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Spring April 7, 2015

Access to competition file as a precondition of access to justice - A dialectical approach to justice and effective competition

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Rezumat:

Această lucrare este rezultatul unor luni de cercetare în domeniul de aplicare a dreptului concurenței în sfera privată și după publicarea unei serii de articole în e-Competitions sub egida Kluwer Law International care au avut ca obiect cea mai recentă jurisprudență în domeniul amintit. Cartelurile ca și fenomen mondial nu constituie o situație neobișnuită într-o lume globalizată. În ciuda acestui fapt, dreptul Uniunii prevede instrumente, așa spune destul de obtuze care pot utilizate în rezolvarea cauzelor de despăgubiri civile pentru încălcări ale dreptului concurenței de tip cartel. Aplicarea metodei dogmatice trebuie avansată către un nivel de analiză mai profund, de tip dialectic, în scopul de a descoperi cât mai multe aspecte ale acestei realități. Accentul cade pe accesul la documente, ca și condiție primordială a accesului la justiție, deoarece aducerea dovezilor cu privire la existența unei încălcări a dreptului concurenței ar fi imposibilă în cazul în care accesul la dosarul autorităților publice ale concurenței ar fi interzis.

Cuvinte cheie: aplicarea dreptului concurenței în sfera privată, politica de clemență, acces la documente, principiul efectivității, amicus curiae

Abstract:

This paper comes as a result of a couple of months of research in the field of private enforcement of competition law and after writing a series of articles in e-Competitions under Kluwer Law International dealing with the most recent case law. The occurrence of global cartels is not an unusual state in a globalized world. Despite this reality, the Union law provides quite blunt instruments to deal with the case of civil damages for cartel infringements. The use of the legal dogmatic method should be enhanced to a level of deeper dialectical analysis in order to reveal more aspects of this reality. The focus falls on the access to documents as a precondition of access to justice, since bringing evidence about the infringement would be rendered impossible, if access to the Competition file was denied.

Keywords: private enforcement of competition law, leniency, access to documents, effectiveness, amicus curiae

Access to Competition file as a precondition of access to justice – A dialectical approach to justice and effective competition

I. Introduction

Openness, a fundamental principle of Union law increases the legitimacy of public institutions and the confidence of citizens in them. Conversely, the lack of information may give rise to doubts in the minds of citizens, not only regarding the lawfulness of an isolated act, but also concerning the legitimacy of the decision-making process as a whole¹. A decision denying disclosure of public documents is compatible with EU law only if it is based on one of the exceptions provided for in Article 4 of the Regulation no 1049/2001. Moreover according to constant case-law, the exceptions must be construed and applied strictly, so as not to defeat the application of the general principle of transparency². The principle of proportionality entails in addition that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view³.

The information to be disclosed that I discuss about in the present paper relates to the content of the antitrust files produced by Competition Authorities in the EU. All officials working for any Competition Authority are required even after their duties have ceased, not to disclose information of the kind covered by the duty of professional secrecy, in particular information about undertakings. This information may be disclosed to other Competition Authorities in the EU and even outside the EU, based on principles such as reciprocity, comity and the condition that the duty of professional secrecy applies also for the receiver.

As known national courts may act as competition authorities since the organization of enforcement at the national level is an issue determined by the national legislation. The access of a potential claimant for antitrust damages to the public proceedings files falls within the scope of national procedural autonomy, thus the matter will be judged against the standard of effectiveness and equivalence imposed by Union law⁴.

¹ CJEU, 1 July 2008, Joined cases C-39/05 P and C-52/05 P, Turco, [2008] I-04723 paragraph 59

² CFI, 26 April 2005, Joined Cases T-110/03, T-150/03 and T-405/03 Sison v Council [2005] ECR II-1429 paragraph 45; see, by analogy, CFI, 7 February 2002, Case T-211/00 Kuijer v Council [2002] ECR II-485 paragraph 55

³ CJEU, 6 December 2001, Case C-353/99 P Council v Hautala [2001] ECR I-9565 paragraph 28

⁴ CJEU, 20 September 2001, Case C-453/99, Courage [2001] ECR I-06297

In order to avoid the extrajudicial use of the documents, statements and confessions produced by a leniency applicant, the European Commission has inserted in its 2006 Leniency Notice⁵ the condition that any written statement made in the context of leniency regime may not, as such, be disclosed or used for any other purpose than the enforcement of Article 101 TFEU. Moreover where disclosure of leniency corporate statements is at stake the Commission may intervene as *amicus curiae* in foreign pending proceedings as the principle of international comity may prevent the disclosure. Similar strategies to protect the leniency applicants can be expected to exist also in relation to national regimes assuring immunity from or reduction of fines⁶.

At first sight we seem to be confronted with a dilemma inquiring whether to disclose or not certain information that can deter the effective enforcement of Article 101 TFEU by making the participants in a cartel to be less cooperative. The same disclosure can nevertheless enhance the effectiveness of enforcement by giving support to the impending action for damages.

The presence of a global cartel on the relevant market is interrupted by the intervention of the public enforcer. This act opens for a new possibility in dialectical terms. However the new possibility will be administered by 27 different national jurisdictions in more or less different manners. How much different can these manners be in order to maintain the unity of the supranational system of EU law?

II. Uniformity versus diversity

The European integration is a pursuit that employs a plurality of means, both legislative and non-legislative in character. The implementation of Union law through mutual recognition, comitology and sincere cooperation represents a unique method to derive unity from diversity. The cornerstone of the principle of mutual recognition is the famous judgment in *Cassis de Dijon*.

‘There is therefore no valid reason why, provided that [alcoholic beverages] have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State’⁷

⁵ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17 Even after a decision has been taken in a Competition file, the Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations stipulated by article 4 of the Regulation 1049/2001.

⁶ CJEU/AG Jääskinen, 7 February 2013, Case C-536/11, Donau Chemie and CJEU, 14 June 2011, Case C-360/09, Pfeleiderer [2011] ECR I-05161

⁷ CJEU, 20 February 1979, Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] I-00649

The fact that deliberation takes place in a norm-minded framework represented in the first case by the mutual recognition and in the second by the steering role of the Commission adds a normative meaning to the deliberative process. In my view the slogan '*unity in diversity*' cannot be understood as '*united they diverge*', but just the opposite that any dialectical process starts from a position of opposed determinations and ends with their imminent unification, while opening for a new confrontation i.e. a new dialectical process.

Divergence and convergence are direct consequences of co-existence in the same space, a space where cooperation is the main norm. Integration is a dialectical process in itself. Setting the pursuit of integration as a definite intention amounts also to the recognition of its necessity; admitting its necessity implies the acknowledgment of national diversity as a normative source in cross-border situations.

The mutual recognition is applicable also in the field of judicial cooperation in criminal and civil matters. In this context I want to underline that there are limits to the extension of the application of national law definitions as developed by the home state. It must be a genuine cross-border element that induces the duty of mutual recognition. Moreover, in relation to movement of persons, the activity in the host member state must have a temporary character and do not involve an actual business establishment or permanent residence.

Binsbergen is the first case where the question of abuse of rights has been tackled. The case is about a Dutch citizen acting as a lawyer before a Dutch court and moved his residence to Belgium, while the case was still pending. The question was whether residence should be a condition for being able to represent clients before Dutch Court. If the rules of conduct of Netherlands are supposedly stricter than the Belgian corresponding rules, a lawyer whose clientele is mainly Dutch cannot circumvent them by making appeal to the rights established by Article 56 TFEU that stipulates the freedom of services.

Just the opposite if it is just a matter of a temporary assignment on the territory of another Member State a lawyer who is subject to a less strict code of conduct shall be allowed to represent his client. This means that the effort required to adapt in the case of a permanent establishment is more onerous. In a sense the incidence of the cross-border element becomes weaker subsequent to the establishment in the host member state, point after the rules of the latter become gradually applicable and the cross-border element ceases to be significant.

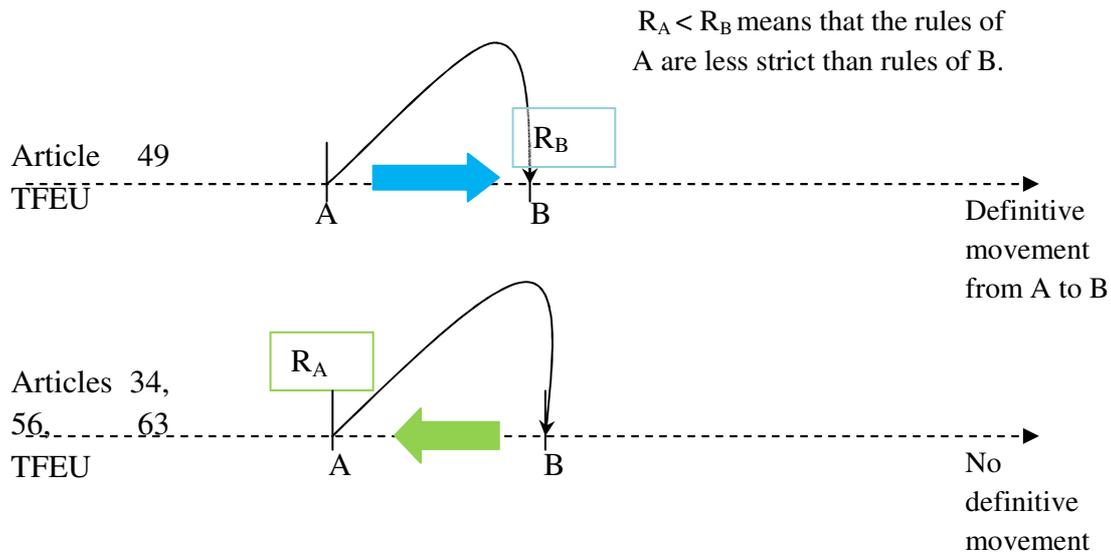


FIGURE 1: Temporary business activities, sales of goods, portfolio investments, and provision of services imply that the stricter rules of the host country B do not apply. In the case of permanent establishment in host country B the stricter rules become applicable.

In the field of procedural rules that are relevant for the matter of private enforcement of competition we have the same situation of diverse rules and in some jurisdictions the access to documents will be easier than in others. Any citizen of the Union and any resident of a Member State has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium. Once the enforcement of the competition law has been decentralized the access to Competition file has as well been transferred from the core to the periphery.

In a sense the situation is antithetic to the one in *Cassis de Dijon* and *Binsbergen*. A set of common rules on access to documents has been replaced with a plurality of procedural rules that must ensure the same level of protection by employing diverse means. The main method of implementation for the field of competition is coordination of the enforcement activities both horizontally, but also vertically.

Diversity of legal cultures is a fact, though its importance is just incidental in this context, since the Union alone has the competence to determine the relationship between national laws and provisions and the EU rules giving effect to Article 101 TFEU. In the meanwhile within the scope of the preliminary ruling mechanism the national courts cannot be compelled to create new remedies, unless there are no legal remedies available under national law that can ensure respect for the right under Union law⁸.

⁸ CJEU, 13 March 2007, Case C-432/05 *Unibet* [2007] ECR I-2271

...it was not intended to create new remedies in the national courts to ensure the observance of [Union] law other than those already laid down by national law. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under [Union] law. Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Union law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right⁹.

A cartel affecting the internal market actually or potentially cannot be seen as a phenomenon with a clear cut geographic localisation. While in the free movement cases we often have an unambiguous movement as shown from one member state to another, a cartel has multidimensional implications that cannot be delineated geographically in an explicit manner. Their geography is fuzzy and several regional and national markets are most often affected. Therefore we can't use the simple logic exposed above in relation to *Cassis de Dijon* and *Binsbergen*, where stricter or less strict rules apply depending on the character and direction of the movement of persons, goods or capital. The decentralization of competition law made possible for the Commission to focus on some cases of special importance for the interests of the Union. It also allows in most cases that individuals in their position of plaintiffs may address claims before a court and within a legal system that they are closer connected with. It allows the respondent to construct a defence making appeal to legal means, which they are more acquainted with. However I will show further on that litigations under competition law imply a level of complexity that cannot be easily tackled and comprised within the scope of the usual logics applied to equations of applicable law on non-contractual obligations and jurisdiction of courts. What it's important to retain is that the logic of '*unity in diversity*' must be understood as a malleable approach oriented towards unification of law.

⁹ *Unibet*, supra footnote 8, paragraphs 40-42

III. Decentralization of competition law

The competition authorities of the Member States and their courts and tribunals are required to apply Articles 101 TFEU and 102 TFEU, where the facts come within the scope of European Union law, and to ensure that those articles are applied effectively in the general interest. The Commission is entitled to refer to the public interest of the Union in order to determine the degree of priority to be applied to the various cases brought to its notice. It must set out the legal and factual considerations which led it to conclude that there was insufficient Union interest to justify investigation of the case¹⁰.

Article 101 TFEU is an application of the general objective of the activities of the Union laid down by Protocol 27 of the Treaty, namely the institution of a system ensuring that competition on the internal market is not distorted. In view of that general objective and the functions conferred on it, the Commission may lawfully decide that it is not appropriate to pursue a complaint regarding practices, which have since ceased, all the more so where, they have ceased as a result of action by the Commission, provided it states reasons for its decision¹¹. National competition authorities do not set out to decide disputes between parties, but pursue to objective enounced in Protocol 27.

We observe the difference between the protection of competition as a goal in itself and the protection of competitors, but in some cases the harm brought to individuals in their position as competitors may imply harm brought to competition as such. The exit of a strategic competitor from the market may lead to a distortion or inhibition of competition¹².

The seminal statement in *Van Gend en Loos* that ‘*the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights ... and the subjects of which comprise not only Member States, but also their nationals*’¹³ serves as a foundation for the judgments in *Courage*¹⁴ and *Manfredi*¹⁵. Article 101 TFEU constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Union and, in particular, for the functioning of the internal market¹⁶. Article 101(1) TFEU produces direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard¹⁷.

¹⁰ CFI, 18 September 1992, Case T-24/90, *Automec Srl v Commission* [1992] II-02223 paragraph 85

¹¹ CFI, 25 May 2000, Case T-77/95, *Syndicat Français de l'Express International, DHL International, Service CRIE and May Courier v Commission*, [1997] II-00001 paragraph 57

¹² 2007/193/EC: Commission Decision of 26 April 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3916 — T-Mobile Austria/tele.ring) *OJ L 88, 29.3.2007, p. 44–46*

¹³ See the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1, Case 6/64 *Costa* [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 31

¹⁴ *Courage*, supra footnote 4

¹⁵ CJEU, 13 July 2006, Joined Cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA, Fondiaria Sai SpA, Assitalia SpA*, [2006] ECR I-06619

¹⁶ CJEU, 1 June 1999, Case C-126/97 *Eco Swiss* [1999] ECR I-3055 paragraph 36

¹⁷ CJEU, 27 March 1974, Case 127/73, *BRT and SABAM*, [1974] ECR 51 paragraph 16

The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in [101(1) 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 competition¹⁸.

Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition on the internal market. The institution of a system ensuring that competition on the internal market is not distorted may be provided not only by the public, but also by the private enforcement of competition. A correct interpretation of national law must be consistent with the objective expressed in Protocol no 27 no matter if the means of enforcement refer to the activity of the public competition authority or to judicial authority of the national courts in relation to disputes between private individuals.

The most convenient, inexpensive and expeditious manner to support a civil action for damages for a third party potentially affected by a cartel is to obtain access to completed public law competition proceedings. It is obvious that the less possibility plaintiffs have to require the production of documents, the more difficult will be to prove their case. Third parties do not have access to Commission file according to the provisions of Regulation no 1/2003 thus the main way to obtain access is supported in secondary EU law by the provisions of Regulation 1049/2001 in conformity to which the right of access to public documents must be '*widest possible*'¹⁹.

Despite this extensive interpretation of the term '*access*' the refusal can be grounded on general presumptions, but these general presumptions are applicable under strict conditions and the burden of proof that such conditions sustain the specific case is incumbent upon the public authority. These two grounds of refusal are closely related to the rationale of the public antitrust regime protecting the information obtained by way of a voluntary submission by a leniency applicant. In the context of the leniency regime occurs an inherent conflict between two objectives pointing towards the same target: the effective enforcement of EU competition law. The foundation of public enforcement may support the refusal of the request to disclose. In the meanwhile the access to completed public competition proceedings is most often absolutely necessary for a successful follow-on action.

An opposite situation has occurred in Case T-345/12 R, Akzo Nobel NV, where the Commission has rejected the claim for confidential treatment of information provided to the Commission pursuant to its Leniency Notice without weighting up the involved interests. The decision of the Commission is currently suspended by an interim barring order²⁰.

¹⁸ Courage, supra footnote 4, paragraph 26

¹⁹ Article 1 of Regulation no 1049/2001

²⁰ General Court, 11 November 2012, Case T-345/12 R, Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and Eka Chemicals AB v European Commission, [2012] ECR II-00000

According to settled case-law, the principle of effective judicial protection is a general principle of Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter²¹.

The primordial claim made by the present thesis is that access to courts and access to documents are closely interrelated in general, but the degree of interdependency is even higher in relation to follow-on civil actions, since the alternative methods to produce evidence are de facto not operative. The access to justice is rendered impossible or extremely difficult in situations, where the access to the public antitrust documents is not available or permitted only with the consent of the wrong-doer as it's the case in *Donau Chemie*²².

Figure no 2 below highlights an interval of uncertainty around the probability value of 0.5, where the argument pro and contra disclosure tend to be equal as weight. In this interval the national court is required to interpret its national law in a proactive manner that not only prevents an incompatible solution, but also promotes Union law and prescribes a consistent and unitary application.

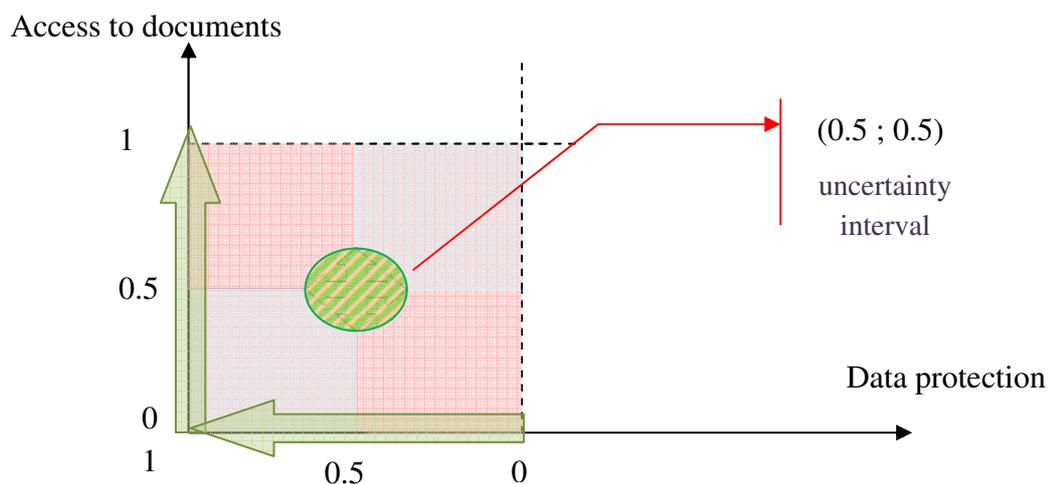


FIGURE 2: Deliberation process in relation to access to documents

²¹ CJEU, 3 September 2008, Joined cases C-402/05 P and C-415/05 P, [2008] ECR I-06351, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council, paragraph 335; CJEU, 6 November 2012, Case C-199/11, Europese Gemeenschap v Otis NV and Others, [2012] ECR I-00000 paragraphs 46-47

²² Donau Chemie, supra footnote 6

The intervals of uncertainty where the pro and contra arguments meet are diverse, each member state having the authority to apply its own procedures on access to documents, burden of proof and access to justice. However it must be emphasized that national competition authorities and national courts act within the scope of EU law and in an area where the Union enjoys exclusive competence, hence the result must be a convergent one. They have a duty to cooperate with a view to attaining a set of uniform solutions. The European Commission coordinates the activity of the network of public enforcement without acting as a formal decision maker in relation to the activities of private enforcement. However the recommendations, various communications and *amicus curiae* interventions have a critical influence on the process of private enforcement before the courts of EU and non-EU member states.

IV. Transparency

The concept of transparency can refer to more structural aspects in the sense of maintaining transparent decision-making processes and judicial protection systems as well as the fact that legislation must itself be coherent and clear. The need to introduce greater transparency into the work of the public institutions is placed at the core of the set of principles that govern any modern society. However any antithetic private interests opposing the public disclosure must be considered as well. The information contained by Competition files is usually obtained directly from the wrong-doer in connection with the initiation of the public antitrust trial concluded with a finding of an infringement of EU competition law.

In *Sweden and Others v API and Commission*, the Court established that the restrictions imposed on the application of the principle of transparency in relation to judicial activities pursue the objective of ensuring that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings²³. In principle, all documents of the institutions should nevertheless be accessible to the public²⁴. The second indent of Article 4(2) of Regulation No 1049/2001 provides a ground for exception from disclosure of pleadings lodged in relation to still pending court proceedings. Just the opposite, concerning past and future court proceedings the public institution cannot rely on a general presumption that implies, in particular, that observance of the principles of equality of arms and the sound administration of justice must be ensured.

²³ CJEU, 21 September 2010, Joined cases C-514/07 P, C-528/07 P and C-532/07 P, Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission (C-514/07 P), Association de la presse internationale ASBL (API) v European Commission (C-528/07 P) and European Commission v Association de la presse internationale ASBL (API) (C-532/07 P), [2010] ECR I-08533 paragraph 94

²⁴ Regulation no 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ L 145/43, recital 11

Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 TEU and in the Charter of Fundamental Rights of the European Union. The legal basis for Regulation no 1049/2001 is the Article 15 TFEU that stipulates the requirement that EU public institutions must conduct their work as openly as possible and the grounds for refusal must be determined by the European Parliament and the Council by means of regulations. Recital 6 of Regulation 1049/2001 states that:

Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

In Technische Glaswerke Ilmenau, a case related to State aid control, the Court has distinguished between the legislative and administrative exercise of public power. In principle the existence of a general presumption that disclosure of documents in the administrative file may undermine protection of the objectives of investigation activities has been established²⁵.

In Agrofert Holding, AG Cruz Villalón has suggested that given the fact that Regulation No 659/1999 and Regulation No 139/2004 establish administrative review procedures pursuing an identical objective of fundamental importance to the European Union, the finding of Technische Glaswerke Ilmenau can be transposed to the case of merger control²⁶. The same objective to ensure competition in the internal market is followed also by the administrative procedures established by Regulation No 1/2003²⁷ and by national legislation concerned with the implementation of Article 101 TFEU, including the national leniency regime.

According to Pfleiderer it is for the courts and tribunals of the Member States, 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. EU competition rules do not preclude a person who has been harmfully affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to such a leniency procedure involving the perpetrator of that infringement²⁸.

²⁵ CJEU, 29 June 2010, Case C-139/07 P, European Commission v Technische Glaswerke Ilmenau GmbH, [2010] ECR I-0588 paragraph 61

²⁶ CJEU, 8 December 2011, Case C-477/10 P, European Commission v Agrofert Holding a.s., [2012] ECR I-00000 paragraph 63-64

²⁷ See also by analogy EFTA Court, 21 December 2012, E-14/11, DB Schenker v ESA, [2012] Rec. I-000 paragraph 207

²⁸ CJEU, 14 June 2011, Case C-360/09, Pfleiderer AG v Bundeskartellamt, [2011] ECR I-00000 paragraph 32

In order to resume all the above said about competition law and access to documents a number of observations must be made. First and most important is the fact that the relation between national laws and provisions and the application of Article 101 TFEU is utterly governed by Union law. This implies that the general principles of Union law are fully applicable. The principle of proportionality requires that in any case characterised by uncertainty a balance exercise must be performed. The conclusion is that access to documents can neither be denied nor allowed without further reasoning. The lack of resources or a heavy administrative burden imposed on the public enforcer or on the defendants in the case for damages does not constitute a pertinent argument to excuse an automatic refusal to allow partial access to documents.

V. Application of the dialectical model on the relevant case law

In the following I will analyse some important recent cases from the CJEU that relate directly with issues such as leniency, effective enforcement and access to documents. As cartels are difficult to detect the national competition authorities and courts consider that leniency programs are the most effective means to counter anticompetitive agreements and their effectiveness would be jeopardised if access to leniency documents was too easily granted.

1. Pfleiderer AG v Bundeskartellamt C-360/09

It's a preliminary reference from Germany, where the referring court sought clarification on whether, and if so to what extent, a national competition authority may disclose information, voluntarily send to it by members of a cartel pursuant to the authority's leniency programme, to an aggrieved third party for the purpose of the preparation by the latter of an action for damages in respect of alleged injury caused by the cartel. Could the disclosure of such information destabilize the effective enforcement of Union competition law and the system of cooperation and exchange of information between the Commission and the national competition authorities of the Member States pursuant to Articles 11 and 12 of Council Regulation (EC) No 1/2003 laid down in Articles 101 and 102 TFEU?

AG Mazák expressed the view that possibly diverging interests have to be balanced; on one hand the efficacy of leniency programmes designed to detect, fine and deter the creation of illegal cartels has to be preserved and on the other hand the protection of the right of any individual to claim damages for harm suffered as a result of such cartels pursuant to Article 101 TFEU must be considered. According to U.S. antitrust law, the leniency programme grants also immunity against treble damages and joint-and-several liability, however the actual damages sustained by such claimant must be recovered. In other words there is no significant jurisdiction that grants to leniency applicants immunity from actual damages incurred by the cartel.

Any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation²⁹.

The fundamental right to an effective remedy in such instances is guaranteed by Article 47, in conjunction with Article 51(1) of the Charter as interpreted in the light of Article 6(1) of the ECHR on the right to a fair trial and the case-law of the European Court of Human Rights thereon. The German Authority granted protection against disclosure according to its Notice no 9/2006 for information obtained from leniency applicants.

Where an application for immunity or reduction of a fine has been filed the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned³⁰.

The ECN Model Leniency Programme as revised in November 2012 stipulates that no access will be granted to any records of any statements before the statement of objections has been issued. The document is a non-binding instrument and moreover it does change the level of protection, but tries to maintain it at the same level.

In addition, given the differences in the rules concerning access to the file and/or public access to documents in the various jurisdictions, the ECN Model Programme stipulates that the exchange of records of statements (oral or written) between CAs is limited to cases where the protections afforded to such records by the receiving CA are equivalent to those afforded by the transmitting CA³¹.

²⁹ Section 213 of ACPERA Act of 2004 'Limitation on recovery'
<http://www.gpo.gov/fdsys/pkg/BILLS-108hr1086enr/pdf/BILLS-108hr1086enr.pdf>

³⁰ Point 22 German Authority Leniency Notice

³¹ Point 52 of the ECN leniency model

The Competition Authorities must ensure both an effective leniency programme and effective private enforcement. Moreover both activities constitute remedies with deterrent effect on the formation of cartels. Actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU. AG Mazák considers that 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 of the Charter.

It is necessary to preserve as much as possible the attractiveness of a national competition authority's leniency programme without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy. AG Mazák considers that the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and indeed private interests in detecting and punishing cartels. Access to voluntary self-incriminating statements made by a leniency applicant should not, in principle be granted.

The information transmitted by the leniency applicant voluntarily that has been later forwarded to the Commission or to other Competition Authorities within the ECN must be protected in such in such a way as to make it practically impossible or excessively difficult to obtain compensation for damages according to the conditions imposed by the national law and the circumstances of the case.

The risk of private damage claims could not be compensated by the prospect of a reduction in, or immunity from fines according to the Local Court of Bonn. This disadvantage would impede the detection of competition infringements. The non-disclosure would not make it excessively difficult for Pfleiderer to obtain compensation, pursuant to the reasoning of the German Court, because once the cartel decision of the German antitrust authority becomes definitive, Pfleiderer would not have to prove a competition infringement in an action for damages, but could use the decision as evidence. Furthermore, if competition infringements were not detected by competition authorities in the first place, this would also hinder private actions for damages³². However not all jurisdictions allow the use of the decision of public enforcer as evidence for the infringement.

³² Local Court of Bonn, Case No. 51 Gs 53/09, decision of 18 January 2012

2. CDC, EnBW Energie, Akzo Nobel NV and DB Schenker

The position adopted by the Commission under the Regulation No 1049/2001 in *CDC Hydrogene Peroxide v Commission*³³ and in *EnBW Energie Baden-Württemberg v Commission*³⁴ was that the risk of an action for damages could constitute a serious disadvantage in the future and lead undertakings taking part in cartels to cease to cooperate.

The hydrogen peroxide & perborate cartel had been sanctioned by Commission Decision and the applicant sought access to the statement of contents enclosing potentially incriminatory information. The Commission failed to establish to the requisite legal standard, that disclosure of the statement of contents could specifically and effectively undermine protection of the objectives provided for in Article 4(2) of the Regulation No 1049/2001. In connection with the decision concerning the GIS cartel in *EnBW Energie Baden-Württemberg v Commission* five categories of documents have been subsequently identified³⁵.

The General Court pointed out a series of errors committed by the Commission, foremost the fact that no individual assessment of the documents belonging to the categories 3 and 5a) had been made. In *AKZO Nobel*³⁶ the Commission acts in the opposite direction and agrees with no judicious assessment to disclose the documents and affirms that the implementation of the law on cartels by means of actions for damages is part of the penalty for infringements of competition law for the purposes of paragraph 33 of the Leniency Notice.

³³ General Court, 15 December 2011, Case T-437/08, ECR 2011 paragraph 31

³⁴ General Court, 22 May 2012, Case T-344/08, ECR 2012 paragraph 70

³⁵ Categories: (1) documents provided in connection with an immunity or leniency application, namely statements from the undertakings in question and all documents submitted by them in connection with the immunity or leniency application; (2) requests for information and parties' replies to those requests; (3) documents obtained during inspections, namely documents seized at on-the-spot inspections at the premises of the undertakings concerned; (4) statement of objections and parties' replies thereto; (5)(a) internal documents: documents relating to the facts, that is, (i) background notes on the conclusions to be drawn from the evidence gathered, (ii) correspondence with other competition authorities and (iii) consultation of other Commission departments to have been involved in the case; (5)(b) procedural documents, that is, inspection warrants, inspection reports, lists of documents obtained in the course of inspections, documents concerning the notification of certain documents and file notes.

³⁶ General Court, 16 November 2012, Case T-345/12 R, *Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and Eka Chemicals AB v European Commission*, paragraph 55

Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, together with the legal counsels getting access on their behalf, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements³⁷.

The Commission seems to oscillate between radically opposed positions. A recent case from the EFTA Court reveals that ESA, the public competition enforcer adopted in fact a similar position with the European Commission in the two of above named cases, *EnBW Energie* and *CDC Hydrogene Peroxide*, refusing to disclose and pointing out that the individual assessment of the documents incurred a heavy administrative burden. Freight forwarding and logistic is the relevant market in *DB Schenker v ESA* and the infringement refers to Article 54 EEA corresponding to Article 102 TFEU therefore leniency protection was not an issue in the EFTA case. ESA's and the European Commission's opinions that follow-on damages in competition law cases only serve the purpose of defending the plaintiff's private interests could not be upheld. According to the EFTA Court, while pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest³⁸.

Moreover ESA considered that the administrative burden of drawing up non-confidential versions would have been particularly heavy and required the use of an unreasonable and disproportionate amount of resources. Therefore, ESA decided that partial access to the inspection documents could not be granted. However neither the volume nor the complexity of the documents can constitute an excuse for not granting partial access. The exception in Article 4(6) of Regulation no 1049/2001 states that if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released³⁹.

3. Donau Chemie and Others Case C-536/11

It's a reference for preliminary ruling from an Austrian Court. The questions asked are alternative. First it is inquired whether Union law precludes a provision of national antitrust law which, in proceedings involving the application of competition rules makes the grant of access to documents before the cartel court to third persons subject to the condition that all the parties to the proceedings must give their consent.

³⁷ Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11 point 33

³⁸ EFTA Court, 21 December 2012, E-14/11, *DB Schenker v EFTA Surveillance Authority*, paragraph 132

³⁹ It corresponds to article 5 of EFTA Decision on Public Access to EFTA Documents

If the answer to Question 1 is in the negative the referring court wants to know whether Union law precludes such a national provision where, although the latter applies in the same way to purely national antitrust proceedings and, moreover, does not contain any special rules in respect of documents made available by applicants for leniency, comparable national provisions applicable to other types of proceedings, in particular contentious and non-contentious civil and criminal proceedings, allow access to documents before the court even without the consent of the parties. The third party shall adduce prima facie evidence showing the legal interest in obtaining access to the file and that such access is not excluded by overriding interests of either private or public nature.

At the moment only the AG Opinion has been released. The answer provided by AG Jääskinen emphasized the importance of the fact that protection of effective competition is a field covered by Union law and the member state have an obligation to make available remedies that are sufficient to afford protection. Moreover these remedies must be at least as favourable as the ones provided for similar purely internal situations.

The similarity of the character of national situations that can serve as basis of comparison has been discussed in *Palmisani* in relation to actions for reparation of the loss or damage sustained as a result of EU law implementation and the conclusion of the Court has been that it's for the national court to determine it taking into account the essential characteristics of the domestic system of reference must be examined. The actions for damages are designed to guarantee reparation of the loss or damage sustained as a result of the conduct of the perpetrator⁴⁰.

AG Jääskinen concludes that actions for damages resulting from competition infringements are specific and restricts the basis of comparison to the actions based on national competition law. In my view actions for reparations are in principle similar and a final determination must be given based on the essential characteristics of the domestic system.

The most important incompatibility of the Austrian rule is the lack of proportionality test. The requirement of consent expressed by the counter-litigator infers a breach of the proportionality principle, since this rule eliminates the possibility to engage in the balance of the opposed interests⁴¹.

4. More rather than less access to documents

After reaching a zone of comfort on the eve of the new millennium the enforcement of EU competition law has been decentralized and the national competition authorities have been empowered to apply Article 101 TFEU in full. A set of predominantly common procedural rules under the control of the Commission and subject to judicial review of the CJEU has been partly replaced with a plurality of national procedural solutions. Information being concentrated at the core the access to it was fully subject to Union law. After decentralization the information concerning cartels has become ubiquitous and started to circulate through a myriad of channels.

⁴⁰ CJEU, 10 July 1997, Case C-261/95, [1997] I-04025, paragraphs 38-39

⁴¹ Donau Chemie, supra footnote 6, paragraphs 63-64

However the fact that the authorities of the Member States are entitled to conduct inspections and investigations and apply EU antitrust rules does not mean that the role of the Commission has been diminished in any manner. The national authorities have a duty to cooperate, inform each other and the Commission, avoid taking any conflicting decisions and suspend or close a case if another authority has already been engaged in that case. National authorities are immediately relieved of their competence if the Commission decides to take over the case.

In my view the authorities of the Member State act merely as agents of Union institutions and in this quality the principles of good administration and wide access to public documents stipulated by the Charter should be relatable, to same extent as the right to an effective remedy is applicable. The judicial structure of Union law does not provide for direct access to supranational Courts, but instead the national courts are invested with the authority but also with the duty to enforce Union law and ensure the judicial protection of individual rights. In that sense the access to documents won't necessarily be direct, but the access can be granted to documents existent in possession of another competition authority than the one, who has gathered or produced the evidence in question.

I observe a certain contradiction in the reasoning of some public enforcers. They all agree that cartel evidence is difficult to accede and therefore the leniency programmes are so important, but they do not accept the idea that from the position of an applicant for damages the difficulty to produce evidence is even bigger. Another aspect must be named, which is the fact that the presence of a cartel has already produced actual damages to certain market actors who are not in the position to benefit from the deterrent effects of the action of public enforcement. Those who have been forced into bankruptcy or compelled to exit the market or precluded from entering a market will not be able to benefit from the annihilation of the cartel agreement. The loss of opportunity is not recoverable by means of public enforcement. The logic of treble damages in the U.S. is in fact to cover for the actual damages produced in the past and prevent such damages in the future.

The Commission and the competition authorities of the Member States form together a network of public authorities applying the Union competition rules in close cooperation. However the Commission is the spider in the net that occupies a central position and can intervene at any time releasing the national competition authorities from their authority to apply Articles 101 and 102 TFEU. CJEU plays the same coordinative role via the preliminary ruling mechanism providing the correct interpretation of Union law, while allowing the national courts to consider the specific aspects of national law and place them in the larger context of European integration.

In more complex litigations, where several defendants and plaintiffs from several member states are involved the interaction between the rules on burden of proof, disclosure of evidence and access to Competition files becomes more complex. Each system is characterised by a certain internal balance, where a more strict access may be compensated by the possibility to use the infringement decision as evidence. Other systems will have a more generous access to documents connected with a more onerous burden of proof for instance⁴².

⁴² Compare the Bonn Court judgment in *Pfleiderer*, supra footnote 32, with the English judgment in *National Grid Electricity Transmission Plc v ABB Ltd & Others* [2012] EWHC 869

The formula of integration adopted by the Union for the field of competition enforcement appears to be more complex than the one adopted in the field of free movement provisions where the mutual recognition is the dominant principle. This principle gives an indication on the fact that diversity of rules can be maintained only by accepting the co-existence of multiple legal standards in areas where no harmonization has been effectuated. In competition law there is a well-defined body of common substantive rules being applicable on all situations where the cross-border trade might be affected.

VI. Dialectics as legal methodology

Henri Atlan's book '*À tort et à raison*' begins by telling a story supposedly of Talmudic origins. A teacher had been asked about his opinion on a matter disputed by some of his students. The first student expounded his point of view. The teacher answered '*You are right*' after an apparently long reflection. Then the second student objected and expounded his reasons and the teacher answered again, '*You are right*'. Then the third student exposed a different opinion and provided arguments to support it. The teacher answered constantly '*You are right*'.

Various discourses supporting either private or public enforcement are all '*right*' and all equate in fact the same overriding public interest i.e. the effectiveness of Union competition law. Usually, the position of a judge requires deciding who is *right* and who is *wrong*, taking sides even if in reality there are often degrees of truth in any of the opposing standpoints. However the position of the CJEU in a preliminary ruling concerned with the effective enforcement of Union competition law before the national court and all the related questions is a more flexible one.

A preliminary ruling involves a certain detachment from definitive '*rights*' and '*wrongs*' and allows a more dialectical opinion, where the degrees of truth can be exposed. The unity of Union law, its correct implementation and effective enforcement are nevertheless the ultimate objectives to follow in the context of the preliminary ruling mechanism. The key principle of dialectics is known as the law of unity of opposed determinations. It may sound as a thought-provoking proposition to derive unity from an antinomy⁴³; however dialectic can demonstrate that this path of reasoning is perfectly valid. Another benefit brought by the dialectical method is the ability to perform an investigation beyond the self-evident and immutable, since the idea that logical laws are necessarily intuitive has been discarded by modern science.

⁴³ An apparent contradiction or antinomy is the result of the conjunction between a thesis and an antithesis. Kant wrote '*Antinomies of pure reason*' where he has formulated 4 antinomies: finite-infinite, simple-complex, causality-freedom and conditioned-unconditioned.

Kant, Hegel, Marx and Engels are the most significant developers of dialectic in modern times. According to Kant all propositions contain their own negations and this is the very key of dialectical thought. Kant is the first who brings a new dimension to classical logic⁴⁴ by making a clear distinction between logic and dialectic. For Kant dialectic is inherent in the nature of the reason itself⁴⁵.

Hegel attempted to reincorporate logic into dialectic. Sublation (*'Aufhebung'*) in Hegelian dialectic refers to the solution reunifying the fragmentary into the wholeness or in other words into a higher form of unity. The realm of reason seeks to unify what the realm of understanding has divided. Hegel's criticism of Kant refers to the impossibility to solve the antinomies exposed since reason fails to overcome them; his suggestion is to use reason in order to correct the deficiencies of understanding. On the other hand Hegel agrees with Kant that everything is inherently contradictory, contradiction being the root of all movement. Marx and Engels attempted later to incorporate the Hegelian dialectic into materialism⁴⁶.

Badiou in his *'L'être et l'événement'* has employed the concept of event in order to rebuild the dialectics and explain it a merely affirmative manner⁴⁷. By extrapolation a cartel exists and operates and its presence defines the current market situation. The event is represented by the initiation of antitrust proceedings by a public enforcer. This event creates a new possibility for a new world in Badiou's terms. A more competitive market through competition law enforcement is envisaged as a possibility, but the final result i.e. the actual transformation of the current market situation within the process of enforcement depends on how the new possibility will be administered.

⁴⁴ Two laws of classical logic are especially important in the present context. The law of non-contradiction affirms that $A = B$ and $A \neq B$ cannot be simultaneously true. The law of excluded middle affirms the existence of proposition 'P', that neither is true nor false. This affirmation can be reformulated as its negation, ' $\neg P$ ', is both true and false.

⁴⁵ Immanuel Kant: *'Kritik der reinen Vernunft'* 1781 Hartknoch Riga translated and republished *'Critique of Pure Reason'* 2007 Penguin Classics

⁴⁶ There are four modes of philosophy: idealism (Kant, Schopenhauer, Hegel) that privileges thinking over being, materialism (Marx, Engels, Žižek, Badiou), dialectic (Plato, Socrates, Hegel, Marx) turns contradiction into the law of being and metaphysics (Aristotle, Hume, Kant, Heidegger, Sartre, Deleuze) turns identity into the law of being.

⁴⁷ Badiou, Alain: *'Being and Event'* Continuum 2007. Original edition *'L'être et l'événement'* Paris Seuil 1988 The event does not bring about a new situation, but a new possibility of a new world. An event simply interrupts the law, the current rules and the structure of the present situation and creates a new possibility. The situation remains the same, but it can be transformed inside the emerging new possibility

I will focus for the purposes of this paper on the access of a potential claimant for damages to Competition files. I will define two strict opposites: '+A' and '-A'. The first represents the situation of complete disclosure and the second of total refusal to disclose information contained in the Competition file. Already at this point we can understand that the strict opposites are abstract positions. In reality a degree of disclosure will be made available, because the general public has a fundamental right to access public documents, apart from the confidential information contained by them. Intuitively, between '-A' and '+A' in a continuum there must be an interval 'I' of intermediate values a_i . This can be expressed mathematically $a_i \in (-A; +A)$, which means that $-A < a_i < +A$. In other words all the disclosure degrees contained by the interval 'I' describe partial disclosure or partial access to documents.

Another observation I have to make already at this point relates to the doctrine of '*acte clair*' which describes the situation, where the national court confronted with a matter of Union law declines to make a reference for a preliminary ruling, because it considers that the answer to be given is clear. Any situation that presupposes that an interval of intermediate values can constitute the solution to the problem would be a case where the national court must send a reference. Just the opposite if the indubitable answer is either 'disclose' or 'do not disclose' then the problem can be solved by the national court with no recourse to the preliminary ruling mechanism.

A certain degree of uncertainty about what the correct answer might be brings about the necessity of a dialogue. Any appreciation implies a degree of subjectivity. Now I will amend the initial hypothesis of $-A$ and $+A$, as total non-disclosure and total disclosure of the information contained in the Competition file and define $-A^*$ and $+A^*$. There is a relation of inequality $-A < -A^*$, where $-A^*$ represents the maximum amount of information not to be disclosed according to the law. There is also a relation of inequality $+A^* < +A$, where $+A^*$ represents the minimum amount of information to be disclosed according to the law. In this manner I have defined two intervals, one of illegal non-disclosure and the other of illegal disclosure (the red rectangles in figure no 3). In the immediate vicinity of the positions $-A^*$ and $+A^*$ there is a high uncertainty about the legality of a non-disclosure, respectively disclosure of a certain piece of information belonging to that interval.

First at all I must explain that number 0.5 is a symbol for uncertainty borrowed from Lewis & Langford logic.⁴⁸ By defining a position where the probability to disclose is 0.5, the law of the excluded middle and the law of non-contradiction become inapplicable and the unity of the system is maintained. The competence to determine according to Union law the legal character of the disclosure in these situations of high uncertainty belongs to the CJEU; this is to say that what must be disclosed (the purple rectangle close to value 1) and what should not be disclosed (the purple rectangle close to value 0) shall be determined by the supranational court through the preliminary ruling mechanism. In other words the interval I^* described as $(-A^*; +A^*)$ represents the totality of positions compatible with Union law. A new interval of uncertainty 'Y' included in I^* can be revealed, where according to the applicable national law, it is not clear whether to disclose or not (the yellow rectangle in the vicinity of value 0.5).

⁴⁸ Lewis & Langford: 'Symbolic Logic' New York 1932, p 214

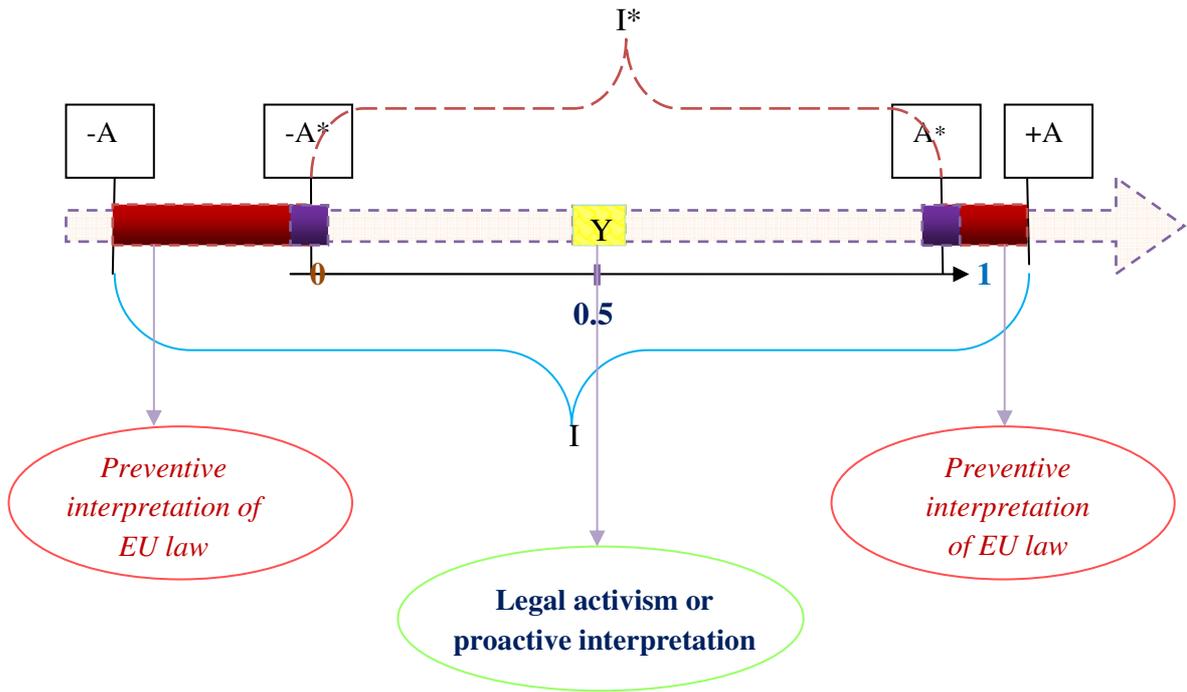


FIGURE 3: The alternation between preventive and proactive interpretation

It can be argued that even if this situation represents a clear position of compatibility with Union law and it's for the national Court to decide according to national procedural law, the adopted interpretation would be nevertheless comprised inside the Union law. This type of interpretation shall be qualified as proactive, while the type of interpretation adopted to determine the legal character of a national measure with Union law shall be qualified as preventive. The latter defines the frame within which a procedural rule is allowed under Union law, while the first is about giving momentum to the development of EU law.

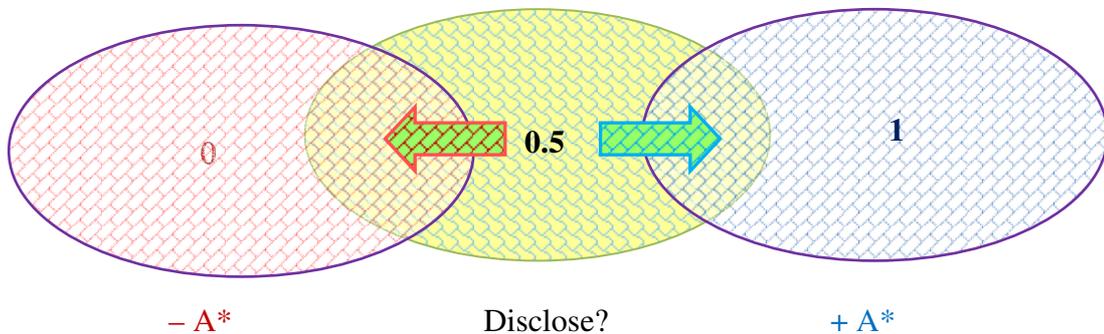


FIGURE 4: Arguments pro and contra disclosure in their dialectical confrontation

In the continuum interval between the positions $-A^*$, where the probability to disclose is 0, and $+A^*$, where the probability to disclose is 1, the national Court must apply the Union law in a manner consistent with the interpretation given by the supranational Court. The information that can be associated with the interval $(-A; -A^*)$ shall not be disclosed. In this interval we have certain dominant principles that justify the refusal to disclose: professional secrecy, protection due to commercial interests, protection of inspections and investigations, protection of court proceedings and decision-making process of public institutions, privacy and the integrity of the individual.

Just the opposite the information that relates to the interval $(+A^*; +A)$ must be disclosed, because in this area transparency principle, the right of access to public documents, good administration and democracy constitute the primary paradigm. However as figure no 5 shows despite the reasons justifying a refusal, an overriding public interest in the disclosure may require it anyway. Moreover, the information obtained within the leniency regime cannot be used to support a criminal charge and according to the Commission Notice the information cannot be used for a different purpose than the application of Article 101 TFEU.

Back to the situation of the teacher in Atlan's book '*À tort et à raison*', it must be observed that the assertion that disclosure of documents improves the effective enforcement of competition law is both true and false. It is true having in mind that disclosure makes possible the private enforcement and it is false having in mind that the potentiality of civil damages has a discouraging effect on prospective leniency applicants.

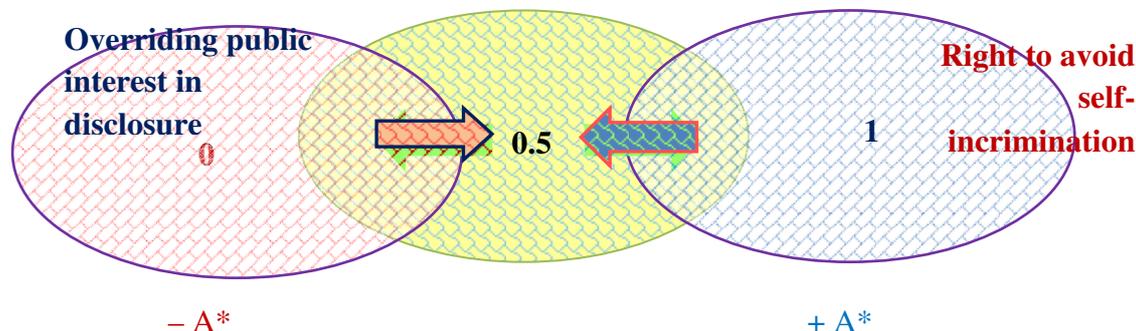


FIGURE 5: Adjustment of the probabilities for disclosure

The argumentation as presented above reveals already that the process of deciding what to disclose is dialectical in nature. This process equates the unity of opposite determinations. The movement of the system is determined by these directly opposable forces. Adopting a radical position with no effort involved in discussing the counterarguments will be sanctioned by the Union law. Principles of good administration and proportionality require the decision maker not to apply automatically the exceptions provided for by the EU regulations.

VII. The dialogue behind the scenes

Looking at the institutional structure in which the enforcement of Union competition law takes place we have to notice that networking is the major norm. The main role of ECN is to hinder undertakings from engaging in cross-border anticompetitive practices. ECN is a policy tool designed to share pools of best practices and experience accumulated by the national competition authorities, inform about new released decisions and exchange board comments.

In November 2012 the ECN model for leniency has been revised. No access to any records of the statements will be granted before the statement of objections has been delivered to the parties. Moreover, the receiving and the transmitting authorities must adhere to the same standard of protection against disclosure. It's not surprising that the Competition authorities try to protect the interests connected with the effectiveness of public enforcement, since the responsibility for an effective private enforcement is attributed exclusively to the national courts.

ICN has been founded in 1997 and today reunites most competition authorities in the world and it comprises several working groups i.a. a cartel working group which aims to address the challenges of antitrust enforcement across the entire range of ICN members and amongst agencies with various levels of experience. According to ICN waivers of confidentiality should be required if the same leniency applicant appears before two or several different competition authorities. The confidential character of leniency information is presupposed unless:

- 1) A waiver of confidentiality has been issued by the applicant;
- 2) The public enforcer is required to disclose according to law;
- 3) The applicant has made the information public by own initiative.

In the case of parallel models of enforcement it's recommendable to articulate clearly the conditions to be applied if a leniency applicant is subject to criminal or civil proceedings. In the EU these rules are not clearly articulated since the criminal and civil proceedings occur at the national level in 27 different jurisdictions. In my opinion it's not easy to determine whether or not the same degree of protection is ensured by the receiving authority requiring access to documents, since the national body of procedural laws must be considered in its entirety.

Therefore, the actual dialogue does not take place within the public enforcement networks, such as ECN or ICN, but via the preliminary ruling mechanism. It must be observed that only courts or tribunals of a member state have access to this mechanism and in the same time Union competition law applies not only intra- but also extra judicially. In principle it's likely that a global cartel agreement affects several markets belonging to different antitrust jurisdictions. Acknowledging the dimensions of the internal market a global cartel would most probably affect the internal market and restrict the competition actually or potentially in a significant manner.

Depending on what products or services make object of the named illegal agreement we can delineate a map of potentially injured parties, consumers, competitors or customers of the cartel members. Rome II Regulation is not very helpful in determining the issue of applicable law to non-contractual obligations arising out of an anticompetitive agreement. The applicable law does not have to be one of a member state according to Article 3 of Rome II Regulation. It offers to a potential plaintiff the possibility to choose between several laws of countries where the market has been affected actually or potentially. The rational option of choosing the law of the seized court is also available, as long as it is a court of a member state.

What enhances the complexity of this legal equation is the fact that cartels per definition imply the existence of several defendants. The plaintiff can choose according to Brussels I Regulation any of the courts for the place where any of the defendants is domiciled or the court of the place where the harmful event occurred or may occur. There must be a link between proceedings to which the Brussels I Regulation applies and the territory of the Member States. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States. A defendant not domiciled in a Member State is as a general rule subject to national rules of jurisdiction applicable in the territory of the Member State of the court seized, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

Despite the persistence of some not yet clarified subtleties it is clear that the domicile of the defendant is an important connecting factor, even outside the scope of the named regulations, being the universal rule for allocation of jurisdictions. In the case of a defendant domiciled outside the EU, the article 4 of Brussels I Regulation stipulates that the jurisdiction is established by the law of the member state where the Court is seized. The applicable law to non-contractual obligations is the one of a member state, where the market has been or it's likely to be affected and the assessment of the alleged infringement is governed by Union competition rules.

In conclusion if the defendant is not domiciled in the EU the action for damages must be brought before a foreign court, the law governing the infringement is Article 101 TFEU and the law governing the action in tort is the law of the member state where the market has been or is likely to be affected. However the foreign court cannot ask for a preliminary ruling. Furthermore it is almost certain that a foreign court is less familiar with the laws of the member state where the harmful event took or is likely to take place.

A possibility is offered by the device of *amicus curiae* and the European Commission has used this tool in order to inform foreign courts about the correct interpretation and application of Article 101 TFEU, but also to defend its own interests as public enforcer of Union law. Subsequent to the EU cartel decision in the Air Cargo case, plaintiffs in actions for damages before several foreign courts sought disclosure of the confidential version of the Commission decision from the defendants. In its letter addressed to New York court the Commission countered the request for disclosure noting that:

the success of this [leniency] program, which is the most effective tool at the Commission's disposal for the detection of cartels, crucially depends on the willingness of the companies to provide comprehensive and candid information. This willingness could be jeopardized if potential leniency applicants knew that their corporate statements could become discoverable in civil litigation⁴⁹.

This declaration appears to run contrary with the *Courage* and *Pfleiderer* jurisprudence where it has been established that the wrong-doer is not entitled to protection against action for damages. The arguments against disclosure appear to be disproportionately strong in cases where the private enforcement of Article 101 TFEU occurs backstage i.e. outside the scope of the Article 267 TFEU. In all cases where EU is to be applied by foreign courts, the proactive type of interpretation promoted by the preliminary ruling mechanism is inhibited and probably only cases situated at the extremes where preventive interpretation is due will be accepted by foreign courts⁵⁰.

Back to the proposed analogy with the mutual recognition and free movement provisions⁵¹, it appears to me that both the Commission Leniency Notice as revised in 2012 and the extrajudicial cases in which the Commission has participated as *amicus curiae* show that the Union public enforcer tends to adopt a reticent position against the possibility to take advantage of a more relaxed regime of disclosure. The same or higher level of protection must be ensured by the receiving authorities making the private enforcement before foreign courts especially in jurisdictions like U.S. where disclosure of evidence precedes the actual litigation virtually impossible or extremely difficult. At first sight a double standard applicable on the private enforcement of Article 101 TFEU seems to be applicable, one game takes place on the stage and another one behind the scenes. It's my intention to write a more advanced research paper in this field of law, since, as I have already shown in this short introductory article, there are many questions left without a satisfactory answer.

⁴⁹ Air Cargo Shipping Services Antitrust Litigation, M.D.L. No. 1775 referred to a cartel formed by Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas. Lufthansa (and its subsidiary Swiss) received full immunity under the Commission Leniency Programme, as it brought the cartel to the Commission's attention and provided valuable information. Actions for damages have been brought before the U.S. court Eastern District of New York.

⁵⁰ See Figure no 3 supra

⁵¹ See Figure no 1 supra