

Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications – Disclosure of Leniency Applicant Statements and Materials¹

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Introduction

Recent rulings by courts in a number of jurisdictions (UK, Australia, United States, and the European Union) are resulting in increased disclosure of oral statements and interview materials produced by leniency applicants.³ Increased disclosure of leniency material may affect the willingness of immunity applicants to report cartel conduct in certain jurisdictions, create disincentives for comprehensive internal investigations, and cause immunity and leniency applicants to circumscribe the statements of collusive conduct they provide to enforcement authorities.

These developments – when combined with an increasing number of jurisdictions with immunity and amnesty policies – may lead amnesty applicants away from parallel applications in multiple jurisdictions, and towards focusing on those countries where there is the greatest net benefit in applying. This may in turn lead enforcement efforts to once again become focused on the major enforcement jurisdictions, and may marginalize “newer” cartel enforcement jurisdictions. In the medium term, applicants will be faced with a more complex analysis of immunity and leniency incentives, with substantial differences between jurisdictions.

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³ Except where stated otherwise, this paper uses the term “leniency applicants” to denote amnesty applicants in US terminology and immunity and leniency applicants in most other jurisdictions (whether first applicants for immunity, or subsequent applicants for reduction of penalties). The paper also uses the term “disclosure” as a common term for US-style discovery, court ordered disclosure in systems inspired by English law, or indeed voluntary disclosure by enforcement authorities where it is understood that the prosecution on the basis of leniency applicant evidence would not be able to go forward without disclosure of such evidence to parties outside the enforcement agency. The paper also refers to the “UK jurisdiction”, but focuses on English law and does not address any issues specific to Scottish law.

I. Immunity incentives and protecting statements of leniency applicants against disclosure

Since the introduction of amnesty and immunity programs in the US in 1993 and the EU in 1996, it is a generally accepted tenet of cartel enforcement that leniency applicants will only come forward if they can be certain that their position, having revealed the cartel conduct, is at least no worse than the expected outcome in the absence of the leniency or immunity application. This is said to require that the leniency program provide for certainty, predictability, and critically, protection of the leniency applicant against disclosure of admissions that it would not have made but for the leniency application.

The protection of the confidentiality of leniency applicant statements against disclosure in Court is commonly seen as a cornerstone of leniency regimes. As an example, the most recent official statement by the Commission in this regard is in the Observations submitted to the UK High Court pursuant to Article 15(3) of Regulation 1/2003 in the *National Grid* litigation:

*“The Commission’s policy [is] that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members that refuse any cooperation. In practical terms, this means the Commission’s long established practice is that the corporate statements specifically prepared for submission under the leniency programme are given protection against disclosure both during and after its investigation”.*⁴

Similarly in the US, Scott Hammond, director of Criminal Enforcement at the Department of Justice, described in the following terms the long-standing policy of the department in the field:

“The Antitrust Division’s policy is to treat as confidential the identity of leniency applicants as well as any information they provide. Thus, the Antitrust Division will not disclose a leniency applicant’s identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. [...] [T]he confidentiality policy is a necessary inducement to encourage leniency applications. If jurisdictions shared information obtained from an amnesty applicant with other competition and prosecuting authorities without the applicant’s permission, then it would create a significant disincentive to entering the leniency program that would lead to fewer leniency applications.

⁴ The Observations of the Commission in the *National Grid* case are available at: http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf

The same concern can be found in recital 8 of the Commission Leniency Notice: *“In addition to submitting pre-existing documents, undertakings may provide the Commission with voluntary presentations of their knowledge of a cartel and their role therein prepared specially to be submitted under this leniency programme. These initiatives have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement.”*

Such a result would not be in anyone's interest. First, lost applications would mean that no one would have the information and the conduct would go unpunished. Second, it is important not to lose sight of the fact that amnesty applications lead to cases against other cartel members that result in public filings detailing aspects of the cartel conduct that can assist other competition authorities as well as victims to develop their own cases, even if they do not have direct access to the leniency applicant's information.”⁵

Over the years, enforcement authorities have gone to great lengths to protect, from disclosure to third parties, the various forms of statements or materials that are prepared by leniency applicants, whether in the form of lawyer proffers in the US, Australia, UK, and Canada, or statements of corporate leniency applicants in EU and civil UK proceedings⁶, or legally privileged records of internal investigations.⁷

Even if the protection of such materials has not been perfect,⁸ the general consensus in the private bar has been that the occasional failures to protect leniency applicant statements have not undermined incentives for corporate entities to seek immunity or leniency. Recent developments in some jurisdictions may, however, change this analysis and are therefore the focus of this paper.

II. Recent International Developments in Disclosure Practices

The remainder of the paper examines four recent judgments and enforcement authority positions in the United Kingdom, Australia, the United States, and the European Union, and seeks to identify possible consequences of these recent developments. The four situations raise different issues for immunity and leniency applicants, each of which may affect the incentive to apply for immunity, in one or more jurisdictions.

1. The UK Office of Fair Trading (“OFT”), in October 2011, published its proposed new leniency guidance setting out the circumstances where it will

⁵ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice “*Dispelling the myths surrounding information sharing*” speech presented before the ICN Cartels Workshop Sydney, Australia November 20-21, 2004, available at: <http://www.justice.gov/atr/public/speeches/206610.htm>

⁶ A number of jurisdictions which rely on corporate statements in leniency – including the EU and Japan – moved from written to oral corporate statements after 2002 following attempts by civil plaintiffs in US litigation to gain access to copies of written corporate statements in the hands of the leniency applicant. See, e.g., footnote 8 below.

⁷ The DOJ Antitrust Division has for years taken the view that they will not require, as a condition for cooperation under the DOJ Amnesty Program, waiver of privilege of interview records prepared by legal counsel to an amnesty applicant. This is in contrast with the view of the DOJ in other areas of enforcement where an amnesty program is not in place (e.g., for FCPA violations).

⁸ See United States District Court for the District of Columbia, in *Re Vitamins* Antitrust Litigation—Misc. No. 99–19 in May 2002.

require a leniency applicant to waive legal privilege⁹ over legal advisors' interview notes from an internal investigation.

2. In August 2011, the Australian Federal Court ruled that the Australian Consumer and Competition Commission (the "ACCC") could not in the specific circumstances of a case rely on public interest immunity or similar principles to avoid disclosing to defendants the notes of the ACCC taken during proffer meetings with corporate immunity applicants. On 3 February 2012, the Australian Federal Court dismissed a claim of legal privilege advanced by the ACCC in the same dispute.
3. In response to recent high profile criminal trials where the government allegedly failed to disclose certain exculpatory material, in 2010 the United States Department of Justice ("DOJ") issued new criminal discovery guidance to ensure that all federal prosecutors meet their discovery obligations to criminal defendants, including those accused of cartel conduct.¹⁰ As more cartel cases go to trial in the U.S., this new discovery policy has the potential, and as recently as August 2011, actually led to the disclosure of virtually all of the attorney proffers provided to the government by cooperating companies and individuals in a major cartel investigation.¹¹
4. In June 2011, the European Court of Justice ruled in *Pfleiderer*¹² that European Union competition law rules do not prevent a person adversely affected by a cartel infringement, who is seeking to obtain damages, from being granted access to leniency documents submitted by the perpetrator of that infringement and that it was a matter for national courts to perform the balancing exercise required. The uncertainties created by the *Pfleiderer* case were compounded by an even more recent judgment by the General Court in the case *CDC v Commission*,¹³ which arguably dismisses the expansive theory of confidentiality of investigation materials put forward by the Commission in several cases.

Individually and collectively, these four recent developments may lead to a shift in how leniency applicants will approach immunity and leniency applications.

⁹ This paper uses the term "legal privilege" to denote the various forms of that privilege in different legal systems, whether referred to as legal professional privilege, legal privilege or other attorney-client confidentiality.

¹⁰ "Department of Justice Guidance for Prosecutors Regarding Criminal Discovery" David W. Ogden, Deputy Attorney General (2010) available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm

¹¹ *United States v. AU Optronics Corp., et al.*, 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 502 at p. 2, filed Dec. 7, 2011.

¹² Judgment of the Court of 14 June 2011 in *Pfleiderer AG v. Bundeskartellamt*, C-360/09.

¹³ Judgment of the General Court of 15 December 2011 in case T-437/08, *CDC v European Commission*.

United Kingdom – Requirement placed on immunity applicant to waive legal privilege in respect of applicant’s internal investigation

Since the collapse in May 2010 of the prosecution brought by the OFT against four British Airways (“BA”) executives, the OFT’s policy with regard to disclosure requirements placed on leniency applicants has been the subject of considerable public discussion and legal commentary.¹⁴

The BA case was the first contested prosecution of a cartel offence in the UK, and was the result of information provided by Virgin Atlantic Airways (“Virgin”) under the leniency policy of the OFT. The Virgin information alleged participation by certain BA and Virgin employees in anti-competitive discussions to fix passenger fuel surcharges. On the basis of the information provided, Virgin obtained full (civil and criminal) immunity under the OFT’s leniency program. Following an investigation, the OFT brought criminal charges against four BA executives, alleging an offence under Section 188 of the Enterprise Act 2002 (the criminal cartel offence in UK law).

During trial, a substantial volume of electronic communications (which had been in Virgin’s possession, but had not been provided to the OFT) came to light shortly before a key witness from Virgin was called. The judge, Owen J, was already cognizant of disclosure difficulties in the case and refused an OFT application for an adjournment. As a result, the OFT was forced to offer no evidence against all defendants in the case and the prosecution came to an end.

The collapse of the prosecution, and the events leading up to it and in particular a ruling by the judge in the case on disclosure by the OFT to defendants of “unused material” that may be exculpatory, have called into question the OFT’s approach to the interaction between legal privilege, disclosure and leniency.

Prior to the BA case, the leniency guidelines¹⁵ had been silent on the issue of waiver of privilege. Following the experience during the *BA / Virgin* investigation and the circumstances leading to its collapse, in December 2008, the OFT issued substantially revised guidance setting out, *inter alia*, the OFT’s position on disclosure obligations of leniency applicants, and in particular whether a leniency applicant may assert legal privilege (“the 2008 Guidance”).¹⁶ The 2008 Guidance, was heavily influenced by the difficulties the OFT faced in obtaining material leading up to the trial of the four BA executives, and provided that in certain circumstances the OFT might require a leniency applicant to waive legal privilege over lawyer’s notes taken during internal investigations. According to paragraph 8.29:

“It is accepted that the undertaking may contend that legal professional privilege will attach to notes [of internal investigations and witness interviews].”

¹⁴ See e.g., “Criminal cartel prosecution and civil leniency: international perspectives on irreconcilable differences?”; *British Institute of International and Comparative Law, London, September 2011*. Nicholas Purnell QC, Sir Christopher Bellamy QC, Nicole Kar, Daniel Piccinin and Priya Sahathevan “Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case” *Competition Law Journal*.

¹⁵ Draft final guidance note on the handling of leniency applications (OFT, November 2006); Guidance on the appropriate amount of a penalty (OFT 423, as revised in December 2004); and Guidance on the issue of no-action letters for individuals (OFT 513, March 2003).

¹⁶ Leniency and no-action guidance (OFT 803, December 2008).

However, there may be circumstances where the OFT is advised by counsel that disclosure to the OFT and to others is necessary to enable a case to proceed and in those circumstances the OFT will expect an undertaking or individual to waive any applicable privilege to the extent that the OFT is advised that it is necessary. The OFT will not require the disclosure to it of such notes as a matter of course – it simply asks that notes are taken by the undertaking or its advisers and duly preserved pending any possible issues which might subsequently arise.”

This conditioning – in certain circumstances – of immunity on waiver of legal privilege was motivated by the OFT’s desire to ensure that it would have access to the requisite exculpatory material in sufficient time to enable it to comply with its disclosure obligations as a prosecutor.¹⁷

The OFT’s treatment of legal privilege and disclosure in the 2008 Guidance was explored in detail in a judgment given by Owen J in the BA case (on 7 December 2009 (unreported)). Relying on UK case law and the Attorney General’s Guidelines on Disclosure,¹⁸ Owen J held that:

“where there are reasonable grounds to suspect that a third party has material or information that might be disclosable if in the possession of the OFT, the OFT is under a duty to take reasonable steps to obtain it.”¹⁹

In applying this principle to the BA case, Owen J further stated:

“furthermore the argument that the OFT would not have succeeded in obtaining the relevant material, had the airlines sought to protect the privilege that they claimed by the application to the court, appears to me to miss the point. The question is whether, as the case has evolved, it would be reasonable for the OFT now to press for disclosure of the material, notwithstanding the claim to LPP, on the basis that both airlines and the VAA witnesses are under the duty to give continuous and complete cooperation as a condition of leniency/immunity, and failing a satisfactory response, to have invoked its power to revoke the leniency agreements and no-action letters. In my judgment the OFT ought reasonably to take such steps ... for a number of reasons ... the overriding obligation of the OFT as the prosecuting authority to deal fairly with the defence ... the duty on the airlines and VAA witnesses to give continuous and complete cooperation ... the nature of the material sought and ... the fact that it may shed light upon an issue likely to be of considerable importance at trial, namely whether the VAA witnesses were subject to pressure or inducement with regard to the changes in their account...”²⁰

¹⁷ See for a detailed discussion of UK prosecutorial disclosure obligations: *“Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case”*; see footnote 14 above.

¹⁸ “[W]here the investigator...believes that a third party...has material...which...might reasonably be capable of undermining the prosecution case or of assisting the case for the accused, the prosecutor should take what steps they regard as appropriate...to obtain the material.” Attorney General’s Guidelines on Disclosure, Attorney General (2005), para. 51.

¹⁹ R v George, Crawley and Others (unreported) 7 December 2009, para. 11.

The competition bar in the UK was quick to point to the potentially far-reaching implications of this ruling, not only for the conduct of internal investigations and disclosure of investigation results, but in particular with regard to international cartel cases where waiver of legal privilege in one jurisdiction may result in a global waiver and in circumstances not considered by the UK court or enforcement authority.²¹

The disclosure problems in the BA case were also among the central reasons for the OFT appointing a panel of members of the OFT Board (“the Board Review”) to examine the events leading up to and during the trial with a view to making recommendations for the conduct of future criminal cartel cases in the UK.²²

When it delivered its report, some of the key findings and recommendations of the Board Review were on the issue of waiver of legal privilege.²³ The following recommendations were included in the conclusions:

- (i) The 2008 Guidance should be reviewed and consideration should be given to including an explicit notice to leniency applicants that they may expect requests for disclosure of witness account material (including legally privileged material) in any criminal proceedings conducted by the OFT arising out of their proffer.²⁴
- (ii) The OFT should in addition consider specifying in the revised guidelines that such disclosure may be required as a condition of leniency/immunity. The Board Review considered that *“any concern about the impact of this approach to disclosure and possible chilling effects on future leniency applicants must be weighed against the huge financial and other advantages to applicants resulting from immunity”*.²⁵
- (iii) It should be made clear in the revised leniency guidelines that where material sought by the OFT is withheld on the basis of claims for legal privilege or commercial sensitivity, the OFT may require the applicant to make it available for review by independent counsel (the instructions to

²⁰ R v George, Crawley and Others (unreported) 7 December 2009, para. 31 and 32.

²¹ Owen J went a step further than the 2008 Guidance and considered that the courts could order limited disclosure, the result potentially being that such disclosure would not amount to a waiver of legal privilege under EU or US rules. Whether disclosure could be limited in this way remains untested and it is, as some commentators have suggested, somewhat difficult to see how this would operate in practice. See e.g., *“Criminal cartel enforcement – more turbulence ahead? The implications of the BA/Virgin case”*, see note 14 above.

²² Project Condor Board Review, December 2010.

²³ In the BA case, the OFT was in the position of seeking disclosure from a leniency applicant (who was subject to a duty of cooperation) of material, some of which the applicant considered to be protected by legal privilege, which arguably it was not in the applicant’s interests to disclose.

²⁴ Project Condor Board Review, Appendix Recommendation 2.

²⁵ Project Condor Board Review, Appendix Recommendation 2.

whom will be disclosable) or, where appropriate, by an OFT lawyer unconnected with the case.²⁶

The OFT, as follow-up to the Board Review, accepted the recommendations and in October 2011, published for consultation a revised version of its guidance on applications for immunity and no action (the “Draft Guidance”).²⁷

The Draft Guidance confirms that the OFT will continue to seek waivers of lawyers’ notes taken during internal investigations (para. 3.18). The language appears, however, to offer some solutions to the types of problems seen in the BA case, while at the same time offering some protection against the consequences in other jurisdictions of requiring the applicant to waive legal privilege for lawyers’ notes taken during internal investigations.

First, one must welcome the statement in para. 3.17 of the Draft Guidance that the OFT will not seek waivers in civil investigations. However, as it will only become clear after the initial internal investigation whether there is a risk of criminal investigation, the fact that there remains a risk of waiver requests will in many cases have to inform the conduct of investigations and applicants’ decision-making even in cases that eventually only turn out to be civil investigations.

Second, the OFT appears to have acknowledged the validity of concerns relating to the timing of waiver requests. Paras. 3.19 and 3.22 of the Draft Guidance now make it clear that the waiver requests will be made at the earliest when the OFT has “determined that there is otherwise sufficient evidence to charge one or more individuals with the cartel offence” (para. 3.22), or in some cases even later when a case is before the courts (para. 3.19).²⁸ This represents a significant departure from practice in early cases and limits disclosure to cases where charges are about to be brought, or the court proceedings have already commenced.

The suggestion in para. 3.19 that, at least in some cases, the waiver would only be considered when the case is before the courts (“having sought the guidance of the court where necessary”) may be intended to deal with cases with an international component. In such cases, there is a significant risk of even limited waivers in a UK proceeding being found to result in complete subject-matter waiver in other jurisdictions, and perhaps even under English law.²⁹ By involving the court in the decision to seek disclosure of privileged materials, the OFT may be seeking ways to avoid collateral (international) effects of the waiver policy. This should be lauded, and while a UK court may not be willing³⁰ to issue an order that the privileged

²⁶ Project Condor Board Review, Appendix Recommendation 3.

²⁷ Applications for leniency and no-action in cartel cases (OFT 803con).

²⁸ A court would not be expected to give guidance on the need to seek disclosure of materials before charges had been brought and the court had been seized of the case.

²⁹ In this regard, the language in para. 3.21 of the Draft Guidance suggesting that waivers should not imply that the materials will be disclosed to third parties, may be of limited comfort to parties in international cases. A third country court may well find that a limited waiver to a UK enforcement authority results in full waiver. The same is likely to apply where the OFT requests that the privileged materials be reviewed by a lawyer “unconnected with the case” in para. 3.16.

³⁰ See footnote 21 above for commentators’ doubts in this regard.

materials be disclosed under protective order (thereby avoiding need for a waiver of privilege), there may be court-enforced procedural devices by which the waiver is limited and protective orders are imposed which would convince a judge, e.g., in the United States or Australia, that waiver had not been entirely voluntary and that the disclosure was under circumstances similar to procedures that might have been employed in those jurisdictions to order limited disclosure of privileged communications.

Even with these proposed improvements over the 2008 Guidance, it is regrettable however that the OFT has not focused on whether intrusive waiver requirements are indeed the best way to address the issues that come up in cases such as the BA case, which as many commentators have noted, involved a perhaps unique set of facts in which a criminal prosecution was pursued in a bilateral cartel case where a jury would ultimately have been asked to consider whether a self-admitted cartelist was, despite this, a witness of truth.

In this regard, one may question whether there are not more proportionate responses to late disclosure of contradictory or exculpatory statements, such as possibly requesting the leniency applicant to certify at certain times during a proceeding (under risk of loss of leniency) that there are no material contradictory or exculpatory materials.³¹ In any event, with increasingly interlinked international investigations, it is not clear that it will serve the enforcement interests of the United Kingdom to seek waivers except in very specific and narrow circumstances.

Australia – Disclosure of proffer notes of the enforcement agency

The ACCC has since August 2005 had an immunity policy in place for cartel enforcement. The most recent version of that policy was issued in 2009.

The various iterations of the ACCC immunity policy, and the ACCC practice under that policy, have provided that immunity applicants may provide certain information to the ACCC – e.g., in the context of proffers by applicants which are subject to cooperation obligations – subject to an understanding that elements of such statements or proffers will be held in confidence by the ACCC, or at least that the ACCC will use its “best endeavours” to protect such confidentiality.³² This is

³¹ The draft revised leniency guidance seeks to rectify this uncertainty by specifying that information that will have a bearing on the OFT investigation includes ‘*information that supports a finding of cartel activity, information which suggests and absence of cartel activity (generally, or on the part of specific undertakings or individuals) – “exculpatory” material – and information on possible leads or sources of information that the OFT may wish to pursue*’ (para 5.14). However it could be much more specific and require the applicant to set out in detail where key individuals provide any exculpatory comment or information and this obligation could be continuous throughout the investigation.

³² See para. 45 of the Interpretation Guidelines issued with the 2005 Immunity Policy of the ACCC. See also para 64 of the current Interpretation Guidelines issued with the 2009 Immunity Policy. This provision of the Interpretation Guidelines must be seen in the context of the Australian enforcement system, where the ACCC does not have decision-making authority, but must prove its case in court and the judges will likely require considerable disclosure. As a result of the enforcement framework, it is obvious for any immunity applicant that witness statements given to, and documents provided to the ACCC are provided with a view to their disclosure in court, and the

particularly relevant in cases where a witness cooperating in Australia may be the subject of prosecution in another country, but the ACCC is seeking information from that witness which would only serve as background and may not necessarily be needed for an Australian prosecution but could be harmful to the witness if disclosed to the third country authorities. It is also very relevant for leniency applicants assessing whether admissions to the ACCC will be disclosed to civil plaintiffs.

Two recent judgments of the Australian Federal Court sheds new light on the degree to which the ACCC can protect information provided in confidence by an immunity applicant.

The case concerns allegations of cartel conduct in contravention of section 45 of the (then) Trade Practices Act 1974 against, inter alia, Prysmian Cavi E Systemi Energia SRL ("Prysmian") and Nexans SA ("Nexans") (*ACCC v. Prysmian & Ors, SAD 145/2009*).³³ The action, commenced in September 2009, was brought against the French and Italian parent companies of Nexans and Prysmian as those companies were established outside Australia and had no local presence against which the action could be brought.

Prysmian and Nexans contested the ACCC's ability to serve process outside of Australia in a preliminary action. In order to serve process outside the jurisdiction, the ACCC had the onus to establish a prima facie case against Prysmian and Nexans. In this connection, they sought to have disclosed to them, inter alia, evidence supporting the ACCC's affidavits in support of the action and documents relating to the immunity application.

The ACCC had taken evidence prior to the commencement of proceedings having "assured" a witness for the leniency applicant that it "*would not waive legal professional privilege or public interest immunity privilege*".³⁴ An attorney for the witness noted that "*prior to the interview the ACCC had stated 'public interest immunity would appear likely to be available should a third party seek to access any records of the interview, in addition to the separate legal professional privilege residing in the notes'*".³⁵

The ACCC objected to the Nexans and Prysmian disclosure requests and argued that "public interest immunity" applied, at least at an early stage of the proceeding, to information provided by immunity applicants who cooperate with the ACCC, and also requested that a "confidentiality order" should be made under the Federal Court of Australia Act 1976 ("FCA").

only likely protection against disclosure of such materials to third parties is the "implied undertaking" that defendants are subject to and which restrict the defendant from using the materials for purposes other than their defence. Even this implied undertaking has limitations as a third party (e.g., a civil plaintiff) may and often will apply to the court to obtain documents, and will often be granted such leave.

³³ The case has been described by a number of Australian practitioners and law firms, including Blake Dawson, which has provided the following insightful summary of the case: http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=63787

³⁴ *ACCC v. Prysmian & Ors*, [2011] FCA 938 ("*Prysmian Judgment*") at [52].

³⁵ *Prysmian Judgment* at [52].

The judge, Lander J, hearing the applications of Nexans and Prysmian ruled in the first judgment of August 2011 that the ACCC was not entitled to withhold the evidence from Nexans and Prysmian on grounds of “public interest immunity”, and ordered the disclosure of a significant amount of documents. Judging by the disclosure requests formulated by the defence, the documents disclosed would appear to have included the ACCC officials’ notes of proffer meetings with the immunity applicants counsel.

The Court held that the ACCC had a “heavy burden” to establish that real detriment to the public interest would result from the disclosure.³⁶ In this case the Court held that Prysmian and Nexans were entitled to the documents in order to prepare for their challenge to the jurisdiction of the Australian courts. In its findings, the Court recognized that the result may undermine the ACCC’s immunity policy and the willingness of individuals and companies to assist the ACCC in its cartel investigation, but indicated that these considerations were outweighed by the public interest of a “fair trial” in favour of disclosure, and specifically found that the risk of prosecution of witnesses provided by the immunity applicant in other jurisdictions as a result of the disclosure is not a matter to which the Court should have regard when determining where the public interest lies. The Court also refused to grant a “confidentiality order”, restricting disclosure of the information. The judgment found that such an order “*was in no way necessary...to prevent prejudice to the administration of justice*” where the public interest favors disclosure.³⁷

The first judgment of the Federal Court in *Prysmian* again raises the question of the degree to which the ACCC can always give immunity applicants meaningful assurances with respect to disclosure of proffers and other preliminary information. It has been well-understood by the cartel bar that given the procedural framework within which the ACCC operates, witness statements and other evidence collected by the ACCC will eventually be disclosed when an enforcement action is brought in court, and that disclosure in court of such information is the norm given the absence of plea bargaining procedures that operate to reduce disclosure of immunity applicant materials in other jurisdictions (such as in particular the US).

The ACCC recognized this issue already some years ago and amendments to the relevant legislation now provide additional protection for information provided by immunity applicants by the introduction of a provision on “protected cartel information” in section 157B of the TPA. This “protected cartel Information” provision was held not to apply to the conduct considered by the Court in the *Prysmian* case.³⁸

This new provision of Australian law provides that the ACCC may withhold from disclosure “protected cartel information”, except when ordered by a court. When deciding such a matter, the Court must have regard only to those matters set out in section 157B, including, relevantly, the fact that the protected cartel information was given to the ACCC in confidence; the need to avoid disruption to national and international efforts relating to law enforcement; and the fact that the production of a document/disclosure of protected cartel information may discourage informants from giving protected cartel information in the future.

³⁶ *Prysmian Judgment* at [180].

³⁷ *Prysmian Judgment* at [240].

³⁸ *Prysmian Judgment* at [271].

To date, the Courts have not had an opportunity to consider the application of this provision. However, the language of the new section 157B does not give all practitioners comfort when considered in light of the reasoning in the recent *Prysmian* Judgment. In its commentary on the judgment, Blake Dawson states: “While, this statutory formula appears to shift the balancing exercise to be undertaken when determining whether information is to be disclosed in the ACCC’s / an immunity applicant’s favour, the precise ramifications of section 157B in light of judicial decisions like *Prysmian* remain uncertain.”

Following the first ruling of the Federal Court, the ACCC resisted to the Court order to produce the documents by filing a claim for legal professional privilege. Nexans opposed the claim, calling for another examination of the matter by the Federal Court.

By a ruling of 3 February 2012, the Court rejected the ACCC’s claim for legal professional privilege on certain documents (including communications between an immunity applicant and the ACCC) created before proceedings were opened or anticipated.³⁹

Australian law accords legal professional privilege to documents created “*in anticipation of legal proceedings*,” i.e., when litigation was reasonably anticipated or contemplated. According to the Court, the ACCC did not show that it reasonably anticipated or contemplated the opening of an investigation when the immunity applicant submitted to the ACCC the disputed documents. This notwithstanding the self-incriminating nature of the documents and proffers by the applicant, and a context where other enforcement authorities already had initiated investigations on substantially the same set of facts.

It was only some months later -- after interviewing obtaining further evidence from an employee of the immunity applicant -- that the Court’s considered that the ACCC could show that it reasonably contemplated litigation. Any document created prior to that date therefore was found not to be protected by legal professional privilege.

As regards the documents created after the interview of the immunity applicant’s employee, the Court upheld the ACCC’s privilege claim. However, the Court also held that the ACCC had waived legal professional privilege in respect of a draft oral statement, by making extensive reference to such statement in an affidavit filed by one of its officials with the Court. Note that the draft oral statement itself had not been filed with the Court.

This second ruling of the Federal Court adds further concern as regards the degree of protection afforded by Australian law to leniency applicants and their statements.

First, the interpretation given here to the long-standing principle of “reasonable contemplation of litigation” is perplexing. Although it might seem obvious to an immunity applicant who gives a self-incriminatory statement to a prosecutor that such statement is for the purpose of prosecuting other parties to the cartel, this is not the view of the Australian Federal Court. This can discourage leniency applications, and it would certainly seem to warrant seeking early guarantees from the ACCC as to the nature and status of their investigations, in particular before giving very precise details of a matter.

³⁹ *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* (No 2)[2012] FCA 44

A second concern arises in relation to the “waiver” of legal professional privilege. According to the Federal Court, the ACCC waived the legal professional privilege on the draft oral statement by acting inconsistently with the maintenance of the confidentiality of the document. The ACCC argued that “*it does not necessarily follow that a reference to the contents of documents in an affidavit leads to a waiver of privilege over those documents. Determining whether a party has waived privilege in a document is always a question of fact and degree to be assessed in the particular circumstances of the case. Considerations of fairness are relevant [...]*”.⁴⁰ The Federal Court in *Prysmian* did not accept this argument.

The full impact of these recent rulings on the attractiveness of the ACCC leniency program cannot be assessed at present, but one must assume that prospective leniency applicants will consider the impact of the rulings carefully when considering whether to include Australia in a multi-jurisdictional immunity or leniency strategy. In this connection it will be clear that absent immunity applications in Australia, the ACCC will not have access to information obtained by other authorities through bilateral waivers and will need to conduct the investigation using traditional information discovery means. Where a company does not have a substantial presence in Australia, this may complicate the investigation significantly.

United States– Disclosure of proffer notes at trial

Since 1993, with the adoption of the DOJ Antitrust Division's Corporate Leniency Policy, a bedrock principle of the leniency program in the United States has been the ironclad assurance of confidentiality for all leniency applicants. In 2008, the DOJ reiterated this principle and stated that: “[t]he Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.”⁴¹ The Division also adopted a “policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure.”⁴²

The Division has been able to dutifully abide by these confidentiality guarantees in most cases and most, if not all, of the information supplied by a leniency applicant has been kept confidential and out of the public domain. This success is the result of cartel cases being resolved primarily through plea agreements with limited information disclosed to pleading defendants or in open court.

However, with an increase in cartel cases going to trial, more information from the leniency applicant must be disclosed to the defendant and ultimately disclosed in open court. In the last few years almost every major cartel case has resulted in some indictments and the subsequent disclosure to the defendants of the identity of

⁴⁰ *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* (No 2), at [94]

⁴¹ “Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)” by Scott D. Hammond and Belinda A. Barnett, Question No. 32 available at: <http://www.justice.gov/atr/public/criminal/239583.htm>

⁴² *Id.* at Question No. 33.

the leniency applicant and information provided to the government by the leniency applicant, including witness statements.⁴³ While the DOJ regularly seeks protective orders in criminal antitrust cases, to ensure that the criminal discovery is not publicly disclosed, and is used solely for the defense of the case, there is a large amount of information relating to the leniency applicant that is inevitably disclosed in open court during the course of a criminal trial. Moreover, recent guidance from the DOJ relating to pretrial discovery obligations increases the chance of even greater disclosure of leniency material.

In 2010, in response to recent high profile criminal trials where the government allegedly failed to disclose certain exculpatory material (including the prosecution of former United States Senator Ted Stevens), the DOJ issued new criminal discovery guidance to ensure that all federal prosecutors meet their discovery obligations to criminal defendants, including those accused of cartel conduct.⁴⁴ One particular area of the guidance which is relevant to cartel cases is the requirement that DOJ prosecutors review and produce “[p]rior inconsistent statements (**possibly including inconsistent attorney proffers**, see *United States v. Triumph Capital Group*, 544 F.3d 149 (2nd Cir. 2008)).” (Emphasis added)

The possibility that attorney proffers from cooperating parties, including leniency applicants, may be disclosed, may come as a surprise to cartel defense lawyers. Antitrust enforcement agencies have gone to great lengths to allow for leniency applicants, and other cooperating parties, to provide cooperation through oral attorney proffers as a basis to obtain leniency or gain cooperation credit. These “paperless” presentations were specifically crafted to prevent their disclosure to private plaintiffs in civil damage claims. These efforts may be in vain if these same statements will be disclosed to defendants in criminal cases and possibly disclosed in open court. Moreover, it is not uncommon for a witness’ initial statements to company counsel to be incomplete, especially if the lawyer does not have the benefit of documents to refresh the witness’ recollection. If these early witness statements are disclosed to government, they may later need to be disclosed to the defendant as prior inconsistent statements when compared to later statements by the witness with the benefit of full preparation and review of all relevant documents.

In the United States, the government has a duty to disclose all material evidence favorable to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This disclosure requirement also applies to material that can be used to impeach prosecution witnesses. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). “A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused.” *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence is material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 870.

Courts have recently extended the government’s disclosure obligations under *Brady* to include attorney proffer notes that are inconsistent with subsequent statements by the prosecution witnesses. See *United States v. Triumph Capital Group, Inc.* 544 F.3d 149, 162-165 (2nd Cir. 2008). (The government’s failure to produce attorney proffer notes that were inconsistent with that witness’ later statements resulted in the

⁴³ E.g., DRAM, Marine Hose, Air Cargo, and LCD cases.

⁴⁴ “Department of Justice Guidance for Prosecutors Regarding Criminal Discovery” David W. Ogden, Deputy Attorney General (2010) available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm

reversal of the defendant's conviction on certain charges). Thus, in the context of a cartel case, if an attorney provides a proffer indicating that a particular witness was not at a meeting with a competitor or did not reach an agreement on pricing, those proffer notes may need to be handed over to the defendant by the government if the witness later provides materially different testimony.

Moreover, based on the recent practice of the DOJ, counsel should assume that all attorney proffer notes, whether inconsistent or not, will be produced to defendants indicted for cartel conduct. The disclosure of attorney proffer notes recently arose in the highly publicized case of *United States v. AU Optronics, et al.*, Case No. 3:09-CR-0110-SI (N.D. Cal.). As part of pretrial discovery in that case the government produced “200 boxes of hard-copy documents, approximately 2300 GBs of electronically stored documents, all FBI 302s from the investigation, 132 extensive summaries of witness interviews, and transcripts of all grand jury testimony.”⁴⁵ In addition “the government, erring on the side of disclosure” produced “over 500 typewritten pages containing information proffered by counsel for cooperating individuals and corporations at various stages during the investigation.”⁴⁶ Given the large volume of attorney proffer notes it appears as if the government simply produced a copy of every single attorney proffer in its possession.

As more cartel cases go to trial in the U.S., the DOJ's new discovery policy has the potential to lead to the disclosure of leniency applicant witness statements and attorney proffers in all cases that go to trial. Fortunately, although the government is obligated to produce leniency material including attorney proffers in all criminal cases, the government recognizes its bedrock obligation to protect the confidentiality of the leniency applicant's identify and information provided by the leniency applicant. Therefore, the DOJ's Antitrust Division routinely seeks pre-trial protective orders in all criminal cases to preclude the public disclosure of leniency materials, except for the purpose of defendants defending themselves at trial. Such a protective order was entered in the *United States v. AU Optronics, et al* case.⁴⁷ Nevertheless, despite the government's efforts to protect the identity of the leniency applicant and its cooperation material, given the public policy favoring public and open trials in the United States, there is still a large amount of material that is disclosed to the public during criminal trials. Although necessary for the fair trial of a criminal defendant, these disclosures do create meaningful disincentives to companies in deciding whether to report cartel conduct to the enforcement agencies.

European Union – Pfeleiderer⁴⁸ and access to leniency statements

The *Pfeleiderer* case originated with a cartel decision of the German Bundeskartellamt of 2008 imposing fines on three manufacturers of specialty paper.

Pfeleiderer – a customer of the companies involved in the cartel – sought from the

⁴⁵ *United States v. AU Optronics Corp., et al*, 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 502 at p. 2, Filed Dec. 07, 2011.

⁴⁶ *Id.* at p. 3.

⁴⁷ *United States v. AU Optronics, et al.* 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 120, Filed on Aug. 19, 2010.

⁴⁸ Judgment of the Court of 14 June 2011, *Pfeleiderer AG v. Bundeskartellamt*, C-360/09.

Bundeskartellamt full access to the investigation file, to prepare a follow-on damages action. The Bundeskartellamt only granted access to a non-confidential version of the decision and to a list of the evidence seized during the inspections. Pfeleiderer insisted on having access to the entire file, including the leniency applications and the evidence seized, and brought an action to this effect before the local court in Bonn, Germany. The court ordered the Bundeskartellamt to grant access to the file, but stayed the enforcement of the decision, seeking a preliminary ruling from the European Court of Justice (“ECJ”). The local court asked the ECJ whether European Union law prevents parties adversely affected by a cartel, and seeking damages, from being granted access to leniency applications, documents and information voluntarily submitted by a leniency applicant to a national competition authority under a national leniency regime, in the framework of an Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) investigation.

The case has attracted considerable interest among EU practitioners and enforcement authorities. The European Commission, the European Free Trade Association (“EFTA”), and several EU Member States intervened in the ECJ proceedings, supporting the view that access to leniency documents should be denied to preserve the effectiveness of leniency programs.⁴⁹

In its judgment delivered on 14 June 2011, the ECJ applied the fundamental EU law principle of national procedural autonomy, and in doing so, opted for a decentralized approach where the decision on access to leniency statements in a proceeding involving the application of EU competition rules is ultimately made by the national courts of each EU Member State.

The reasoning of the Court is that absent any binding EU regulation, it is for the Member States to establish and apply national rules on the right of access to leniency materials, even where the substantive violation is under EU law (i.e., a violation of Article 101 TFEU). As regards the concrete exercise of this competence, the Court held that national courts must carry out a balancing act between two conflicting interests:

- On the one hand, they must protect the effectiveness of leniency programs, which are “*useful tools*” serving the objective of effective application of EU competition rules. The Court recognized that the effectiveness of leniency programs could be compromised if leniency documents were disclosed to claimants in private actions.
- At the same time, the Court held, EU law affords to any individual the right to claim damages for loss caused by a breach of competition rules, and this right also serves the effective application of EU competition rules, by

⁴⁹ Advocate General Mazak delivered an opinion in the case advising that access to leniency statements should be prevented, as “*it could substantially reduce the attractiveness and thus the effectiveness of a national competition authority’s leniency programme. This in turn could undermine the effective enforcement by the national competition authority of Article 101 TFEU and ultimately private litigants’ possibility of obtaining an effective remedy*”; on the other hand, he advised that access to pre-existing evidence should be granted as these documents are not “*a product of the leniency procedure as they, unlike the self-incriminating corporate statements referred to above, exist independently of that procedure and could, at least in theory, be discovered elsewhere. [...] It would run counter to the fundamental right to an effective remedy if access to such documents could be denied by a national competition authority in circumstances such as those in the main proceedings.*”

discouraging companies from entering into illegal agreements. Thus, the rules governing the right to claim damages cannot operate in such a way to make recovery of the loss “*practically impossible or excessively difficult*”.

Unfortunately, the Court gave little guidance on the criteria that must govern this balancing act, stating only that the assessment must be “*on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case*”.

This sentence is potentially a cause of concern for leniency applicants. The need for a case-by-case assessment makes it difficult to predict how a national court will treat requests for access. The solution suggested by Advocate General Mazak – to adopt different rules for different categories of documents (leniency statements vs. pre-existing evidence; see footnote 49 above) – would have offered more security. Moreover, rather than being constrained by common principles (which the Court did not identify), each assessment will be influenced by the specific features of the national law applied in the case. The reference to “*all the relevant factors*” equally offers little security to leniency applicants.

This uncertainty is particularly troubling in cases where (as is often the case in the EU) parallel leniency applications have been filed in different Member States. In such cases, plaintiffs could take advantage of the decentralized and case-by-case solution adopted in *Pfleiderer* by obtaining leniency documents in plaintiff-friendly jurisdictions, subsequently using them in other jurisdictions (including outside the EU).⁵⁰ This risk could have a chilling effect on companies contemplating an application for leniency in multiple jurisdictions. It could also dissuade companies from granting waivers authorizing enforcement authorities to share information as a leniency applicant might be reluctant to grant a waiver to share documents with an authority of a jurisdiction where there is a serious risk of disclosure to private claimants.

Another important feature of *Pfleiderer* is that its reasoning seems to be applicable not only to proceedings before national competition authorities, but also, to a more limited extent, to Commission enforcement procedures. Although the preliminary reference of the German court explicitly referred to documents submitted in an investigation by a national competition authority, pursuant to a national leniency program, the broad language in the first sentence of paragraph 32 of the ECJ judgment states that EU competition rules do not prevent access to leniency materials, without mentioning the national or EU nature of the proceedings where the document were submitted. The Commission itself has recognized in the Observations submitted to the UK High Court in the *National Grid* litigation that the reasoning in *Pfleiderer* is also applicable by analogy to EU investigations.

The implication for the Commission is that when requested to provide leniency documents by a private party under the EU Transparency Regulation, it will – in the present state of EU law – have to carry out a balancing exercise weighing the interests of a civil litigant in disclosure against preserving the incentives of a leniency applicant in blowing the whistle on cartel conduct similar to that which the ECJ imposed on national courts.

This will be no easy task. The Commission decisions on requests for public access

⁵⁰ In practice, this could well lead to a preliminary reference to the ECJ in the first case and a stay of other cases pending resolution of the first case, but the uncertainty remains.

to documents submitted in competition cases are already subject to a pervasive judicial review by the EU Courts. So far, the Commission has refused to grant public access to leniency documents under the EU Transparency Regulation relying on Article 4(2) of the Regulation, which provides that: “*The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*” However, the recent judgment by the General Court of the European Union in *CDC*⁵¹ shows that this exception must be interpreted strictly, and its conditions must be proven to the required legal standard. Specifically, the Court rejected the Commission’s argument that the concept of the “purpose of the investigation” includes all of the Commission’s policy in regard to the punishment and prevention of cartels and that the exception may be relied in a general way to refuse disclosure of any leniency document likely to undermine the Commission’s cartel policy. It can be expected that future *Pfleiderer*-type balancing of interests by the Commission will be subject to a similar rigorous analysis by the Court.

The German court that had referred the dispute to the ECJ for the *Pfleiderer* preliminary ruling, issued on 30 January 2012 its judgment on the case.⁵² Following the application of the balancing test set out by the ECJ, the Bonn Amtsgericht refused to allow *Pfleiderer* to access the leniency statements in the Bundeskartellamt’s file.

The Amtsgericht recognized that leniency applications are essential for the discovery of secret cartel arrangements. Disclosure in court of the leniency documents could deter future applicants from cooperating with the enforcement authorities thereby adversely affecting the efficacy of antitrust investigations. Ultimately, the disclosure of leniency applications would also hinder private enforcement of competition law, as many infringements would never be discovered and come to the attention of the victims.

According to the Amtsgericht, the victim’s right to a redress must be balanced with the interest to an effective enforcement of competition law, as well as with the German legal notion of “informational self-determination” (a personal right to control which information is available about oneself, and under what conditions). Finally, the Amtsgericht noted that denying disclosure of the documents would not be inconsistent with EU law, which equally sees in the detection and punishment of competition law infringement an interest worth of legal protection.

Interestingly, the Amtsgericht stated that preserving confidentiality of the leniency submissions would not necessarily result in a denial of justice for the victim of a competition law infringement. Such party still has access to the decision of the National Competition Authority, the index of the documents seized as well as the procedural file and the documents seized during the inspections (the so-called “pre-existing documents”), for which a non-confidential version had to be made available.

There is little doubt that the ECJ preliminary ruling and the Amtsgericht judgment will not be the last words on all these issues. At least one other case is currently pending

⁵¹ Judgment of 15 December 2011 in Case 437/08.

⁵² Amtsgericht Bonn, Decision of 18 January 2012, 51 Gs 53/09

before the ECJ⁵³ and similar cases are likely to reach national courts.

In the months since the *Pfleiderer* judgment of the ECJ, the Commission has continued defending against disclosure requests and stressing the importance of confidentiality for leniency programs. It did so in official statements⁵⁴ and in *amicus curiae* submissions, such as the Observations in the *National Grid* litigation described above and in a letter sent by the Director General of DG Competition Alexander Italianer to Magistrate Judge Pohorelsky of the Eastern District of New York in the context of the Air Cargo litigation.⁵⁵

Following the EU cartel decision in the Air Cargo case, plaintiffs in an action for damages before the New York court sought disclosure of the confidential version of the Commission decision from the defendants. In its letter, the Commission opposed the request for disclosure noting that “*the success of this [leniency] program, which is the most effective tool at the Commission’s disposal for the detection of cartels, crucially depends on the willingness of the companies to provide comprehensive and candid information. This willingness could be jeopardized if potential leniency applicants knew that their corporate statements could become discoverable in civil litigation*”.⁵⁶ On 22 December 2011, Judge Pohorelsky rejected on grounds of international comity the plaintiffs’ request to compel production of the EU decision.

The Commission has also specifically acknowledged the threat to its cartel enforcement program resulting from the *Pfleiderer* judgment and tried to provide some guidance to national courts on how to approach this issue.⁵⁷ In the recent submission to the UK High Court in the *National Grid* litigation, it attempted to provide two criteria for the balancing act:

- The first criterion being “*whether, in the circumstances of the case, the*

⁵³ Case C-536/11, Reference for a preliminary ruling from the Oberlandesgericht Wien (Austria) lodged on 20 October 2011 - *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

⁵⁴ The EC Commissioner for Competition Joaquín Almunia stated in a recent speech that: “*Damages actions can start before or after a competition authority has issued a decision. In either case, we need to regulate access to the evidence held by competition authorities. This is absolutely necessary if we want to preserve our leniency programmes, which are crucial for the effectiveness of our fight against cartels*” (Speech /11/598, *Public Enforcement and Private Damages Actions in Antitrust*, delivered in Brussels on 22 September 2011 at the European Parliament.

⁵⁵ In *Re: Air Cargo Shipping Services Antitrust Litigation*, M.D.L. No. 1775 (Eastern District Court of New York).

⁵⁶ It appears that the Commission sent a similar letter to a Court in Vancouver, Canada, to oppose the disclosure in a private litigation of materials related to the EU settlement in the DRAM cartel investigations. See the report of 6 February 2012 by Lewis Croft on Mlex.com: “*EC seeks protection for DRAM cartel documents in Canadian Court*”.

⁵⁷ See the remarks by Eddy de Smijter, Deputy Head of Unit, Private Enforcement, DG Competition, reported by Lewis Croft, “*EC mulls legislative option for solving leniency, damage disclosure dilemma*” of 16 September 2011, available on Mlex.com: “*The most worrying element of the Pfleiderer case is this ‘case-by-case analysis’ [...] ‘That is exactly leading to the uncertainty that is so hard to live with if you want to protect leniency programmes’*”.

disclosure of the leniency documents, or documents including material derived from leniency documents, would expose the leniency applicants to greater liability than those parties that did not cooperate with the Commission [...]”.

- The second criterion was stated as follows: “*whether disclosure is proportionate in the light of its possible interference with leniency programmes*”; The Court should consider whether the leniency document is “*at all relevant for the purpose of the claim, and whether there are other available sources of evidence that are equally effective for that purpose*” which are less likely to adversely affect the functioning of the leniency program.⁵⁸

The Commission’s suggestions must be welcomed as an attempt to set some boundaries to the *Pfleiderer* analysis. The Commission’s view is, however, not binding in any way on national courts and has not been so far been validated by the ECJ.

Despite these recent efforts to defend the confidentiality of leniency documents post-*Pfleiderer*, the trend seems to be toward an even greater tension between leniency regimes and private antitrust enforcement, as damage actions spread across the continent. The Commission is aware of this, and has indicated in recent statements that it is seriously considering proposing legislation to impose harmonized rules on access to evidence in private antitrust actions.⁵⁹

III. *Implications for Cartel Enforcement and Leniency Programs*

The developments described above may well, in the view of the authors, have an impact on the decision-making of putative immunity and leniency applicants. Applicants may see these developments as signaling a greater risk of disclosure of materials, which previously – rightly or wrongly – were perceived as unlikely to be disclosed. This applies in particular to oral attorney proffers and oral corporate statements given to authorities, as well as to notes of internal investigations and attorney witness interviews that are needed in order to determine whether to apply for immunity or leniency.⁶⁰

Such a shift in perception will affect decision-making in particular in two situations.

⁵⁸ In the *National Grid* case, the defendants had already consented to disclosure of pre-existing documents, so the Commission did not need to take a position on those materials, but it referred to witness statements as a possible alternative source of evidence preferable to leniency statements.

⁵⁹ See the remarks by Eddy de Smijter of DG Competition reported in Lewis Croft, “*EC mulls legislative option for solving leniency, damage disclosure dilemma*”, cit. in footnote 31 above: “*It seems that the only real cutting alternative is to have hard law. We all have an interest in the Commission coming up with some ‘ex ante’ way as soon as possible*”.

⁶⁰ We assume for this purpose that applicants already take it as a given that any “pre-existing” (contemporaneous) documents relating to the alleged infringements of law, and witness statements will be disclosable in many jurisdictions, either by way of court ordered disclosure/discovery, or access to file in ways that do not protect against use of the materials by other jurisdictions or by civil plaintiffs. The issue for these documents is therefore often more a question of *when* rather than *whether* they are disclosed.

First, cases where a company (or its employees) have immunity in one jurisdiction, but may be at risk of prosecution in another jurisdiction. Second, cases where the applicant considers that it would be in a position to withhold from civil plaintiffs certain materials or oral statements provided to enforcement authorities.

While counsel to an immunity or leniency applicant will have to consider the implications in light of the specific facts of each case, one may already identify the following possible effects of expansive disclosure rulings:

1. Increased disclosure risks may affect the willingness of immunity applicants to come forward in certain “marginal” jurisdictions where the downsides of additional disclosure are seen to outweigh the upsides of an immunity or leniency application;
2. Increased risk of disclosure of proffers (by way of disclosure of notes of authorities taken during proffer meetings) could lead applicants to more narrowly circumscribe proffer statements to ensure that these do not reveal more than what will eventually come out in witness testimony;
3. Narrower proffer statements in certain jurisdictions could well have the effect of causing applicants to circumscribe more narrowly oral corporate statements in jurisdictions such as the EU, thereby increasing pressure on the EU to move to more requesting witness testimony in order to get the same level of information as other jurisdictions;
4. Increased disclosure of leniency applicant materials in certain jurisdictions could lead applicants to seek to limit information exchange waivers given to enforcement authorities so as to avoid information flowing to the disclosing jurisdiction, and from there to plaintiffs or other (non-immunity) enforcement jurisdictions; and
5. A requirement that applicants waive legal privilege over notes of internal investigations and witness interviews by counsel to the corporate immunity applicant could cause companies to limit internal investigations (and therefore less unlawful conduct might be found and reported), or perhaps to segregate investigations conducted for jurisdictions that require disclosure from investigations conducted for other jurisdictions.

These possible reactions to the new disclosure requirements – when combined with an ever-increasing number of jurisdictions with immunity and amnesty policies – may also lead immunity and leniency applicants away from the recent trend of many parallel applications, and towards a focus on those countries where there is the greatest net benefit in applying (“must have” jurisdictions).

This could, on its own, lead to other jurisdictions competing to attract leniency (in particular immunity) applicants. Such a development could lead to a difference in approach between jurisdictions on the issue of the level of immunity incentives that are “sufficient” to bring out applications, which in turn could slow down or reverse the recent trend towards harmonization of approaches to leniency. Over time, this could create new challenges for inter-agency cooperation (e.g., affect the use of information obtained by asymmetric waivers).

There are several steps that enforcement agencies can take to mitigate the negative impact of disclosure of leniency materials and statements.

First, the agencies should clearly state at the beginning of an investigation the nature and scope of its disclosure policy. It is important for counsel to know what will, and will not, be disclosed before any disclosures by leniency applicants are made to enforcement agencies. In this regard, it will be important that authorities carefully consider their ability to enforce policy positions when dealing with the courts, and if necessary seek appropriate changes in legislation.

Second, the enforcement agencies should seek protective orders or similar measures in all cases where disclosures are necessary to ensure that leniency material is not publicly disclosed and is only used by the accused in the defense of its case. It may be appropriate to adopt practices similar to those of the US DOJ, Antitrust Division, which obtains protective orders in almost all criminal cartel cases before discovery is provided to the defendant.

Third, enforcement agencies should make every effort in private damage claims to prevent the disclosure of leniency material to private civil plaintiffs. Many enforcement authorities, including those of the US, the EU, and Japan, have regularly intervened in private civil damage litigation to ensure that leniency material or other confidential information connected with their investigations is not disclosed in civil discovery. These steps will go some way in limiting the damage resulting from increased disclosures of leniency material in cartel cases.