

## The Impact of EU Law on a National Competition Authority's Leniency Programme – the Case of Poland

by

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## *Abstract*

This paper is devoted to the impact of EU law on national leniency programmes, especially the Polish one. It analyses the jurisprudence of the Court of Justice in *Pfleiderer*, *Donau Chemie* and *Schenker* and identifies three specific areas of potential EU influence on national leniency programmes. The impact of EU law on the rules of access to leniency documents is analysed in detail on the basis of both EU and Polish law and taking into account the Draft Directive on Antitrust Damages Actions. The paper covers also the extent to which the principle of effectiveness of EU law limits the procedural autonomy of Member States in regard to their leniency programmes. This analysis covers both “negative conditions”, that is, elements of national leniency programmes which are incompatible with EU law, and “positive conditions”, in other words, those elements of domestic leniency programmes which are seen as necessary for securing their effectiveness.

## *Résumé*

L'article concerne l'influence du droit de l'Union européenne sur les programmes de clémence nationaux, en particulier le programme polonais. La jurisprudence de la Cour de justice de l'Union européenne est analysée, surtout les arrêts en *Pfleiderer*, *Donau Chemie* et *Schenker*. Les trois avenues de l'influence du droit européen sur le programme de clémence sont identifiés – les règles d'accès aux confessions des entreprises bénéficiaires de la clémence, qui sont analysées en détail, les limitations des programmes nationaux de clémence à cause du principe d'effectivité et les obligations des autorités nationales de concurrence d'assurer l'effectivité des programmes de clémence.

**Classifications and key words:** competition law, leniency, antitrust damages actions, access to evidence, procedural autonomy, efficiency, public enforcement, private enforcement

## **I. Introduction**

Since 1 May 2004<sup>1</sup>, EU competition law is applied in a decentralized system, where the responsibility for the public enforcement of Article 101 TFEU is shared between the European Commission and National Competition Authorities (hereafter: NCAs). Importantly, the substantive rules on anti-competitive agreements stipulated in Article 101 TFEU have to be applied by

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<sup>1</sup> The date of the entry into force of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1–25 (hereafter: Regulation 1/2003).

NCA's in every case where trade between EU Member States may be affected<sup>2</sup>. Yet the procedural framework for their enforcement has not, in principle, been predetermined by the EU legislature. As stated by the Commission in its Report on the functioning of Regulation 1/2003<sup>3</sup>: "Regulation 1/2003 does not formally regulate or harmonise the procedures of national competition authorities, meaning that they apply the same substantive rules according to divergent procedures and they may impose a variety of sanctions". The question thus emerges, do the uniform substantive rules of EU competition law, as applied by a network of diverse NCA's and national courts, have any influence on national procedural rules applied in competition cases with an EU dimension? This issue has already been widely discussed with regard to the right of defence<sup>4</sup>. Recent judgments of the Court of Justice (hereafter: CJ) pose, however, interesting questions concerning the influence of EU law on another key element of the procedural landscape of national antitrust rules – the leniency programme. The aim of this paper is to critically examine the consequences flowing from the jurisprudence of the CJ in *Pfleiderer*<sup>5</sup>, *Donau Chemie*<sup>6</sup> and *Schenker*<sup>7</sup> for domestic leniency programmes overall and the Polish one in particular.

The analysis is divided into five parts. Considered first are the general principles governing the interface between EU law and national procedural rules. It is shown that the discussed effects are not limited to the use of national leniency programmes to cases of parallel application of Article 101 TFEU and national competition law, but extend also to the use of leniency in a purely national setting. Second, the influence of EU law on a NCA's duty to disclose

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<sup>2</sup> Article 3 of Regulation 1/2003.

<sup>3</sup> Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003, Brussels 29.4.2009, SEC (2009) 574 final, point 31.

<sup>4</sup> See e.g. K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych. W kierunku unifikacji standardów proceduralnych w Unii Europejskiej*, Warszawa 2012, p. 530–546; K. Kowalik-Bańczyk, "Procedural Autonomy of Member States and the EU Rights of Defence in Antitrust Proceedings" (2012) 5(6) *YARS*, p. 215–234; M. Bernatt, "Convergence of Procedural Standards in European Competition Proceedings" (2012) 8(3) *Competition Law Review*, p. 255–283; M. Kolasinski, "Influence of the General Principles of Community Law on Polish Antitrust Procedure" (2010) 3(3) *YARS*, p. 29–51.

<sup>5</sup> Judgment of the Court of 14 June 2011 in case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECR [2011] I - 05161.

<sup>6</sup> Judgment of the Court of 6 June 2013 in case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG and Others*, not yet published.

<sup>7</sup> Judgment of the Court of 18 June 2013 in case C-681/11 *Bundeswettbewerbshörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, not yet published.

leniency documents<sup>8</sup> to third parties is examined in part three of this paper. That obligation is later compared with the current state of Polish law in this area<sup>9</sup>. Covered here is the preparatory work on a legislative reform of both European law on private enforcement of EU competition law as well as that concerning Polish competition rules<sup>10</sup>. Part four of this article deals with the restraints placed on national leniency programmes by EU law, especially the condition of necessity. The formulation of those restraints (so-called “negative conditions”) makes it possible to identify which feature of a given programme is incompatible with EU law and to assess Polish leniency in that context. Part five of the paper discusses the more general “positive conditions” placed upon national leniency programmes by EU law. Its influence on national competition programmes is discussed only as far as binding legal principles are concerned<sup>11</sup>. Part six contains conclusions.

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<sup>8</sup> Unless stated otherwise, the term “leniency documents” is used in this paper as signifying both the corporate leniency statement and all other documents and information provided to a NCA by the leniency applicant in the framework of its cooperation with the authority. The term “leniency applicant” is used as signifying an undertaking applying either for immunity from fines, or for leniency (reduction of the fine).

<sup>9</sup> The article does not analyse the duties of the European Commission concerning the disclosure of leniency documents submitted in the framework of its own leniency programme.

<sup>10</sup> This paper does not cover access to leniency documents based on transparency rules. Regarding the use of transparency rules to obtain access to leniency documents from the European Commission, see judgment of the Court of 27 February 2014 in case C-365/12 P *European Commission v EnBW Energie Baden – Württemberg AG*, not yet published; G. Goddin, “Access to Documents in Competition Files: Where do We Stand, Two Years After TGI?” (2013) 4(2) *Journal of European Competition Law & Practice*, 112–120; A. Beumer, A. Karpetas “The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality?” (2012) 8(1) *European Competition Journal*, 133–143; A. Caruso, “Leniency Programmes and Protection of Confidentiality: the Experience of the European Commission” (2010) 1(6) *Journal of European Competition Law & Practice*, 465–469; N. Khan, *Kerse & Khan on EU Antitrust Procedure*, London 2012, p. 24–245; C. Hödlmayr, L. Ortiz Blanco, K. Jörgens, “Investigation of Cases (I): Leniency Policy”, [in:] L. Ortiz Blanco (ed.), *EU Competition Procedure*, Oxford 2013, p. 269–272; A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję*, Warszawa 2013, p. 247–255; S. Famirska, “Sposoby postępowania w przypadku stwierdzenia praktyki antymonopolowej”, [in:] A. Bolecki, S. Drozd, S. Famirska, M. Kozak, M. Kulesza, A. Madała, T. Wardyński, *Prawo konkurencji*, Warszawa 2011, p. 341.

<sup>11</sup> The paper does not discuss the “soft harmonization” of national leniency programmes. See the ECN Model Leniency Programme and the ECN Report on Assessment of the State of Convergence, available at DG Comp’s website at <http://ec.europa.eu/competition/ecn/documents.html>; V. Juknevičičūtė, J. Capiiau, “The state of ECN leniency convergence” (2010) 1 *Competition Policy Newsletter*, 13–15.

## II. General principles and their application to a NCA's leniency programme

### 1. General principles

It is a well established principle that, in absence of European procedural rules governing the enforcement of applicable substantive EU provisions, it is for the domestic legal systems of individual Member States to regulate the procedure in which EU rights and obligations are enforced<sup>12</sup>. Somewhat confusingly<sup>13</sup>, literature refers to that duty of the Member States as the principle of procedural autonomy<sup>14</sup>. That autonomy is limited by the principles of equivalence and effectiveness<sup>15</sup>. The former signify that national procedural rules applicable to EU-derived rights or obligations must not be less favourable than those governing similar national situations. The latter means that they should not render the exercise of rights conferred by the EU legal order practically impossible or excessively difficult<sup>16</sup>. The two principles place powerful limits on the procedural autonomy of EU Member States.

The principle of equivalence would not challenge a Member State's procedural system as such. By contrast, the principle of efficiency allows the

<sup>12</sup> See e.g. judgment of the Court of 20 September 2001 in case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECR [2001] I-06297, point 29.

<sup>13</sup> The principle of procedural autonomy applies only in the absence of binding EU rules and so it would seem the term "autonomy" is misused in this context. See also M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, p. 234-236. On the origin of the concept of "procedural autonomy" see K. Kowalik-Bańczyk, "Procedural Autonomy...", p. 218-220 and the case law and literature cited in footnote 7 therein.

<sup>14</sup> On the principle of procedural autonomy, see e.g. P. Craig, G. De Búrca, *EU Law. Text, Cases and Materials*, Oxford and New York 2011, p. 218-241; A. Wróbel, "Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej kontroli sądowej w prawie Unii Europejskiej" (2005) 1(67) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 35-57; A.P. Komninos, *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Oxford and Portland, Oregon 2008, p. 147-149; A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie...*, p. 112-116, N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, p. 62-73.

<sup>15</sup> Judgment of the Court of 20 September 2001 in case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* ECR [2001] I-06297, point 29; judgment of the Court of 13 July 2006 in joined cases C-295-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA, Nicolò Traicarico and Pasqualina Murgolo v Assitalia SpA*, ECR [2006] I - 06619, point 62.

<sup>16</sup> On principles of equivalence and effectiveness, see T. Tridimas, *The General Principles of EU Law*, Oxford 2006, p. 423-427.

CJ to demand that a Member State changes its legal rules if EU-protected rights or obligations are not enforced in a sufficiently efficient manner. The effects of this principle are further reinforced by the duty of sincere cooperation, as stipulated by Article 4(3) TEU. Although Regulation 1/2003 contains no explicit provisions to that effect, it is thus possible to argue that national legislation must provide for a specific type of sanctions for the infringement of Articles 101 TFEU. They must be effective and capable of a sufficiently strong deterrent effect, as well as targeted at entities who are the addressees of EU competition rules, that is, undertakings<sup>17</sup>. It is equally justified to say that the principle of effectiveness requires national laws to provide for effective powers of investigation for their NCAs in cases where EU trade may be affected and that the purpose of Regulation 1/2003 is “fully to involve all national competition authorities in the enforcement of Articles 81 and 82”<sup>18</sup>.

The very same principle of effectiveness also applies to national leniency programmes also in so far as they are applied so as to uphold the Treaty rules on competition. As such, EU law limits national procedural autonomy with regard to leniency<sup>19</sup>. The cases which are discussed in parts three, four and five of this paper are examples of the application of this general principle.

European jurisprudence has already made a couple of forays into the territory of national procedural autonomy in situations concerning the uniform or efficient enforcement of EU competition law. In *Tele2 Polska*<sup>20</sup>, the CJ ruled here that Article 5 of Regulation 1/2003 could not be interpreted so as to allow NCAs to adopt decisions stating that Article 102 TFEU had not been breached<sup>21</sup> in light of the objective of a uniform application of EU competition law<sup>22</sup>.

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<sup>17</sup> K. Ost, “From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence” (2014) 5(3) *Journal of European Competition Law & Practice*, p. 131.

<sup>18</sup> W. Wils, “Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law”, [in:] A.M. Mateus, T. Moreira (eds.), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement*, Alphen aan den Rijn 2007, p. 107–109.

<sup>19</sup> For an example of similar reasoning discussed in literature before Regulation 1/2003 entered into force, see J. Temple Lang, “The Implications of the Commission’s Leniency Policy for National Competition Authorities” (2003) 28(3) *European Law Review* 430–435.

<sup>20</sup> Judgment of the Court of 3 May 2011 in case C-375/09 *Prezes Urzędu Ochrony konkurencji i konsumentów v Tele2 Polska sp. z o.o., now Netia S.A.*, ECR [2011] I-03055.

<sup>21</sup> See K. Kowalik-Bañczyk, “Jednolite stosowanie unijnego prawa konkurencji jako ograniczenie dla autonomii proceduralnej krajowych organów ochrony konkurencji” (2012) 2 *Europejski Przegląd Sądowy* 39–45.

<sup>22</sup> The reasoning applies directly also to Article 101 TFEU.

It was then clarified in *Webic*<sup>23</sup> that a Member State's duty to ensure the effective enforcement of Articles 101 & 102 TFEU precluded the application of national provisions which would preclude their NCA from participating in appeal proceedings against its own decisions<sup>24</sup>. Importantly also, the CJ said that NCAs were obliged to ensure that Articles 101 & 102 TFEU were applied effectively in the general interest, and that national procedural rules must not jeopardise the attainment of this obligation<sup>25</sup>. EU jurisprudence on national leniency programmes is the result of the application of the very same general principles as those mentioned above and share a common theme with *Tele2 Polska* and *Vebic* – national procedural autonomy is subject to limitations by the principles of equivalence and effectiveness of EU law.

## 2. Application to leniency programmes in purely national settings

The jurisprudence of the CJ applies directly only to leniency programmes pertinent to agreements that may affect trade between Member States. In practice however, the effects analysed in this article are very likely to also influence leniency applied in purely national settings. First of all, leniency programmes operated by NCAs apply both to infringements of Article 101 TFEU and to analogous national provision. NCAs do not have separate programmes for infringements of national and EU competition provisions seeing as creating and operating such separate schemes would cause unnecessary complications.

Moreover, any differentiation of leniency conditions between purely national situations and those where Article 101 TFEU is applicable could be incompatible with the principle of equivalence. It is fair to say therefore that the practical effect of the discussed EU jurisprudence extends beyond the scope of the application of EU competition law and reaches also the leniency programmes applicable to infringements of national competition laws of individual EU Member States.

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<sup>23</sup> Judgment of the Court of 7 December 2010 in case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereids en Chocoladebewerkers (VEBIC) VZW*, ECR [2010] I-12471, point 64.

<sup>24</sup> On that judgment, see P. Van Cleynenbreugel, "Institutional Assimilation in the Wake of EU Competition Law Decentralisation" (2012) 8(3), *Competition Law Review* 285–312; J. Goyder, "'VEBIC: the Role of National Authorities in Appeals against their own Decisions'" (2011) 2(3) *Journal of European Competition Law & Practice* 238–239.

<sup>25</sup> Judgment of the Court of 7 December 2010 in case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereids en Chocoladebewerkers (VEBIC) VZW*, ECR [2010] I-12471, points 56–57.

### III. Access to leniency documents

#### 1. The judgment in *Pfleiderer*

*Pfleiderer*<sup>26</sup> was the first case in which the CJ could rule on a leniency programme operated by a NCA<sup>27</sup>. The judgment concerned a reference for a preliminary ruling submitted by the *Amstgericht Bonn*, made in proceedings initiated by *Pfleiderer*. The latter challenged here a decision issued by the German NCA, the *Bundeskartellamt* which refused to grant *Pfleiderer* access to part of its file, including leniency documents, relating to the NCA's decision in the decor paper cartel case. *Pfleiderer* sought access to the file in order to bring an action for damages in light of the fact that it was a major client of the cartel's participants<sup>28</sup>. It was thus the *Bundeskartellamt's* initial refusal to disclose the sought documents which was challenged by *Pfleiderer*. The German Court asked the CJ whether EU law precluded national provisions from permitting disclosure of leniency documents to third parties. The question was limited to circumstances where the NCA's decision, based on leniency documents submitted by cooperating undertakings, was enforcing Article 101 TFEU in parallel to the respective national competition rules.

In his Opinion of 16 December 2010<sup>29</sup>, Advocate General Mazák proposed that a distinction should be drawn between, on the one hand, self-incriminating statements created and submitted by the applicant for the purpose of cooperating with the NCA in the framework of a leniency programme ("corporate statements"), and, on the other hand, all other documents whose creation preceded the applicant's decision to cooperate with the NCA ("pre-existing documents"). According to Advocate General Mazák, the former should not be disclosed, as "this could substantially reduce the attractiveness and thus the effectiveness of the authority's leniency programme and in turn undermine the effective enforcement by the authority of Article 101 TFEU"<sup>30</sup>. He argued by contrast that pre-existing documents would have to be disclosed,

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<sup>26</sup> Judgment of the Court of 14 June 2011 in case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECR [2011] I-05161.

<sup>27</sup> The jurisprudence of the Court of Justice of the European Union concerning the Commission's leniency programme is well developed, see F. Arbault, E. Sakkers, "Cartels", [in:] J. Faull, A. Nikpay, *Faull & Nikpay. The EC Law of Competition*, Oxford 2007, p. 839–845; V. Rose, *Bellamy & Child. European Community Law of Competition, Second Cumulative Supplement*, Oxford 2012, p. 301-304.

<sup>28</sup> Judgment in *Pfleiderer*, points 9-15.

<sup>29</sup> The Opinion of Advocate General Mazák delivered on 16 December 2010 case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECR [2011] I-05161.

<sup>30</sup> *Ibid*, point 48.



as their disclosure is mandated by the fundamental right to an effective remedy and fair trial “guaranteed by Article 47, in conjunction with Article 51(1), of the Charter of Fundamental Rights of the European Union”<sup>31</sup>. These rights would be infringed if potential claimants could not obtain access to pre-existing documents which could assist them in obtaining damages for the loss they suffered due to an infringement of Article 101 TFUE<sup>32</sup>.

The CJ did not follow the opinion of the Advocate General. In a laconic judgment, it stated instead that neither the provisions of the Treaty nor of Regulation 1/2003 lay down common rules on leniency or on access to leniency documents<sup>33</sup>. The CJ recalled that such documents as a Commission notice<sup>34</sup> or the Model Leniency Programme<sup>35</sup> do not bind EU Member States, nor do they bind national courts or NCAs. The CJ arrived at the conclusion that it was for the Member States to establish and apply their own rules on access to leniency documents. The distinction between corporate statements and pre-existing documents was not mentioned in the judgment<sup>36</sup>, nor did it say anything about the fundamental right to an effective remedy. The judgment relied instead on a number of well-established principles – the right of every victim of an Article 101 TFUE infringement to file an action for damages as established in *Courage*<sup>37</sup> and reinforced in *Manfredi*<sup>38</sup>; on the principle of national procedural autonomy applicable in the absence of relevant EU procedural rules and; on the limitations of that autonomy by the principles of equivalency and effectiveness<sup>39</sup>. Importantly, however, the CJ emphasized, by quoting its *Vébic* judgment<sup>40</sup>, that

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<sup>31</sup> Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389.

<sup>32</sup> The Opinion of Advocate General Mazák delivered on 16 December 2010, point 48.

<sup>33</sup> The judgment in *Pfleiderer*, point 20.

<sup>34</sup> The Court named two notices, the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17 and the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.

<sup>35</sup> Available at DG Comp’s website at <http://ec.europa.eu/competition/ecn/documents.html> (2.04.2014).

<sup>36</sup> This fact is correctly emphasized by S. B. Völcker, “Case C- 360/09 *Pfleiderer AG v. Bundeskartellamt*, judgment of the Court of Justice (Grand Chamber) of 14 June 2011, nyr” (2012) 49 *Common Market Law Review* 709–712 and A. Jurkowska-Gomulka, *Publiczne i prywatne egzekwowanie...*, p. 239.

<sup>37</sup> Judgment of the Court of 20 September 2001 in case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECR [2001] I-06297, point 29.

<sup>38</sup> Judgment of the Court of 13 July 2006 in joined cases C-295-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA, Nicolò Traicarico and Pasqualina Murgolo v Assitalia SpA*, ECR [2006] I-06619.

<sup>39</sup> The judgment in *Pfleiderer*, points 24 and 30.

<sup>40</sup> *Ibid.*, point 24. See the judgment of the Court of 7 December 2010 in case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakers, Ijsbereids en Chocoladebewerker (VEBIC) VZW*, ECR [2010] I-12471.

“specifically, in the area of competition law”, national rules must not jeopardise the effective application of Articles 101 & 102 TFEU.

It follows from the above that the principle of effectiveness plays, according to the jurisprudence of the CJ, a significant role in the application of EU competition law by NCAs and national courts. Regarding the main question posed by the national court in *Pfleiderer*, the CJ held that EU law did not preclude national provisions allowing the disclosure of leniency documents. It was said at the same time that it was for a national legal order to decide, taking into account the interests protected by EU law, whether to permit or to prohibit access to leniency documents to a potential damages plaintiff. Quoting *Courage*, the CJ listed those “interests protected by EU law” by acknowledging, on the one hand, the importance of private actions for damages for the strengthening of EU competition rules and, on the other hand, the role of leniency in enforcing the cartel prohibition. It also acknowledged that the disclosure of leniency documents could discourage undertakings from cooperating with NCAs and could thus limit the effectiveness of leniency programmes<sup>41</sup>. Therefore, competent national authorities were left with the task of weighing on a case-by-case basis EU interests in supporting private enforcement of EU competition law (through actions for damages) and ensuring its effective public enforcement (by way of efficient leniency programmes).

The *Pfleiderer* judgment was widely discussed in literature<sup>42</sup>. It has been rightly criticized for its vagueness and lack of clear guidance for national

<sup>41</sup> The judgment in *Pfleiderer*, points 25–26.

<sup>42</sup> S.B. Völcker, “Case C-360/09 *Pfleiderer* AG v. Bundeskartellamt...”, p. 695–720; B. Nascimbene, “Interaction between Leniency Programmes and Damages Actions in Antitrust Law: Perspectives for Collective Redress” (2013) 2 *World Competition* 275–283; C. Cauffman, “The Interaction of Leniency Programmes and Actions for Damages” (2011) 7(2) *Competition Law Review* 200–204; M. Sanders, E. Jordan, Ch. Dimoulis, K. Schwedt, B. DiLuigi, M. van Wissen, “Disclosure of Leniency Materials in Follow-on Damages Actions: Striking the Right Balance Between the Interests of Leniency Applicants and Private Claimants?” (2013) 34(4) *European Competition Law Review* 174–182; A. Beumer, A. Karpeta “The Disclosure...”, p. 125–130; P.J. Slot, “Does the *Pfleiderer* judgment make the fight against international cartels more difficult?” (2013) 34(4) *European Competition Law Review* 197–206; A. Jurkowska-Gomułka, “Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia art. 101 ust. 1 TFUE – glosa do wyroku TS z 14.06.2011 r. w sprawie C-360/09 *Pfleiderer* AG v. Bundeskartellamt” (2012) 7 *Europejski Przegląd Sądowy* 39–46; N. Harsdord Enderndorf, N. Maierhofer, “The road after *Pfleiderer*: Austrian preliminary reference raises new questions on access to file by third parties in cartel proceedings” (2013) 34(2) *European Competition Law Review* 78–83; C. Cauffman, “Access to leniency related documents after *Pfleiderer*” (2012) 3 *Maastricht European Private Law Institute Working Paper* 1–18; F. Bien, S. Pietrini, J.-Ch. Roda, “Chroniques. Jurisprudences européennes et étrangères” (2012) 2 *Concurrences* 174–176; A. Geiger, “The end of the EU cartel leniency programme”

courts<sup>43</sup> as to the proper way of conducting a case-by-case balancing act between the disclosure and non-disclosure of leniency documents. It has been pointed out that the ruling increased uncertainty for potential participants in leniency programmes<sup>44</sup>. Yet opinions about the actual impact of *Pfleiderer* on the effectiveness of leniency remained mixed. They ranged from severe criticism claiming that the judgment would lead to the end of cartel leniency programmes and a situation where “every European court from Palermo to Hamburg can decide differently whether your secret is safe or not”<sup>45</sup>, to opinions that its effects should not in fact be overstated<sup>46</sup>.

Key, from the perspective of national leniency programmes, is the fact that the CJ demanded in *Pfleiderer* that national legal systems must allow for an assessment of various conflicting interests in deciding on a potential disclosure of leniency documents. However, the judgment was not clear whether that weighting of the varying interests had to be done by national courts on a case-by-case basis or whether it could also be done by legislative means. The judgment failed to clarify also whether the necessity of a case-specific balancing act was mandated by the CJ only in the absence of national rules to the contrary – after all, the CJ acknowledged that procedural issues of leniency belonged in the realm of the procedural autonomy of Member States. In the wake of *Pfleiderer*, it seemed possible to argue that the judgment provided room “for adequate legislative solutions at the national and in particular at the EU level”<sup>47</sup>. However, that hypothesis was put into doubt by subsequent developments, especially the CJ judgment in *Donau Chemie*.

## 2. The aftermath of *Pfleiderer*

The “*Pfleiderer* test”, which requires that national courts weigh conflicting interests speaking in favour and against the disclosure of leniency documents,

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(2011) 32(10) *European Competition Law Review* 535–536; A.K. Singh, “Pfleiderer: assessing its impact on the effectiveness of the European leniency programme” (2014) 35(3) *European Competition Law Review* 110–123; H.M. Siltan, , C.S. Davis, D. Levisohn, “Pfleiderer AG v. Bundeskartellamt: a step forward in efforts to obtain discovery from European Commission antitrust proceedings” (2011) 19(6) *Westlaw Journal Antitrust* 1-10; D. Goddin, “The Pfleiderer judgment on Transparency: The National Sequel of the Access to Document Saga” (2012) 3(1) *Journal of European Competition Law & Practice*, 40–42; B. Turno, *Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji*, Warszawa 2013, p. 328–330.

<sup>43</sup> A. Jurkowska-Gomułka, “Między efektywnością...”, p. 41.

<sup>44</sup> B. Völcker, “Case C- 360/09 Pfleiderer AG v. Bundeskartellamt...”, p. 720.

<sup>45</sup> A. Geiger, “The end...”, p. 535.

<sup>46</sup> B. Völcker, “Case C- 360/09 Pfleiderer AG v. Bundeskartellamt...”, p. 720.

<sup>47</sup> *Ibid*, p. 720.

has been put to the test in two European jurisdictions, both leaders with respect to the private enforcement of EU competition law, namely Germany and the United Kingdom<sup>48</sup>.

In Germany, in the very *Pfleiderer* case, the Amstgericht Bonn declined to grant access to the leniency documents to *Pfleiderer*<sup>49</sup>. The Court relied here on a national provision allowing for access to the file to be denied, should such access threaten to compromise the objective of the investigation. A threat was found to exist in this case in the risk of deterring undertakings from cooperating with the NCA in the framework of its leniency programme. The German Court relied also on the “right of informational self-determination of the leniency applicant”, who supplied information on a voluntary basis, trusting that its confidentiality would be protected<sup>50</sup>. Taken into account were also interests protected by EU law as mandated by *Pfleiderer*. In light of significant evidentiary difficulties in detecting and deterring cartels, which are the most severe form of Article 101 TFEU violation, the Amstgericht Bonn noted that leniency programmes were the most effective tools in anti-cartel investigations and that granting access to leniency documents would jeopardise their successful functioning. The Court stated also that in the case under investigation, lack of disclosure of the requested pieces of evidence would not make it excessively difficult for *Pfleiderer* to obtain compensation, seeing as it could rely on the binding effect of the NCA’s decision stating that an Article 101 TFEU infringement took place. Moreover, if the cartel had not been detected thanks to the leniency programme, there would be no potential for bringing a private action at all.

A very similar reasoning was employed by another German court in a further example of a rejection to disclose the entirety of leniency documents<sup>51</sup>. The Court of Appeals granted here limited disclosure of non-confidential versions of fining decisions, redacted of personal data and business secrets, which

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<sup>48</sup> In the period 2008–2012, over thirty follow-up actions followed Commission cartel decisions in the UK, almost fifteen in Germany, five in the Netherlands, two in Belgium and Spain, a single action in Austria and Finland but not a single one in any of the other Member state, see “The Commission’s Proposal for a Directive on Antitrust Damages Actions”, presentation by C. Esteva Mosso, Director – Policy and Strategy at DG Competition, Brussels 20 June 2013, [http://www.bruegel.org/fileadmin/bruegel\\_files/Events/Presentations/130620\\_CPL/Carles.pdf](http://www.bruegel.org/fileadmin/bruegel_files/Events/Presentations/130620_CPL/Carles.pdf) (2.04.2014).

<sup>49</sup> Case 51 GS 53/09, decision of 18 January 2012.

<sup>50</sup> Mayer Brown, “Leniency Applications Protected: German Court Denies Private Plaintiffs Access to File”, p. 1–2; <http://www.mayerbrown.com/files/Publication/cc956e5e-870a-4982-8975-831d68a133f2/Presentation/PublicationAttachment/e10e7f58-a476-4963-be96-88cf04984827/12166.pdf> (2.04.2014).

<sup>51</sup> Case V-4 Kart 5 and 6/11 (Owi), decision of the Court of Appeals of Düsseldorf, 22 August 2012.

resulted in an indirect disclosure of parts of leniency documents, as those decisions relied heavily on the cooperation of leniency applicants'. However, the Court rejected the motion for the disclosure of the leniency documents as such, referring to the effectiveness of leniency in the fight against cartels, as acknowledged in the CJ *Pfleiderer* judgment. In its further ruling, it relied on arguments similar to those presented by the Amstgericht Bonn in that it did not regard leniency documents as indispensable for proving a damages claim, especially since it was stressed that they did not contain data necessary for the precise calculation of damages<sup>52</sup>.

A different issue arose in the United Kingdom within a litigation before the High Court of Justice in *National Grid*<sup>53</sup> (follow-up actions prompted by the Commission's decision of 24 January 2007 in case COMP/F38.899 Gas Insulated Switchgear<sup>54</sup>). Access to leniency documents was requested here on the basis of British procedural provisions on disclosure between parties. Moreover, the documents themselves had originally been submitted in the framework of the EU leniency programme. In accordance with the Commission's *Amicus Curiae* observations<sup>55</sup>, the Court concluded however that the principles established by the CJ in *Pfleiderer* applied equally to national leniency programmes and to the programme operated by the European Commission<sup>56</sup>.

The High Court correctly identified the key issue as far as the effectiveness of leniency programmes is concerned, that is, whether the disclosure of leniency documents would lead to the leniency applicant being put into a worse position in civil proceedings than non-cooperating undertakings. That would be the case if only the leniency applicant was sued<sup>57</sup> because it would have become subject to a final cartel decision (be it from the Commission or a NCA) earlier than non-cooperating cartel members, considering that it is fair to assume that the applicant would be less likely to lodge an appeal against such decision. In the words of the High Court, this would have been "a powerful factor against disclosure of leniency materials"<sup>58</sup>. However, this concern did not arise on the facts of the given case because leniency applicants were sued alongside non-cooperating undertakings.

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<sup>52</sup> T. Mäger, D. J. Zimmer, S. Milde, "Access to Leniency Documents – Another Piece in the Puzzle Regarding Public and Private Enforcement? (Germany)" (2013) 4(2) *Journal of European Competition Law & Practice* 182–184.

<sup>53</sup> *National Grid Electricity Transmission v. ABB Ltd* [2012] EWHC 869 (Ch).

<sup>54</sup> OJ 2008 C 5/7.

<sup>55</sup> Observations of the European Commission Submitted pursuant to Article 15(3) of Regulation 1/2003, [http://ec.europa.eu/competition/court/amicus\\_curiae\\_2011\\_national\\_grid\\_en.pdf](http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf) (2.04.2014).

<sup>56</sup> *National Grid*, point 26.

<sup>57</sup> Or, obviously, if the applicant was sued earlier than non-cooperating undertakings.

<sup>58</sup> *National Grid*, point 35.

Inevitable in light of *Pfleiderer*, the High Court also reached the conclusion that a general perception of uncertainty due to the possibility of a court-ordered disclosure of leniency documents is not enough to prevent it, although it might possibly deter future applicants. Yet if such perception was deemed enough to prevent disclosure, then providing access to leniency documents would be impossible in each and every case and that would be contrary to what the CJ had said in *Pfleiderer*<sup>59</sup>. Relevant in this context is also the gravity and duration of the infringement and the resulting severity of the fine. If an undertaking was not to cooperate, it would run the risk that another member of the cartel would apply for leniency instead and the former would be left with the prospect of paying a significant fine in addition to its liability for civil damages<sup>60</sup>. It is also important to assess whether the damages claim can be substantiated without making use of the leniency documents<sup>61</sup>. Ultimately, the High Court ordered limited disclosure of certain parts of the confidential version of the Commission Decision and of parts of the responses by defendant undertakings to information requests from the Commission, but refused to grant disclosure of all other leniency documents sought<sup>62</sup>.

The uncertainty resulting from *Pfleiderer* might have played a role in prompting the European Commission to finally, after a long period of deliberation<sup>63</sup>, introduce a legislative proposal for a directive on private damages actions for infringements of national and EU competition rules<sup>64</sup>. The proposed Directive would be applicable in cases where EU competition law is applied on its own or in parallel with national provisions<sup>65</sup>. The Commission Proposal<sup>66</sup> wanted to reintroduce EU law to the distinction

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<sup>59</sup> *National Grid*, point 36.

<sup>60</sup> *National Grid*, point 37.

<sup>61</sup> *National Grid*, point 44.

<sup>62</sup> *National Grid*, points 56–61. The High Court's observations, in light of their intellectual quality, may be of assistance to any national court tasked with applying the *Pfleiderer* test in cases dealing with either the Commission's or a national leniency programme.

<sup>63</sup> A. Piszcz, "Still Unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland after the 2008 White Paper" (2012) 5(7) *YARS* 58–61; A. Schwab, "Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims" (2014) 5(2) *Journal of European Competition Law & Practice* 65.

<sup>64</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Strasbourg 11.6.2013, SWD (2013) 203 final (hereinafter: Commission Proposal).

<sup>65</sup> Article 4, points 1 and 4 of Commission Proposal.

<sup>66</sup> On Commission Proposal, see A. Howard, "Draft directive on competition law damages – what does it mean for infringers and victims?" (2014) 35 (2) *European Competition Law Review* 51–55; R.H. Lande, "Proposed Damages Litigation – Don't Believe the Critics" (2014) 5(3) *Journal of European Competition Law & Practice* 123–124; A. Howard, "Too little, too late? The

between corporate leniency statements and other leniency documents – a division originally presented by Advocate General Mazák in his Opinion to *Pfleiderer* but ultimately disregarded by the CJ. In agreement with the Advocate General, the Proposal was designed to introduce absolute protection against disclosure to corporate leniency statements only<sup>67</sup> which would, however, also apply in the case of access sought by one of the parties to the original antitrust proceedings. As a result, even if a party would have had access to leniency documents contained in the NCA's file within the exercise of its right of defence in public antitrust proceedings, those documents would later be inadmissible as evidence in private damages actions.

Moreover, the Proposal provided for temporary protection of all documents drawn up by the parties specifically for the purpose of public competition law proceedings, or drawn up by the competition authority during those proceedings. The disclosure of such documents (or their use as evidence in private damages actions) was to be possible only after the competition authority had closed its proceedings<sup>68</sup>. With respect to all other documents, Article 5 of the Proposal obliged Member States to provide their courts with the authority to order the disclosure of evidence from a defendant or a third party at any time during the proceedings. The Commission Proposal strengthened leniency programmes also by stipulating that the undertaking which has been granted immunity (immunity recipient) shall be liable to parties injured by the infringement of Article 101 TFEU only if those parties were that undertaking's direct or indirect purchasers or providers, or if they proved that they could not obtain full compensation from other infringers<sup>69</sup>. An undertaking which has been granted leniency would also have its liability for its contribution to other co-infringers limited to the amount of harm which it had caused its own purchasers or providers; also, this undertaking would be liable only to the limit of its relative responsibility for the harm caused to entities other than the infringers' purchasers or providers<sup>70</sup>. The Proposal showed the Commission's commitment to protecting leniency programmes against disclosure. It seemed to respond to those calls of the doctrine<sup>71</sup> which demanded decisive actions from that very Commission in order to secure the effectiveness of leniency. However, further developments in EU jurisprudence

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European Commission's Legislative Proposals on Anti-Trust Damages Actions" (2013) 4(6) *Journal of European Competition Law & Practice* 455–464.

<sup>67</sup> Article 6(1)(a) of Commission Proposal.

<sup>68</sup> Article 6(2) of Commission Proposal.

<sup>69</sup> Article 11(2) of Commission Proposal.

<sup>70</sup> Article 11(4) of Commission Proposal.

<sup>71</sup> B. Völcker, "Case C-360/09 *Pfleiderer AG v. Bundeskartellamt...*", p. 720.

have seemed to, once again, put in doubt the chance of introducing clear EU rules on the protection of leniency documents.

### 3. The judgment in *Donau Chemie* – current state of EU law

In *Donau Chemie*<sup>72</sup>, the Court of Justice was given a chance to elaborate on its earlier findings in *Pfleiderer*, especially on the extent to which EU law limits the freedom of national legal orders as far as access to leniency documents is concerned<sup>73</sup>. The judgment followed a preliminary question submitted by the Oberlandesgericht Wien concerning the compatibility with EU law of Austrian rules on access to judicial files in cartel proceedings. The contested rule stated that access to the file required the consent of all parties to the proceedings.

In its judgment, the CJ provided some important clarifications on the duty of national legal orders to ensure that the *Pfleiderer* test is applied. It ruled that: “That weighing up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals”<sup>74</sup>. The CJ thus clarified that its *Pfleiderer* ruling was not only applicable to situation characterised by the absence of relevant national rules. Even if such rules exist, as was the case in *Donau Chemie*, EU law principles of equivalence and effectiveness place limits on a national legal system. The CJ had no doubt about the incompatibility of the contested Austrian rule with EU law seeing as it conditioned access to every document in the national cartel court’s file upon the absence of an objection from any of the procedural parties<sup>75</sup>. This rule made the exercise of the right to damages excessively difficult where

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<sup>72</sup> Judgment of the Court of 6 June 2013 in case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, not yet published.

<sup>73</sup> See M. Stanavičius, “Cartel File Disclosure to Damages Claimants” (2013) 4(4) *Journal of European Competition Law & Practice* 322–324; N. Hirst, “*Donau Chemie*: National Rules Impeding Access to Antitrust Files Liable to Breach EU Law” (2013) 4(6) *Journal of European Competition Law & Practice* 484–486; I. Vandenborre, T. Goetz, “EU Competition Law Procedural Issues” 2013 4(6) *Journal of European Competition Law & Practice* 506–509; É. Chassaing, “Procédures de clémence et accès aux documents: de l’*défiance* à la conciliation?” (2013) 37 *Revue Lamy de la concurrence* 67–72.

<sup>74</sup> Judgment in *Donau Chemie*, point 31.

<sup>75</sup> In fact, the Austrian rule allowed a potential defendant to prevent any access by the plaintiff to the cartel court’s file.



access to the documents contained in the judicial file was the only way in which a potential plaintiff could substantiate and prove its claim<sup>76</sup>.

The CJ reiterated that the national legal system must allow the competent court to weigh relevant interests in every single case. It stressed that a “one size fits all” approach of adopting a single, rigid legislative rule was contrary to EU law<sup>77</sup>, be it where such general national rule would provide for the principle of free access to the file, or, in fact, excessively limit that access. The judgment listed what factors should national courts take into account when deciding on disclosure – first, the interest of the requesting party in obtaining access<sup>78</sup>; second, actual harm to public interest, or to the legitimate interests of other parties, that might follow from such disclosure<sup>79</sup>. The CJ clearly stated that protecting the effectiveness of leniency can never justify the refusal of access to leniency documents if their disclosure is necessary for bringing an action for damages<sup>80</sup>. Refusing access might be acceptable only if there is a risk that the disclosure of a given document might undermine public interests related to the effectiveness of the national leniency programme<sup>81</sup>.

It is clear that the judgment in *Donau Chemie* excludes the possibility of adopting any clear-cut, unequivocal national legal rules precluding access to leniency documents. By so doing, it reinforces the effect of *Pfleiderer* in that regard. A national legal system must allow its courts to weigh the relevant interests on a case-by-case basis – the results of such assessment must be consistent with the aforementioned conclusions of the CJ. In particular, refusing disclosure must never preclude the possibility of a successful damages action being brought forward. If those documents are necessary for such action’s success, and there are no alternative evidentiary sources, then the assessing court must provide access regardless of its opinion about the effects of the disclosure on the effectiveness of the national leniency programme. It seems, therefore, that when those two interests conflict, the CJ provides for a clear preference for the right to access and the resulting right to bring a damages claim.

EU jurisprudence prompted the European Parliament’s Rapporteur in the Committee on Economic and Monetary Affairs to introduce wide-ranging changes to the aforementioned Commission Proposal on the Draft

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<sup>76</sup> Judgment in *Donau Chemie*, point 39.

<sup>77</sup> Judgment in *Donau Chemie*, point 35.

<sup>78</sup> Especially taking into account other possibilities of substantiating its claim for damages.

<sup>79</sup> *Ibid*, points 44–45.

<sup>80</sup> *Ibid*, point 46.

<sup>81</sup> *Ibid*, point 48.

Directive<sup>82</sup> including the deletion of absolute protection against disclosure for corporate statements. Instead, the Schwab Report formulated Article 6(1) of the Draft Directive so as to provide for a conditional protection of leniency documents. National courts would be precluded from ordering their disclosure to the claimant unless the latter could provide facts and *prima facie* evidence substantiating the claim that such access is indispensable. In the latter scenario, national courts would have the authority to order disclosure<sup>83</sup>. The Schwab Report justifies the above modification of the original Proposal by direct reference to the *Pfleiderer* and the *Donau Chemie* judgments. In their light, any per-se<sup>84</sup> protection of leniency documents is incompatible with primary EU law, especially the principle of effectiveness of the right to compensation<sup>85</sup>.

However, the negotiations between the European Parliament, the Council and the Commission<sup>86</sup> that occurred after the publication of the Schwab Report, led the European Parliament to the adoption of the Draft Directive in a version that retained the absolute ban on the disclosure of leniency statements, as formulated in the Commission Proposal<sup>87</sup>. Seeing as the text of the Final Draft Directive is the result of an inter-institutional compromise, which “cannot be reopened at any time without jeopardizing the whole agreement”<sup>88</sup>, and that it needs only to be approved by the Council before it can be published in the Official Journal, it seems almost certain that the Directive will end up containing an absolute ban on the disclosure of leniency statements<sup>89</sup>.

It remains to be seen whether the solution introduced by the Final Draft Directive will face, and survive, a potential action for annulment, seeing as it could be described as incompatible with the Treaty, as interpreted by the

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<sup>82</sup> See Committee on Economic and Monetary Affairs, Draft Report of 3.10.2012 on the proposal for the directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013/0185(COD) – hereafter: Schwab Report. See also A. Schwab, “Finding the Right Balance...”, p. 65–68.

<sup>83</sup> See Schwab Report, Article 6(1) – introductory part.

<sup>84</sup> That is, not allowing for any exceptions.

<sup>85</sup> Schwab Report, justification to Article 6(1), p. 27.

<sup>86</sup> See the Note from General Secretariat of the Council to the Permanent Representatives Committee, Brussels 24 March 2014, 2013/0185 (COD).

<sup>87</sup> European Parliament legislative resolution of 17 April 2014 on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 - C7 - 0170/2013 - 2013/01185(COD)), hereafter: Final Draft Directive.

<sup>88</sup> Note from General Secretariat of the Council to the Permanent Representatives Committee, Brussels 24 March 2014, 2013/0185 (COD), p. 2.

<sup>89</sup> Article 6(6) of the Final Draft Directive.

CJ in *Donau Chemie*<sup>90</sup>. However, it seems more justified to argue that the *Pfleiderer - Donau Chemie* jurisprudence was strongly influenced by the lack of EU rules on procedural aspects of actions for damages for infringements of EU competition law, especially regarding access to evidence. Taking into account that the Final Draft Directive will introduce a wide array of legal instruments aimed at facilitating access to evidence and bringing actions for damages, the CJEU should be expected to uphold the Directive's legality and, as a consequence, accept that leniency statements will be provided with protection against disclosure going further than the European judiciary has envisaged in its *Pfleiderer - Donau Chemie* jurisprudence.

#### **4. The application of *Pfleiderer - Donau Chemie* to the Polish leniency programme**

Polish competition law, contained primarily in the Act of 16 February 2007 on Competition and Consumer Protection<sup>91</sup> (hereafter: Competition Act), gives leniency documents a high level of protection against disclosure<sup>92</sup>. As a general rule, it provides for an absolute ban on the use of any information, including leniency documents, obtained in the course of the proceedings carried out by the Polish NCA (hereafter: UOKiK President), in actions for damages before civil courts<sup>93</sup>. The possibility to use such information, by way of exception, applies to a number of proceedings listed in Article 72(2-4) of the Competition Act<sup>94</sup>. However, Polish doctrine is of the predominant opinion that none of these exceptions apply to civil proceedings before national courts. There is only one provision which could cause doubts in that regard – Article 73(2)(5) of the Competition Act, which provides that the UOKiK President may provide competent authorities with information which may indicate that

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<sup>90</sup> See the Schwab Report, p. 26.

<sup>91</sup> Journal of Laws 2007 No. 50, item 331, with amendments.

<sup>92</sup> See, in detail, E. Rumak, P. Sitarek, “Polish Leniency Programme and Its Intersection with Private Enforcement of Competition Law” (2009) 2(2) *YARS* 110–115; B. Turno, *Leniency...*, p. 546–551.

<sup>93</sup> See Articles 73(1–2) of the Competition Act; the ban applies to all information received in the course of proceedings before the UOKiK President and precludes their use in any other proceedings, but for some exceptions listed in Articles 73(2–4) of the Competition Act.

<sup>94</sup> They include penal and fiscal penal proceedings, as well as information exchange with the European Commission and relevant national authorities based on the provisions of Regulation 1/2003 and Regulation 2006/2004, as well as the possibility that the UOKiK President may “provide competent authorities with information which may indicate that any separate regulations have been infringed”.

any separate legal rules have been infringed. Literature suggests that the term “competent authorities” should be understood as only those that may institute proceedings *ex officio*, which would exclude civil courts from the scope of that provision<sup>95</sup>. However, some authors note that the interpretation of the ambiguous terms contained in Article 73(2)(5) is still uncertain due to the lack of actual jurisprudence<sup>96</sup> applying that provision<sup>97</sup>. Other commentators argue that Article 73(2)(5) should be interpreted as allowing the UOKiK President to provide any competent authority with information regarding any infringement of any rule of universally binding law, which would presumably also include informing civil courts of competition law breaches<sup>98</sup>. Although such a wide interpretation of a provision stipulating an exception from the general ban on disclosure would seem unwarranted on the basis of national law alone<sup>99</sup>, it should be reassessed in light of *Pfleiderer – Donau Chemie*.

Article 70 of the Polish Competition Act provides for temporary protection of all leniency documents<sup>100</sup>. Accordingly, those documents are not to be disclosed<sup>101</sup> but for two exceptions. First, they must be disclosed to the parties of the given antitrust proceedings before the UOKiK President renders his/her final decision<sup>102</sup>. Second, access might be granted if the leniency applicant consents to such disclosure. In this light, Polish legislation seems incompatible with EU law because it does not give national courts the possibility to conduct the weighing exercise mandated by *Pfleiderer – Donau Chemie*. National

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<sup>95</sup> C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 689; B. Turno, *Leniency...*, p. 550–551; E. Rumak, P. Sitarek, “Polish Leniency Programme...”, p. 112; M. Bernatt, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2009, p. 1303.

<sup>96</sup> The shortage of court judgments shows that private enforcement of competition law in Poland can still be described as severely underdeveloped, see the data in footnote 48 above, see also A. Piszcz, “Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland After the 2008 White Paper” (2012) 5(7) *YARS* 65, 70.

<sup>97</sup> S. Famirska, “Sposoby...”, p. 346–347.

<sup>98</sup> J. Krüger, [in:] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Warszawa 2011, p. 807.

<sup>99</sup> It would completely defeat the purpose of Article 73(1) of the Competition Act, which stipulated a general rule that such information was not to be used.

<sup>100</sup> And also about the information about the very fact that a leniency application has been submitted.

<sup>101</sup> Article 70(1) of the Competition Act.

<sup>102</sup> Article 70(2) of the Competition Act. The information is disclosed to the parties at the latest when the UOKiK President calls on the parties to finally inspect all the evidence in the case file, see point 29 of the Guidelines of the President of the Office of Competition and Consumer Protection concerning the leniency programme. available at the UOKiK website. See also M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 168–175.

courts should thus not apply<sup>103</sup> these rules when dealing with a motion for the disclosure of leniency documents in a case in which trade between Member States may be affected. Instead, they should balance all of the relevant interests as mandated by the CJ in *Donau Chemie*.

However, it could be argued that the existing rules should be interpreted in a way which would ensure their harmonious interpretation in light of EU principles of effectiveness and sincere cooperation<sup>104</sup>. It is therefore submitted that in cases where the UOKiK President applies Article 101 TFEU in parallel to Polish competition law, Article 73(2)(5) of the Competition Act should be interpreted as allowing the leniency documents to be disclosed to a Polish civil court in a way, which would allow it to assess whether they should also be made available to the plaintiffs. Moreover, Article 73(2)(5) and Article 70(1) of the Competition Act should be interpreted so as to allow leniency documents to be used in civil litigations for damages based on an infringement of Article 101 TFEU in cases where the national court deems them indispensable to the success of the action. A potential plaintiff could therefore petition the civil court to order either the UOKiK President, or the leniency applicant itself, to submit to the court any leniency document, on the basis of general Polish civil procedure rules<sup>105</sup>. While the civil court is not bound by such motion<sup>106</sup>, it is nevertheless bound by *Pfleiderer – Donau Chemie* in cases concerning Article 101 TFEU. As such, it must therefore weigh the interests protected by EU law that speak both in favour, and against disclosure. If the court is convinced that disclosure of leniency documents is indispensable for the success of the damages action, it cannot refuse the plaintiff's motion only because of the potential dissuasive effect for leniency applicants<sup>107</sup>. Moreover, rejecting such a motion should be based on factors applicable to each particular document<sup>108</sup>.

It has to be noted that the Polish Parliament is currently deliberating on a draft Law amending the Competition Act of 2007<sup>109</sup>. Not only does the Draft Law not take into account the *Pfleiderer – Donau Chemie* jurisprudence, it

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<sup>103</sup> P. Craig, G. De Búrca, *EU Law...*, p. 264–265.

<sup>104</sup> See A. Madeja, “Wykładnia prounijna w orzecznictwie polskiego Trybunału Konstytucyjnego (1997-2005)”, (2011) 8 *Studia Iuridica Toruniensia* 142–146.

<sup>105</sup> Article 248 of the Civil Procedure Code (KPC), Journal of Laws 1964 No. 43, item 296 with amendments.

<sup>106</sup> See in more detail E. Rumak, P. Sitarek, “Polish Leniency Programme...”, p. 114–115; A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie...*, p. 224–227, 236–244, 273–277.

<sup>107</sup> Judgment in *Donau Chemie*, point 46.

<sup>108</sup> Judgment in *Donau Chemie*, point 48. The analysis conducted by the British High Court of Justice in *National Grid* should also serve as a source of inspiration for any national court applying the *Pfleiderer* test.

<sup>109</sup> See the Parliamentary Document No. 2124, Warsaw 2 February 2014, available at the Polish Parliament's website [www.sejm.gov.pl](http://www.sejm.gov.pl) (2.04.2014).

in fact further strengthens the level of protection against disclosure already granted to leniency documents in Poland by stipulating that self-incriminating statements by leniency applicants may be copied by parties only with the consent of the applicant. In its absence, parties can make hand-written notes from those statements, provided they commit to use them only in the given administrative proceedings or the appeal proceedings against the resulting UOKiK President's decision<sup>110</sup>.

It is submitted that the Draft Law amending the Competition Act should be re-drafted in order to take account of *Pfleiderer – Donau Chemie* and that the modification should be based on the provisions of the Final Draft Directive<sup>111</sup>. Absolute protection against disclosure should be retained only in regard to leniency statements while national courts should be allowed to decide on the disclosure of other leniency documents on a case-by-case basis and in accordance with the criteria set out in the Final Draft Directive<sup>112</sup> and the *Pfleiderer – Donau Chemie* jurisprudence. Moreover, the resulting amendment should apply not only to cases where trade between Member States may be affected, but should also extend to the use of leniency in purely national situations<sup>113</sup>.

#### **IV. Limitations placed on national leniency programmes – the principle of necessity**

##### **1. The *Schenker* judgment and the necessity principle**

In the case of *Schenker*<sup>114</sup>, the CJ could rule on the very premise of national leniency programmes. An Austrian court submitted a preliminary question on whether NCAs and national courts were competent not to impose a fine on an undertaking that infringed Article 101 TFEU. The resulting ruling is interesting not merely because the CJ answer that indeed they had such

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<sup>110</sup> Parliamentary Document No. 2124, Warsaw 2 February 2014, available at the Polish Parliament's website [www.sejm.gov.pl](http://www.sejm.gov.pl) (2.04.2014) – Article 1(26) of the Draft Law.

<sup>111</sup> On the need to take national legal context into account while transposing a directive into the national legal order and the Draft Directive in general, see A. Piszcz, ““Pakiet” Komisji Europejskiej dotyczący powództw o odszkodowanie z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń” (2013) 5(2) *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 55–64.

<sup>112</sup> Articles 5 and 6 of the Final Draft Directive.

<sup>113</sup> Reasoning justifying this conclusion has been presented in part II of this article.

<sup>114</sup> Judgment of the Court of 18 June 2013 in case C-681/11 *Bundeswettbewerbshörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, not yet published.

competence<sup>115</sup>, but also because it imposed a stringent limit on the procedural autonomy of Member States in this regard.

Article 5 of Regulation 1/2003, which regulates the powers of NCAs in the application of EU competition law, neither expressly provides for, nor excludes, the power of NCAs to declare that an infringement of Article 101 TFEU took place without however imposing a fine for it. The CJ ruled that such a decision by a national authority is permissible, albeit only in certain circumstances, those limits flowing from a NCA's obligation to effectively apply Article 101 TFEU in the general interest<sup>116</sup>. According to the CJ, NCAs are allowed not to impose a fine when finding an infringement of Article 101 TFEU only in exceptional circumstances. When such a decision is taken because of the application of a national leniency programme, it is justified only when such programme is "implemented in such a way as not to undermine the effective and uniform application of Article 101 TFEU"<sup>117</sup>. The CJ gave an example of such a justified immunity – where an undertaking's cooperation had been decisive in detecting and actually suppressing the cartel<sup>118</sup>.

The *Schenker* ruling regarding national leniency programmes is truly extraordinary. Although only two years have passed between the judgments in *Pfleiderer* and *Schenker*, the CJ has effectively overruled its *Pfleiderer* findings which stated that EU law does not lay any common rules for leniency in national legal systems<sup>119</sup>. In *Schenker*, the CJ formulated such common rule, that is, that national leniency programmes may be applied to Article 101 TFEU infringements only in exceptional circumstances<sup>120</sup>.

It is submitted that the *Schenker*<sup>121</sup> judgment pronounced the principle of necessity, seeing as immunity<sup>122</sup> from fines for Article 101 TFEU infringements

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<sup>115</sup> Judgment in *Schenker*, point 46.

<sup>116</sup> Judgment in *Schenker*, point 46. The requirement that national authorities are obliged to apply Article 101 TFEU effectively in the general interest was cited from the *VEBIC* judgment, the very same was cited in both *Pfleiderer* and *Donau Chemie*.

<sup>117</sup> Judgment in *Schenker*, point 47.

<sup>118</sup> Judgment in *Schenker*, point 49.

<sup>119</sup> *Pfleiderer*, point 20. It is worth pointing out here that both *Pfleiderer* and *Schenker* are judgments by the Grand Chamber of the CJEU.

<sup>120</sup> The CJ even cited its jurisprudence on the Commission's leniency programme, regarding the requirement of genuine cooperation of leniency applicants, see judgment of 28 June 2005 in joined cases C-189/02 P, C-202/02 P, C-205-208/02 P and C-213/02 P *Dansk Rørindustri A/S and Others v. Commission of the European Communities*, ECR [2005] I-05425.

<sup>121</sup> On the *Schenker* judgment, see C. Georgieva, "Arrêt Schenker: précisions importantes sur la portée du principe de confiance légitime et de la compétence des autorités nationales de concurrence en matière d'application du droit de la concurrence de l'Union", (2013) 37 *Revue Lamy de la concurrence* 66.

<sup>122</sup> It is submitted as well that the principles of *Schenker* can be applied equally to immunity and to the reduction of fines, even though the preliminary question was concerned with

can be accorded only exceptionally. Such a situation would arise only when immunity would serve the interest of an efficient enforcement of Article 101 TFEU more than it would harm it by reducing the overall level of fines. Therefore, national leniency programmes in cases of Article 101 TFEU breaches can be applied only if they are necessary to ensure efficient enforcement of Article 101 TFEU.

It is submitted that the national leniency programme can infringe the necessity principle either because its application scope is too widely defined or through a too generous practice of the relevant NCA. The fact that the CJ cited its own rulings on EU leniency<sup>123</sup> suggests that some of its jurisprudence on the Commission programme should be applied to national leniency also, especially regarding the question of whether immunity is justified by the undertaking's cooperation<sup>124</sup>.

As far as the scope of the application of a national programme is concerned, it is submitted that it should be applied only to those kinds of anti-competitive agreements that cannot be effectively detected and sanctioned otherwise. Moreover, they should be reprehensible enough to warrant such an exceptional investigative method as immunity from fines for an undertaking breaking its "solidarity" with other parties to the multilateral practice. The use of leniency is thus not justified in light of the necessity principle and the *Schenker* judgment if the infringement can be effectively detected and sanctioned without offering immunity, especially when it is not secret or the parties do not apply measures making it difficult to prove it. The same applies to situations where there is no solidarity between parties, as their interests are not convergent, or if the anti-competitive effects of the infringements are not severe enough to warrant deploying exceptional measures to fight it. In such cases, the use of leniency is incompatible with the principle of effectiveness of EU law.

## 2. Application of the necessity principle to the Polish leniency programme

The Polish leniency programme has an unusually wide application scope seeing as it covers all anti-competitive agreements infringing Polish

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immunity only. Therefore, in this part of the article, "immunity" should be understood as meaning also a reduction of the fine.

<sup>123</sup> See footnote 126 above.

<sup>124</sup> This article will not discuss EU jurisprudence on this issue, as it has been done elsewhere, see e.g. F. Mélin, *Le programmes de clémence en droit de la concurrence. Droit français et droit communautaire*, Paris 2010, p. 88–90; F. Arbault, E. Sackers, "Cartels", [in:] J. Faull, A. Nikpay, *Faull & Nikpay. The EC Law...*, p. 839–845.



competition law or Article 101 TFEU<sup>125</sup>. In fact, according to the ECN Report on leniency convergence<sup>126</sup>, only Polish, Swedish, Romanian and Finnish leniency programmes among the ECN members had such a wide scope of application<sup>127</sup>. Since the date on which the ECN Report was issued, the Finnish NCA has narrowed the scope of application of its leniency programme<sup>128</sup>. The Romanian programme, even though it applies both to horizontal and vertical agreements, still concerns only so called “hardcore agreements”<sup>129</sup>. That means that among the ECN members only Poland and Sweden have leniency programmes applicable to every single anti-competitive agreement.

It is fairly straightforward to conclude that such an extensive application scope is not compatible with the principles of necessity and of the exceptional character of immunity from fines as established by the CJ in *Schenker*.

First of all, multilateral practices other than secret cartels can be detected without the need to use the leniency programmes. This is true especially to vertical restraints, which form the majority of the cases where Polish leniency is being used<sup>130</sup>. These very often concern distribution agreements which can relatively easily be decisively proven by the NCA by way of normal investigative measures such as information requests or inspections<sup>131</sup>.

Secondly, solidarity, which causes cartel members to apply common schemes to keep their agreement secret, does not seem to be a common feature of other types of multilateral practices. In the vertical context, the interests of the parties are very often divergent<sup>132</sup> and there is little need

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<sup>125</sup> See Article 109 of the Competition Act and point 6 of the Guidelines of the President of the Office of Competition and Consumer Protection concerning the leniency programme, available at the UOKiK’s President website.

<sup>126</sup> ECN Model Programme: Report on Assessment of the State of Convergence, issued by ECN on 13 October 2013 and available at the ECN website. Hereafter: ECN Report.

<sup>127</sup> ECN Report, p. 5.

<sup>128</sup> Finnish Competition Authority Guidelines – Immunity from and Reduction of fines in cartel cases, p. 5, available at <http://www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-2-2011-Leniency-EN.pdf> (2.04.2014).

<sup>129</sup> R. Vasilache, “Romania”, [in:] S.J. Mobley, R. Denton, *Global Cartels Handbook. Leniency: Policy and Procedure*, Oxford 2011, p. 469.

<sup>130</sup> B. Turno shows that among the UOKiK President’s decisions rendered between 2004–2012, the leniency programme was successfully applied in only 12 and among those, only 3 concerned cartels, 3 others concerned “hub-and-spoke” agreements and the remaining 6 (50%) were typical vertical agreements on RPM. B. Turno, *Leniency...*, p. 630.

<sup>131</sup> The convincing critique of the excessive scope of the Polish leniency programme based on efficiency considerations can be found in B. Turno, *Leniency...*, p. 460–466, 671–673. See also R. Molski, [in:] T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa...*, p. 1669–1670; ECN Model Leniency Programme, Explanatory Notes, point 14.

<sup>132</sup> I. Lianos, “Collusion in Vertical Relations under Article 81 EC” (2008) 45 *Common Market Law Review* 1032.

for applying measures primarily designed to break the solidarity of cartel members<sup>133</sup>.

Thirdly, the anti-competitive effects of multilateral practices other than cartels are less harmful than in the case of cartels. In fact, those effects are complex and their influence on consumer welfare cannot be easily determined<sup>134</sup>. There is no need for exceptional measures to be used to fight multilateral practices the negative effects of which are uncertain – those efforts should be saved for cartels which are clearly damaging for consumer welfare<sup>135</sup>.

The European Commission does not offer the chance to obtain leniency to parties of vertical agreements<sup>136</sup>. Since the UOKiK President not only applies leniency to vertical restraints, but is also known to issue his/her decisions solely in respect to the leaders of a vertical agreement<sup>137</sup>, a situation might emerge where after leniency is applied to a vertical agreement, no fines are ultimately imposed. Such a decision would definitely threaten the efficient and uniform application of Article 101 TFEU<sup>138</sup>.

It has to be concluded that the Polish leniency programme, due to the excessively wide scope of its application, is incompatible with the principles of necessity and of the effective application of Article 101 TFEU as established in *Schenker*. The programme should apply to secret cartels only.

## V. Are NCAs under a positive duty to operate an efficient leniency programme?

There is an inherent uncertainty surrounding the concept of using positive obligations in order to maximize the effectiveness of a certain legal institution<sup>139</sup>. As a result, it may be speculative to claim that unless national leniency

<sup>133</sup> Ch. Harding, J. Joshua, *Regulating Cartels in Europe*, Oxford 2010, p. 228–236.

<sup>134</sup> F.M. Scherer, D. Ross, *Industrial Market Structure and Economic Performance*, Boston 1990, p. 569; A. Zawłocka-Turno, B. Turno, “Ustalanie sztywnych lub minimalnych cen odsprzedaży jako porozumienie ograniczające konkurencję ze względu na cel (przedmiot) w prawie unijnym” (2011) 4(73) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 72–74.

<sup>135</sup> J.-Ch. Roda, *La clémence en droit de concurrence. Étude comparative des droits américains et européens*, Marseille 2008, p. 158–161.

<sup>136</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases, (OJ 2006 C 298/17), point 1.

<sup>137</sup> G. Materna, “Prowadzenie postępowań antymonopolowych w sprawie antykonkurencyjnych porozumień dystrybucyjnych przeciwko ich organizatorom” (2012) 5 *Przegląd Prawa Handlowego* 42–49.

<sup>138</sup> If the Commission conducted the proceedings, leniency would not be available and all parties would be included in the decision.

<sup>139</sup> It always seems possible to make a certain institution more effective.

programmes incorporate some solutions meant to increase their efficiency, they will be incompatible with EU law and its effectiveness principle. It seems appropriate, nonetheless, to stress some of the very interesting observations made by the Advocates General in *Pfleiderer* and *Donau Chemie*. In his *Pfleiderer* Opinion, Advocate General Mazák stated that: “When a Member State (...) operates a leniency programme in order to ensure the effective application of Article 101 TFEU, I consider that despite the procedural autonomy enjoyed by the Member State in enforcing that provision, it must ensure that the programme is set up and operates in an effective manner”<sup>140</sup>. That view was endorsed by Advocate General Jääskinen in his Opinion in *Donau Chemie*<sup>141</sup>.

It is therefore submitted that a positive duty is placed on NCAs to operate an efficient leniency programme, although the meaning of efficiency must be defined in light of the principle of legal certainty – only well justified and uncontroversial conditions may be imposed on NCAs in the name of EU law efficiency. It is therefore submitted that the following basic conditions must be fulfilled by NCAs:

- 1) each NCA should operate a leniency programme. Although it might seem contrary to CJ’s words in *Pfleiderer*<sup>142</sup>, the CJ itself limited the impact of that statement in *Schenker* when it ruled on placing certain limits on the right of NCAs to offer immunity to undertakings infringing Article 101 TFEU. However, if it can be argued that EU law imposes a duty on Member States to operate deterrent sanctions<sup>143</sup>, or that Member States are obliged to provide their NCAs with sufficient powers of investigation<sup>144</sup>, it seems equally justified to submit that NCAs are obliged to operate the single most efficient anti-cartel investigative device known<sup>145</sup>, that is, the leniency programme. It would be difficult to argue that efficient enforcement is secured when the most effective detection device is not actually available;
- 2) each leniency programme should provide for automatic<sup>146</sup> immunity for one, and only one, undertaking that fulfils certain conditions. That rule

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<sup>140</sup> Opinion of Advocate General Mazák in *Pfleiderer*, point 34.

<sup>141</sup> Opinion of Advocate General Jääskinen delivered on 7 February 2013 in *Donau Chemie*, footnote 28.

<sup>142</sup> The Court said that there were no common EU rules on leniency, point 20 of *Pfleiderer*.

<sup>143</sup> K. Ost, “From Regulation 1...”, p. 131.

<sup>144</sup> W. Wils, “Powers...”, p. 107–109.

<sup>145</sup> Ch. Leslie, “Editorial – Antitrust Leniency Programmes” (2011) 7(2) *Competition Law Review* 175–176.

<sup>146</sup> “Automatic” in that context means “independent of the authority’s discretion”.

has been well tested in practice<sup>147</sup> and can be said to have a tangible influence on the overall effectiveness of the scheme;

- 3) leniency should be available before the opening of the investigation and, under certain conditions, also after its start<sup>148</sup>. An alternative solution could strongly limit the effectiveness of leniency as potential applicants may be discouraged if they cannot apply also after the investigation has started.

The above three conditions are general and are met by most competition law systems, including the Polish one. However, it is not yet clear whether any other conditions are imposed on national leniency programmes by the effectiveness principle of EU law.

## VI. Concluding remarks

Despite the existence of the principle of national procedural autonomy, EU law influences domestic leniency programmes to a considerable extent. This article has demonstrated three distinct areas in which such influence takes place. Greatest developments have been made in relation to access to leniency documents in the context of private actions for damages. Not only has the jurisprudence of the CJ already influenced EU legislature, it should be expected to influence also the amendments of the Polish Competition Act. The current Polish regime on access to leniency documents has been identified as incompatible with EU law.

The second area concerned limits on a NCA's ability to offer immunity to cooperating undertakings in the framework of a leniency programme. The CJ judgment in *Schenker* has put in place limitations on the use of national leniency. Their analysis has shown that the Polish programme is applicable to too many different kinds of agreements and that this is not only problematic from the point of view of its efficiency, but also its legality.

The third area concerned an attempt at formulating, on the basis of the statements of two Advocates General and general rules of EU law, a short list of positive obligations placed upon NCAs regarding the set-up of national leniency programmes. However, only future legislative or judicial developments can illuminate this issue further.

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<sup>147</sup> J.-Ch. Roda, *La clémence...*, p. 171; S. Hammond, "Cornerstones of an effective leniency programme", p. 18–19, <http://www.justice.gov/atr/public/speeches/206611.pdf> (3.04.2014).

<sup>148</sup> M. Motta, M. Polo, "Leniency programs and cartel prosecution" (2003) 21 *International Journal of Industrial Organization*, p. 375.

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