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THE LENIENCY PROGRAM BETWEEN PUBLIC AND PRIVATE ENFORCEMENT OF ANTITRUST LAW

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SUMMARY

The adoption of the Directive 2014/104/EU stops long time of expectations doubled by extended debates regarding private antitrust enforcement as one of the most important part of competition law. The Directive, regulating how an injured party can obtain compensation, makes a compromise between the need for the injured to have access to material documents and the need to protect the confidentiality of leniency documents. Analyzing the conflict between private and public enforcement of antitrust law, this research accentuates the importance of leniency policy, for both domain of competition law enforcement, such as an essential mechanism for uncovering cartels, but also a precious fund of information for private claimants.

Key words: antitrust law, leniency program, private enforcement, disclosure of documents.

АННОТАЦИЯ

Принятие Директивы 2014/104/ЕС останавливает длительные ожидания, которые удвоены длительными дебатами на тему частного антимонопольного законодательства как одну из самых важных частей закона о конкуренции. Директива, регулирующая вопрос получения компенсации пострадавшей стороной, идет на компромисс между потребностью потерпевшего в получении доступа к документальным материалам и необходимостью защитить конфиденциальность документов о смягчении наказания. Анализируя конфликт между частным и общественным исполнением антимонопольного закона, подчеркиваем важность политики смягчения ответственности для обеих периферий конкуренции, такой как механизм для выявления картелей, а также для ценного информационного фонда для частных заявителей.

Ключевые слова: антимонопольный закон, политика смягчения ответственности, частное исполнение, разглашение документа.

I Introduction

Since the adoption of leniency program, the majority of scholars have praised it considering that, finally, contemporary society has implemented an effective mechanism able to attenuate destructive effects of banned and secretive cartels' settlements. The efficiency of the leniency, developed for the reason that modern society considers cartels to be very dangerous for the prosperity of human beings, can be simply noticed from the reality that many countries on the globe have enlarged its provisions in order to offer more incentives to companies willing to self-report.

However, the innovative technique developed firstly to fight in opposition to anti-competitive agreements has become also, in short time, to be essential for damage actions in cartel cases. It is because usually private enforcement comes after the moment damages produced whilst it is difficult in front of national courts to prove the infringement of art. 101 and 102 TFEU and the connection between illegal conduct and damages. This issue has evolved in a complex contradiction between private and public enforcement of antitrust law. Both sides have feared to be affected in their interests or rights by this interaction. On the one side, applicants and beneficiaries of leniency policy have feared that their applications become source of evidence for plaintiffs in civil proceedings against them. On the other side, harmed persons by anti-competitive behaviors have feared that a too strong protection of leniency materials would make their claims impossible to be proved because the lack of evidence.

This article mainly evaluates the influence of the Directive on the efficiency of leniency policy and its interactions with public and private enforcement provisions. Ruling impact of the most important previous judicial decisions outlining the significance of leniency policy as main source of information and evidence for private enforcement and public enforcement of antitrust law is also taken into consideration. As the Member States are in the process of transposing provisions of the Directive adopted in December 2014 [1], it is not very clear how the conciliation between the need for harmed people to have access to documents and the need to protect leniency documents will increase the private enforcement of competition law. But, it is supposed that the Directive will not affect the effectiveness of leniency programs because it comes with a complete protection to leniency documents.

II. Short history of European leniency program

First European leniency program (1996 Notice) [2, p. 4–6] was adopted in 1996 due to the leniency program success in the United States [3, p. 798–799]. The 1996 Notice moved toward with the purpose that struggling against cartels can attain objectives defined by the 1993 White Paper on "Growth, competitiveness, employment: The challenges and ways forward into the 21st century": "<…> lay the foundations for sustainable development of the European economies, thereby enabling them to withstand international competition while creating the millions of jobs that are needed" [4]. Because this first leniency material did not have expected results and consequent with paragraph 3 of the 1996 Notice which announced that, later, it would be considered adjustments to leniency policy after acquiring adequate practice, the Commission amended its rules in 2002.

The 2002 Notice came with enhanced transparency and certainty and with first very short provisions regarding disclosure of leniency documents [5, p. 3–5]. Recital (33) of the 2002 Notice forbade that any written record regarding the Commission's leniency activity to be disclosed or used in favor of different objectives than implementation of art.81 EC Treaty. According to recital 32, the Commission sustained

this decision with art. 4(2)'s provisions of the Regulation (EC) № 1049/2001 forbidding access to documents if this would affect commercial interests, court proceedings, legal advice or the reason of inspections, investigations and audits [6]. Through this material there were also defined more comprehensibly conditions on which immunity or reduction of fines would be granted.

The latest Notice form, 2006 Notice took into consideration all experience accumulated since the program has started [7, p. 17]. The 2006 Notice has improved the transparency of modus operandi. There were added more provisions about data required to be presented by the applicants so as to profit of the clemency. For the first time, there were set up rules protecting corporate statements completed under this guidance as not to be accessible to plaintiffs in civil procedures. In line with recitals (33) and (34), only receivers of a statement of objections can obtain permission to utilize corporate statements. Furthermore, in order to eliminate any suspicion that evidence submitted under leniency could be used against whistleblowers, the usage of corporate statement is strictly prohibited other than administrative proceedings enforcing European competition rules.

The 2006 Notice's provisions trying to elucidate the safeguard of corporate statements brought different approaches between Member States' authorities and the Commission. Different understandings and handles emerged in judicial case, such as Pfleiderer case, Donau Chemie AG case, the Netherlands versus the Commission case. In order to eliminate any anxiety between the Commission and national competition authorities (NCAs), the Head of European Competition Authorities adopted a resolution on 23 May 2012 [8]. The resolution expresses a common understanding of NCAs on the safeguard of leniency material in the framework of civil damages actions. The common position relies on the significance of leniency material. Defense of leniency material is vital for efficiency of antitrust enforcement. In this context, although the resolution appreciates the importance of successful compensation of damages caused by cartels, it qualifies "<…> private enforcement of competition rules, in particular through damages actions, as a complementary tool to enforce competition rules".

III. Explaining the conflict between public and private enforcement

The concept of private enforcement of competition law in Europe appeared for first in 1963 when the Commission imagined this type of policy [9, p. 515, 517]. Since that moment widespread discuss and dispute have tried to generate a solution for excessively underdeveloped victims' right to obtain compensation. It had passed many years up to the Courage judgment which stated that the full effectiveness of art. 101 of the Treaty on the Functioning of the European Union (TFEU) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by a conduct liable to restrict or distort competition. Although, in the text of art. 101 or 102 TFEU, there is no clear indication regarding the right of receiving compensation, the court explained its decision by reference to the art. 101 TFEU. Through the Courage judgment, it is for first time when the conflict manifested clearly. It is for first time a decision recognized the importance of private enforcement and made a major evolution regarding the remedies available for violations of competition law.

The conflict has evolved in relation with the dilemma that many decisions of competition authorities in cartel cases are based on leniency applications but, at the same time, leniency applications are significant for the effectiveness of actions for damages in cartel cases because, frequently, damage actions in cartel cases follow on from those decisions. Leniency applications have become essential either in support of public enforcement or in favor of private enforcement.

The public institutions at both UE and national levels, having the Commission leader on this subject, have tried to prevent leniency materials to be disclosed for at least two main reasons. Firstly, they consider defense of leniency material to be imperative for effectiveness of antitrust enforcement because by means of leniency applications many corporate trusts have been uncovered within European Economic Area. Secondly, protection of leniency applications comes with significant time and money savings for NCAs and the Commission because motivations to cooperate under leniency are preserved and cartelists do not fear to be sued by private claimants. Therefore, with aid of leniency programs as "key tool to shorten the time necessary for prosecutors to get the relevant information", the NCAs can devote their efforts on other investigations [10, p. 6].

IV. The ECJ's decisions strengthening private enforcement

The evolution of private enforcement has been marked profoundly by court decisions. These decisions contributed to a better understanding of private enforcement content and urged the adoption of the Directive. The Pfleiderer undertaking, one of the world's three leading manufacturers of engineered wood, surface finished products and laminate flooring, suffered a loss over EUR 60 million by purchasing goods from a cartel of producers of decor papers. Due to a leniency application, the cartel formed by four European manufacturers of decor paper and five individuals was discovered and, on 21 January 2008, it was fined by competition authority of the Republic of Germany (Federal Cartel Office), pursuant to article 81 EC, in total EUR 62 million. The undertakings concerned did not appeal and the decisions imposing those fines have now become final. The Pfleiderer submitted an application to the Federal Cartel Office seeking full access to the file relating to the imposition of fines in the decor paper sector, including the documents relating to the leniency applications which had been voluntarily submitted by the applicants for leniency and the evidence seize, with a view to preparing civil actions for damages. Upon failing to gain access, the claimant took the claim to the Ambtsgericht Bonn which subsequently requested the European Court of Justice (ECJ) clarify whether the provisions of Community competition law, in particular arts 11 and 12 of Regulation 1/2003, are to be interpreted as meaning that parties adversely affected by a cartel may not "be given access to leniency applications" voluntarily submitted to an NCA by a leniency applicant.

In this case, it was for the first time when the Court deliberated if third parties can claim access to the file of an NCA containing documents submitted under a national leniency program [11, p. 123, 125]. The ECJ had to decide between two fundamental mechanisms of European competition law for instance between the effectiveness of the leniency program and the fundamental right of an individual to compensation [12, p. 110]. These two fundamental mechanisms are associated with different legal institutions. The leniency program was developed to serve public enforcement whilst the fundamental right of an individual to compensation represents the foundation of private enforcement. Subsequently, the Court had to decide if the disclosure of such information could undermine the effective enforcement of European Union competition law and the system of cooperation and exchange of information between the Commission and the national competition authorities of the Member States [13].

The ECJ decided that European competition law must be interpreted as not preventing a person who had been affected by an infringement of these provisions to obtain damages, access to documents relating to a leniency procedure being granted by the courts and tribunals of the Member States in concordance

with the rules of their national law [14, p. 535–536]. It its decision the ECJ insisted that "it is necessary to ensure that the applicable national rules are not less favorable than those governing similar domestic claims" with a special view of its previous decision Courage and Crehan [15]. According to the ECJ, it is up to the national courts of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused taking into account the interests protected by EU law.

Second decision Donau Chemie has helped private enforcement in the issue regarding to the rights of claimants for antitrust damages to have access at competition authorities' files [16]. In 2010, the Austrian Cartel Court (Oberlandesgericht Wien) fined the Donau Chemie and other six companies for their alleged participation in a cartel in the wholesale distribution of chemicals. The decision was confirmed by higher cartel court (Oberster Gerichtshof). The TVDM, trade association in the printing sector, representing the interests of its members, considering itself damaged by the infringement of competition law, in order to prepare an action for compensation, applied for access to the file held by the Cartel Court of the cartel proceedings. Parts defended by provisions of paragraph 39(2) of the 2005 Law on cartels which precludes third party access to leniency evidence without the consent of the parties to the proceedings. This provision applies only to cartel cases. The Cartel Court requested the ECJ to rule on whether such a national rule was compatible with EU law.

The ECJ ruled that, in light of the Pfleiderer decision, European Union law, in particular the principle of effectiveness precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of art. 101 TFEU is made subject solely to the consent of the parties to those proceedings. National courts weighed up the interests involved respecting the right to protection of professional secrecy, business secrecy or the right to protection of personal data. The national courts, having to rule on a request for access to the file, have no opportunity to weigh up the interests protected by EU law. Documents mentioned by decision included access to documents made available under leniency program. The right of accessing documents belongs to third parties who are not party to those proceedings with a view to bring action for damages against participants in an agreement or concerted practice. By this decision the ECJ stated that protection of leniency documents is not absolute and effectiveness of the leniency program cannot justify the non-disclosure of leniency evidence.

V. The conflict after entering into force of the Directive

1. Disclosure of evidence

Disclosure of evidence regulated in Chapter II of the Directive is one of the most important parts of this legislative act. Disclosure can be done only under strict judicial control obeying principles of necessity and proportionality. When a claimant makes a request for disclosure of evidence, the national courts, respecting principle of proportionality, may order the disclosure if the claimant has presented "reasonably available facts" and evidence that create "the plausibility" that he has suffered harm caused by the infringement. Proportionality should be carefully assessed when disclosure risks ravel out the investigation strategy of a competition authority by revealing documents or affecting on the way in which undertakings cooperate with the competition authorities. "Reasonably available facts" is a vague and indefinite formulation. There are no further descriptions of this concept. It is for the Member States in the process of transposition of the Directive to set a precise definition of it or, in the absence of national legislative intervention, national courts will have to find a solution for this issue. Therefore, claimants do not have to prove suffered damage at this stage. Making a request for disclosure of evidence using facts or evidence they have only to create the apparent validity that they were damaged by infringement. This situation is quite complex because suffered harm plausibility does not mean that the harm was produced. It is widely accepted that there is a strong presumption of plausibility of claim when harmed persons acquired from the cartel [17, p. 155, 156].

Generic disclosure of documents in the file of a competition authority relating to a certain case or generic disclosure of documents submitted by a party in the context of a particular case are not affected by the principle of proportionality. In this case evidence could be in possession of defendant or third party. Upon request of the defendant, the evidence could be in possession of the claimant or the third party. Disclosure is limited to evidence that is relevant to the claim. Relevance is analyzed in relation with the request which should be identified after constitutive elements: nature, object, content and time during which evidence was drawn up. The disclosure should be ordered only if that evidence cannot be reasonably acquired from another party than a competition authority.

2. Disclosure of evidence included in files of competition authorities

The Directive makes a distinction between evidence being in possession of defendant or third party and evidence included in the file of a competition authority (NCA). For this last type of evidence the Directive distinguishes three categories. First category which during negotiations was called "grey list" includes according to art. 6 para. 5 documents referring to: information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, information that the competition authority has drawn up and sent to the parties in the course of its proceedings and settlement submissions that have been withdrawn. "Grey list" of evidence may be disclosed by national courts after competition authority has closed its proceedings. If a person obtained such kind of information solely through access to the files of a NCA, this evidence cannot be used in actions for damages until the authority closed its proceedings by adopting a decision.

Second category of evidence according to art. 6 para. 6 formed by leniency corporate statements and settlement submissions was called "black list". In order to: "ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence" this evidence cannot be disclosed anytime by national courts. According to the Directive, leniency statement means an oral or written presentation voluntarily provided by an undertaking or a natural person to a competition authority with a view to obtaining immunity or a reduction of fines under a leniency program. Leniency statement describes the knowledge of that undertaking or natural person of a cartel and its role therein. Leniency statement cannot include pre-existing information which means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority. Settlement submission means a voluntary presentation by, or on behalf of, an undertaking to a competition authority which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure. Settlement describes the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law. The Directive considers leniency programs and settlement procedures important tools for the public enforcement of Union competition law. They contribute to the detection and efficient prosecution of the most serious infringements of competition law. In order to avoid undertakings might be deterred from

cooperating with competition authorities under leniency programs and settlement procedures if these evidences would be used against them in private litigations, corporate statements and settlement submissions cannot be disclosed anytime. If such kind of information was obtained by a natural or legal person solely through access to the files of an NCA, this information is not allowed to be used in actions for damages.

Third category of evidence, which is not on the black or grey list, as called "white list" may be disclosed anytime. If this information was obtained by a natural or legal person solely through access to the file of a NCA, this information can be used in actions for damages. But, in order to avoid that information become object of trade, use of this information in damage lawsuits are limited only to the natural or legal person who was originally granted access or to its successors. However, national courts can order that information obtained solely through access to a NCA's file, information which in not on "black list" of "grey list", be admissible in damage actions by other person than was originally granted access to the file or its legal successors.

VI. Compliance of the Directive with previous ECJ's decisions

Although judicial cases before the adoption of the Directive appeared to support private claimants, new provisions, embedded through the legislative packet, being supposed to sustain private enforcement are rather a conservative approach, "privileging the role of public enforcement" [18, p. 81]. On the one side, it is much appreciated that and it attempts to reach a compromise on several difficult issues, but, on the other side, it raises questions of incompatibility with recent decisions of the ECJ. The Directive provisions are not proportionate to the Pfleiderer and the Donau Chemie ruling's impacts. A critique of the Directive's measures is that trying to solve tension between the interests of private claimants and the effectiveness of leniency programs, it gives unconditional protection to leniency applicants. Therefore, the Directive does not harmonize different interests and neglects the interests of harmed private or legal persons by rewarding illegal behavior. It seems that the ECJ and the EU institutions have different objectives, while the ECJ is continuing a trend toward strengthening civil redress for violations of EU competition law, other EU institutions, particularly the Commission, are concentrated on protecting leniency program's appliances. The Directive represents a step back from the Pfleiderer decision which held that leniency material could be disclosed in private enforcement proceedings before the national courts, subject to a balancing exercise by the judge [19, p. 469–479]. The same conclusion is applicable regarding the Directive's provisions comparable with the Donau Chemie decision. Art. 6 para. 6(a) of the Directive is incompatible with the ECJ judgment in the Donau Chemie case because prohibiting the disclosure of leniency statements and settlement submissions the Directive can undermine the right conferred to the individuals by the art. 101 TFEU.

After entering into force of Directive 2014/104/EU, there are divergent acts sustaining different interests. On the one hand, the ECJ's verdicts defend disclosure of evidence and, on the other hand, the Directive prohibiting disclosure of evidence resulting from leniency programs. Is the Directive 2014/104/EU illegal because it does not comply with the ECJ's decisions? To answer at this question the most important is to analyze the arguments used by the ECJ in the process of adoption its decisions. The ECJ had two main arguments.

The first argument comes from the nature of leniency program. Paragraphs 20, 21, 22 are the most relevant parts of the Pfleiderer decision for this point of view: "20. Neither the provisions of the EC Treaty on competition nor Regulation № 1/2003 lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure which have been voluntarily submitted to a national competition authority pursuant to a national leniency program." Leniency program does not have legislative power because it is not regulated by a legislative act. The paragraphs 21 and 22 of the decision develop the consequences of point 20 content. Because leniency program or common rules on the right of access to documents are not regulated by the EC Treaty or by Regulation 1/2003, leniency program is not binding on the Member States. Furthermore, that model of leniency program has no binding effect on the courts and tribunals of the Member States. Under the provisions of Directive 2014/104/EU, is this situation going to be changed? The Directive in art. 6 para. 6 mentions leniency statements and settlement submissions ("black list") like evidence which national courts cannot order at any time a party or a third party to disclose any of the following categories of evidence for the purpose of actions for damages. Has the leniency program, even only being mentioned in art. 6 para. 6, received legislative recognition? Has the Directive changed the argument of no legislative force used by the ECJ in the Pfleiderer decision? I consider that leniency program under the Directive's provisions continues to maintain its no legislative force. Firstly, it is because there is only a short reference in art. 6 paragraph 6 regarding leniency statements and settlement submissions. It is very clear that the Directive does not regulate all aspects representing leniency program. Secondly, in Pfleiderer decision it is clearly specified that leniency program was developed neither by the provisions of the EC Treaty on competition nor by the Regulation № 1/2003. Therefore, directive is not mentioned by the court decision as a legislative act which would be able to change legislative statute of leniency program.

The second argument of the Pfleiderer judgment is presented in paragraph 30. In the consideration of an application for accessing to the documents relating to a leniency program submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency program, it is necessary to ensure that the applicable national rules are not less favorable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation. This is principle of effectiveness. The principle is the main argument of the ECJ in the Donau Chemie judgment. In agreement with it, national law is forbidden from making a provision under which access to documents is made subject solely to the consent of all parties to those proceedings. Third parties with a view to bring an action for damages against participants in an agreement or concerted practices have access to documents, made available under leniency program, after a weighing exercise by national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all relevant factors. The weighing up is a condition of compatibility with EU law. National law must not restrict the opportunity to weigh, on a case-by-case basis, of a national court. The Directive 2014/104/EU forbidding disclosure of all materials specified by the "black list" transgresses the principle of effectiveness.

VII. Proposals for improvement and stop the conflict

For the reason that the conflict, particularly, focuses on the interests of private claimants versus the interests of the leniency program, any solution of improvement must concentrate to make optimal the combination between damages actions and leniency policy. It must be taken into consideration that farther suggestions apply, particularly, to European competition law. This article considers that a sustainable solution to this conflict should start from the reality that public and private enforcement are complementary and equally important sides of any antitrust enforcement system. The option put forward by the Directive to eliminate disclosure of leniency materials is not acceptable in

the idea that it breaks the ruling impact of judicial decision by this way making almost impossible probation of infringements for private claimants. The article suggests some improvements which make an effort to preserve the incentives offered by a strong leniency policy but to take into consideration the need of private claimants to access leniency applications in order to succeed in their private proceedings. Is this possible? Does a legislative act can realize this?

The proposed improvement conserves reward granted to the companies providing evidence under leniency program but, at the same time, it brings significant help for private parties enforcing their rights before national courts. First step to realize this goal, complying with the ruling impact of the Pfleiderer and the Donau Chemie decisions, has to be as third parties affected by an infringement of competition law should have the right to access documents made available under a leniency program. In order to achieve this standard, the Directive provisions regarding leniency documents as called "black list" has to return partially at the state before entering into force of the Directive. The state created by the Pfleiderer ruling imposes weighting up all arguments in favor or against disclosure of evidence in order to protect both competing interests. In this manner, in the opinion of the ECJ, balancing the competing interests makes sure that protection of the leniency program does not hinder the established right to a remedy.

In line with previous judicial decision, third parties affected by infringements of European competition law, based on flexible rules enacted by national legislative authorities in order to protect the rights of individuals, can access documents made available under leniency programs. A flexible rule, according to the paragraph 31 of the Donau Chemie judgment, has to avoid: "any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, art. 101 TFEU and the rights that provision confers on individuals". But, the rule, put forward by the Directive, by means of any request to be granted access to documents being part of leniency regime receives absolute refuse, is not flexible. A flexible rule governing the access to leniency documents must assess discoverability of corporate statements balancing between public and private interests. A flexible rule should start appraisal considering that disclosure of documents represents the principle in this matter whilst non discoverability of corporate statements represents the exception. Therefore, excluding discoverability of leniency materials, the Directive broke the provisions of art. 101 TFEU undermining effective implementation of the rights awarded on individuals.

Then again, a rule of generalized access under which any document relating to competition proceedings must be disclosed to a party requesting it on the sole ground that that party is intending to bring an action for damages is not necessary in order to ensure effective protection of the right to compensation enjoyed by that party. Such kind of rule can infringe other rights protected by law such as: the right to protection of professional secrecy, business secrecy or the right to protection of personal data. The confidentiality has to be protected by the national courts when rights of third parties outbalance the interest of getting access to the files. The provision from art.6 para.6 of the Directive regarding to leniency corporate statements and settlement submissions is a rigid rule because national courts cannot any time accept disclosure of this evidence. In order to reestablish normality, acting in accordance with the ECJ's decisions and human rights, persons affected by infringements of competition law should have access to leniency materials after a weighting up procedure carried up by the national courts.

This article, appraising ruling impact of judicial decisions and the interest of public enforcement to preserve incentives offered by the leniency program, considers that disclosure of leniency materials for a limited and clear purpose would be the best option. Corporate statements are allowed to be used by harmed persons in civil proceedings only against undertakings which did not apply for leniency treatment. This option would give to harmed persons more incentives to bring private claims whilst the incentives to self report would remain at least not affected. In an ideal situation, the possibility as all damages produced by a cartel to be paid by the non-collaborating undertakings under leniency program would even increase incentives for cartels' members to come forward.

It is true that this proposal can lead, at the same time, to the situation as harmed persons not receive compensation because of insolvency of the no cooperating undertakings under leniency program. In this situation, once more, any legislative solution must preserve the principle established by judicial decisions, namely, third parties affected by an infringement of competition law have the right to access documents made available under a leniency program, with civil responsibility moving to next undertaking starting from the last to the first. The last undertaking benefiting leniency clemency would be first responsible for civil damages. In this system, the undertaking which received full immunity would be liable the last if the damage was not repaired in order by no cooperating or cooperating undertakings. Implementing these rules will also increase incentives to come forward because cartelists faced to the probability to be liable for civil damages will assess their illegal agreements, not only, with the possibility to be caught, but also, to compensate their customers.

VIII. Conclusion

This article has aspired to analyze the conflict between public and private enforcement of antitrust provisions. In the middle of this issue there is leniency program which represents a valuable source for both enforcement sides. The conflict putting face to face institutions of European Union, the Commission ignoring the interest of private claimants and the ECJ trying to boost private remedies, moved toward with the adoption of the Directive which improved protection of leniency applications. The Directive came with many provisions which represent a right solution for the problem of inexistence a disclosure process within some of the Member States but it has not solved the main issue, namely, difficult probation of infringements of competition law. The Directive's provisions, protecting leniency materials not to be disclosed, implements the Commission's policy regarding private enforcement and makes almost impossible for private claimants to prove existence of a cartel, their illegal agreements or causation link between loss and infringement of competition law.

Bibliography:

1. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0104.

2. Commission Notice on the non-imposition or reduction of fines in cartel cases [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996Y0718%2801%29.

3. Spratling G.R. Detection and Deterrence: Rewarding Informants for Reporting Violations / G.R. Spratling [Electronic resource]. – Access mode : http://heinonline.org/HOL/LandingPage?handle=hein.journals/gwlr69&div=43&id=&page=.

4. Growth, competitiveness, employment : Bulletin of the European Communities [Electronic resource]. – Access mode : http://europa.eu/documentation/official-docs/white-papers/pdf/growth_wp_com_93_700_parts_a_b.pdf.

5. Commission notice on immunity from fines and reduction of fines in cartel cases [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002XC0219%2802%29.

6. Regulation (EC) № 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [Electronic resource]. – Access mode : http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf.

7. Commission Notice on Immunity from fines and reduction of fines in cartel cases [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208%2804%29.

8. Leniency material protection [Electronic resource]. – Access mode : http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf#page=3.

9. Kloub J. White Paper on Damage Actions for Breach of the EC Antitrust Rules: Plea For A More Holistic Approach To Antitrust Enforcement / J. Kloub // European Competition Journal. – 2009. – № 5. – P. 514–520.

10. Zingales N. European and American Leniency Programme: Two Models towards Convergence? / N. Zingales // European Competition Law Review. – 2008. – № 5(1). – P. 5–8.

11. Beumer A. The disclosure of files and documents in EU cartel cases: fairytale or reality? / A. Beumer, A. Karpetas // E.C.J. – 2012. – № 8(1). – P. 120–127.

12. Singh A.K. Pfleiderer: assessing its impact on the effectiveness of the European leniency programme / A.K. Singh // European Competition Law Review. – 2014. – № 35(3). – P. 110–120.

13. Opinion of Advocate General of December 16, 2010, Pfleiderer (C-360/09) [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0028.

14. Geiger A. The end of the EU cartel leniency programme / A. Geiger // European Competition Law Review. – 2011.

15. Opinion of Advocate General of December 16, 2010, Pfleiderer (C-360/09) [Electronic resource]. – Access mode : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0028.

16. Bundeswettbewerbsbehorde v Donau Chemie AG (C-536/11) // C.M.L.R. – 2013. – № 5. – P. 19.

17. Babirad R.M. The Commission's proposal for a Directive on damages for anti-competitive infringements: an increase in evidentiary accessibility, disclosure and legal certainty for private litigants / R.M. Babirad // G.C.L.R. – 2013.

18. Cissotta R. Some Considerations on the Last Developments on Antitrust Damages Actions and Collective Redress in the European Union / R. Cissotta // European Competition Law Review. – 2014. – № 10(1). – P. 80–84.

19. Roger G. The European embrace of private enforcement: this time with feeling / G. Roger // European Competition Law Review. – 2014.