de op de zaak betrekking hebbende stukken’).
321 Article 8:29(3) Awb.
322 The Court generally interprets the ‘noteworthy reasons’ exception in line with the reasons for refusing disclosure under the Dutch Act on Access to Administrative Information (“Wob”, see *section 3.2.2.*). At least reasons are not noteworthy if the administration would be obliged to disclose the same document to a member of the public under the Wob. See Pietermaat&De Poorter 2004, p. 38-42.
323 Article 90 Mw.
325 Documents that the NMa had lawfully denied under the commercial interests exceptions of the Wob, did have to be disclosed to Norsk Hydro as a party having suffered damages of the refusal to supply.
326 Article 3(3) Wob.
327 Article 1(a) Wob.
328 Article 90 Mw, pursuant to which the NMa shall use information about undertakings acquired in the application of Dutch competition law only for the purpose for which it was obtained.
330 However, when the NMa supports the investigation of the Commission, the information obtained about the undertakings falls under the obligation of professional secrecy of Article 28 of Regulation 1/2003 and is not covered by the Wob, see Article 90 of the Dutch Competition Act.
The Wob regime sets the general democratic right of access to information as a standard, subject to limited exceptions protecting overriding interests of confidentiality.\textsuperscript{331} Individual interests in access to information are therefore not relevant.\textsuperscript{332} The administration has a discretion in balancing the interests militating for access against those in favour of confidentiality. As a general rule, this is done on the basis of a one-by-one examination of the documents. However, if the request concerns many of the same type of documents the balancing exercise may also be done in categories.\textsuperscript{333} The court reviews whether the motivation of the rejection is sound.\textsuperscript{334}

There is no strict criterion of specification of the requested documents. The applicant has to indicate the administrative subject matter or the document related thereto.\textsuperscript{335} Given its low application threshold, the Wob seems an attractive instrument for cartel victims to seek access to the competition file. However, the NMa has denied access to leniency material under the confidentiality exceptions.\textsuperscript{336} To date this has not been subject to court review.

The question arises whether the Dutch administrative court competent in Wob cases (“the Wob court”) would be subject to the Pfleiderer test. The ECJ assigned the task of balancing the relevant EU law interests of access versus confidentiality of leniency material to “the national courts”, without confining this definition to civil cases. However, an administrative court applying the Wob does not deal with the right of cartel victims to be compensated following from Article 101 TFEU. This is because the Wob regime applies to the right of the public to access information, rather than an individual’s right of access to evidence and access to a court. It seems that a cartel victim being denied access to leniency material will not be successful in relying on the direct effect of Article 101 TFEU and Article 47 Charter before the Wob court. Nevertheless, the administrative court in Wob cases is bound to ensure the effectiveness of EU law as any other national court. Even if the Pfleiderer test does not apply, national courts must interpret national law in consistence with EU law.\textsuperscript{337} It remains to be seen whether the Wob court dealing with denials of access to leniency material would align the exceptions of the Wob with those of Transparency Regulation 1049/2001.\textsuperscript{338} In particular it will be interesting to see whether, in the light of the case law of the EU courts, leniency material may be denied as a category, or whether the documents must be examined one-by-one (see section 3.1.2.).

In the absence of court decisions, the rest of this section examines which exceptions the NMa could invoke to refuse disclosure of leniency material. It focuses on three possible exceptions, namely 1) the protection of commercial information, 2) the protection of investigation interests

\textsuperscript{331} Article 10 Wob.
\textsuperscript{332} E.g. Rechtbank Breda 13 July 2011, Visser/NMa, LJN: BR4482, para 2.4.
\textsuperscript{333} Rechtbank Breda 13 July 2011, Visser/NMa, LJN: BR4482, para 2.4.
\textsuperscript{334} Given the sensitive nature of the documents, the court may examine them in confidence under Article 8:29 Awb (see section 3.2.1.)
\textsuperscript{335} Article 3(2) Wob.
\textsuperscript{336} Decision of the NMa of 25 June 2007, case 6112, Behandeling verzoek op grond van de Wob inzake Martens & Van Oord Aannemingsbedrijf. The policy of the NMa is to protect both corporate statements and pre-existing documents, see the Joint Position of the ECN. See also the position of the Dutch government in Pfleiderer, opinion of A-G Mazák para 16.
\textsuperscript{337} This follows from the principle of loyal cooperation in Article 4(3) TFEU (see Daalder 2011, p. 538).
\textsuperscript{338} Although Regulation 1049/2001 does not change national transparency rules, national courts must ensure that their national laws do not make the exercise of the EU fundamental right of transparency excessively difficult. See recital 15 Regulation 1049/2001 and Daalder 2011 p. 535.
and 3) the protection of the interests of the parties concerned or third parties.\textsuperscript{339} It should be noted that the protection of commercial information is absolute, which means that commercial information remains confidential even though there is an overriding public interest in disclosure. The second and third exceptions to be discussed are both relative. They will warrant investigation and third party interests unless there is an overriding public disclosure interest.

- **Absolute protection of commercial information**
  Under Article 10(1)(c) of the Wob, an administration shall deny access to commercial information which it has received from natural persons or undertakings in confidence. Given its absolute character, Article 10(1)(c) seems to protect commercial information in corporate statements and pre-existing documents, even after a certain lapse of time in which the information may have lost its commercially sensitive character. However, this exception ground is unlikely to protect leniency material as a category.

- **Relative protection of investigation interests**
  Article 10(2)(d) protects the inspection, control and surveillance by public administrations. The question arises whether the public interest in effective investigation also protects leniency material after the fine has been imposed. This will depend on whether the court interprets ‘investigation’ narrowly as covering exclusively the detection and punishment of the cartel to which the follow-on claim relates, or broadly as covering the effectiveness of the detection of future cartels. On the latter interpretation, the public interest in effective investigation may protect leniency material. The NMa could refer to the risk that future leniency applicants will be deterred from cooperating having the foresight of disclosure. Case law will have to clarify whether the Dutch administrative court adheres to the interpretation of the investigation exceptions by the EU Courts. In ENBW, the General Court held that the Commission could not refuse access to leniency material as a category by the general argument that disclosure would deter future leniency applicants. It is possible that the ECJ rules differently. The uncertainty at a European level about the interpretation of the investigation exception poses doubt as to how national courts will interpret their national equivalent.

  Under the general administrative system of the Wob (not related to competition law), Article 10(2)(d) has been successfully invoked in order to protect future investigation dependent on evidence from informants.\textsuperscript{340} Of course, it remains to be seen whether Wob courts dealing with a denial of access to leniency material will choose an interpretation consistent with that of the EU courts in competition cases, or rather adhere to the general administrative application of the Wob.

  Even if the national court ruled that Article 10(2)(d) also applies to the effectiveness of future investigations of the NMa, it would have to be assessed whether there is an overriding public interest in disclosure. The court may find that the deterrent effect on future leniency applicants is too uncertain to override the public interest in disclosure. It is open to doubt whether promoting compensation of cartel victims will count as a general interest militating for democratic access under the Wob regime. In summary, it is uncertain

\textsuperscript{339} Article 10(2)(c) protects the inspection and prosecution of criminality. This exception does not seem to apply in investigations leading to administrative sanctions (see Daalder 2011, p. 334-340). Article 10(2)(e) protects private life. Its role in denying disclosure of leniency material seems marginal.

whether the NMa could rely on the investigation exceptions in order to keep leniency material confidential.

- Relative protection of the interests of the parties concerned or third parties

According to Article 10(2)(g) the requested documents shall remain confidential if the general interest in disclosure does not outweigh the interest in protecting the ‘prevention of a disproportionate benefit or harm to the (legal) persons concerned or third parties.’ The legislator envisaged an application of this exception in a wide array of situations.\(^{341}\)

In 2007 the NMa denied access to leniency material under Article 10(2)(g) of the Wob.\(^{342}\) The NMa considered that access to leniency material by third parties who are not a party to the administrative proceedings is likely to deter future leniency applicants from cooperating. This would hamper the effectiveness of public enforcement of competition law. The position of the NMa was that the interest in an effective leniency policy outweighed the right of public access to administrative documents. As noted in the last paragraph of the NMa’s decision, the applicant of the Wob request was a party to the fining proceedings in a construction cartel case. In that case the undertaking in question had consented to an accelerated procedure which included the waiver of the right of defence of the investigated undertaking to access the file of the NMa (including leniency material). The applicant did not appeal against the NMa’s denial of access.

The position of the NMa that the interest in an effective leniency policy outweighs the right of public access to documents concerned a Wob request by one of the suspected undertakings The question is whether Article 10(2)(g) could also be a basis to deny access to follow-on claimants. The exception ground has three elements: 1) a benefit or harm must be identified; 2) which is likely to be disproportionate; 3) the interest in preventing this disproportionate benefit or harm must be weighed against the general interest in disclosure of information.\(^{343}\) It seems likely that public disclosure of leniency material will cause harm to the whistleblower concerned as well as future leniency applicants. The recipient of the leniency material may use it in evidence in follow-on claims. This may place the leniency applicant in a worse position than non-cooperating cartelists (see section 2.1.3.). However, it is less clear whether this potential injury to whistleblowers is disproportionate and outweighs the general interest in disclosure, particularly after the fine has been imposed. It must be noted that the NMa has an administrative discretion in balancing the interests involved, which the Wob court marginally reviews. Given the wide application of Article 10(2)(g), it could serve as a safety net for protecting leniency material. The exception ground is not confined to investigation interests and has no European equivalent which may be restrictively interpreted by the EU courts. Therefore, it seems that leniency material is safer in the competition file on the basis of Article 10(2)(g) than on the basis of the investigations exception.

\(^{341}\) Daalder 2011, p. 372.
\(^{342}\) Decision of the NMa of 25 June 2007, case 6112, Behandeling verzoek op grond van de Wob inzake Martens & Van Oord Aannemingsbedrijf.
\(^{343}\) Daalder 2011, p. 737.
3.2.3. Access via civil proceedings

The Netherlands is one of the jurisdictions in which either individual customers of the cartel or associations representing a class of alleged cartel victims have started follow-on proceedings in relation to a cartel fined by the Commission.

A Dutch road constructions company has claimed compensation of loss allegedly suffered as a consequence of a European bitumen cartel. The Rotterdam District Court suspended the proceedings on the basis of Article 16 of Regulation 1/2003, while awaiting the cartelists’ appeal against the Commission’s decision before the General Court.

This paragraph deals with the criteria for the collection of evidence from the other party in Dutch civil proceedings and whether or not they leave room for disclosure orders of leniency material. Furthermore, it analyses how the Dutch civil court will have to carry out the balancing exercise of access versus confidentiality of leniency material in the light of Pfleiderer. Finally, it addresses the question whether under Dutch civil law the leniency applicant would be placed in a worse position compared to the other cartelists if leniency material was disclosed.

Disclosure requests on the basis of Article 843a of the Dutch Code of Civil Procedure
The legal basis in Dutch law for compensation of cartel victims is generally Article 6:162 of the Dutch Civil Code. This Article provides that the perpetrator of a wrongful act (which is amongst others a breach of an obligation established by law) is liable for the damage caused by that act and which can be attributed to him (see section 2.1.3.). Dutch civil procedure does not provide for a general duty of disclosure of documents between the parties concerned. However, Article 843a of the Dutch Code of Civil Procedure (Wetboek van Rechtsvordering, hereafter “Rv”) lays down a limited right of inspection or duty of disclosure (inzagerecht of exhibitieplicht). The rationale of this Article is that the applicant invoking the Article (“the applicant”) knows that the other party (“the defendant”) possesses certain documents which the applicant has a legitimate interest to examine, often for use in evidence. Under Article 843a the applicant may start summary proceedings (incidentele vordering) asking the court to order disclosure of specified documents. In order to be successful a claimant must 1) prove a legitimate interest in viewing the documents; 2) specify the documents; 3) prove that the documents concern a legal relationship to which he is a party. The question arises whether the elements of Article 843a permit a follow-on claimant to successfully ‘discover’ leniency material in the possession of the defendant or in the file of the NMa. It should be noted in this respect that the Dutch legislator has proposed to amend certain

---

345 E.g. Rechtbank Rotterdam 28 March 2012, Stichting Elevator Cartel Claim v Thyssenkrupp Lijfen BV and others, Lijn Lijn BW0832 (elevators cartel).
347 The applicant invoking Article 843a is not necessarily the applicant in the main proceedings (the follow-on claimant). Also the defendant cartelist may invoke the right of inspection in preparing his defence.
Articles in the DCCP in order to expand the possibilities for collection of evidence in civil proceedings.\textsuperscript{348} A follow-on claimant will not have much difficulties in fulfilling the first and third criteria. According to Parliamentary history, a legitimate interest exists if the discovery request is not unnecessarily used and – without submission of the documents – one of the parties to the proceedings would gain an unfair advantage or suffer an unfair disadvantage in comparison to the other party.\textsuperscript{349} In the light of the evidential problems of the follow-on litigant to prove causation and loss, his interest of full compensation seems legitimate.\textsuperscript{350} The third criterion is also fulfilled if the follow-on claimant seeks disclosure from the defendant cartelist. The required ‘legal relationship’ may result from contract or from tort.\textsuperscript{351} In follow-on proceedings, a cartel victim claims that the defendant cartelist has committed a wrongful or tortuous act (in the meaning of Article 6:162 BW) by infringing the cartel prohibition.

The second criterion is that a claimant has to specify which documents he needs aims to prevent fishing expeditions. This will be the main hurdle for the success of Article 843a in follow-on cases\textsuperscript{352}, since the follow-on claimant does not know in advance what evidence a competition file contains. Some guidance may be found in the references of a fining decision, unless these have been marked as confidential.\textsuperscript{353} Leniency applicants may refer in their corporate statements to pre-existing documents that could be helpful in establishing causation and loss (section 2.1.3.). However, it will be difficult for lawyers to specify which documents they need in evidence, as they do not know what information is ‘pre-existent’.\textsuperscript{354} The legislative proposal leaves the exact definition of ‘specified documents’ to the circumstances of the case at hand.\textsuperscript{355} Should the documents not be in the possession of the defendant, the applicant may ask for a court order requiring the defendant to obtain the documents from a third party. In the case of ‘missing’ leniency material, the file of the NMa may be the only possible source of the requested information. In this respect, Article 843a does not prevent that disclosure is asked from a person or administration who is not a party to the proceedings.\textsuperscript{356} There is no example of an Article 843a judgment in which a follow-on claimant asked the defendant or the NMa for disclosure of (leniency) material from the competition file. It must be noted that the application of Article 843a in competition proceedings is rare. In summary proceedings in the follow-on action of *TenneT v. ABB*, the Arnhem district court has dismissed

\textsuperscript{348} *Kamerstukken II*, 2011-2012, 33 079, nr. 2. The proposal is subject to debate debate in the Dutch second chamber. Under the proposal, Article 843a would be repealed and the right to inspection would be placed in a new Article 162a DCCP.


\textsuperscript{350} Daalder 2011, p. 483 argues that the criterion of ‘legitimate interest’ is relatively low, as the claimant does not have to prove that he has no other means to obtain the evidence. Zippro 2009, p. 556 points at case law supportive of claimants with evidential problems.

\textsuperscript{351} The application of Article 843a to a legal relationship on the basis of Article 6:162 BW follows from Parliamentary history. See Zippro 2009, p. 559; Daalder 2011, p. 484. The legislator aims to make the use of the successor of Article 843a in tortuous legal relationships more explicit:*Kamerstukken II*, 2011-2012, 33 079, nr. 3, p. 9.


\textsuperscript{353} The Commission’s policy is to redact the sources of evidence in its fining decision. See the High Court’s judgment in *NGET*, paras 56-57 (discussed in section 2.1.3 above).

\textsuperscript{354} Legal scholars have argued that it should be possible under Article 843a to request production of the documents on which a competition authority bases its decision: W. van Lierop & E. Pijnacker-Hordijk, ‘Privaatrechtelijke aspecten van het mededingingsrecht’ (Preadvies voor de vereniging van burgerlijk recht), Deventer: Kluwer 2007, p. 93; Zippro 2009.

\textsuperscript{355} *Kamerstukken II*, 2011-2012, 33 079, nr. 3, p. 10.

\textsuperscript{356} Daalder 2011, p. 483. The proposed successor of Article 843a clarifies that production of documents can be requested from both the opponent party in civil proceedings as well as from a third party outside the proceedings. See *Kamerstukken II*, 2011-2012, 33 079, nr. 3, p. 1.
an Article 843a request. However, it was not follow-on claimant TenneT who made the disclosure request to support its follow-on claim, but rather ABB in order to defend itself.

TenneT is the owner of the Dutch electricity network. It claims that it has suffered damages from an overcharge in its contract with ABB for supply of GIS. ABB was one of the cartelists in the GIS cartel. On the basis of Article 843a ABB sought disclosure of documents from TenneT relating to the latter’s allegedly suffered damages with a view to preparing its defence. Amongst other things, ABB asked access to the documents in the TenneT’s possession relating to the Commission’s investigation in the Switchgear cartel case. Although ABB was the successful leniency applicant in that case, it claimed that it did not possess the requested documents. The District court rejected the disclosure request mainly because TenneT had sufficiently substantiated that there were no more documents available in its records than those it had already submitted in the proceedings. The court also remarked that a request for disclosure of ‘all documents relating to the Commission’s GIS cartel investigation’ does not meet the specification criterion. As ABB had not substantiated that the requested documents would be in the possession of a third party (for instance the Commission), the district court set that issue aside.

Although the specification criterion may be a hurdle, on balance Article 843a leaves possibilities for it to be used for collecting evidence supporting a follow-on claim. However, there are three exceptions to the right of inspection. The possessor of the requested documents is not bound to fulfil the request if (1) the requested documents are subject to an obligation of professional privilege; (2) there are ‘noteworthy’ reasons not to disclose or (3) the administration of justice is also safeguarded without disclosure of the requested documents. The question is whether the leniency applicant or the NMa could successfully invoke these exceptions to prevent disclosure of leniency material. On the basis of Article 90 Mw the NMa may use documents of the undertakings concerned only for the purpose for which they were acquired. Although there is no case law on the exact relationship between Articles 90 Mw and 843a Rv, it is in general difficult for a specific professional secrecy Article to override general rules of transparency or disclosure. What qualifies as noteworthy reasons is subject to a case-by-case analysis. Arguably, there is an analogy with the confidentiality exceptions under the Wob (section 3.2.2.). The defendant cartelist may be entitled not to disclose sensitive business information. The NMa, if faced with a disclosure order as a third party, could possibly rely on the protection of future whistleblowers by analogy with Article 10(2)(g) of the Wob. However, it seems unlikely that leniency material may be kept confidential as a category. On the basis of the ‘administration of justice exception’ leniency material is arguably either irrelevant at all to supporting a follow-on claim or does not contain more evidence than for example the fining decision. The legislative proposal removes this exception.

357 Rechtbank Arnhem 16 May 2012, Tenet TSO BV and Saranne BV v. ABB BV, ABB Holdings BV and ABB Ltd (request for access to documents on the basis of Article 843a Rv), LJN BW7445.
358 Tennet judgment, para 3.7.
359 Judgment, para 3.5.
360 Daalder 2011, p. 484. Compare the discussion of the relationship between Article 90 Mw and the Wob in section 3.2.2.
361 Daalder 2011, p. 485.
362 According to Zippro 2009, p. 562-563, noteworthy reasons are rarely accepted as overriding the interest in the collection of evidence. Arguably the exception should be narrowly interpreted in future private enforcement cases when the infringement of competition law already has become definitive.
363 Sijmonsma already argued in his 2010 dissertation on Article 843(a) that there is no convincing reason to make the right to inspection inferior to other ways of finding evidence (J.R. Sijmonsma, Het inzagerecht, Deventer: Kluwer 2010, p. 194-198). The proposed Article 162a(2) DCCP provides for the exceptions of 1) professional privilege/professional secrecy and 2) noteworthy reasons.
The procedural debate of access versus confidentiality in the light of Pfleiderer

A Dutch civil court dealing with a disclosure request of leniency material by a follow-on claimant is bound by the Pfleiderer balancing exercise of EU law interests militating for access and confidentiality of the requested documents. Being actors of the Member States, national courts must ensure the effectiveness of EU law. The fact that a national civil court decides on the right to compensation of an alleged cartel victim triggers the application of Union law. As held by the ECJ in Courage and Manfredi, the right to redress of those injured by cartels lies in the useful effect of Article 101 TFEU. The Charter is a binding source of EU law for national courts applying the Treaties. Therefore, the Dutch civil court in determining the civil rights of a follow-on claimant must take into account the cartel victim’s right of equality of arms and right of access to a court following from Article 47 of the Charter. The right of equality of arms is especially relevant to Article 843a proceedings, as the follow-on claimant seeks access to evidence which might be in the knowledge of the defendant cartelist. The right of equality of arms is not absolute. Confidentiality interests may be overriding if they are legitimate and proportionate.

The question arises how the Dutch civil court will offset the follow-on claimant’s evidential right of access to leniency material can be offset against the confidentiality interests of the leniency applicant and the need to protect the competition authority’s file. Under Dutch civil proceedings, a party may not refuse to submit evidence on the basis of the privilege against self-incrimination or the right to privacy. It is for the judge to weigh the interests of access against the interests of confidentiality. Therefore, it seems that neither the defendant, nor the NMa if it was requested to disclose as a third party, could refuse to submit leniency material by arguing that it is irrelevant to prove causation or harm.

It is recalled that the English High Court in NGET examined the requested documents in confidence and applied the Pfleiderer balancing exercise of access versus confidentiality on a one-by-one analysis. This would also be possible in Dutch civil proceedings, as according to Article 843a(2) the judge determines the way in which the requested documents will be disclosed. However, the parties must consent to the use in evidence of documents that they have not been able to examine. The right of inspection may be exercised either in summary proceedings or in the main proceedings. The decision on disclosure is subject to two appeals.

The position of the leniency applicant compared to the other cartelists in case of disclosure

If leniency material is disclosed pursuant to Article 843a, the question arises whether the leniency applicant will be worse off than the other cartelists who did not cooperate. This depends on various factors. First, Dutch law provides for joint and several liability of the cartelists. The follow-on claimant may address each cartelist individually on the basis of the criteria of Article 6:162 BW. Furthermore, the cartelists may be individually responsible for the

---

364 Article 6(1) TEU.
367 HR 20 December 2002, NJ 2004, 4, para 4.4.4 (Lightning Casino/Antillen). The object of this litigation was administrative. However, it came before the civil judge because the Dutch Antilles at the time did not have a separate administrative judiciary. Arguably the decision is also valid for civil proceedings (Case note Vranken, NJ 2004, 4, para 7).
369 Article 337 Rv.
group under Article 6:166 BW.\textsuperscript{370} The leniency applicant is thus not more liable than the other cartelists under Dutch law. A second factor is that the finding of an infringement against the leniency applicant is proven earlier than against the other cartelists, as the leniency applicant has incriminated itself in its corporate statements. However, this difference between the cartelists does not make it quicker to complete civil proceedings against the leniency applicant, as the national civil court will have to stay the proceedings until all appeals against the finding of an infringement and the fine by the other cartelists are exhausted at an EU level.\textsuperscript{371} A factor connected to this, is whether the Dutch civil court will wait with ordering disclosure of leniency material until the appeals at an EU level are exhausted. It seems, therefore, that it does not only depend on a civil disclosure decision whether or not the leniency applicant is worse off than the other cartelists.

### 3.3. Comparison and explanation

The preceding section described three possible routes for third party access to leniency material under the European and Dutch legal systems. At this stage, the similarities and differences between the two legal systems with regard to access via competition procedure, transparency requests and via civil procedure are enquired and (if possible) explained.

#### 3.3.1. Access via administrative competition proceedings

The main question here was whether follow-on claimants have a right of access to the file on the basis of their rights of defence. This could be argued by reference to the application of equality of arms in the determination of civil rights and obligations (Articles 47 Charter and 6 ECHR). Both legal systems do not confer a right of access to the file to cartel victims based on this rationale.

Dutch competition proceedings strictly adhere to the criteria for a legitimate interest in relation to a decision. The Dutch General Administrative Act does not explicitly exclude the right of cartel victims to become involved in the proceedings by issuing an appeal against the infringement decision. However, their individualised interest in the decision will be difficult to prove. In proceedings before the Commission and the EU Courts cartel victims may be heard as ‘other parties with sufficient interest’.

Under Dutch administrative law consumer organisations are regarded as legally interested within the administrative competition proceedings. The interests of cartel victims could therefore be represented by consumer organisations. The practical success of this will have to be clarified by case law.

In European competition proceedings, cartel victims have a right to access the non-confidential version of the Statement of Objections provided that they are admitted as a complainant. The necessary legal interest for issuing a complaint may lie in the economic harm that an end-customer has suffered as a consequence of a cartel. While complainants are closely associated to European competition proceedings, their position in the Dutch legal system is weak. Dutch competition procedure does not accord complainants a right of access to documents.

\textsuperscript{370} Zippro 2009, p. 359.
\textsuperscript{371} Masterfoods, Article 16 Regulation 1/2003.
In both legal systems the specific competition rules provide for a right of access to the competition file to the investigated undertakings on the basis of their rights of defence. Both the Commission’s and the NMa’s leniency programme state that the investigated undertakings may access the corporate statements of the leniency applicants, provided that they are only used for the purposes of the administrative competition proceedings.

A refusal by the NMa to produce documents to the other parties in court proceedings (that is to date: the suspected undertakings) may be reviewed by the court under Article 8:29 of the Dutch General Administrative Act. This Article provides for a separate procedure in which the NMa may ask the court to examine certain confidential documents in confidence. Case law will have to point out the relationship between Article 8:29 Awb and the legitimate interest of consumer organisations. There is no European equivalent. The European Courts will deal with the hearing officer’s decision to deny access within the context of the main proceedings.

3.3.2. Access via transparency requests

Both the European Commission and the NMa, being public institutions, are subject to transparency obligations. Regulation 1049/2001 as well as the Wob protect the general public interest in disclosure. The instruments are based on any citizen’s democratic right of access to public documents. This right is laid down in the constitution of both legal systems. Both instruments do not require a legitimate interest for a transparency request to be valid.

Furthermore, the threshold for specifying the requested documents is low. This can be explained by the purpose of both legal instruments to ensure a widest possible access in the light of democratic transparency.

Both Regulation 1049/2001 and the Wob offer a legal possibility for follow-on claimants to request access to leniency material. The Commission and the NMa’s policy is to invoke the confidentiality exceptions in order to deny access to leniency material. The exception grounds of the Wob are wider than those of the Transparency Regulation. While both instruments provide for exceptions to democratic access on the basis of commercial interests and in the interests of investigations, the Wob adds a possibility for denial of access in order to prevent a disproportionate benefit or harm to the undertakings concerned or third parties, unless there is an overriding public interest in disclosure.

A denial of access is subject to review by the Commission and the NMa itself and an appeal before respectively the EU Courts and the Dutch administrative court in two instances. The Wob has so far not been invoked by a follow-on claimant to obtain leniency material. However, the Commission has in several cases denied access to leniency material to cartel victims under the exceptions of Regulation 1049/2001. Case law of the CJEU points out that the Commission must apply the exceptions on a document-by-document analysis. Furthermore, the exceptions are interpreted narrowly in order to ensure a widest possible access. Therefore, the Commission cannot deny access to leniency material as a category. The Wob has mainly been interpreted in the context of general administrative law rather than competition law. It seems that the Pfleiderer test of balancing the follow on claimant’s right to compensation against confidentiality of leniency material is not relevant in Wob cases. The competent Dutch court offsets the democratic right of access against limited confidentiality exceptions. It does not apply the individual right to compensation following from Article 101 TFEU. However, in the light of its obligation to ensure the effectiveness of EU law, it remains to be seen whether Dutch transparency courts in competition cases will interpret the investigation exception of the Wob narrowly in line with the General Court in ENBW (which may still be overturned by the ECJ).
The procedural debate of access versus confidentiality under both transparency instruments takes place within the framework of the general public access as a standard subject to limited exceptions. The question is whether this transparency system is suitable for the Pfleiderer test which requires EU fundamental rights and public and private enforcement interests to be weighed on a case-by-case basis. The question whether the use of Regulation 1049/2001 and the Wob by follow-on claimants should be regarded as an unlawful ‘circumvention’ of their lack of access to the file in competition proceedings, is subject to academic and judicial debate in both legal systems.

3.3.3. Access via civil proceedings

After the High Court’s decision in NGET it seems that Pfleiderer confers the task on national civil courts to decide on inter partes disclosure of leniency material obtained by NCAs as well as by the Commission. The weighing exercise of the relevant EU interests will have to be carried out in the context of national civil procedure. While the appeal by Alstom is pending, it is unclear what is the precise relationship between Article 15(1) of Regulation 1/2003 and the application of the Pfleiderer test to leniency material acquired by the Commission but in the possession of the defendant. The Notice on Cooperation between the Commission and National Courts (a source of soft-law) states that corporate statements are not transmitted to national courts. However, applying the Pfleiderer test the national court has jurisdiction to order disclosure of leniency material in the possession of the defendant party.

The EU law component of the comparison in this situation has thus two limbs: on the one hand it is governed by Regulation 1/2003, on the other hand it is developed by different national legal systems. At present Member States either carry out the Pfleiderer interests on a one-by-one analysis of the documents in court, or the legislator has already drawn the balance between access and confidentiality.

As to the Dutch component of the comparison, Article 843a of the Dutch Code of Civil Procedure offers the possibility for follow-on claimants to ask the defendant party (the cartelists) or a third party (the NMa) for disclosure of specified evidence. The success of this route is still to be clarified by future case law. The criterion of specification of the evidence seems to be the biggest hurdle. This hurdle can be explained from the lack of obligatory interpartes disclosure in Dutch civil procedure and the aim of the legislator to prevent fishing expeditions. However, the risk of fishing expeditions seems artificial in relation to documents from the competition file (in the possession of the defendant or the NMa). As the High Court also acknowledged in NGET, the follow-on claimant will not know in advance what evidence it contains.

The outcome of the comparison is, therefore, that in both legal systems the possibility of civil law disclosure of leniency material exists. The success of this route for follow-on claimants will depend on national interpretation and EU clarification of the Pfleiderer ruling. Civil law disclosure seems not the only source of possible deterrence of leniency applicants. This will also depend on how substantive civil law of the applicable national system allocates the responsibility between cartelists.
4. Evaluation: harmonisation or case-by-case analysis?

This thesis has aimed to explore the legal routes under the European and the Dutch legal systems for follow-on claimants to get access to leniency material from the Commission’s and the NMa’s file and what recommendations can be made for harmonisation of third party access to leniency material.

In the absence of EU harmonisation of the conditions for follow-on actions, the ECJ ruled in Pfleiderer that it is for the national courts of the Member States to determine the conditions under which third parties claiming damages as a consequence of a cartel have access to leniency material. The procedural routes of access are subject to national law. However, this procedural autonomy of the Member States is constrained by the principles of equivalence, effectiveness and judicial protection.

The task of national courts is to ensure on the one hand full compensation of cartel victims, while on the other hand protecting leniency programmes. This comes down to a test of ‘access versus confidentiality’ within the framework of national law.

The joint position of the NCAs and the Commission is clear: leniency material, that is both corporate statements and pre-existing documents, will not be disclosed as this would deter leniency applicants and thereby frustrate an important investigation mechanism. The question is, therefore, at what stage the EU legislator could intervene with a harmonising instrument. The Commission has announced a legislative proposal in its Work Programme for 2012. This was recently confirmed in a speech by commissioner Almunia:

"We are committed to protecting our leniency policy following last year’s Pfleiderer judgment. This is a matter of common concern for Europe’s public enforcers. Just a few weeks ago, the heads of the agencies associated in the European Competition Network adopted a joint resolution on the protection of leniency material in the context of damage actions. But we are seeking a more general solution. I intend to propose legislation later this year that will strike the right balance between the protection of leniency programmes and the victims’ rights to obtain compensation." 372

It remains to be seen what will be harmonised. The Draft Directive on Damages Actions that was withdrawn in 2009 aimed to protect corporate statements. However, the Joint Position of the ECN shows that the members are determined to protect all leniency material. The announced legislation should not to deter leniency applicants from cooperating with competition authorities, while at the same time ensuring evidence needed for cartel victims to obtain compensation.

Integrating cartel victims into national or European competition proceedings seems a solution that complies with Article 6 ECHR. It would give competition authorities (in administrative appeal) and European as well as national courts the possibility to balance the need for access to leniency material against its confidential and self-incriminatory nature. For this solution, Regulation 1/2003 would have to be changed, as in its present status the conditions of competition proceedings are left to the autonomy of the Member States.

An important argument of competition authorities not to disclose leniency material is that leniency applicants should not be ‘punished’ for their cooperation by facing greater civil liability than non-cooperating parties. A single European leniency programme could improve the incentives to apply for leniency. In this respect, the Hungarian leniency policy, which mitigates the risk that it is quicker for cartel victims to recover from the leniency applicant,

372 Speech Almunia ‘Antitrust enforcement: challenges old and new 19th international competition law forum
could serve as an inspiration (section 2.1.2.). However, it seems that a single European leniency programme is too ambitious, given the connection between leniency programmes and the particularities of national civil liability law – which differ from Member State to Member State. An intermediate solution could be to lay down in a harmonising instrument that corporate statements will not be disclosed, whereas pre-existing documents are disclosed if necessary to prove a follow-on claim. However, at the same time distinguishing between pre-existing documents and corporate statements seems artificial. Although pre-existing documents are in theory not specifically created for the purposes of leniency, their existence would be hidden without the indications in the corporate statements to factual evidence.

Another solution could be to remove the need for access to leniency material in order to obtain civil damages. The main evidential problems for follow-on claimants are now the establishment of a causal link and the quantification of damages. A directive could harmonise the minimum conditions for follow-on claims, in which a causal link is earlier assumed.

Perhaps a more balanced solution lies in reinforcing a decentralised enforcement of European competition law. National civil courts are bound by the Charter when deciding on disclosure of leniency material to follow-on claimants. This follows from the ECJ judgments in Courage and Manfredi that the right to full compensation lies in the useful effect of Article 101 TFEU. The corresponding Articles 6 ECHR and 47 Charter guarantee the rights of access to evidence and access to a court. It is therefore submitted that national civil courts should take these rights as a point of departure in applying the Pfleiderer test.

However, the right of access to a court is not absolute. It leaves room for confidentiality interests if they are necessary and proportionate restrictions. As regards necessity, relevant public enforcement interests include the need to protect the functioning of a leniency system and the legitimate expectation of the whistleblower that leniency material shall not become subject to a less favourable system of disclosure when exchanged in the ECN. The proportionality of relying on these enforcement interests lies in the court’s case-by-case assessment of the requested documents. This seems also a procedure in accordance with the Article 6 ECHR requirement of continuous judicial supervision. It comes down to an independent and specialist court review of an initial refusal of disclosing potentially relevant evidence by the defendant cartelist. As the High Court’s application of Pfleiderer well shows, proportionality questions are: Does the injured party have evidential problems for instance in establishing causation and harm? Will disclosing leniency material be of more avail than other non-confidential sources such as the Statement of Objections? Will the leniency applicant be placed in a worse position compared to other cartelists when the material is disclosed?

The advantage of this route of access is that all national courts are bound by the minimum rights of defence of Articles 6 ECHR and 47 Charter. However, the conditions for access to evidence in the possession of the defendant party or a third party depend on the national legal system at hand. It is recalled that the Austrian legislator only permits interpartes exchange of leniency material if all parties consent. The German legislator has planned to protect all leniency material from disclosure. The main hurdle for follow-on claimants to obtain leniency material in the possession of the defendant under Dutch law would be the need to specify the evidence that the follow-on claimant needs. This is problematic, as the follow-on claimant does not know in advance where the evidence proving mainly causation and harm pre-exists. Given that under Dutch law the only possibility for follow-on claimants to get access to leniency material is via
civil procedure, it is submitted that the criterion of specification should not be interpreted too strictly.

In summary, if national civil courts carefully apply their procedural autonomy in deciding on the question of access versus confidentiality of leniency material, this seems an adequate system of determining the civil rights of a cartel victim compared to other legal ‘routes’. Transparency courts do not weigh the individual interest of cartel victims in compensation, but rather the general democratic right of access to information. Competition proceedings before the Commission and the NMAs are strongly investigation focused. An integration of cartel victims in these proceedings bears the risk of unduly mixing investigation with compensation interests. It should be noted that a civil court often orders disclosure from the records of the defendant. This does not lift the veil of secrecy from the file of competition authorities.

373 The Commission has also suggested cartel victims to request disclosure inter partes via civil proceedings. See the speech by A. Italianer (Director-General of DG Competition at the European Commission) on the 5th international competition conference (Brussels, 17 February 2012), ‘Public and private enforcement of competition law’.
5. **List of sources**

In using this list of sources, the reader should note the following things:

- The page numbers of the papers of Wouter Wils referred to in this the footnotes of this thesis correspond to the online versions available on www.ssrn.com
- I have accessed the webpages for the last time on 13 July 2012.
- The 2011 cases of the Court of Justice and the General Court are not yet reported, however they are accessible on www.curia.europa.eu

**Legislation**


**Case law**

**European Court of Justice**

Judgment of 7 June 2007, C-222/05 Van der Weerd [2007] ECR I-04233
Judgment of 21 September 2010, Joined cases C-514/07 Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission, [2010] ECR I-08533
Judgment of 22 December 2010 Case C-279/09 DEB Deutsche Energiehandels- und Beratungs-gesellschaft mbH v Bundesrepublik Deutschland
Judgment of 5 May 2011 Case C-543/09 Deutsche Telekom AG v Bundesrepublik Deutschland
Judgment of 14 June 2011, Case C-360/09, Pfleiderer AG v Bundeskartellamt
Judgment of 25 October 2011, C-110/10, Solvay SA v European Commission
Judgment of 8 December 2011, case C-279/09P and C-389/10P, KME v European Commission
Judgment of 21 December 2011, Case C-482/10 Cicala
Judgment of 14 February 2012, Case C-17/10, Toshiba Corporation v. Úřad pro ochranu hospodářské soutěže

General Court
Judgment of 29 June 2010 Case C-139/07 Commission v Technische Glaswerke Ilmenau [2010] ECR I-5885
Judgment of 3 March 2011, Case T-110/07, Siemens AG v European Commission
Judgment of 24 March 2011, Case T-385/06, Aalberts v European Commission
Judgment of 12 July 2011 Case T-112/07, Hitachi Ltd and others v European Commission
Judgment of 15 September 2011, Case T-234/07, Koninklijke Grodaal v European Commission
Judgment of 15 December 2011, T-437/08 CDC Hydrogene Peroxide v European Commission
Judgment of 22 May 2012 Case T-344/08 ENBW Energie Baden-Württemberg v Commission
Pending Case T-164/12, Alstom and others v Commission, [2012] OJ C165/32

European Court of Human Rights
Judgment of 21 February 1975, Golder v United Kingdom, [1979-80] 1 EHRR 524
Judgment of 8 June 1976, Engel and others v The Netherlands, Application nr. 5100/71
Judgment of 16 December 1992, Niemietz, Application number 13710/88
Judgment of 16 April 2002, Colas Est and Others v France, Application number 37971/97
Judgment of 24 June 2003, Dowsett v United Kingdom, [2004] EHRR 41
Judgment of 15 July 2003, Fortum Corp v Finland [2004] 38 EHRR 36
Judgment of 29 June 2007, O’ Halloran and Francis v United Kingdom, 46 EHRR 21
Judgment 27 September 2011, Menarini Diagnostics srl v Italy, Application number 43509/08

Dutch courts
Rechtbank Rotterdam 26 November 2002, Nederlands Elektriciteits Administratiekantoor BV tegen NMa (Norsk Hydro), LJN: AR4219
HR 20 December 2002, Lightning Casino/Antillen, with case note Vranken, NJ 2004, 4
CBB 17 November 2004, Glasgarage Rotterdam BV en Carglass BV tegen NMa, LJN: AR6034
CBB 11 November 2005, VVR v. Judgment of the Rotterdam Court in VVR/NMa, LJN: AU6574
ABRvS 7 February 2007, NMa tegen Koninklijke Gazelle BV, LJN: AZ7951
Rechtbank Breda 13 July 2011, Visser/NMa, LJN: BR4482
Rechtbank Arnhem 26 October 2011, Tennet TSO BV v. ABB BV, ABB Holdings BV and ABB Ltd, LJN BU3546
Rechtbank Rotterdam 28 March 2012, Stichting Elevator Cartel Claim v Thyssenkrupp Liften BV and others, LJN BW0832
Rechtbank Arnhem 16 May 2012, Tennet TSO BV and Saranne BV v. ABB BV, ABB Holdings BV and ABB Ltd (request for access to documents on the basis of Article 843a Rv), LJN BW7445

Other national courts
Oberlandesgericht Wien (Austria), Reference for a preliminary ruling of 20 October 2011 Bundeswettbewerbsbehörde v Donau Chemie AG and Others (Case C-536/11) OJ C 013, 14 January 2012, p. 5-6. Original reference:
Amtsgericht Bonn (Germany), Beschluss of 18 January 2012, case 51 Gs 53/09.

Http://ec.europa.eu/competition/court/antitrust_requests.html

**NMa decisions**

Decision of the NMa of 25 June 2007, case 6112, Behandeling verzoek op grond van de Wob inzake Martens & Van Oord Aannemingsbedrijf.

**National legislative proposals**

*Kamerstukken II*, 2011-2012, 33 079, nrs 2 and 3 (proposal on the right of inspection)

*Kamerstukken II*, 2011-2012, 33 186 (proposal on the Consumer and Market Authority)


**Advocate General Opinions**

Opinion Advocate General J. Mazák in C-360/09 Pfleiderer

**Soft law instruments**

Commission Notice on Cooperation within the Network of Competition Authorities *OJ 2004 C 101/43* (‘Network Notice’)
ECN model Leniency Programme of 29 September 2006
Commission 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 (2005/C 325/07)
Commission Notice on the Handling of Complaints by the Commission under Article 81 and 82 of the EC Treaty [2004] OJ C101/65
Notice on the cooperation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC [2004]OJ C101
Commission Notice on the immunity from fines in cartel cases, OJ 2006 C298/17 (‘Leniency Notice’)
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 actions”.

Other documents

Speech by Joaquin Almunia (Vice President of the European Commission responsible for Competition Policy) of 8 June 2012, “Antitrust enforcement: challenges old and new”, 19th international competition law forum St Gallen. Reference: SPEECH/12/428.

Speech by A. Italianer (Director-General of DG Competition at the European Commission) of 17 February 2012, 5th international competition conference Brussels, ‘Public and private enforcement of competition law’, p. 6-8.: http://ec.europa.eu/competition/.../sp2012_02_en.pdf


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 actions”.


Books

Andréangeli 2008
Van Bael 2011  

Basedow 2007  

Chalmers, Davies & Monti 2010  

Craig & De Bürca 2011  

Daalder 2011  

Ekelmans 2007  

Gerbrandy 2009  

Jans 2007  

Jones and Sufrin 2011  

Van Lierop & Pijnacker-Hordijk 2007  

Pietermaat and De Poorter 2004  

Sijmonsma 2010  

Waelbroeck, Slater and Even-Shoshan 2004  

Zippro 2009  
**Articles**

**Amadór Sanchez 2012**  
P. Amadór Sanchez, ‘Spanning tussen de vertrouwelijkheid van kartelprocedures en civiele schadevergoedingsacties’, *Actualiteiten Mededingingsrecht* 2010-12, 195-197

**Beumer and Karpetas 2012**  

**Broks 2001**  

**Buendía and Givaja 2012**  

**Buijze 2011**  

**Burnside 2012**  
Burnside A. ‘Bent copper and human rights: Closing the gap between the Strasbourg and Luxembourg courts remains a challenge following the KME/Chalkor and Menarini cases’, *Competition Law Insight* 21/02/2012

**Canenbley and Steinvorth 2011**  

**Caruso**  

**Cauffman 2011**  

**Drijber 2011**  
B.J. Drijber, ‘Zaak C-360/09, Pfeiderer AG/Bundeskartellamt’, *SEW Tijdschrift voor Europees en economisch recht* 2011-10

**Geradin 2012**  
Geradin, EU *Competition law and economics*, Oxford: OUP 2012, p. 321

**Gerbrandy 2009**  

**Gerbrandy 2012**  

**Geursen 2011**  
Goddin 2011
G. Goddin, ‘Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where does the Court of Justice of the EU strike the Balance?’, *Journal of European Competition Law & Practice* 2011 (2)(1)

Haasbeek 2009
L. Haasbeek, ‘De WOB en de Eurowob in het mededingingsrecht’, *Markt & Mededinging* 2009 (5)

Heinisch and Cochrane 2012

Hempel 2012

Jukneviciute and J. Capiau 2010
V. Jukneviciute and J. Capiau, “The State of ECN leniency convergence”, *Competition Policy Newsletter* 2010 (1)

Kuijper 2011
M. Kuijper, *Pfleiderer AG/Bundeskartellamt, Markt & Mededinging* 2011 (5)

Nauta 2012
T. Nauta, ‘De inroepbaarheid van het Handvest voor de Europese en nationale rechter’, *Nederlands Tijdschrift voor Europees Recht* 2012-1

Örücü 2006

Pahladsingh and Van Roosmalen 2012
Pahladsingh and Van Roosmalen, Het Handvest van de grondrechten van de Europese Unie twee jaar juridisch bindend: rechtspraak in beweging?, *Nederlands Tijdschrift voor Europees Recht* 2012-2

Polley and Zagrosek 2012

Schwab and Steinle 2008

Smits 2012

Stijnen 2012
R. Stijnen, ‘Menarini en KME: marginale of volle toetsing van mededingingsboetes door de rechter?’, *Nederlands Tijdschrift voor Europees Recht* 2012-4

Stijnen 2012
R. Stijnen, ‘Menarini en KME: marginale of volle toetsing van mededingingsboetes door de rechter?’, *Nederlands Tijdschrift voor Europees Recht* 2012-4

Vandenborre 2011
I. Vandenborre, ‘The confidentiality of EU Commission Cartel records in civil litigation: the ball is in the EU Court’, *European Competition Law Review* 2011, 116
Völcker 2012
S. Völcker, ‘Case C-360/09 Pfleiderer AG v Bundeskartellamt, Judgment of the Court of Justice (Grand Chamber of 14 June 2011)’, Common Market Law Review 2012 (49) 695-720

Wils 2003

Wils 2003

Wils 2007

Wils 2009

Wils 2011

Wils 2012