DISCLOSURE OF LENIENCY EVIDENCE: AN OVERVIEW OF ECJ’S PFLEIDERER AND UK’S NATIONAL GRID CASES IN THE LIGHT OF THE RECENTLY ADOPTED DAMAGES DIRECTIVE

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1. INTRODUCTION

This note aims at providing an overview of the most relevant case-law facing the crucial issue represented by the interaction between civil actions for antitrust damages and leniency programs.

After a description of the Pfleiderer case law, the United Kingdom’s National Grid ruling will be analyzed focusing on the aspects to be taken into consideration in order to balance the opposing interests in favor, on one hand, of disclosure of evidence, fulfilling the right to full private compensation, and, on the other, of protecting the information voluntarily submitted by a leniency applicant, defending an effective public enforcement.

The conclusion highlights the existence of cooperation mechanisms that facilitate the balancing of those opposing interests also in the context of the recently adopted Damages Directive, consistently with the Pfleiderer case law.

2. THE PFLEIDERER CASE LAW

Both the European Court of Justice’s (hereinafter, the “ECJ”)4 Pfleiderer case and the United Kingdom’s National Grid5 cases concern access to leniency documents kept by a competition authority, respectively, the German Bundeskartellamt and the European Commission (hereinafter, the “EC”).


5 For a wider comment on the cases at stake see M.Todino, E. Botti, Azioni risarcitorie per illecito antitrust recenti sviluppi e interazione con il public enforcement, in “Antitrust fra diritto nazionale e diritto dell’Unione Europea”, Primento, 2013.

1 Italian Competition Authority.

2 The present paper as been redacted with the contribution of Riccardo Haupt.
The Pfleiderer case was referred to the ECJ by the Amtsgericht Bonn, the latter having to decide on a refusal by the Bundeskartellamt to provide full access to a cartel investigation’s file needed to file a civil claim for damages. More specifically, the Bundeskartellamt provided only certain documents which Pfleiderer retained unsatisfactory. The German administrative Court then asked the ECJ whether victims of cartels could be denied access to documents voluntarily submitted by leniency applicants.

As a preliminary remark, the ECJ, on one hand, noted that leniency programs are “useful tools” to uncover infringements of competition rules and that the effectiveness of such programs could be compromised if the information voluntarily provided by leniency applicants were disclosed to companies intending to bring an action for damages, while, on the other hand, it underlined that - consistently with its settled case-law - “any individual has the right to claim for damages for loss caused to him by conduct which is liable to restrict or distort competition”.

The ECJ underlined that - aside the crucial role played by leniency programs in strengthening the effectiveness of competition rules - actions for damages can provide a significant contribution to the maintenance of effective competition in the European Union. Accordingly the ECJ stated that “in the consideration of an application for access to documents related to a leniency program […]”, it is necessary to operate a balance and “weigh the respective interests in favor of disclosure of the information and in favor of the protection of that information provided voluntarily by the applicant for leniency”.

The ECJ moreover specified that such balancing exercise shall be conducted by national Courts “only on a case-by-case basis…and taking into account all the relevant factors in the case”.

The ECJ held that both leniency programs and private actions for damages contribute to the deterrent effect of antitrust enforcement. Nevertheless, while serving the same objective,

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6 More specifically, in 2008, the Bundeskartellamt found that three producers of decor paper had infringed Article 101 of the Treaty through price fixing and capacity limitation, imposing fines for a total amount of 62 million euros.

7 A non-confidential version of the infringement decision and a list of documents seized during an inspection.

8 In its reference to the ECJ, the Amtsgericht Bonn proposed the following question: “Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article [101 TFEU]?"
the policies conflict with each other implying different consequences depending on the specific circumstances of the case. Therefore, the ECJ held that it should be left for national competition authorities and Courts to decide on an individual basis which of the interests should prevail under the specific circumstances of the case.

3. THE NATIONAL GRID CASE

National Grid\textsuperscript{14} concerned a follow-on damages claim, in the United Kingdom, resulting from the illegal cartel ascertained by the EC in the case COMP/F38.899 – Gas Insulated Switchgear\textsuperscript{15} (hereinafter, the “Decision”).

The Competition Appeal Tribunal (hereinafter, the “CAT”) was asked to decide on whether to meet the request of the National Grid Electricity Transmission Plc. (hereinafter, the “Claimant”) which sought disclosure from the cartelists of certain documents which might contain leniency materials submitted to the EC\textsuperscript{16}.

Following the requests of disclosure by the Claimant, the CAT, pursuant to Article 15 (3) of Regulation 1/2003, invited the Commission to submit written observations in relation to the following issues:

i) whether the ruling in Pfleiderer applied also to EC decisions;

ii) whether the national Courts had jurisdiction to determine disclosure of evidence or whether it could only be made by the EC;

iii) if the national Court does have such jurisdiction, what are the factors to be taken into account in the balancing exercise provided by Pfleiderer.

After having received the written observations by the EC\textsuperscript{17}, the CAT concluded that:

i) the application of Pfleiderer was not limited to national leniency programs but also encompassed the EC’s own program; the Court pointed out that the ECJ’s reasoning was expressed in general terms, and the

\textsuperscript{14} National Grid Electricity Transmission Plc v ABB Ltd & Ors [2011] EWHC 1717 (Ch) (04 July 2011) and National Grid Electricity Transmission Plc v ABB Ltd & Ors [2012] EWHC 869 (Ch) (04 April 2012).

\textsuperscript{15} The Decision was addressed to 20 companies and found that they had been engaged in an extensive and sophisticated cartel in breach of Article 101 of the Treaty regarding the supply of gas insulated switchgear (hereinafter, “GIS”). The Decision found that the cartel lasted over a period of 16 years from 1988 to 2004 and imposed fines of over 750 million euros.

\textsuperscript{16} The Claimant sought disclosure of i) the confidential version of the Decision; ii) the responses (including any accompanying documents) to the Commission’s Statement of Objections; iii) the responses to requests for information made by the Commission that explain the meaning of pre-existing documents relating to the operation and/or effects of the cartel, or otherwise provide information on the operation and/or effects of the cartel.

\textsuperscript{17} The relevant document is available at http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf
Bundeskartellamt’s program in that case concerned the enforcement of Article 101 of the Treaty, just as the Commission’s program is; furthermore, “although the Commission may be well placed to consider the effect of disclosure on its leniency program, that does not mean that it should be the arbiter of disclosure since it can present its views to the national court, as it indeed has done in the present case”18; finally, the CAT highlighted that the Commission itself had not suggested that there was any policy reason to give Pfleiderer a more restricted application;

ii) it had jurisdiction to determine the disclosure application as “there is nothing in Regulation 1/2003 that even remotely suggests that the court is precluded from applying its national procedures for access to documents”19; again, the Commission had not suggested differently in its observations; the CAT added that the contrary would be highly undesirable, if every application for disclosure of leniency documents had to be referred, that would place a significant burden on the Commission20;

iii) it is difficult to conduct the balancing exercise referred to in Pfleiderer, however the factors to be taken into account in the present case are that:

a) the claimant was not seeking access to full leniency statements, but rather to extracts from those statements incorporated into the confidential version of the Decision, replies to the Statement of Objections and requests for explanations;

b) disclosure would not increase the immunity/leniency applicant’s exposure to liability compared with liability of parties that did not cooperate;

c) although there may be “some deterrent effect” on potential leniency applicants as regards other cartels still uncovered, on the basis that subsequent disclosure applications may be made against them, that had to be set against the gravity and duration of the infringement and consequent scale of the penalties imposed in the case at stake;

d) the proportionality principle pointed in favor of disclosure, based on the fact that i) the information sought was not available from other sources, such as ‘pre-existing’ documents, and ii) the leniency materials were likely to be relevant.

Moreover, the Court expressly rejected arguments made by the defendants that they had the legitimate expectation that leniency materials would be protected from disclosure21. Both the 2002 and 2006 versions of the Commission’s Leniency Notice22 indeed made clear that the grant of immunity did not protect

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18 Paragraph 26.
19 Paragraph 28.
20 Paragraph 29.
21 Paragraph 34.
22 Recital 36 of the 2006 Leniency Notice, on the one side, states that the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine, but, on the other side, clarifies that “the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC”.

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the applicant from the civil law consequences of its infringement of Article 101. Lastly, the ECJ in Pfleiderer had expressly rejected the Advocate General’s view that immunity applicants had such a legitimate expectation.

The mere fact that documents would be “relevant” for the purposes of disclosure was, however, not sufficient in the present balancing exercise; it was instead necessary for the Court to consider whether the documents were “of such potential relevance that specific disclosure should be ordered”. The CAT concluded that “before determining an application under the Pfleiderer test where relevance, or potential relevance, is in issue, unless the decision is obvious I consider that it is appropriate for the court to inspect the documents and consider them individually before reaching a decision”. Following that analysis, the CAT ordered partial disclosure of the documentation at stake.

4. CONCLUSIONS

The system defined by the Damages Directive has been defined as “two pillars”, based both on private and public enforcement, even though it remains centered on the latter, especially in relation to the disclosure of evidence.

However, public and private enforcement should be interpreted as complementary, also with regard to evidence related to leniency programs.

Even if those programs are included in the so-called “black list”, benefiting from a total protection from disclosure, cooperation principles between the described “two pillars” should be highlighted. More specifically, article 6.7 establishes the mechanism through which national Courts may request assistance from the competent competition authority with regard to the assessment of evidences falling into the “black list”. In that context, the Damages Directive seems to be aligned to the “case-by-case basis…and taking into account all the relevant factors in the case” defined in Pfleiderer.

23 Paragraph 52.
24 Paragraph 55.

25 Article 6.6, letter (a), states that ‘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 statement (…). In addition, Recital 26 of the Directive provides that “exemption should also apply to verbatim quotations from leniency statements (…) included in other documents”.

26 “A claimant may present a reasoned request that a national court access the evidence referred to in point (a) …of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence”.