LENIENCY PROGRAMMES: ADJUSTMENT OF DOMESTIC LAW TO EU REGULATIONS

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Abstract: The article analyses the relationship between European and Italian law on leniency programmes, starting with an examination of the case law of the Court of Justice and administrative courts on this topic. In particular, the paper aims to demonstrate the relevant derogations introduced by European law from Italian common principles of law and rules on administrative procedures regulated by Law no. 241/1990.

1. INTRODUCTION

Leniency programmes1, which prove very successful in fighting cartels2, have assumed central importance in European competition law.

As detailed below, leniency programmes are instruments that allow any enterprise participating in a cartel to obtain the non-imposition or reduction of fines if the enterprise "reports" its participation in illegal agreements or practices.

The public interest that justifies the system of leniency programmes is based on the desire to repress illegal conducts that could be prejudicial for the community and for consumers. This is particularly true because


As far as domestic regulations are concerned, see: C. PESCE, I nuovi strumenti di pubblica enforce


1Lawyer.

2 As far as combating cartels is concerned, refer particularly to: D. J. WALSH, Carrots and Sticks – Leniency and Fines in EC Cartel Cases, in E.C.L.R., 1, 2009; M. MORTA, M. POLO, Leniency Programs and Cartel Prosecution, in International Journal of Industrial Organization, 21 (3), 2003, pages 347-380.
cartels – being secret in nature – are difficult to detect, but also because it is equally hard to find the evidence required to demonstrate their existence. However, without the cooperation of participants, it is not easy to assess the geographic extension of cartels, or their exact composition.

Consequently, the public interest in the discovery of the most critical antitrust conducts prevails over that of sanctioning the enterprise participating in a cartel that decides to cooperate with the authorities.

Leniency programmes are a paradigmatic example of the interrelationship between European and domestic levels of regulation in competition matters. As detailed below, leniency programmes have not been regulated by secondary European law (i.e. regulations or directives), but by the European Commission's Notices, which are soft law instruments.

Nowadays, in fact, leniency programme regulations have basically been applied to all the Member States through a natural harmonisation process that has also been improved by the Court of Justice.

Also because of the above-mentioned spontaneous harmonisation, the topic of leniency programmes becomes relevant in the review of the interaction methods between the European and the domestic level with respect to competition.

In fact, as we will see in detail forward, reviewing Italian domestic law, the impact of European law has implied the introduction at the domestic level of important derogatory regulations in the field of administrative law, applicable to ordinary administrative proceedings.

At the same time, the analysis of some specific issues – again with respect to the interconnection between European and internal levels – will lead to the detection of some gaps that are difficult to fill with solely "legislative" intervention on the part of the Court.

For instance, the question of the relations between the confidential character of the leniency materials and the right to access of any third parties damaged by cartels – which will be widely examined below – demonstrates the basically legislative role of the intervention of the Court and, at the same time, the need for an informed definition at political level of the conflicts affecting the values at stake.

This paper aims to investigate whether there are any "possible accommodations" of internal law resulting from the need to adjust and adapt to European legislation, and, if so, what they are.

In particular, we will examine the problems related to i) the execution of the sub-proceedings for the admission to leniency programmes; ii) the possibility to challenge and question the decisions of the Authority.

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3 For a general discussion of the interrelationships between the two legislative levels in the competition sector, G.M. ROBERTI, *La dimensione europea della politica della concorrenza*, in *Federalismi*, 2012, no. 3.

4 The need for uniformity has created the coordination of national Authorities within the European Competition Network that has promoted a single model of Leniency Programme. See note n. 20.
concerning the admission to and/or the rejection from leniency programmes; and iii) the right to access the documents submitted by leniency applicants.

The examination of these issues will allow us to draw our conclusions on the interrelations between European and domestic law and on the necessary adaptations of the latter due to the impact of the former.

2. **EUROPEAN LAW AND LENIENCY PROGRAMMES: THE GENERAL PRINCIPLES**

As we know, at the European level leniency programmes are not regulated by Treaties or derived law (i.e. 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). They were in fact originally included in the Notice of the European Commission of 1996, which was improved and replaced first by the Notice of the European Commission no. 5/2002/C 45/03, and then by no. 2006/C 298/11.

The latter Commission Notice (2006) was the result of a decade of practical applications that made it possible to correct and amend a few defects of the regulations.

Generally, as the evolution of notices directs us to believe that the Commission has achieved a delicate equilibrium of the interests involved, the ratio of the benefits promised to leniency applicants, the fines applied and the benefits that companies may obtain from the participation in a cartel is found to be suitably balanced.

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5 This aspect is relevant in the wider issue of the relation between public and private enforcement. On this point see, in particular, the recent work by A. CARUSO, *Leniency Programmes and Protection of Confidentiality: The Experience of the European Commission*, in *Journal of European Competition Law & Practice*, 2010, vol. 1, 6, pp. 453-477.


9 In order to avoid a long and detailed digression on the changes made by the Commission in the years following the first notice, we deemed it appropriate to base this paper on the most recent regulations deriving from the 2006 notice.

10 At present, we can affirm that, on a European level, the instrument of leniency programmes has had a significant impact on the fight against cartels. On the basis of the data on cases initiated by Commission, available at [http://ec.europa.eu/competition/cartels/cases.html](http://ec.europa.eu/competition/cartels/cases.html), the use of leniency programmes has now become the approach of choice, accounting for up to 70 – 80% of the proceedings relating to cartels. This leads us to maintain that the system has effectively achieved an adequate balance between the various interests and positions involved.

11 On this point, see F. DENOZZA, *op. cit.*, p. 93. As we know, the institution of leniency programmes was and may be reviewed through complex and structured schemes of economic analysis, inspired also by game theory. On this point, see – in particular - C. HARDING, J. JOSHUA, *op. cit.*, p. 228 and following pages; J. MÆDINGER, *Antitrust leniency programs: a call for increased harmonization as proliferating programs undermine deterrence*, Emory L.J., 2003, 52, p. 1460; S. BISHOP, M. WALKER, *Economics of EC competition law: concepts, application and
Regardless of possible alterations or further improvements that could be introduced, we may assert that the distinctive central value of European regulations consists of the need to be able to predict the conduct of the Commission regarding the admission of a certain company in a leniency programme.

In other words, the effectiveness of the whole mechanism requires that the potential beneficiary is able to assess the ratio of benefits that may result from admission to a leniency programme or, alternatively, from its unchanged position in the cartel.

In fact, solely by performing an economic assessment of the benefit/cost ratio, the company may become convinced to apply for leniency after having evaluated the probability that its application may be accepted and the amounts saved because of this decision.

Consequently, the regulations on leniency programmes should allow the conditions and requirements for the admission of the leniency application to be identified clearly and early. In other words, the central aspect of the rules governing leniency programmes is the need to make the procedures and requirements of admission to a programme “mechanical” and almost automatic.

This is also confirmed by the evolution of European regulations and, in particular, by the subsequent notices of the Commission, whose interventions were unanimously considered as a progressive "objectification" of the procedure for the admission to leniency programmes.

The first notice dated 1996 awarded the Commission (in contrast to US regulations from which this instrument derives) extensive discretionary power to evaluate the leniency application, and established that the Commission itself would assess the existence of the requirements «solely upon the adoption of its final decision». Of course, given that – as said – the company willing to "confess" the existence of a cartel has to count on related – and almost necessary – protection under the "umbrella" of the leniency programme (to avoid ending up in a worse situation than that of the other cartel members), this made the instrument basically useless.

Subsequently, the 2002 Commission Notice first, and then – in an even more definite manner – the 2006 Notice, provided regulations to remove these defects and attempted to establish with greater detail the conditions required to access leniency

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13 See L. BROKX, A patchwork of leniency programmes, in European competition law review, 2001, 22, p. 35.
programmes, and the economic benefits for leniency applicants\(^\text{17}\).

Therefore, the possibility to assess the conduct of the Commission may be identified as the central, basic principle of the instrument; on the contrary, the granting of greater or lesser discretionary power to the Commission itself may turn out to be not only unsuitable, but even potentially in conflict with European provisions and, in particular, the 2006 Commission notice.

As the regulations have evolved through instruments of soft law, increasingly used by European institutions (especially in antitrust law), the above-mentioned Commission Notices cannot be considered formally binding for the member States, also because they concern solely the leniency programmes implemented by the European Commission\(^\text{18}\).

In spite of this, European regulations on leniency programmes have basically been implemented by almost all the member States, even if with primary differences\(^\text{19}\).

In 2006 the "informal" harmonization process implied – amongst other things – the adoption by the European Competition Network\(^\text{20}\) of a

\(^{17}\) The changes made in regulations on leniency programmes were successful, as shown by the remarkable increase from 2002 onwards in leniency applications; on figures see D. SCHROEDER, S. HEINZ, op. cit., 161 and C. PESCI, op. cit., p. 151.

\(^{18}\) See paragraph 21 of the judgment of the Court of Justice, 14\(^{th}\) June 2011, case C-360/09, Pfleiderer AG vs. Bundeskartellamt, in Racc. 2011, I-5161.

\(^{19}\) On leniency programmes of the member States, see the remarks by D. SCHROEDER, S. HEINZ, op. cit., p. 161.

\(^{20}\) ECN is the network that includes the Commission and the antitrust authorities of each Member State; it was established in 2004 to ensure an efficient allocation of tasks (and cooperation) to these authorities and the efficient application of EU competition regulations within the European Union.


\(^{22}\) See paragraph 22 of the judgment quoted in footnote no. 18; on case law, see J.S. SANDHU, op. cit., p. 155.


\(^{24}\) In this case, there could be the risk that a company turns out to be the first applicant to the competent authority in a member state, but that this same condition does not occur with the competent authority in another
authorities having the competence to apply article 101 of the TFEU (hereinafter also “the Treaty”).

So, the "model" of leniency programme as promoted by the ECN is aimed at ensuring – in an increasingly integrated market (so integrated that the submission of the leniency application becomes a «transnational game») – that the leniency applicant is not dissuaded from submitting a leniency application by an excessive differentiation of domestic regulations.

In other words, as highlighted in the document itself, the ECN Model Leniency Programme was adopted by the network members as a response to the need to enhance the effectiveness of leniency programmes and to simplify the burden for applicants and authorities in the event of multiple failings.

As usually happens for various subjects affected by European law, so-called "soft law" may already be the outcome of a process of convergence, as well as a step that may also lead to the – albeit unnecessary – formalization of regulations, (as, for example, occurs on the basis of the decisions of the Court of Justice).

The Court of Justice implements the contents of the Commission notices, giving them the same effectiveness as regulations. Frequently, the main grounds used for the formalization of soft law consist of the real need to meet the principles of effectiveness and efficacy of the European Treaty regulations.

This course was followed also for the issue in question, as the Court of Justice pointed out that, although the adoption of leniency programmes falls within the competence of the member States, they have to make sure that adopted regulations are not prejudicial to the effective application of articles 101 and 102 of the Treaty.

So, there is no specific guidance so far stating the member States’ duty to adopt and apply a leniency programme; and one possible view is that member States are at liberty to adopt (or refrain from adopting) their own leniency programmes and to design their cartel detection system as they find suitable.

As leniency programmes remain outside Regulation no. 1/2003, the uniformity issue does not arise.

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25 Also the introduction of the 2007 general regulations issued by the ICA (Italian Competition Authority) highlights that "different approaches to the availability of leniency benefits risk having negative consequences on the assessment of and fight against corruption by EU competition authorities" and that, on the other hand, «with respect to the parallel application of article 81 CE, cooperation between the Commission and competition domestic authorities is simplified by the adoption of favourable treatment programmes if inspired by these same principles». On this matter, see L. TORCHIA, Lezioni di diritto amministrativo progredito, Il Mulino. Bologna, 2010, 261.

26 See C. HARDING, J. JOSHUA, op. cit. p. 246; see also J. S. SANDHU, cit., p. 154.
However, if leniency is employed in relation to infringements of national competition law, the principle of equivalence should result in the application of the same system for infringements of Articles 101 and 102 of the Treaty. On the other hand, the principle of loyal co-operation in Article 4 of the EU Treaty requires the member States to take all measures necessary to guarantee the application and effectiveness of European law. Speculatively, perhaps a duty to design a national leniency programme might be deduced from the above-mentioned Article 4.

The case law "construction" of the Court of Justice should produce the same effects as the formal harmonization of domestic regulations, whose consequence would seem to be a physiological and – insofar as this is possible – inevitable standardization of the leniency programmes adopted by member states.

Indeed, Italy has introduced leniency programmes under paragraph 2-bis of article 15 of Law no. 287/1990 (introduced by article 14 of Law no. 248/2006), which transferred to the Italian Competition Authority (ICA) the need to adopt a general regulation that "in compliance with European regulations" would identify "the cases when fines may be avoided or reduced under the circumstances provided by European law because of the qualified cooperation supplied by companies in the assessment of infringements of competition regulations".

The rule contains two references to European law; one of them refers generically to «European regulations», as if its aim consisted of subjecting domestic regulations to legal instruments that in themselves are not binding, such as the Commission notices on leniency programmes 28.

In implementing the above-mentioned rule, the Italian Competition Authority adopted general regulation no. 16472 of 15/2/2007 (as amended under regulation no. 21092 of 6/5/2010, no. 24219 of 31/1/2013 and no. 24506 of 31/7/2013 29) that sets forth leniency programme regulations and is in line with those provided in the European Commission notice.

Once we have identified the reference context of regulations, we should note that from a methodological point of view the analysis of domestic regulations is to be carried out considering the inevitable concurrence of domestic regulations, the need to ensure the efficacy of European competition regulations (article 101 TFEU) and the reference to the

28 It seems that M. CLARICH (op. cit., p. 278) has a different opinion; he argues that the reference to the European regulations is non-technical «as leniency programmes are not among the antitrust law aspects subject to harmonization within the EU»; therefore, there is not any «European law in a proper sense to refer to». However, the acknowledges that, at European level, «a soft harmonization process is in progress» («the reference actually appears to be non-technical, insofar as leniency programmes are not among the antitrust law aspects subject to harmonization within the EU, and therefore there lacks any European law in a proper sense to refer to. It is moreover true, as we have seen, that a soft harmonization process is in progress at the European level, and that the legislative models introduced in the various member states represent a useful basis for comparison»). On the «voluntary harmonization» process being followed by each Member State, see D. SCHROEDER, S. HEINZ, op. cit., p. 170.

29 The latest regulation, no. 24506 of 31/1/2013, amended the previous ones by reintroducing paragraph 10-bis (regarding the access to leniency programme documents) that had been erroneously abrogated by regulation no. 24219 of 31/1/2013.
European regulations converging in paragraph 2-bis of article 15 of Law no. 287/1990.

This means that the interpretation and application of domestic regulations – in particular traditional administrative instruments for procedures and proceedings – are required to comply with the European reference context.

Therefore, this paper aims to investigate whether there are any "possible accommodations" of domestic institutions due to the need to adjust and adapt domestic regulations to European ones – and, if so, what they are.

3. THE CONSEQUENCES OF EUROPEAN REGULATIONS ON DOMESTIC INSTRUMENTS (THE ITALIAN CASE)

3.1 The execution of sub-proceedings for the admission to leniency programmes

The regulations on sub-proceedings for the acceptance of a leniency application are clearly described in the general regulation issued by Agcm. 31

30 It is unnecessary to highlight that in order to implement leniency programmes the Italian Competition Authority has recourse to traditional instruments of domestic law. For instance, leniency applications are accepted on the basis – and according to the result – of administrative proceedings whose phases are governed by the 2007 ICA regulations. During and at the end of such proceedings, the Authority issues administrative measures that may be challenged before the administrative court; the Authority itself may receive applications for access to the documents produced by the leniency applicant; etc.

31 First of all, the company willing to benefit from the immunity from fines or the reduction of fines is required to submit an application to Agcm (both before the Authority starts the preliminary investigation and in the course of the preliminary investigation itself), which shall be provided with any relevant information and documents. In this case, in order to unequivocally identify the application order, the authority shall issue – upon the request of the company – a note confirming the date and time of the application receipt. This is necessary, since leniency applications are assessed in order of arrival. When submitting the company application to Agcm, the applicant identity is not necessarily disclosed at the initial phase. Furthermore, the submission of the application may be preceded by a "booking" mechanism (so-called marker), which was introduced by the 2006 Commission notice to promote and objectify the acceptance procedure for leniency applications. In particular, on the basis of a reasonably justified request by the company, the authority may appoint a term for the implementation of the leniency application to gather all and any evidence. However, the request for the marker must be enclosed with the production of the following data: name and address of the company; description of the cartel, specifying the nature of the cartel itself and the goods and services involved; specification of its territory and term; information on other leniency applications – if any – already submitted to other authorities. Should the application be implemented within the term appointed by the authority, it will be deemed received –
The procedure for the above proceedings is very different from ordinary proceedings provided for under Law no. 241/1990.

It seems that this characteristic is an application of so-called informal administrative law that in recent years has given cause for an intensive discussion, although – as we said – the Italian general law on administrative proceedings is based on the formalization of the relationship between the administration and private individuals subject to administrative action.

First of all, it is possible to observe a clear "deformalization" of the proceedings, which are characterized by many significant informal steps (submission of oral applications; informal anonymous contacts, etc.).

Secondly, the proceedings in question are so highly confidential that some of the documents produced by the leniency applicant may be disclosed solely to the other companies participating in the cartel and only after Agcm has notified them of the statement of objections.

Also this characteristic strays from the approach of Law no. 241/1990, which – on the contrary – is based on the principle of transparency, restricting the hypothesis of priority of secrecy and confidentiality to exceptional circumstances that are, in turn, subject to a restrictive interpretation.

At the same time, due to the distinctive characteristics of the proceedings, it seems that no third parties – if indirectly involved – are allowed to exercise their rights under articles 9 and 10 of Law no. 241/1990 during the proceedings (intervention, submission of objections).


33 M. Clarich, op. cit., p. 286. The author’s opinion is shared by L. Torchia, Lezioni, cit., p. 261.
records and/or documents, access to documents in the course of the proceedings, etc.).

Thirdly, if at the end of the proceedings the leniency application is rejected, the proceedings could "implode" or be subject to a retroactive lapse because – as said – the documents of evidence may be withdrawn by the leniency applicant\textsuperscript{34}. This fully voids the proceedings, which would be deprived of one of their essential contents (i.e. the documents submitted by the leniency applicant).

As we can see, then, the distinctive characteristics of regulations on leniency programmes affect the traditional structure of proceedings so much that they imply a substantial departure from the general rules of Law no. 241/1990.

For that reason, we may see a concrete change in the effect on domestic administrative law and, in particular, in the system and general configuration of administrative proceedings, due to the influence of European regulations that basically allow the supervisory body to "transform" the characteristics of administrative proceedings in order to admit a certain person to a leniency programme.

### 3.2 The possibility to challenge and question the decisions of the ICA concerning the admission of a certain company to and/or its exclusion from leniency programmes

As said, the proceedings for the admission to leniency programmes are defined by the ICA through the adoption of administrative measures that may cause the acceptance or rejection of leniency applications.

For that reason, it is necessary to examine the procedures for challenging these measures, also with a view to verify whether Authority decisions may be submitted to an administrative court for review and, if so, with what restrictions and methods.

#### 3.2.1 Leniency applicants

Leniency applicants are doubtlessly entitled to challenge the adverse regulations that may be adopted by the ICA with respect to their admission to leniency programmes.

For example, exclusion may be decided pursuant to paragraph 11 of the general regulation of the ICA following the objection that the requirements for indemnity from fines have not been satisfied, and consists of an official decision to reject the leniency application.

Pursuant to paragraph 13 of the above Notice, the Italian Competition Authority may decide to reject an application even after its preliminary acceptance (on the basis of a conditional decision), if the ICA ascertains that the company does not meet the conditions for the granting of the benefit.

\textsuperscript{34} See paragraph 11, Agcm general regulations.
In fact, these regulations are directly prejudicial to the position of the company, as they affect its legitimate interest in benefiting from the immunity to fines.

On the other hand, the tendential "objectification" of the requirements and conditions for the granting of the benefit in question may actually emphasize the qualified position of the leniency applicant.

As far as the time limit for appeal is concerned, we may deem that the rejection of the benefit could be seen as a source of immediate harm, which should be challenged within the due term entailing the forfeiture of rights.

The issue was dealt with and resolved in a different way by the administrative court in the DHL case, since the decision to admit the companies to the leniency programme was qualified as an intra-procedural measure that could be challenged by the interested parties only at the conclusion of the proceedings, in the event of the admission being confirmed in the Authority’s final decision.

The view expressed by the Tar and the Council of State is based on the non-definitive nature of the documents stating admission to the leniency programme, taking into account the fact that, in accordance with point 12 of the national leniency programme, the preliminary acceptance of the application takes place on the basis of a "decision which is subject to satisfying the requirements for the granting of the benefit". The definitive decision regarding the existence of the premises for the non-application of fines, meanwhile, is embodied in the final measure.

The view set forth above – while attempting to extend the ordinary procedural instruments to the procedure in question – raises some doubts, which we summarize below.

Firstly, from a formal point of view, it does not yet seem to be fully clear whether the measure admitting a company to the leniency programme effectively constitutes an intra-procedural measure, without prejudice to the fact that also this latter type of measure must usually be appealed against within the limitation period (such as a decision to exclude a company from a tender procedure for public works, which is intra-procedural within the context of the procedure still in course, but which causes immediate harm to its recipient).

In effect, the conditions laid down by the leniency programme for admission are circumstances which in some sense are extrinsic and external to the fact of admission itself. These are, in other terms, conditions for admission whose fulfilment must be ascertained before the definitive decision regarding admission is made.

But conditional admission may be considered in any case valid and effective: we thus cannot rule out the possibility of it being immediately harmful (albeit in the presence of the

35 On this point, we should remember that, with respect to the system of commitments, the Council of State (VI, July, 20th 2011, no. 4393, Mastercard) issued a judgment which departed from previous confirmations, denying the possibility to challenge immediately the decisions issued by ICA to reject commitment proposals.  
conditions and of the necessary subsequent check as to whether these have been met).

From another point of view, the decision made by the administrative court does not seem to take into account the aforementioned need for certainty and objectivity in the procedure for admission to the leniency programme.

In fact, deferring until completion of the procedure any appeals by enterprises interested in accessing the leniency programme means introducing significant uncertainty into the position of enterprises that intend and apply to obtain the benefits in question.

Nor should we forget that the enterprise (provisionally) admitted is nevertheless required to provide relevant information on the cartel without having any certainty regarding the stability of its own position, taking into account the “shifting” of the appeals process to the end of the procedure.

Consequently, in the event of the admission of such appeals, the enterprise admitted to the leniency programme could in theory run the risk of finding itself excluded ex post from the programme after having contributed in any case to collecting evidence against the cartel and evidently also against itself.

Without prejudice to the above, the appeal must not be hindered in the event of the company, once notified of rejection by the ICA, deciding to transform its application into a request for the reduction of fines; in fact, it seems that this option cannot be considered as an acquiescence with respect to the rejection, provided – of course – that this clearly emerges from the conduct of the company, which must notify its disagreement regarding the rejection by ICA.

Given the circumstances, it appears that traditional rules on proceedings regarding the legitimacy to challenge and the interest in appealing against rejection decisions by the ICA are observed.

This seems to be in line with the need to establish a clear position, also with respect to proceedings, for the individual willing to access leniency programmes. Otherwise, if the possibility for individuals to defend their position out of Court was limited or reduced, the discretionality of the ICA would be extended and leniency programmes would turn out to be less attractive for the companies participating in cartels (which, in their benefit/cost assessment, could even include a restriction on their ability to defend themselves out of court in the event of rejection by the ICA).

In other words, the tendency to "objectify" the requirements and procedure for the admission to leniency programmes also impacts on the subjective legal position of leniency applicants, which is consequently strengthened.

### 3.2.2 Companies sentenced to fines at the end of the proceedings

Another problem to solve is the position of companies participating in cartels and sentenced to fines by the ICA at the end of proceedings.

In fact, it may happen that a company sentenced to fines not only challenges the regulation concerning fines, but also the
measures used to grant a leniency benefit to the applicant, also in order to object to the admissibility of the evidence provided by the ICA.

It seems that this question requires a negative answer, since the legitimacy of the company sentenced to fines because of a real and current interest to appeal has to be excluded.

This issue was faced for the first time by Tar Lazio in a case regarding chipboard panels.

In particular, in the matter submitted 37 to the administrative court, some of the companies sentenced to fines had challenged the fact that the leniency applicant had been admitted to the leniency programme by infringing the rules on discrimination and fine-increase prohibition. On this account, the Tar Lazio deemed the criticism inadmissible and stated that the claimants had no legally relevant interest in challenging the admission of the leniency applicant to the leniency programme, since the consequences arising from this admission were not detectable and the fines imposed on the companies responsible for the infringement, the admission and the granting of benefits could not be directly related.

In fact, it seems that the company sentenced to fines has only a particular interest in challenging the truthfulness or reliability of the evidence used by the ICA for its final decision in the proceedings.

The circumstance that some of the evidence is provided by the leniency applicant does not apparently legitimate the company sentenced to fines to challenge the admission of the applicant to the leniency programme.

This is due to the fact that any acceptance of such a challenge would not imply the voidness or exclusion of the evidence from the preliminary investigation documents, since the leniency applicant could ask – as we said – for its application to be transformed into a request for the reduction of fines. In this case, the challenge of the company sentenced to fines would not bring it any benefit, as the evidence provided by the leniency applicant would be deemed usable.

On the other hand, the conclusion reached above seems to be in line with the position of case law, which shows that the information and documents provided by the applicant are not sufficient to fully satisfy the need for evidence, since the Authority is supposed to justify its conclusions with additional elements 38.

37 See Tar Lazio – Rome, I, 13th March 2008, no. 2312, *Saib Pannelli Truciolari*. In particular, according to the position of the Court, the admission of the applicant to leniency programmes does not imply any hypothesis of discrimination, because the law itself introduced the awarding measure in 2006. Furthermore, there is no connection between the admission of the applicant to the leniency programme and the quantification of the fines imposed on the enterprises considered liable. Please note that the TAR court, in this judgment, also rejected the complaint submitted by the petitioners on the merits.

38 On this point, see the judgment of the TAR Lazio – Rome, I, 13th December 2010, no. 36126, *Liquigas/Butangas case*. With respect to this judgment, the companies sentenced to fines challenged the reliability and possibility to use the preliminary elements provided by the leniency applicant.

Firstly, the Court pointed out the evidential relevance of these elements by remarking that the statement of an enterprise accused of participating in a cartel, whose
Furthermore, the above solution contributes to eliminating an obstacle to the predictability of

exactness is challenged by other accused enterprises, cannot be considered sufficient evidence of the existence of a violation carried out by them without other evidence.

On the other hand, the position of the TAR is in line with the prevailing European case law (Court of First Instance, 26th April 2007, case T-109/02, Bolloré vs. European Commission, in Rac. 2007, II-947 and 14th May 1998, case T-337/94, Enso Gutzeit vs. European Commission, in Rac. 1998, II-1571).

However, the TAR highlighted that without elements of objective confirmation of the truthfulness of the statements of the leniency applicant, the verification of the reliability of the leniency applicant could be considered sufficient to support the assessment of the existence of a non-competitive conduct.

Nevertheless, the TAR court confirmed that the sole statement of the leniency applicant, if not supported by consistent and convincing items of evidence – that should be collected by the authorities – is not sufficient to demonstrate the existence of non-competitive collusion, achieved through agreements, relevant for the application of antitrust regulations.

It is necessary to prevent any possible distortive application of the instrument of leniency programmes, in the cases justified by an instrumental intention of the applicant to promote the (total or partial) removal of fines, such as to be prejudicial (although indirectly) to other competitors.

Secondly, in the opinion of the Court, there are other reasons that – even if apparently based on evaluations of mere opportunity – are directly connected to the necessary protection of the fundamental principles of the legitimate exercise of the functions of the antitrust authorities in identifying and fighting non-competitive conduct.

In fact, any "self-sufficiency" of statements could not only compromise the necessary development of the search for items of evidence – investigation falls within the specific tasks of the authorities – but it could also imply a restriction or alteration of the principle of cross-examination. An indiscriminate acceptance of the evidential value of a "confession" by the leniency applicant would imply an absurd inversion of the burden of evidence – accused individuals should provide suitable elements and/or circumstances able to challenge the statements of the leniency applicant.

the decisions of the ICA regarding the admission of leniency applications.

In fact, the reduction of the ICA’s discretionary power – as pursued by European and domestic regulations – could be vanished if the decision on the admission to leniency was subject to the opinion of the administrative court, as requested by the companies sentenced to fines at the end of the proceedings.

For example, if the appeal of the companies sentenced to fines was accepted and, therefore, the leniency applicant was later excluded from leniency programmes, the applicant would be in a very delicate position, having basically confessed its participation in the cartel without benefiting – as a counterweight – from the protection resulting from the admission to leniency programmes.

The situation would thus be similar to that already mentioned in relation to the “shifting” of appeals by pretermitted persons to a time after the definitive ruling on penalties.

As said, the lack of legitimacy of the companies sentenced to fines is based upon the particular situation resulting from the acceptance by the ICA of the leniency application; these companies are entitled to challenge the relevance, suitability or reliability of the evidence provided to the ICA, but not its subjective origin (as the documents could be kept on file even if the challenge concerning acceptance of the leniency application were accepted).

Also in this case, we see a departure from the ordinary rules of domestic administrative law: in fact, the specific requirements of the discipline of leniency programmes cause a
limitation of standing of persons potentially interested in challenging the decision of the authority on the admission of the applicant to the leniency programme.

As said, this is aimed at ensuring certainty and predictability, allowing the leniency applicant to reasonably predict whether his/her application for the leniency programme could be accepted and, therefore, to consider a legitimate expectation on the stability of the ICA’s decision.

3.2.3 Companies pretermitted in the proceedings for the acceptance of a leniency application

The benefit of immunity from fines provided for the first company accessing leniency programmes necessarily implies a kind of "race for confession" among the companies participating in the cartel.

In consideration of the critical aspects that may emerge upon the decision of the authority to grant leniency benefit to a company, both the 2002 and 2006 Commission Notices, and the Agem general regulations focus on setting an objective criterion to be adopted for the granting of benefits\textsuperscript{39}.

In particular, the criterion adopted is that of chronological priority, making it possible to establish an objective order for the assessment of the applications to be evaluated by the authority.

However, despite the effective objectification of the proceedings, we cannot exclude challenges between companies willing to benefit from the immunity from fines\textsuperscript{40}. In fact, it may happen that a company which failed to submit its leniency application first, intends to challenge the Authority’s decision to grant the leniency benefit to another company.

As said above, companies applying for the immunity from fines have a legitimate interest in benefiting from leniency; so, their legitimacy to challenge a decision by the Authority for the admission to leniency programmes seems hard to doubt.

Therefore, this implies that the relevant decisions of the Authority may be submitted for evaluation to the administrative court, which could annul them; consequently, a company other than the one originally chosen by the Authority could then be admitted to leniency programmes.

Nevertheless, in consideration of the strict predefinition of the time criterion for the admission of applications and of the requirements for the granting of the benefit, the risk of uncertainty related to disputes and review—although out of court—of the Authority’s decision should not be underestimated.

Furthermore, the opinion of the administrative court on the decisions made by the ICA

\textsuperscript{39} On this point see S. GUZZARDI, I programmi di clemenza per la lotta ai cartelli: riflessioni sull’introduzione nell’ordinamento italiano, in Giar. Comm., 2004, 05, p. 1087 ff.

\textsuperscript{40} On this account see, for instance, the case in point—still subject to the 1996 Commission Notice—decided by the Court of First Instance in the judgment of 15\textsuperscript{th} March 2006, case T-15/02, Basf Ag v. Commission of the European Communities, in Racc. 2006, II-497.
regarding admission to leniency programmes should be intended as limited to arbitrary or clearly unreasonable evaluations. In leniency programmes, then, there could emerge a different stance to that usually taken regarding the extensive discretionary power of the ICA, supported by case law in the Menarini judgment.

So, for the same reasons stated above, we believe that pretermitted companies should immediately submit any challenges regarding the Authority’s decision (albeit "conditional") to admit an applicant to leniency programmes. This is due to the fact that these companies start suffering from harm from the moment the authority accepts the application pursuant to paragraph 12 of the general regulations, which estops the admission of other companies to the benefit of immunity from fines.

4. THE RIGHT TO ACCESS THE DOCUMENTS SUBMITTED BY LENDENCY APPLICANTS

One of the most controversial issues concerns the setting of limits for exercising the right to access the documents produced by leniency applicants.

As said, leniency applicants are supposed to enclose with their application any elements that may demonstrate the existence of the cartel, as well as any other explanations and details required to understand its scope. Therefore, the documents enclosed with the leniency application may be divided into those documents existing before the leniency application (for instance, internal corporate documents, such as e-mails, faxes, memos, letters, minutes of meetings, etc.) and the statements or information provided by the leniency applicant in the course of the proceedings for the acceptance of the application itself (which consist of documents prepared in the light of and on during the proceedings themselves).

Generally speaking, the secret nature of the proceedings leads us to believe that the exhibition of documents produced by the leniency applicant is an exception to the rule of confidentiality, thus reversing the principles under article 22 et seq. of Law no. 241/1990.

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41 See Court of Justice, 9th July 2009, case C-511/06, Archer Daniels Midland Co. v. Commission of the European Communities, in Racc. 2009, I-5843. In line with this, see L. Torchia, Legioni, cit., p. 262, that states that the decisions of the authority concerning the admission to leniency programmes may be submitted to the administrative court for evaluation «solely in the event of a clear misevaluation … according to the principles of reasonableness, proportionality and equal treatment».

42 On the Menarini case we should mention the decision of the ECtHR of 27 September 2011, whereby the exercise of jurisdictional control by an Italian administrative court may be qualified as a strong rather than weak control exercised on the assessments of the ICA.

43 See paragraph 3 of the ICA general regulations.

44 See M. Clarich, op. cit., p. 287. With respect to the specific discipline on access to documents of the ICA, refer to Presidential Decree no. 217/1998.
In order to investigate the matter, however, we need to distinguish between two different situations, with particular respect to the position of the company requesting the documents produced by the leniency applicant.

### 4.1 Requests from companies subject to proceedings for the imposition of fines

The 2006 Notice of the European Commission acknowledges charged companies’ right to access the official statements of a leniency applicant, although the exhibition of the documents is subject to significant restrictions. In fact, access is permitted provided that the information received may be solely used in connection with the judicial or administrative proceedings aimed at the application of the rules governing proceedings for the imposition of fines\(^{45}\).

On the basis of the 2006 Commission notice on leniency programmes, the use of information for other purposes in the course of the proceedings may be considered as a lack of cooperation for the evaluation of fines. Furthermore, if the information is used after the Commission has already adopted a decision of prohibition in the proceedings, the Commission itself – in the course of proceedings before the European courts – may request an increase in the fines to be imposed on the company responsible. At any time, should the information be used «for a different purpose with the participation of an external legal advisor, the Commission may report the fact, in the view of a disciplinary measure, to the court where the advisor practises»\(^{46}\).

On this account, the requesting companies shall commit themselves – together with their legal advisors – «not to copy with any mechanic or electronic means any information contained in the official statement they are allowed to access and to use the information received through the official statement solely for the purposes» hereinbefore\(^{47}\).

On the contrary, the original version of the ICA general regulations did not provide complete, articulated rules on access\(^{48}\); therefore, this gap was filled by regulation no. 21092/2010, which introduced paragraph 10-bis on the exhibition of the documents produced by the leniency applicant.

In compliance with the provisions under the Commission Notice, access to the oral or written statements released by the representatives of the requesting company is deferred, for companies charged with the infringement of article 2 of Law no. 287/1990 or article 101 of the Treaty on the Functioning

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\(^{45}\) See also the Commission notice on the rules for accessing the preliminary file (Official Journal C 325, 22/12/2005, page 7).

\(^{46}\) See paragraph 34 of the 2006 Commission notice on leniency programmes.

\(^{47}\) See paragraph 33 of the 2006 Commission notice on leniency programmes.

\(^{48}\) In particular, the Communication of 24/2/2007 merely established that access to the documentation presented by the company applying for admission to the leniency programme could be deferred pursuant to Article 13(10) of Presidential Decree no. 217/1998. Also with regard to statements made verbally, access was deferred "until notice of the statement of objections was sent".
of the European Union, until they receive notice of the statement of objections.

The text of paragraph 10-bis\(^49\) refers to article 13, paragraph 10, of Presidential Decree no. 217/1998, that allows the ICA «to order a reasonable deferment of the access to the documents requested until their relevance as criminal evidence is defined and – in any case – no later than the notification of the statement of objections».

Afterwards, the receivers of this notice may access the corporate statements provided that they undertake not to copy the information therein and to use it solely to defend their position in relation to charges brought by the ICA.

As far as the other documents are concerned (such as those «submitted by the requesting company as enclosures or supplements of statements»), it is rightly stressed that the ICA is entitled – but not obliged – to decide to defer access; after the notification of the statement of objections, these documents may be fully accessed by the companies subject to proceedings for the imposition of fines.

Consequently, failing a specific regulation, the 2006 principles of the Commission Notice should be considered applicable both to domestic regulations on access and to those of the national leniency programme.

In one case\(^50\), brought before the Council of State, a company sentenced to fines had claimed and obtained – on the basis of the rules above – access to only some of the documents produced by the applicant for leniency (and, in particular, the leniency application and the documents enclosed therewith).

Furthermore, the Authority denied the exhibition of some documents that were included in the file because they believed that the information they contained was basically irrelevant to the main proceedings and included some commercial secrets.

So, the Council of State deemed the denial by the Authority to be legitimate and highlighted that confidentiality prevails over the exhibition of the information provided by the leniency applicant and included in the preliminary investigation file. A contrariis, we may believe that the Authority is entitled to release only the documents provided by the company admitted to the leniency programme that are relevant to the exercise of the right to defence and – therefore – that are strictly connected to the scope of the main proceedings.

In this respect and in consideration of the methods adopted by the Council of State, the judgment is significant also from the point of view of the proceedings; in fact, during the preliminary investigation, the Council of State ordered the acquisition of a documented report by ICA that was aimed at describing - for each document subject to non-exhibition - the «context of the document, especially identifying in detail the phase of the proceedings when it was prepared», the «reasons of confidentiality or secrecy required for individual documents», any «suitability of individual documents to provide evidence for an infringement or elements deemed essential for the defence», as well as

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\(^49\) See note no. 30.

\(^50\) Council of State, VI, September, 6th 2010, no. 6481, Produttori Cosmetici and the TAR Lazio – Rome, I, 22nd April 2010, no. 8016, L’Oreal Cosmetici.
the «assessments that led the authority to exclude access partially or totally».

In particular, in the report submitted in the proceedings before the Council of State, the supervisory body specified that the rejection of the request for access was due to the basic irrelevance of the information requested with respect to the topic of the main proceedings, where such information was not to be used, or, more in general, to the irrelevance of the information for the correct formation of a complete cross-examination and of an adequate defensive strategy.

For the other documents, instead, the authorities acknowledged the reasons why, despite its use in the course of appeal, they decided not to allow full exhibition also to third parties other than those mentioned in the notice of preliminary findings. Their reasons were based not only on the possible disclosure of personal or confidential information, but also on the irrelevance of the confidential elements for the correct formation of a complete cross-examination and of an adequate defensive strategy, or of their partial coincidence with other data reported in documents that could be accessed freely.

This occurred in the event of an e-mail from the Sales Manager of the leniency applicant, to which access was authorised only for the part required to show the context of the e-mail and the circumstantial meaning assigned by the authorities, but of which the part containing confidential information irrelevant for the main proceedings was not disclosed.

We should highlight that the Council of State, in this judgment, only acknowledged and shared the position of the authorities, without apparently evaluating or assessing the correctness of the judgments of the authorities themselves.

On this point, therefore, the decision is perplexing, even if the issue involves the more general topic of a judgment by the administrative court on the technical assessments by the authorities.


In the light of the above, the exception is confirmed with respect to the ordinary rules on administrative proceedings, as previously detailed in section IV; confidentiality seems to be an important value also to defend the leniency applicant’s position from the risk of being forced to exhibit confidential documents and data.

4.2 Requests by third parties

a) We cannot rule out the possibility – quite the opposite, it is a frequent occurrence – of the documents produced by the leniency applicant being requested by third parties that may be interested in bringing an action for any damage caused by the activities of the cartel. For instance, we should consider a company that is somehow harmed by the existence of the cartel or a consumers’ association willing to start a class action.

In fact, we should remember that the application of leniency by the Commission (or by ICA) does not exempt the leniency applicant from the «consequences deriving from its participation in a crime» under article 101 of the Treaty on the Functioning of the European Union.

On this account, we should remember that according to consolidated case law, any person injured by anti-competition practices is entitled to claim damages if the causal link

51 See paragraph 39 of the 2006 Commission notice.

between the damage and the agreement or prohibited practice may be demonstrated pursuant to articles 101 or 102 of the Treaty. So, in the event of cartels, the injured party (i.e. a consumer or competitor) is entitled to start a civil action for damages before the national courts.

The introduction of private antitrust enforcement has been justified by reference to the direct effect of the provisions of the Treaty on competition, as well as to the principle of the effectiveness and uniform application of European law.

In fact, recital no. 7 of Regulation no. 1/2003 has acknowledged that domestic courts have to protect the subjective rights ensured by European law with respect to the disputes between private individuals.

Consequently, the possibility for private individuals to claim damages in civil proceedings should complete the application of rules on competition by national authorities.

This means that the leniency applicant may be exempted from antitrust fines, but not from any damages owed to third parties; of course, in consideration of these circumstances, the positions of a leniency applicant that confessed its participation in the cartel becomes critical.

As clearly highlighted in the 2006 Commission notice, any companies potentially willing to apply for leniency could be dissuaded from cooperating with the Commission because of this notice if their position in civil proceedings could become weaker than that of the companies that do not cooperate. In other terms, one of the elements to be considered by the leniency applicant in the benefit/cost assessment is the possibility of actions for damages brought by individuals that were damaged by the activities of the cartel.

This makes the possibility of accessing the documents produced by the leniency applicant in the event of a request for exhibition submitted by third parties a main issue.

This issue has been frequently discussed in case law, and has been dealt with in a judgment of the Court of Justice (Pfleiderer case)\textsuperscript{55}, which –

\textsuperscript{55} On the tendential conflict between private enforcement and regulations on leniency programmes (and, more in general, on EC Competition Policy), see D. J. WALSH, Carrots and Sticks – Leniency and Fines in EC cartel cases, in E.C.L.R., 2009, 1, 31 and M. BLOOM, Despite its great success, the EC Leniency Programmes faces great challenges, in European competition law annual, 2006, p. 558.
far from providing a final solution – has raised complex issues.

The case in question originated in Germany; it emerged in the course of a dispute involving a company – which in turn was the customer of another company in the industry of decorative paper, fined by the Authority – that had submitted a request to access the documents of leniency proceedings in order to bring an action for damages.

The issue focused on the necessary balance between the right to defence of the requesting company (that must be entitled to start an action for damages against the company participating in the cartel) and the need to protect the leniency applicant from the wholesale exhibition of documents that could compromise its position in the action for damages above (thus discouraging the submission of leniency applications)56.

First of all, we have to remark that the Advocate General, in his plea, clearly decided on a restriction on access with a view to protecting the leniency applicant (and, generally, the effectiveness of regulations on leniency programmes).

In fact, the Advocate General points out that the disclosure of the information and documents produced by a leniency applicant may seriously reduce the attractiveness and therefore the effectiveness of leniency programmes, as potential applicants could be afraid of finding themselves in an unfavourable position in the event of an action for damages based on their statements and on the evidence they produce regarding the other participants in the cartel that do not apply for leniency.

In other terms, although the leniency applicant may benefit from the immunity from fines or from the reduction of fines, it may however consider this benefit irrelevant if compared to the higher risk of being found liable for damages if the contents of its leniency file are disclosed wholesale, especially if domestic regulations consider the participants in a cartel to be personally, jointly and severally responsible57.

56 As the Advocate General effectively remarked in his final plea, there is a feeling of «tension between the efficient management of the leniency programme of domestic competition authorities, and therefore the application of competition regulations by public authorities, on the one hand, and the grant to third parties to access the information provided by the leniency applicants, in order to help them to start an action for damages pursuant to article 101 of the Treaty on the Functioning of the European Union on the other hand» (paragraph 39).

57 In the opinion of the Advocate General, it is necessary to balance the two interests involved: in fact, the Advocate General highlights that «nor regulation no. 1/2003 or the Court jurisprudence have defined a hierarchy de iure or a priority order between the application of the European competition law by public authorities and the actions suggested by private individuals». The balance has to be decided in favour of confidentiality on the basis of some issues that will be summarized below.

Firstly, it should be noted that, from a factual point of view, the activities of the Commission and of domestic authorities aimed at fighting cartels «are definitely much more important than the actions for damages started by private individuals pursuant to articles 101 … and 102 of the Treaty on the Functioning of the European Union». Secondly, the tension between the positions involved seems to be «more apparent than real, as there is not only a public interest in the application of effective leniency programmes aimed at identifying and imposing fines on secret cartels, but also that such programmes are also beneficial for the private individuals damaged by cartels». This is due to the fact that, in the absence of effective
On the contrary, in its decision, the Court follows a different line to that used by the Advocate General in his plea, also with respect to arguments. In fact, it seems that the Court starts with the opposite assumption of the central and prevailing character of the right to damages as an essential instrument for fighting cartels.

The Court acknowledges that the effectiveness of leniency programmes could be compromised by the «exhibition of documents … to the individuals willing to start an action for damages»: according to the Court «it seems reasonable to assume that any individual involved in a competition crime, confronted with such a possible exhibition, would be dissuaded from applying for leniency programmes, because the spontaneous information provided by the individual could be used as an object of exchange by the Commission and domestic competition authorities leniency programmes, cartels could remain secret and, consequently, their negative effects on general competition and on private individuals in particular could not be detected by any form of control. Furthermore, cartel detection and investigations started by the Authority following a leniency application could bring about the adoption of final decisions that, in turn, are doubtlessly useful to the damaged individuals willing to start a civil action for damages. In fact, despite the lack of certain regulatory data on this issue, the impositions of fines decided by domestic authorities can only be used by domestic judges as relevant evidence documents to assess the existence of the cartel and to sentence participants to fines. Consequently, the solution adopted by the Advocate General provides that, «in order to protect both private and public interests in the identification of and fight against cartels, it is necessary to pursue to the utmost the attractiveness of the leniency programmes provided by domestic competition Authorities, without limiting the right to access information unduly and, finally, the right to appeal effectively of a party involved in civil proceedings».

pursuant to articles 11 and 12 of regulation no. 1/2003» (paragraph 27, grounds).

Despite this, it confirms everyone's right to «claim for the damages caused a conduct able to reduce or distort the game of competitions».

In the Court's opinion, this right could strengthen the functioning of European competition regulations and is the suitable instrument to discourage company agreements or conduct; for that reason, actions for damages «can effectively contribute to preserve real competition».

At the end, the Court adopts a prudent solution and merely remarks that the conflict between the access to documents and the right to damages should be found, case by case, by applying the principles of effectiveness and equivalence.

In particular, states the Court, in evaluating a request to access the documents concerning a leniency programme submitted by an individual wishing to claim for damages, it is necessary to make sure that domestic provisions «are not less favourable than the ones provided for similar domestic requests, or that they are not drafted in such a way to make any indemnification almost impossible or excessively hard»; furthermore, it is necessary to compare «the interests justifying the exhibition of information to those for the protection of the information itself», by remarking that such a comparison «may be made by domestic judges solely case by case, pursuant to articles 11 and 12 of regulation no. 1/2003» (paragraph 27, grounds).

60 See paragraph 28, judgment.
61 See paragraph 30, grounds.
with respect to domestic law, and in consideration of all the elements of relevance in the case in points\(^\text{62}\).

It is thus clear that the decision of the Court increases the rate of uncertainty of leniency programmes, as the balance between access and confidentiality is assigned to domestic judges, who shall make this comparison case by case by considering all the elements of relevance in the case in point\(^\text{63}\).

Consequently, the leniency applicant, in evaluating the benefit/cost ratio objectively before applying for leniency, cannot count on any sure reference about the "future" of its statements and evidence documents; the applicant cannot properly evaluate the risk of undergoing an action for damages started by individuals damaged by the activities of the cartel.

Therefore, the prudent line taken by the Court ends up by jeopardizing both the instruments, that required joint coordination.

In fact, the uncertainty that necessarily emerges from the regulations on the exhibition of documents may contribute as part of a domino effect to reducing the attractiveness of leniency programmes, thus hampering the fight against cartels. This obviously also has negative effects on the position of individuals harmed by criminal agreements, as well as on their possibility to exercise their right to compensation. As was successfully highlighted\(^\text{64}\), the decision issued by the Court of Justice in the Pfleiderer case does not help resolve the various issues, but on the contrary raises some new ones.

Given the uncertainty relating to the destiny of the documents and because of the need to achieve a balance in each single case, it is really difficult to think that a certain enterprise could confirm its participation in a cartel, thus putting itself in a risky position with respect to actions for damages that could be started by the individuals harmed by the activities of the cartel.

The solution adopted by the Court in the Pflederer case was confirmed in the recent judgment regarding Donau Chemie AG\(^\text{65}\). Indeed, the Court restated that the balance between access and the confidentiality of

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\(^{62}\) See paragraph 31, grounds.

\(^{63}\) See S.B. Völcker, op. cit., p. 712.

\(^{64}\) See A. Geiger, op. cit., p. 535.

\(^{65}\) Court of Justice, 6th June 2013, case C-536/11, Bundeswettbewerbsbehörde vs. Donau Chemie AG. The Donau Chemie judgment is based on a preliminary question raised by the Court of Appeal of Vienna within proceedings brought by an association of enterprises (Verband Druck & Medientechnik), following the refusal to give them access to documents contained in a bundle regarding competition proceedings in which various enterprises working in the chemicals products sector, including Donau Chemie AG, had been charged with a violation of 101 TFEU. The application for access was functional to the bringing of an action for damages by the association of enterprises.

The refusal for access to the aforementioned documents derived from the application of a particular provision of the Austrian law on cartels (Kartellgesetz, art. 39.2) – in a departure from the general rules on civil proceedings – which ruled out third-party access to the documents of the competition proceedings, in the absence of consent from the parties involved in the proceedings.

The two issues raised by the judge of the Court of Justice regarded the possible conflict of the aforementioned provision of the Kartellgesetz with EU principles of efficacy and equivalence.
leniency documents needs to be evaluated case by case, weighing up the interests involved. More precisely, in the case in point, the Court deemed that the Austrian procedural rule whereby third parties could have access to documents regarding given proceedings only with the consent of all the parties involved was in conflict with European law.

It is evident that this provision implied a substantial, if not absolute, prevalence of the right to confidentiality of information regarding the leniency programme, since it is always in the interest of the leniency applicant to deny consent regarding access to documents by third parties who in turn may intend to seek damages against them.

The Court corrected this “distortion” by ruling that domestic courts should be put in a position to balance case by case the interests at stake, as in fact already seen in the Pfleiderer case.

The decision perpetrates the uncertainty of leniency programmes and runs against the necessary objectification of the procedure.

Furthermore, the final part of the decision in the Donau Chemie case seems to give more relevance to the right of access to the documents.

According to the Court, the public interest in having effective leniency programmes cannot justify a refusal to grant access to the documents. The refusal therefore has to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused.

b) The approach adopted by the Court of Justice has already found application, in the member States, in different ways.

First of all, the Amtsgericht Bonn, in the prosecution of the Pfleiderer case (after the Court decision), held that the Bundeskartellamt had to release a non-confidential version of the decision and any seized documents, but has the right to prevent access to the leniency application and annexed documents. In the Amtsgericht decision, it is said that «the refusal to grant access to the files does not unduly prejudice the interests of the claimant (…), nor does it, in this specific case, make it excessively difficult or practically impossible to obtain damages».

On the other hand, after the European Court judgment on the Pfleiderer case, the English High Court, in National Grid vs. Abb (4/4/2012), ordered disclosure to the claimant of limited parts of the confidential (non-public) version of the Commission's switchgear cartel decision.

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67 See points 46, 47 and 48, grounds of the judgment in the Donau Chemie case.

68 Bundeskartellamt immediately published a press release saying that the ruling supports its policy not to give access to its files.

69 In 2008, National Grid Electricity Transmission
The High Court confirmed that, although the Pfleiderer case is related to access to documents produced for a national competition Authority leniency programme, the same principles applied to the disclosure of documents produced for the Commission's leniency programme.

Accordingly, the High Court had the power to apply its own national procedures for the access to leniency material. Although the Commission could present its views to the national Court (as it did in this case), the Commission was less well placed than the national Court to assess the relevance of the disclosure being sought in litigation before the national Court.

The Court carried out the Pfleiderer balancing exercise, not accepting the disclosure of all the leniency materials sought.70

On the basis of these preliminary remarks, the Court ordered the disclosure only of selected paragraphs of the confidential Decision and the immunity applicant's responses to the Commission’s requests for information.

To protect against further use of the information, disclosure would be made only to those individuals within a pre-agreed confidentiality ring. Moreover, the Court declined to order disclosure of the leniency applicant's responses to the Commission's requests for information.

As said, the position expressed by the Court in the Pfleiderer case was applied in two different ways by the national Courts. The uncertainty derived is an inevitable consequence of the interpretation adopted by the Court of Justice, which – by referring to a balance applied to each single case – created an aleatory

70 In particular, the Court:
   i. rejected the plea of the parties thereto that intended to keep secret the material produced in the course of the proceedings;   ii. while recognizing that the exhibition of such material could prevent the application of the discipline on leniency programmes, it denied the classification of the materials in consideration of the peculiarity of the situation – the cartel had been operating for a long time and its participants should be subject to high fines;   iii. considered that the awareness of the injured individuals of the elements regarding the functioning of the cartel was necessary for adequate jurisdictional protection.
mechanism subject to the discretionality of authorities and judges.\footnote{Maybe, for this reason, the ECN, in the meeting of 23/5/2012, adopted a clear resolution in favour of the restriction of access. It stated that, as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of Leniency Programmes.}

c) The feeling is that the decisions of the Court of Justice in the Pfleiderer and Donau Chemie cases were almost inevitable; if we assume that the leniency applicant can undergo actions for damages started by third parties, it is interpretatively hard to limit or even deny third parties' right to access the documents produced by them.

In fact, we should not forget that both the Charter of the Fundamental Rights of the European Union, and the European Convention on Human Rights acknowledge the right to appeal effectively and to access relevant documents to protect one's position in a trial.\footnote{See, in particular, articles 41 and 47 of the Charter of the Fundamental Rights of the European Union. With respect to the European Convention on Human Rights, see article 13.}

In fact, we should not forget that both the Charter of the Fundamental Rights of the European Union, and the European Convention on Human Rights acknowledge the right to appeal effectively and to access relevant documents to protect one's position in a trial.\footnote{See C. LACCHI, op. cit., 2528.}

Furthermore, Regulation no. 1/2003 explicitly mentioned the application of the general principles of European law; \textit{inter alia}, we should certainly recall the right to effective jurisdictional protection.

Otherwise, as we have said, there is a risk of different approaches being taken in the national Courts in relation to claims arising from the same cartel.

The need for the Commission to take steps to mandate a single approach across the EU appears, therefore, to be clear.

It thus seems that the balance has to be necessarily found at regulatory level.\footnote{See the European Commission White Paper 2/4/2008, Com (2008) on «Damages actions for breach of the EC antitrust rules: adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation that the co-infringers.» See also the legislative proposal on antitrust damages actions (June 2012): «the objective of this legislative initiative would be to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU».}

European legislators should clearly decide between the protection of the leniency applicant's statements and the full effectiveness of actions for damages (that however risks compromising the diffusion and operational effectiveness of leniency programmes).

In fact, the direction followed by EU institutions is aimed at introducing a clear regulation of the relations between access and confidentiality.

On this point, we should firstly remember the Resolution of the Meeting of Heads of the European Competition Authorities of 23\textsuperscript{rd} May 2012, concerning the question of the Protection of leniency material in the context of actions for civil damages.
This document highlights the need for an appropriate protection of leniency material to ensure the effectiveness of leniency programmes and to enable the Authorities to uncover and terminate cartels as well as to document and establish their existence and the participation therein of companies up to a required legal standard.

The conclusion of the document states that «leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes».

The position held by the ECN is basically shared by 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, which is aimed at regulating actions for damages under National law for infringements of the competition law provisions of the Member States and the law of the European Union.

The Directive recently signed by the European Parliament is taking a decisive step towards the secrecy of documents connected to leniency programmes, providing that national courts do not, in actions for damages, order other parties or third parties to disclose evidence concerning statements of companies involved in a leniency programme. In particular, according to article 6 (8), if “only parts of the evidence requested are covered by paragraph 6” (mentioned in the note 75), “the remaining parts thereof shall, depending on the category under which they fall, be released”; on the contrary, confidential parts will continue to be secret (even if courts also incidentally access the documents in question).

Relevant problems could rise in judicial procedure; an extremely unclear provision Council on 10 November 2014; once the Directive is published in the Official Journal of the European Union, Member States will have 2 years to implement it in their national legal systems. The Commission shall review the Directive and shall submit a report thereon to the Parliament and the Council in six years from the entry into force (twenty days after its publication in the Official Journal of the European Union).

We can already offer some considerations on the regulation mentioned in the text, without prejudice to the fact that we will need to await its first practical applications.

For example, it is not clear how the intervention of the judge as established under Article 6(7) of the Directive should be qualified. In effect, the judge should have the task of ensuring that the contents of the documents "fulfil the definitions given in Article 2 (1) (16) and 2 (1) (18)". It thus seems that confidential documents are not part of the procedural bundle, but that the judge’s intervention is aimed solely at deciding what should remain confidential and what, instead, may be exhibited pursuant to paragraph 8 of the provision.

However, the judge acquires direct knowledge of the main items of evidence (namely the leniency corporate statements and the settlements) without these being part of the procedural bundle and without any debate on the issue being held.

75 In particular, according to art. 6 (6) of this draft directive, «Member States shall ensure that, for the purpose of actions for damages, national Courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

a) leniency corporate statements; and
b) settlement submissions». (check with pp. 42 – 47 of the enclosed file).

established that national courts, on a justified claimant's request, may access such documents for the sole purpose of ensuring that their contents fulfil the "leniency statement" definition. This is, in other words, a sort of formal assessment of the content and scope of the leniency applicant's statements.

As far as regards procedural access, Italian domestic regulations, and the ICA, under paragraph 10-bis of the 2007 general regulations (as amended in 2010), provide for the denial of access by any third parties intervening in the proceedings to the leniency applicant's statements and to the documents enclosed thereto.

5. **Final Remarks**

In the paragraphs above, we reviewed some aspects of leniency programmes that lead us to believe that Italian domestic regulations have basically "adjusted" to European ones in order to be in line with them.

The analysis of some material issues has shown confirmation of the complex interrelationship between European law and domestic administrative law; some of the consequences of this interrelationship are both the tendency to uniformly apply domestic regulations and the significant transformation of the Member States’ traditional approaches and instruments.

This phenomenon is even more manifest in antitrust law, because Regulation no. 1/2003 has created a system that may be basically qualified as integrated administration. However, this trend may also be noticed in the more specific regulations on leniency programmes, although we should remark that these have developed on the basis of soft law.

This characteristic has not objectively prevented or slowed down the drive towards uniform application, even if the lack of regulation at a legislative level has raised some questions (i.e. the access to documents by third parties in order to start actions for damages) that the Court of Justice does not seem to be in a position to answer.

However, the European system on leniency programmes has basically "transformed" domestic regulations from many points of view.

Firstly, the proceedings for the evaluation of leniency applications are based on (sub)proceedings, characterized by informality and confidentiality, that depart from the ordinary rules provided by law no. 241/1990.

At the same time, the need to attribute a predictable and assessable nature to the decisions of the Authority limits the legitimacy to challenge the decisions themselves before the administrative courts.

Then, as far as the exhibition of the documents produced by the leniency applicant is concerned, the balance between access and confidentiality is found to be based on completely different reasoning to the domestic approach; so, while the Authority in its general regulations decided to deny access to
documents by third parties, the Court of Justice, in its recent decision reviewed under paragraph IV.2., adopted a different solution that ended up granting domestic judges the task of establishing – case by case – restrictions to access. Of course, general rules under law 241/1990 and specific ones under Presidential Decree no. 217/1998 do not prevail.

As we can thus see, the "adjustment" of domestic regulations (both from a substantive and a procedural point of view) to European regulations is almost total, even if this is not related to the need for and force of European regulatory sources.

Therefore, as said, there is a kind of "harmonisation" of domestic regulations outside the traditional circuit provided by the Treaties. On the other hand, this trend is widely supported, in actual fact, by the network connecting the different Authorities and by the inevitable trend to unify domestic regulations.

In consequence of that, we should wonder whether it still makes any sense generally to speak of decentralization in competition law.

In fact, we may still notice a traditional tendency of the Union to mould organizational solutions in the specific field of competition that follow the above-mentioned decentralization rule, whereby national bodies should act as "neutral" instruments to implement supranational rules indirectly.

Nevertheless, as is confirmed by the concrete analysis of the specific system of leniency programmes, the traditional concept of the decentralization of enforcement will be superseded.

There no longer seems to be a division between the European legal system and those of national authorities, but a polycentric structure comparable to a "network" where both the Commission and the European courts play a central role is being created.

This gives rise to the need not only for coordination, but also – unavoidably – for a tendency towards uniform application or physiological convergence; such needs cause the European regulations – even if resulting from soft law instruments – to remould domestic administrative law (i.e. procedures, administrative acts, and judgments), even though they are already focused on a common line of convergence.\(^78\)

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