

LENIENCY AND RIGHT OF ACCESS: A DIFFICULT BALANCING OF INTERESTS

One of the most crucial issues concerning EU antitrust law refers to the contrast between access to evidence requested by the victims of anticompetitive behaviours, in order to corroborate their actions for damages, and confidentiality expectations of those undertakings that benefitted from a leniency programme by admitting their illicit conduct.

More in general, such a conflict involves the proper functioning of public and private enforcement of EU antitrust law: both tools are necessary (and complementary with each other) for the general enforcement of competition law, as they both represent interests equally deserving protection. However, the clear predominance of public enforcement instruments has so far slowed down the recourse to private enforcement remedies.

In such a scenario, the need arose to facilitate antitrust actions for damages, without undermining the attractiveness of leniency programmes, which are particularly useful and effective for discovering secret cartels.

In the US, the main incentive aimed at preserving leniency applications is primarily focused on reduction of civil liability for the immunity recipient, whose exposition to civil damages is indeed reduced from treble damages to the unit (so called “de-trebling provision”).

On the other hand, punitive damages are unlikely to be used in Europe, as actions for damages have basically a “compensatory” function, aimed at recovering the exact amount of the harm suffered.

Absent any centralised rules at European level, in 2011 the Court of Justice – in the *Pfleiderer* case – stated that this weighing exercise of the opposed interests to access and confidentiality could only be conducted by national courts on a case-by-case basis, according to national law, and taking into account EU principles of equivalence and effectiveness.

Such a solution led to conflicting interpretations of the *Pfleiderer* balancing test by national courts, depending on a greater attention to confidentiality issues (in Germany, *Pfleiderer* case) or right of access (in the UK, *National Grid* case).

The long-awaited intervention of European lawmakers on this delicate issue has finally occurred with the adoption of Directive 2014/104/EU, implemented in Italy by means of Legislative Decree no. 3 of January 19, 2017.

The new piece of legislation represents a well-balanced compromise aimed at safeguarding both public and private enforcement: on the one hand, it exempts the immunity recipient from joint and several liability with other members of the cartel; on the other hand, it expands the number of documents accessible to claimants, without jeopardizing leniency applicant's position as compared to other cartellists.

In this respect, the distinction of three categories of documents is particularly significant, as it entails a different level of protection from access by private parties: i) a black list, which includes document with an absolute level of protection (such as leniency corporate statements and settlement submissions); ii) a grey list, including documents that can be disclosed by court order, following an analysis by the same court on proportionality of disclosure, and only after the competition Authority took a decision in the case or closed the file (including materials prepared by companies or by the

competition Authority for the purposes of the investigation); iii) a white list, which does not benefit from any protection (including pre-existing materials, not prepared in connection with the Authority's investigation: e.g. minutes of the meetings, e-mails, written agreements).

The new regime has undoubtedly contributed to achieve more legal certainty for all parties involved, both leniency applicants and claimants seeking compensation for damages, providing at the same time for a more harmonized application of the rules on disclosure of evidence throughout the Member States.