DISCLOSURE OF EVIDENCE IN CARTEL LITIGATIONS IN THE EU: IS BALANCE OF VICTIMS' RIGHTS AND PUBLIC INTERESTS POSSIBLE?

NATALYA MOSUNOVA,

Adecco Group Russia
(Moscow, Russia)

The research focus is an assessment of disclosure rules in the European Union and a perspective for implementation of the US discovery rules to improve European private enforcement. For these purposes the EU disclosure rules are compared with the US discovery rules; the influence of tension between disclosure of evidence and leniency programme on the effectiveness of protection of information is analyzed in order to propose areas for improvement and solutions to find a balance between some inconsistencies of the EU disclosure rules with interests of European plaintiffs in cartel litigations.

The research method is not limited to a doctrinal approach to the EU and US legislation, but includes case law, and secondary sources. This paper does not deal with particular types of evidence and generic issues of disclosure unrelated to the cartel cases.

The author contends that the American model of discovery in cartel cases cannot be transferred to the European context completely, even though disclosure of evidence in the EU is rather inefficient, and new rules are unlikely to protect consumers' interests. In terms of consumers' interests, protection facilitating follow-on actions looks more relevant on the EU level. Practically, the design of the US disclosure rules and priority of consumers' rights effectively allow victims from the EU to sue in the US and obtain all necessary documents in the US proceeding. In this context convergence of the US and EU positions on disclosure of leniency materials could bring more certainty both to plaintiffs and defendants in cartel litigations.

Keywords: cartels; litigations; damages; disclosure of evidence; leniency.

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1. Introduction

The purpose of this article is to evaluate the effectiveness of disclosure rules in the European Union in comparison with the discovery of evidence in the US as a jurisdiction with effective private enforcement[1] and to determine to what extent the US approach can be implemented to improve European private enforcement.

The impact of disclosure rules on cartel private enforcement is invaluable. Disclosure of evidence directly affects the number of compensated victims; increases the accuracy of fact-finding, damage assessment and probability of the victim's winning at trial;[2] facilitate victims in suing for damages[3] and decreases litigation costs.[4] Consequently, weakness of disclosure rules results in a lack of private enforcement in the EU despite a universal legal basis for compensation claims.[5] According to some estimates, private enforcement in the European Union barely reaches 10%[6] mainly due to the following-on actions while in the US private actions, including high percentage of stand-alone actions, constitute up to 90% of the total number of cases against cartels. Only very little credible data on stand-alone claims can be found in the UK but the number of such claims has been relatively limited.[7] Altogether, disclosure of evidence contributes to cartel deterrence by improving private enforcement. For example, in the US private antitrust enforcement probably deters more anticompetitive conduct than the Department of Justice's anti-cartel programme.[8] Therefore, adequate disclosure rules not only increase accessibility of

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1 *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios: Report for the European Commission*, Contract DG COMP/2006/A3/012, at 11 (December 21, 2007), at <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> (accessed Aug. 11, 2015).

2 *Id.* at 17.

3 *Id.* at 19.

4 *Id.* at 345.

5 *The Impact of Cartels on the Poor*, U.N. Conference on Trade and Development, Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on Competition Law and Policy, 13th Sess., Item 3(a) of the Provisional Agenda: Consultations and Discussions Regarding Peer Reviews on Competition Law and Policy, Review of the Model Law on Competition, and Studies Related to the Provisions of the Set of Principles and Rules, ¶ 39, U.N. Doc. TD/B/C.I/CLP/24/Rev.1 (2013), at <http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> (accessed Aug. 11, 2015).

6 Clifford A. Jones, Private Enforcement of Antitrust Law in the EU, UK and USA 16 (Oxford University Press 1999); Andreas Heinemann, *Private Enforcement in Europe*, in The Development of Competition Law: Global Perspectives 302 (Roger Zäch et al., eds.) (Edward Elgar Pub. 2010). doi:10.4337/9781849803571.00019

7 Marc Israel et al., *United Kingdom: Private Antitrust Litigation*, in The European Antitrust Review 2014, at 306, at <http://www.macfarlanes.com/media/1606/uk-private-antitrust-litigation.pdf> (accessed Aug. 11, 2015).

8 Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2014 BYU L. Rev. 315, available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2591&context=lawreview> (accessed Aug. 11, 2015).

justice in cartel cases, which is essential for the deterrence of infringements but also free up resources of the competition authorities for other purposes.

Access to evidence in private actions, designed to correct the harm caused to consumers, is of particular value for the poorest groups of individuals and small or medium-sized enterprises which are the most affected by anti-competitive agreements among competitors.[9] These groups of victims, seeking to obtain evidence in private litigations, are the most vulnerable to an obvious structural information asymmetry,[10] when courts expect direct evidence of an anti-competitive agreement from victims of cartel, but a substantial part of the documents explaining the operation of a cartel is held by the cartelists. Thus, disclosure rules to facilitate evidence gathering are the main challenge to cartel private enforcement[11] especially in original actions when there is no prior decision from a competition authority establishing the infringement.

Evolution of disclosure in the EU and its controversial nature have been reflected in academic literature, official reports and legislation in the last decade. The Ashurst Report identified the difficulty of proving the various elements of liability as a serious obstacle to damages actions and compared disclosure rules in a number of Member States.[12] The Green Paper investigated whether there should be special rules on disclosure for damage actions and which form such disclosure should take.[13] The White Paper compared civil law and common law disclosure rules and their impact on private enforcement in the EU.[14] The provisions of these documents, rejecting the US model of discovery, have caused heated debate in various jurisdictions.[15] Representatives of the American Bar Association evaluated the European disclosure as 'a relatively little'[16] and proposed principles of US discovery as an ideal

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9 *The Impact of Cartels on the Poor*, *supra* n. 5, ¶ 6.

10 *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final, para. 2.2, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF> (accessed Aug. 11, 2015) [hereinafter White Paper].

11 Denis Waelbroeck et al., *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report* 11 (Ashurst, August 31, 2004), <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> (accessed Aug. 11, 2015) [hereinafter Ashurst Report].

12 *Id.*

13 *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final, at <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0672_/com_com(2005)0672_en.pdf> (accessed Aug. 11, 2015) [hereinafter Green Paper].

14 White Paper, *supra* n. 10.

15 Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675 (2010), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1129&context=articles> (accessed Aug. 11, 2015).

16 *Comments of the ABA Sections of Antitrust Law and International Law on the European Commission's Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (October 7, 2011)*, <http://ec.europa.eu/competition/consultations/2011_actions_damages/aba_en.pdf> (accessed Aug. 11, 2015).

model.[17] Contrariwise, some authors assume that European rules have to be even more limited in favour of 'a complete protection of the leniency applications.'[18] The long-waited Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which retains a cautious approach to disclosure of evidence, barely gives incentives to harmonize procedural law of Member States, but does not give effective remedies to obtain evidence. Although the reasons for differences in private enforcement of competition law in the EU and the US[19] and ideas of borrowing from the US discovery have been discussed by European and American academics and practitioners,[20] it is still an open question whether American style discovery in cartel cases would work in the European Union. Another unsolved issue is a proper balance between interests of victims in disclosure of evidence and interests of whistleblower applied for leniency, which results in the practical question whether victims of cartels can use differences between the EU disclosure and US discovery to protect their interests. The interaction of leniency programmes and disclosure in actions for damages remains uncertain area on the global level.[21]

The main method is doctrinal research of the EU and US legislation, case law, and secondary sources including academic literature and experts' opinions. This research does not deal with particular types of evidence (such as e-mail correspondence and other digital evidence, testimony, *etc.*) and generic issues of disclosure unrelated to the cartel cases.

In order to identify areas of weakness in the EU disclosure and weigh probability of borrowing from US discovery, Ch. 2 compares the EU disclosure rules with the US discovery rules and examines the relation of disclosure to legal traditions. Chapter 3, firstly, investigates the tension of two main remedies to deter cartels – disclosure of evidence and leniency programme – among the obstacles to extend the European

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17 *Comments of the ABA, supra* n. 16, at 4.

18 Alex Petrasincu, *Discovery Revisited: The Impact of the US Discovery Rules on the European Commission's Leniency Programme*, 32 European Competition Law Review (ECLR) 356, 367 (2011).

19 Jones, *supra* n. 6.

20 Crane, *supra* n. 15; *Comments of the ABA*, *supra* n. 16.

21 Caroline Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, 7 Competition Law Review 181 (2011), available at <http://www.clasf.org/CompLRev/Issues/Vol7Issue2Art1Cauffman.pdf> (accessed ug. 11, 2015); Samuel R. Miller et al., *U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials*, 2010(1) The CPI Antitrust Journal 2, available at <http://www.sidley.com/~/media/files/publications/2010/03/us-discovery-of-european-union-and-us-leniency-a__/files/view-article/fileattachment/2010-03-14--competition-policy-international--no__.pdf> (accessed Aug. 11, 2015); Frédéric Louis, *It Is Always Darkest Before the Dawn: Litigating Access to Cartel Leniency Documents in The EU*, in The International Comparative Legal Guide to: Competition Litigation 2013, at 11 (5th ed., Global Legal Group 2012), available at <https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/CL13_Chapter-2_WilmerHale.pdf> (accessed Aug. 11, 2015).

rules, and, secondly, evaluates effect of these restrictions on protection of declared values. Chapter 4 provides solutions to balance some inconsistence of the EU disclosure in order to protect interests of European plaintiffs in cartel litigation. Finally, the Conclusion (Ch. 5) estimates disclosure rules in the EU; contends that the American model of discovery in cartel cases cannot be transferred to the European context completely and evaluates some aspects which can be harmonized in order to facilitate disclosure of evidence.

2. In Which Aspects Are Disclosure Rules in the EU Weaker Than the US Discovery?

This Chapter outlines aspects in which the EU disclosure is less efficient than the US discovery and attempts to find their interrelations with specificity of legal systems.

2.1. Disclosure v. Discovery

Disclosure of evidence is designed 'to reveal relevant facts that the parties analyze to develop their respective claims or defenses and eventually present them to the judge or jury at trial'[22] when relevant evidence is not publicly available and is held by the alleged infringer or by third parties.[23] In the EU the term 'disclosure' is used in the same sense as 'discovery' in the US, however, the scope of disclosure varies between countries that follow a civil law tradition (the majority of the EU members) and countries that follow a common law tradition (such as the US, the UK, Ireland and Cyprus).

In the EU many efforts of plaintiffs injured by cartels to redress their damages have been frustrated by strictness of disclosure rules.[24] Effectively, the plaintiff in cartel litigation, applying for disclosure of evidence in the majority of EU Member States, has to gather an initial amount of information, which is very close to the documentary evidence needed to ultimately win the case.[25] Another serious obstacle is the requirement to have evidence in hand prior to filing lawsuits. These limits usually are justified by probability of requests for more information than defendants are ready to provide; that can increase the business risks and risks of unfair competition (*e.g.*, the requested information may be used in bad faith for commercial benefit rather than for protection of the violated rights). However, the restrictions have led to the lack of private enforcement[26] in the EU. In contrast, in the

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22 *Comments of the ABA*, *supra* n. 16, at 2.

23 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 345.

24 *Comments of the ABA*, *supra* n. 16, at 2.

25 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 671.

26 Ashurst Report, *supra* n. 11, at 11.

US, where plaintiffs can file a lawsuit virtually with no evidence at hand,[27] private enforcement prevails over public enforcement. The vivifying effect of disclosure rules on antitrust private enforcement is also confirmed by popularity of the UK jurisdiction for bringing private antitrust actions,[28] where the disclosure is more like discovery rules in the US.

The EU position that the plaintiff has pleaded facts plausibly showing the existence of an antitrust violation does not differ from that of the US[29] because recently, the United States shifted away from the notice-based exceptionalism when a claimant was required to provide just 'fair notice of what the plaintiff's claim is and the grounds upon which it rests'[30] without details, toward a fact-based model which is the global norm in the rest of the world.[31]

2.2. Differences of Disclosure Rules in Cartel Cases in the EU and the US

2.2.1. Nature of Collection of Evidence

Discovery procedure in common law is more adversarial and allows the plaintiff almost immediate access to the opponent's information on the pre-trial phase whilst in civil law countries relevant evidence becomes available to the parties gradually only after court permission during the trial. In the UK and the US, parties exchange the information upon the filing of a complaint and before the judge is called to assess whether the case has merit.[32] The pre-trial phase often brings parties' position closer and consequently leads to a voluntary settlement amongst the parties. However, the scope of documents subject to mandatory disclosure in the UK proceedings is more limited than the discovery allowed under the broader and more general US standard.[33]

In the US, plaintiffs in cartel cases obtain the necessary evidence from both parties and third parties without specification of evidence unless the scope of discovery is limited by court order if it 'is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who

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27 S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 Notre Dame L. Rev. 899, 949, 950 (2012), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1361&context=facpubs> (accessed Aug. 11, 2015) [hereinafter Strong, *Regulatory Litigation*].

28 Israel et al., *supra* n. 7.

29 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. Int'l & Comp. L. Rev. 1 (2011), available at <http://lawdigitalcommons.bc.edu/iclr/vol34/iss1/2> (accessed Aug. 11, 2015).

30 *Conley v. Gibson*, 355 U.S. 41, 47, 48 (1957).

31 Dodson & Klebba, *supra* n. 29.

32 Fed. R. Civ. P. 26(c); Civil Procedure Rules 2013 [hereinafter CPR], Rule 31.5(3).

33 S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489, 501, 522 (2010), available at <http://papers.ssrn.com/abstract_id=1474026> (accessed Aug. 11, 2015).

know of any discoverable matter.'[34] This generous rule covers matters inadmissible as evidence if they 'lead to the discovery of . . . evidence' in order to assist a party 'in the preparation or presentation of his case.'[35] In the UK, a party is only required to disclose documents that adversely affect its own case, or that support or adversely affect another party's case. However, plaintiffs in the UK can obtain documents from a subsidiary company located in another state if a defendant has a UK parent company because the obligation to disclose documents extends to those that are within a party's possession, control or right to inspect.[36]

In the majority of the EU Member States, as civil law countries, the collection of evidence in private litigation normally starts during the proceeding, after the filing of the claim under the direct supervision of the judge. For example, the German Code of Civil Procedure[37] (Sec. 142) requires that parties produce their own evidence and documents that they intend to use themselves in a case and set limited disclosure rules. Firstly, litigants in cartel cases in Germany must obtain court approval to engage in discovery. Secondly, the court will permit the taking of evidence only if the discovery sought is (a) relevant to the outcome of the case, and (b) necessary to clarify disputed facts. Moreover, under Sec. 142 *ZPO*[38] it is not enough to plead that such a document 'usually exists' – a party must refer to the actual document in one of its pleadings.

2.2.2. Regime of Information

Evidence in private cartel litigations usually contains sensitive business information related to infringement of the law, causality between anticompetitive behaviour and damages or the amount of damages arising from anticompetitive conduct. The common law system allows disclosure of trade secrets, other confidential research, development, or commercial information with some exceptions including the right for a protective order[39] while in civil law countries this information is generally secret.[40]

Parties in US private antitrust actions typically obtain internal correspondence, transactional data, price lists, other price information, supply information, business plans and projections, market share information, conspiratorial communications with competitors, documents produced pursuant to subpoena to the government, grand

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[34] Fed. R. Civ. P. 26(b)(1).

[35] Notes of Advisory Committee on Rules – 1946 Amendment, subdivison (b), at <https://www.law.cornell.edu/rules/frcp/rule_26> (accessed Aug. 12, 2015) (citing: *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed. Rules Serv. 33.351, Case 1).

[36] CPR, Rule 31.8.

[37] *Zivilprozessordnung* [hereinafter *ZPO*]. English version is available at <http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> (accessed Aug. 12, 2015).

[38] *Id.*

[39] Fed. R. Civ. P. 26(c)(1)(G).

[40] *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 348.

jury materials, and materials submitted as part of leniency applications relating to the anticompetitive conduct at issue and source materials of formal submissions which participants of cartel have made to the authorities.[41] Disclosure in the UK context is also considerably broader than across most legal systems in continental Europe,[42] although some limits are set in *Hutchison 3G UK Ltd. v. O2 (UK) Ltd.*, particularly, 'the need for a highly focused application.'[43]

In the EU, the confidentiality of business secrets or other confidential information is considered a necessary limit on disclosure[44] and evidence is classified as the 'black' list (evidence which may never be disclosed including leniency documents), the 'grey' list (information prepared by a neutral or legal person specifically for the proceedings of a competition authority, such as the parties' responses to statements of objections and information requests, which may be disclosed after a competition authority has closed its proceedings) and the 'white' list (evidence which may be disclosed at any time). It is noteworthy that, under no circumstances can evidence from the black or grey lists be used in a private action even if a party obtains them through access to the file of a competition authority during the course of proceedings. Effectively, this means that the EU disclosure rules are removed back from the *Pfleiderer* judgment of the ECJ,[45] which held that leniency material could be disclosed and the strictest approaches of the EU Member States are unlikely to be changed. For example, German courts refuse disclosure of leniency documents following a broad interpretation of the concept investigation, which covers the overall activity of competition authorities in detecting cartels[46] and refuse to grant the disclosure because the purpose of the investigations could be jeopardized.[47] The role of secret materials in the calculation of the quantum of the damage and the availability of alternative elements to prove the existence of damage are supposed to be less important than role leniency programmes, which contribute indirectly to the

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41 Sebastian Jungermann & Terri A. Mazur, *How to Obtain and Use US Discovery in European Private Antitrust Actions*, IFLR Magazine (Jan. 21, 2013), <http://www.iflr.com/Article/3144115/How-to-obtain-and-use-US-discovery-in-European-private-antitrust-actions.html> (accessed Aug. 12, 2015).

42 Barry J. Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases 2005–08 – Part II*, 2009 Global Competition Litigation Review 136, 144, available at <http://strathprints.strath.ac.uk/28605/1/GCLR_article_part_2.pdf> (accessed Aug. 12, 2015).

43 [2008] EWHC 55 (Comm.), paras. 38–40.

44 Green Paper, *supra* n. 13, at 6.

45 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 2011 E.C.R. I-5161, at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09> (accessed Aug. 22, 2015).

46 The German Code of Criminal Procedure (*Strafprozeßordnung* (*StPO*)), Sec. 406e(2). English version is available at <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> (accessed Aug. 12, 2015).

47 Pablo G. de Zárate Catón, *Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law* para. 4.2.1 (College of Europe, Department of European Legal Studies, Research Papers in Law 08/2013), <http://aei.pitt.edu/47511/1/researchpaper_8_2013_gonzalezdezaratecaton.pdf> (accessed Aug. 12, 2015).

success of cartel damage actions due to binding effect of the German competition authorities before the national court.[48]

2.2.3. Judicial Involvement

In common law states, obligations to disclose evidence are set by the law, and do not require any *ad hoc* disclosure order by the court. The parties are under two general obligations during the pre-trial phase: the disclosure obligation and the duty to fulfill discovery requests.[49] In civil law states, only the court may issue an order requesting the opponent or a third party to disclose a specific document.[50] Although the conditions to be fulfilled to obtain a disclosure order vary widely across Member States, a need to apply for a court order certainly does not facilitate disclosure process. In addition, in civil law jurisdictions courts are involved in a preliminary assessment of the robustness of the case which is independent and conditional to the proof of some facts.[51] Often parties have to prove specific and substantiated reasons why they cannot produce the documentary evidence, and to specify the relevant categories of evidence as precisely as can reasonably be expected.

However, the wider the judge's right to supplement the plaintiff's request for disclosure, the fewer restrictions for specification of documents are imposed on the requesting party: France, Czech Republic, Denmark, Latvia, Luxembourg, Malta, the Netherlands, Poland and Sweden provide more powers to the court regarding integration of evidentiary requests by parties and set less strict requirements to a disclosure order. In France, for example, the party is not required to name the exact document, but must at least specify what kind of document they want to be produced.[52] In contrast, in Austria, Belgium, Estonia, Finland, Germany, Greece, Italy, Lithuania, Portugal, Slovak Republic, Slovenia and Spain parties have to specify the document required, its content, its location, the relevance for the case and the reason why they are not able to produce it directly in the trial.[53] The Directive keeps both types of court interventions[54] and obliges judges to assess the disclosure requests for relevance, necessity, and proportionality.[55]

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48 Zárate Catón, *supra* n. 47, para. 4.2 (citing AG Bonn, 18.01.2012 – 51 Gs 53/09, NJW 2012, 947).

49 Fed. R. Civ. P. 26(c); CPR, Rule 31.5(3).

50 *ZPO*, Sec. 142.

51 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 348.

52 Ashurst Report, *supra* n. 11, at 65.

53 *Id.* at 64.

54 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, Art. 5, 2014 O.J. (L 349) 1, 12–13, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN> (accessed Aug. 12, 2015) [hereinafter Directive].

55 White Paper, *supra* n. 10, at 5; Directive, *supra* n. 54, Art. 5(3).

2.3. Legal Traditions as Foundation of Differences between US Discovery and EU Disclosure

The outlined similarities of disclosure in the UK and discovery in the US raise the question of the correlation of availability of evidence and disclosure limits within the law family and, consequently, of prevailing types of enforcement. Indeed, the procedure in civil law countries is more inquisitorial than in the common law countries including the UK and the US.[56] Then, the US system for enforcement of antitrust law follows the paradigm of private antitrust enforcement[57] which has widely used cartel deterrence through the private plaintiffs' lawsuits; public enforcement by the US Department of Justice [hereinafter DoJ] and Federal Trade Commission (FTC) was added only at a later stage.[58] Collective or so-called class actions can also promote the development of discovery of evidence in common law states.[59] Similar processes, including generous disclosure rules, made the UK courts the popular 'forum of choice' in private antitrust actions.[60] In contrast, even private damages actions for breach of competition law have been in doubt till the middle of the 1990[s] in the EU.[61] The dominance of public interests over compensation of damages in protection of whistleblowers from disclosure also indicates a greater role of public enforcement in civil law countries.

These fundamental differences increase costs of any convergence of disclosure rules. For example, shift toward common law style disclosure, when parties have to provide opponents with a list of all relevant documents in their possession unless the court decides that the disclosure requests are disproportionate, in all the EU Member States would entail very high harmonization costs, since all civil law countries would be forced to adapt their legislation to introduce a completely different procedural structure, similar (but not exactly comparable) to the one currently adopted in the UK.[62] Such harmonization would require not only the specification of a new set of rules for antitrust claims, but also training costs for both judges and lawyers everywhere in the EU except the UK, Ireland and Cyprus.[63] For this reason harmonization costs have been considered to be highest for this option.

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56 John T. Lang, *Foreword*, in Jones, *supra* n. 6, at viii.

57 Jones, *supra* n. 19, at 3.

58 Jungermann & Mazur, *supra* n. 41; Jones, *supra* n. 19.

59 Strong, *Regulatory Litigation*, *supra* n. 27.

60 *EU Parliament Backs Cartel Evidence Release Proposals But Leniency Corporate Statements to Remain Confidential*, Out-Law.com (Apr. 23, 2014), <http://www.out-law.com/en/articles/2014/april/eu-parliament-backs-cartel-evidence-release-proposals--but-leniency-corporate-statements-to-remain-confidential/> (accessed Aug. 12, 2014).

61 Jones, *supra* n. 19, at 70–75 (citing: Joined Cases C-6/90 and C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357; Case C-128/92, *H.J. Banks & Co. Ltd. v. British Coal Corporation*, 1994 E.C.R. I-01209).

62 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 372.

63 *Id.* at 383.

Complexity of the system of priorities of EU competition law also entails limits in disclosure rules in antitrust litigations. Although consumer welfare, the promotion of small and medium-sized business and single market integration have all been announced as the objectives of EU competition law,[64] 'the basic sin in Europe is not so much restricting competition but creating an obstacle for integration.'[65] The objective of US antitrust law is more specific: the US antitrust laws have had protection of the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up as the basic objective.[66] Thus, the broader scope and plurality of objectives of EU competition law made the procedure more complicated.[67]

To sum up, disclosure in the EU is more complicated for plaintiffs because it is court-ordered (rather than party-initiated, as in the United States); applicants have to convince the court that they cannot reasonably obtain the facts except through the procedure and specify the precise categories of information to be disclosed in spite of informational asymmetry. However, considering that the majority of the EU members belong to the civil law system, the European plaintiffs are unlikely to have the same opportunity to obtain evidence as their US fellows, not only because both the White Paper and following Directive[68] reject the US model of discovery,[69] but also because there are no necessary system elements for implementation of the US model and transferred rules would not work effectively in the existing European system. The next chapter examines the main obstacle to extension of the current scope of disclosure in the EU in order to find a way to make disclosure of evidence in cartel cases more efficient.

3. Obstacles to Extend Disclosure in the EU

Chapter 2 has concluded that borrowing the US discovery rules would be inefficient due to characteristics of the civil law system; however, since disclosure in the EU is limited, options for its expansion and objections should be considered. Protection of confidential information is one of objections against wide disclosure, especially in antitrust litigation when parties' requests can invade business secrets or leniency documentation and disclosure of evidence not only to consumers but

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64 *First Report on Competition Policy*, European Commission (April 1972), at <http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf> (accessed Aug. 12, 2015).

65 Jones, *supra* n. 6, at 26.

66 *Guide to Antitrust Laws*, Federal Trade Commission, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed Aug. 12, 2015).

67 Jones, *supra* n. 19, at 27.

68 *Supra* n. 54.

69 Crane, *supra* n. 15, at 676.

also to competitors can result in unfair competition. Chapter 3 assesses protection of information as the main reason for restrictions of disclosure and effectiveness of these restrictions in order to set forth areas for improvement.

3.1. Access to Trade Secrets and Disclosure

Interestingly, objections relating to the protection of trade secrets do not create a special obstacle for disclosure of evidence in cartel cases in spite that nature of valuable information regarding products, prices, companies' strategies and market data in this context is similar to leniency documentation. Indeed, limits on disclosure of business secrets are more procedural than substantive and aimed to exclude 'fishing expeditions,' *i.e.* using the disclosure to find out information beyond the fair scope of the lawsuit.[70] Both EU and US jurisdictions allow disclosure of business secrets with appropriate protection by such special measures as the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form[71] or by moving for a protective order.[72] In the UK, courts, among other measures, consider whether there are other ways of obtaining the information which is sought.[73] Therefore, since disclosure of business secrets primarily protects victims' interests and only secondarily – business secrets of parties, the rules protecting business secrets and other confidential information seem unlikely to impede the exercise of the right to compensation more than other procedural rules. Disclosure of leniency documentation has much more ambiguous status.

3.2. Disclosure of Evidence and Leniency Programme: Seeking a Priority

Tensions of disclosure with leniency programmes are the most fundamental reason explaining the restrictiveness of disclosure in private antitrust litigation in Europe. On the one hand, both disclosure rules and leniency programmes constitute the remedy to detect and deter cartels, but, on the other hand, disclosure of leniency statement decreases the attractiveness of leniency programmes for business significantly: news that the European Commission or the US DoJ's Antitrust Division is conducting an investigation often prompts the filing of civil class action suits in the United States and requests for discovery of materials submitted by defendants to competition authorities.[74]

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[70] Duhaime's Law Dictionary, <http://www.duhaime.org/LegalDictionary/F/FishingExpedition.aspx> (accessed Aug. 21, 2015); Macmillan Dictionary, <http://www.macmillandictionary.com/dictionary/british/fishing-expedition> (accessed Aug. 21, 2015).

[71] Directive, *supra* n. 54, Preamble, para. 18.

[72] Fed. R. Civ. P. 26(c)(1)(G).

[73] Paul Matthews & Hodge M. Malek, Disclosure 436 (4th ed., Sweet & Maxwell; Thomson Reuters 2012).

[74] Miller et al., *supra* n. 21, at 2.

3.2.1. The EU: Evolution from Case-by-Case Basis to Direct Prohibition

The EU position on disclosure of leniency statements has evolved from neutral permission to solve this issue in national courts of Member States in accordance with national rules in the landmark judgement in *Pfleiderer*[75] to direct prohibition in the Directive. In *Pfleiderer* a customer of German decorative paper producers sought to obtain access to the competition authorities' (*Bundeskartellamt*) documentation to strengthen its damages claim against the producers who participated in the cartel agreement. The *Bundeskartellamt* refused access to all leniency documents. Upon appeal by Pfleiderer as a plaintiff, the *Amtsgericht Bonn* disagreed with the *Bundeskartellamt* and decided that Pfleiderer was entitled to access under German rules, but agreed to refer preliminary questions to the Court of Justice 'to weigh and balance the possibly diverging interests of ensuring the efficacy of leniency programmes . . . with the right of any individual to claim damages for harm suffered as a result of . . . cartels.'[76] Among arguments 'pro' disclosure of leniency material in this case was the fact that the *Bundeskartellamt*'s investigation into the decorative paper cartel was over, so access to the leniency documents could not harm the investigation in that particular case.[77] The opponents argued, that in that case the disclosure 'could seriously undermine the attractiveness and thus the effectiveness of that authority's leniency programme,' leniency applicants 'will find themselves in a less favourable position in actions for civil damages, due to the self-incriminating statements and evidence which they are required to present to the authority, than the other cartel members' and, consequently, potential applicants will 'abstain from applying for leniency altogether or alternatively be less forthcoming with a competition authority during the leniency procedure.'[78] In addition, the Advocate General indirectly set the priority of public enforcement over private enforcement: '[T]he role of the Commission and national competition authorities is . . . of far greater importance than private actions for damages'[79] and highlighted that victims of cartels also benefit from effective leniency programmes.[80] Nevertheless, the Court ruled that applicable national disclosure rules should not make obtaining of compensation practically impossible or excessively difficult for plaintiffs and confirmed the right of national courts 'to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'[81] on the case-by-case basis for balancing interests exercise.

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75 *Pfleiderer*, *supra* n. 45.

76 *Pfleiderer*, *supra* n. 45, Opinion of AG Mazák ¶ 2.

77 *Id*. ¶¶ 19–20.

78 *Id.* ¶ 38.

79 *Id.* ¶ 47.

80 *Id.* ¶¶ 41–46.

81 *Pfleiderer*, *supra* n. 45, Judgment ¶ 30.

The *Pfleiderer* judgement has been criticized for several reasons. Firstly, because 'most civil liability systems in the EU are purely compensatory in nature and do not allow any "punitive" element in a damages award . . .'[82] Secondly, the necessity of additional monetary awards against cartel defendants for deterrence purposes has been questioned due to success of administrative fines for anticompetitive conduct to ensure deterrence. Finally, those actions have not helped to uncover cartel activity because 'all cartel damages actions to date have been so-called "follow-on" actions, *i.e.* actions that were only started following on the announcement that a public enforcement investigation had been initiated . . .'[83]

After *Pfleiderer*, positions of national courts on disclosure of leniency materials have been varied in the EU Member States: the judgments of the German and the United Kingdom courts on this issue were completely polar.[84] For example, *Amtsgericht Bonn*[85] decided that, under German law, it would not be in the public interest to disclose any leniency document to Pfleiderer because disclosing the leniency documents would prejudice the success of the *Bundeskartellamt*'s leniency programme, which is a primary tool in fighting cartels,[86] and, in addition, the leniency documents were not necessary for Pfleiderer to bring its damages claim and that failure to disclose these documents did not make the claim practically impossible or excessively difficult.[87] Similarly, according to the *Oberlandesgericht Düsseldorf*, access to leniency documents has relatively little value for the claimant in comparison with the cartel authority's finding of infringement and these documents would not necessarily assist a court's assessment of causation and damages. Therefore, in Germany the claimant's interest in accessing the leniency material did not outweigh the leniency applicant's interest in maintaining confidentiality.[88]

The opposite position on disclosure of leniency documentation can be found in *National Grid*.[89] When the plaintiff sought access to confidential pleadings of ABB, Areva, and Siemens in leniency applications, the High Court considered that, firstly,

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82 Louis, *supra* n. 21, at 12.

83 *Id.*

84 Michael Sanders et al., *Disclosure of Leniency Materials in Follow-on Damages Actions: Striking 'the Right Balance' between the Interests of Leniency Applicants and Private Claimants?*, 34 European Competition Law Review (ECLR) 174, 175 (2013).

85 AG Bonn, *supra* n. 48. The English press release (dated January 30, 2012) is available at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/30_01_2012_Pfleiderer.html> (accessed Aug. 22, 2015).

86 *Louis*, *supra* n. 21, at 12 (citing AG Bonn, *supra* n. 48, ¶¶ 28–30).

87 *Id.* at 12 (citing AG Bonn, *supra* n. 48, ¶¶ 36–37).

88 Sanders et al., *supra* n. 84 (citing OLG Düsseldorf, 22.08.2012 – V-4 Kart 5/11 (OWi), V-4 Kart 6/11 (OWi), BB 2012, 2459).

89 *National Grid Electricity Transmission plc v. ABB Ltd. & Ors.*, [2012] EWHC 869 (Ch.).

risks to the Commission's leniency programme could not justify a wholesale refusal of disclosure of leniency materials.[90] Then, the High Court identified a new standard of assessment of public interest in protecting the Commission's leniency programme through the proportionality review inherent in applying the UK rules on discovery, in particular through checking '(a) whether the information is available from other sources and (b) the relevance of the leniency materials to the issues in this case.'[91] Unfortunately, this attitude to the disclosure of leniency materials has not been developed and the issues of standards in leniency disclosure have infrequently arisen in other cases.[92]

Eventually, the Directive[93] rejected compromising models of disclosure of leniency materials and now it explicitly mirrors the opinion of the Advocate General in *Pfleiderer*. Justifying the exclusion of leniency documentation from disclosure, the Note from General Secretariat of the Council highlights the importance of leniency programmes and settlement procedures for the public enforcement of Union competition law, particularly for the detection, the efficient prosecution and the imposition of penalties for the most serious competition law infringements.[94] Following this message, the Directive, explaining exclusion of leniency documents from disclosure, underlines the key role of undertakings which cooperate with competition authorities under a leniency programme in detecting secret cartel and assumes that the harm which could have been caused had the infringement continued is mitigated.[95] Therefore, there is a new challenge for the UK approach to disclosure of leniency materials which has had an intermediate position between nearly absolute discovery in the USA and conditional disclosure prescribed in *Pfleiderer*. For example, a Consultation on Options for Reform[96] proposed balanced (and fair) scope of disclosure of leniency documents: to protect from disclosure

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90 *National Grid, supra* n. 89, para. 36.

91 *Id.* para. 39.

92 Sanders et al., *supra* n. 84, at 177 (citing: Case T-2/03, *Verein für Konsumenteninformation v. Commission*, 2005 E.C.R. II-01121; Case T-237/05, *Éditions Jacob v. Commission*, 2010 E.C.R. II-02245; Case T-344/08, *EnBW Energie Baden-Württemberg v. Commission*, 2012 E.C.R. I-0000).

93 *Supra* n. 54.

94 *Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union – Analysis of the Final Compromise Text with a View to Agreement: Note to the Permanent Representatives Committee*, General Secretariat of the Council, RC 6 JUSTCIV 76 CODEC 885 2014, at 26 (recital 21a), at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%20 8088%202014%20INIT> (accessed Aug. 21, 2015).

95 Directive, *supra* n. 54, Preamble, para. 26.

96 *Private Actions in Competition Law: A Consultation on Options for Reform* para. 7.4, Department for Business Innovations and Skills (April 2012), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf> (accessed Aug. 21, 2015).

only documents which are directly involved in the leniency application and which would not have been created if the company had not been seeking leniency.[97] The UK government in its Response to options for reforming the private antitrust actions regime, decided that the issue of the protection of leniency materials from disclosure would not be addressed in legislation in the UK.[98]

To sum up, conflict of disclosure and leniency programmes in detecting and deterring cartels in the EU results in the priority of protection of whistleblowers over compensation for consumers. Whilst a step back from *Pfleiderer* and narrowing of disclosure is unlikely to be noticed in the majority of Member States, it brings uncertainty to plaintiffs in the UK.

3.2.2. The US: Case-by-Case Analysis

In the US, the conflicts between the liberal scope of US discovery and sovereign promises that certain information or evidence would remain confidential are solved on a case-by-case analysis because there is no explicit countervailing statute or procedural rule that would clearly protect information provided by leniency applicants, whereas Fed. R. Civ. P. 26(b) provides just a general presumption of broad discoverability. The case-by-case basis does not bring certainty to litigants and states. For example, in *Flat Glass*[99] the District Court had compelled discovery of amnesty-related documents which created a direct threat to the US government's leniency program.[100] Later, in *Intel Corp. v. Advanced Micro Devices*[101] the US Supreme Court determined that the materials did not need to be independently discoverable in either US or foreign proceedings and non-privileged confidential materials (potentially including US and EU leniency applications and associated investigative documents) may be subject to discovery.[102] However, in *Micron Technology*[103] the court agreed with the DoJ's position that the discovery would damage the leniency programmes, current and future investigations and used the law enforcement privilege to protect leniency materials from disclosure.[104] A paperless process of application under the US DoJ antitrust leniency programme[105] has been designed to reduce risks of uncertainty for whistleblowers but it is unlikely to help to solve issues of disclosure of the EU leniency materials.

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97 *Private Actions in Competition Law, supra* n. 96, para. 7.6

98 Israel et al., *supra* n. 7.

99 *In re Flat Glass Antitrust (I)*, MDL No. 98-0550 (W.D. Pa. 1998).

100 Miller et al., *supra* n. 21, at 8.

101 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-63 (2004).

102 Miller et al., *supra* n. 21, at 9.

103 *In re Micron Technology, Inc. Securities Litigation*, No. 09-mc-00609 (Doc. No. 17) (D.D.C. Feb. 1, 2010).

104 Miller et al., *supra* n. 21, at 10.

105 Louis, *supra* n. 21, at 13.

Leniency materials of the European Commission are also under threat of discovery in the US because, despite a paperless leniency process, EU cartel proceedings are essentially conducted in writing and information extracted from leniency statements is incorporated in Commission Statements of Objections (SO) and in the ultimate fining decisions. However, in most cases,[106] except the *Vitamins* litigation,[107] the Commission managed to prevent the disclosure of leniency documents through the use of US pre-trial discovery by 'writing to or intervening as *amicus curiae* before US courts to oppose plaintiffs' motions to compel discovery of leniency documents.'[108]

3.3. Discovery in the US and European Taboo: Does It Make Sense to Exclude Leniency Materials from Disclosure?

The broad scope of discovery in the US raises a question of the relation between the US discovery rules and the European Commission's leniency programme because the US procedural rules do not protect information provided by European leniency applicants from discovery. On the one hand, immunity from discovery can be given to a foreign sovereign's amnesty programme pursuant comity agreement in cases when those documents are granted immunity from civil litigations by a foreign sovereign like, *e.g.*, in *Rubber Chemicals*,[109] when the court denied discovery of communications with the European Commission regarding corporate leniency programme due to a forceful comity analysis. On the other hand, this immunity is not guaranteed: in the *Vitamins*[110] case the Commission's interests were recognized as 'not more important as the interests of the United States in open discovery and enforcement of the antitrust laws.'[111] So plaintiffs in civil litigations against cartels in the United States may obtain leniency materials from European Commission rather than from Antitrust Division in criminal investigations, because the Antitrust Division is unlikely to request documents in the possession of foreign companies in other states. A formal procedure for an oral leniency application has been introduced to avoid the problems associated with US discovery but it is unlikely that this method of application can totally prevent discoverability of leniency materials in the US[112]

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106 Louis, *supra* n. 21, at 11 (citing: *In re Methionine Antitrust Litigation*, No. 00-1311, 2003 WL 22048232 (N.D. Cal. Jun. 17, 2002); *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007); *In re Flat Glass Antitrust Litigation (II)*, No. 08-180, 2009 WL 331361 (W.D. Pa. Feb. 11, 2009); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011); *In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775, 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010).

107 *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251 (D.D.C. 2002).

108 Louis, *supra* n. 82, at 13.

109 *Supra* n. 106.

110 *In re Vitamins Antitrust Litigation*, No. 99-197, 2002 WL 34499542, at *10 (D.D.C. Dec. 18, 2002).

111 *Id.* at *82.

112 Petrasincu, *supra* n. 18, at 356.

since the rest of leniency materials is still in paper. The risk that leniency materials of companies considering co-operation with the Commission can be used in the US civil proceeding as evidence against them still exists. It is argued, that this risk can significantly reduce the effectiveness of the Commission's leniency programme.[113] Specific threats must be examined in order to assess the reality of harm to the EU leniency programme.

3.3.1. Are Rights of European Defendants Well Protected?

Leniency applications of the EU defendants are at risk of discovery[114] since plaintiffs in the US can directly require the defendants to provide the written leniency applications they have submitted to the European Commission. Several privileges can be used to limit discovery in this case albeit their success is also questionable. For example, in the overwhelming majority of cases, the attorney-client privilege would be waived by producing documents to government authorities and, consequently, a leniency application to the European Commission would not be protected by this privilege.[115] Similarly, work-product immunity which is defined as a qualified immunity of an attorney's work-product from discovery in order to protect the litigation strategy devised by the attorney[116] can be waived if the document is disclosed to an adversary;[117] since any governmental authorities can be adversaries in that sense,[118] then any leniency applications to the European Commission would not be protected by the this privilege. Law-enforcement investigatory privilege could be useful if the European Commission can invoke this privilege.

3.3.2. How to Resist 'Fishing Expedition?'

A wide-spread 'fishing expedition' fear, based on knowledge of the existence of a leniency application in Europe, is groundless due to the successful prevention by the US federal courts, following the Supreme Court's *Twombly*[119] decision. The case concerned a putative class action against major telecommunications providers, suspected of engagement, firstly, in parallel conduct to inhibit the growth of upstart competitive local exchange carriers by unfair agreements preventing access of new competitors to the networks, and, secondly, in agreements not to compete with

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113 Petrasincu, *supra* n. 18, at 361.

114 *Id.* at 363.

115 *In re Vitamins Antitrust Litigation*, No. 99-197, 2002 U.S. Dist. LEXIS 26490, at **94, 96 (fn. 50), 101–03.

116 *Hickman v. Taylor*, 329 U.S. 495, 509–12 (1947); *Holmgren v. State Farm Mutual Automobile Insurance Co.*, 976 F.2d 573, 576 (9th Cir. 1992); *In re Syncor Erisa Litigation*, 229 F.R.D. 636, 644 (C.D. Cal. 2005).

117 *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3rd Cir. 1991).

118 *Westinghouse*, *supra* n. 117, at 1428; *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984).

119 *Supra* n. 29.

each other. In support of this claim, the complaint pointed to the defendant's failure to meaningfully pursue attractive business opportunities. The District Court had dismissed the complaint for failure to state a claim, the Court of Appeals reversed, the Supreme Court reversed arguing that defendant seeking to defend against the allegations would have almost no idea where exactly to begin because plaintiffs had no any assumption of a specific time, place, or person involved in the alleged conspiracy.[120] At the beginning, the Court underlined that a showing of parallel behaviour is admissible as circumstantial evidence from which an agreement may be inferred, but that parallel behaviour in itself does not conclusively establish an agreement.[121] Then, in order to suggest that an agreement was made, enough factual matter has to be included in a claim under the Sherman Act (Sec. 1) to comply with pleading standard.[122] Moreover, a probability requirement at the pleading stage is not imposed simply by asking for plausible grounds to infer an agreement; it means that enough facts are required to raise a reasonable expectation that evidence of an agreement in violation of the Sherman Act will be revealed by discovery. It is noteworthy that in regard of discovery the Court emphasized the 'potentially enormous expense of discovery' and the pressure this might exert on defendants to settle cases early-on even without reasonable 'hope that the [discovery] process will reveal relevant evidence.'[123] Therefore, the Supreme Court effectively cancelled the threat of its earlier holding in *Conley v. Gibson* when 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'[124] Findings from *Twombly* have been confirmed in a number of cases[125] and improved in the case *Ashcroft v. Iqbal* where the Court emphasized that plausibility is not deemed to introduce a probability requirement, but it requires more than the mere possibility, and considered that the probability requirement is not met if the plaintiff pleads facts that are merely consistent with the liability of the defendant.[126]

The criteria of discoverability following the Supreme Court's *Twombly* decision can be articulated as follows: both direct or circumstantial evidence can be used for alleging a violation of the Sherman Act (Sec. 1) but the plaintiff must demonstrate

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120 *Twombly*, *supra* n. 29, at 565 (fn. 10).

121 *Id.* at 553; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540–41 (1954).

122 *Twombly*, *supra* n. 29, at 556.

123 *Id.* at 559.

124 *Supra* n. 30, at 45–46.

125 *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50 (2d Cir. 2007); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 U.S. Dist. LEXIS 107882, at *79 (E.D.N.Y. Sep. 26, 2008); *In re Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d 1011, 1023–25 (N.D. Cal. 2007).

126 129 S. Ct. 1937, 1949 (2009).

enough factual matter to suggest plausible grounds to infer an agreement; otherwise the allegation that defendants entered into an agreement is not sufficient to meet the pleading standard. The direct allegation of an agreement must include specific dates, places and persons involved[127] and a defendant's activities.[128] Therefore, plaintiffs have to postulate specific allegations, not just allegations that anyone could postulate without knowing any facts of the alleged agreement whatsoever.[129] This attitude to discovery reminds the idea of UK Consultations on Private Actions in Competition Law to protect from disclosure only documents which would not have been created if the company had not been seeking leniency[130] and could be used as guidance for disclosure of leniency materials instead of totally hiding them from plaintiffs especially in view of the intensive courts' role in disclosure of evidence in European traditions.

Consequently, although priority of public enforcement resulted in prohibition of disclosure of all leniency materials in the EU, this prohibition is nearly meaningless since plaintiffs can seek discovery under the US law, and, as US case law indicates, interests of plaintiffs and defendants can be balanced by setting clear criteria for courts rather than by absolute exclusion of leniency documentation from disclosure. Furthermore, as the degree of discovery development in the US allows representatives of European plaintiffs to fill the gaps of European disclosure, the next chapter seeks to explain how European plaintiffs as plaintiffs can exercise their rights if EU disclosure does not facilitate their actions for damages.

4. Solutions for International Legal Practitioners

Nowadays plaintiffs from around the world have vigorously begun to use the opportunities provided by the US discovery system to supplement for the lack of transparent and efficient disclosure rules in Europe. To date, only a quarter of Europe's antitrust infringement decisions led to claimants suing for compensation[131] although almost all of them have been so-called 'follow-on' actions, *i.e.* actions that were only started following on from the announcement that a public enforcement investigation had been initiated.[132] Only a very limited number of stand-alone claims before the

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127 *In re LTL Shipping Services Antitrust Litigation*, 2009 U.S. Dist. LEXIS 14276, at **45–48 (N.D. Ga. Jan. 28, 2009).

128 *In re Elevator*, *supra* n. 125, at 50–51.

129 *Id.* at 50–52; *In re Air Cargo Shipping*, *supra* n. 125, at *81.

130 *Supra* n. 96, para. 7.6.

131 Alex Barker, *Hurdles to Cartel Damages Suits Lifted by Brussels*, Financial Times (Jun. 11, 2013), <http://www.ft.com/cms/s/0/46435c38-d28a-11e2-aac2-00144feab7de.html#axzz2zbf3X3jo> (accessed Aug. 21, 2015).

132 Louis, *supra* n. 82, at 13.

High Court in the UK have been reported.[133] Follow-on actions are hardly conductive to the deterrence of cartels and depend on the success of public enforcement even if they start following just the announcement that a public enforcement investigation had been initiated and not based on a leniency application. In addition, experts and litigators confirm that, access to evidence pursuant to a court order is hardly possible is civil law countries despite existence of procedural rules in national legislation.[134] Thus, ironically, the imperfect disclosure in the European Union motivates plaintiffs to seek alternatives in other jurisdictions.

4.1. Discovery in the US for Private Actions in Other Countries

Paradoxically, plaintiffs from the EU have more chances to discover information in civil litigations against cartels in the US, than in the EU. Section 1782(a) of Tit. 28 of the U.S.C. provides European antitrust litigants with a traditional but effective tool for discovery in foreign private antitrust litigation. Although this right for discovery cannot be automatically executed and a US district court must grant permission to conduct discovery under § 1782, private antitrust litigants in foreign proceedings in the US can take full advantage of the comparatively liberal discovery rules in the US under certain conditions. Pursuant to § 1782(a), the discovery covers the production of documents, electronic discovery, other tangible evidence, as well as sworn deposition testimony of witnesses.[135] The process of discovery under § 1782(a) of the U.S.C. is transparent: the court has to apply a two-step test.[136] The first step examines mandatory factors to determine whether certain elements required on the face of the statute have been satisfied, the second one – additional discretionary factors for exercising the courts' discretion to permit § 1782 discovery.[137]

All four mandatory factors are explicitly established in § 1782(a). First, a request must be made 'by a foreign or international tribunal' or by 'any interested person,' including a party to the foreign proceeding, a foreign sovereign, or a designated agent of a foreign sovereign or any other person possessing reasonable interest in obtaining judicial assistance. Second, a request must seek evidence in the form of the testimony or statement of a person or the production of documents or other thing. Requests for evidence in the form of depositions and / or document requests are the most common in the US antitrust practice.[138] Third, the aim of discovery must be exactly 'for use in a proceeding in a foreign or international

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133 Israel et al., *supra* n. 7.

134 Ashurst Report, *supra* n. 11, at 61.

135 Jungermann & Mazur, *supra* n. 41.

136 *Intel*, *supra* n. 101.

137 *Id.* at 264–65.

138 Jungermann & Mazur, *supra* n. 41.

tribunal, including criminal investigations conducted before formal accusation.' Courts and intergovernmental arbitral bodies are the relevant examples of 'foreign or international tribunal' because under the US Supreme Court's decision in *Intel*, the relevant inquiry is whether the foreign body acts as a first-instance decision maker, rendering a dispositive ruling responsive to a complaint and reviewable in court.[139] Fourth, the interested person must 'reside' or just be 'found' in the district of the US district court in which the application for § 1782 discovery is brought. Consequently, even physical presence in a US district where an applicant submits a request is enough to meet this condition.

Although the US district court is not obliged to permit § 1782 discovery even when all mandatory factors are confirmed, its discretion is rather predictable because four guiding factors are set by the Supreme Court in the 2004 *Intel* decision. First, it is the inaccessibility of the documents or testimony within the foreign tribunal's jurisdiction.[140] For example, 'when the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'[141] Second, 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to US federal-court judicial assistance'[142] is taken into account. Third, the US courts consider whether the § 1782 application 'conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States'[143] and, finally, whether it contains 'unduly intrusive or burdensome requests.'[144] The district court may deny the § 1782 application because of undue burden when 'suspects that the discovery is being sought for the purposes of harassment'[145] or limit the scope of the discovery. Therefore, a district court's discretion is transparent in accordance with § 1782 which sets that '[d]istrict courts must exercise their discretion under § 1782 in light of the twin aims of the statute: "providing efficient means of assistance to participants in international litigation in [US] federal courts and encouraging foreign countries by example to provide similar means of assistance to [US] courts . . ."'[146]

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139 *Intel*, *supra* n. 101, at 257–58.

140 *Id.* at 264.

141 *Schmitz v. Bernstein, Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004).

142 *Intel*, *supra* n. 101, at 264.

143 *Id.* at 265.

144 *Id.*

145 *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012).

146 *Metallgesellschaft AG v. Siegfried HODAPP*, 121 F.3d 77, 79 (2d Cir. 1997) (quoting *Malev Hungarian Airlines v. United Technologies International Inc., Pratt & Whitney Commercial Engine Business*, 964 F.2d 97, 100).

Other statements of US courts confirm flexibility and efficiency of § 1782 rules for European plaintiffs. For example, there is no 'foreign-discoverability' requirement[147] under § 1782, *i.e.* it does not matter whether evidence sought in the US under § 1782 is discoverable or undiscoverable under the laws of the foreign country where the underlying action will be considered because 'a district court could condition relief upon that person's reciprocal exchange of information' and 'the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate.'[148] Also there is no requirement that the foreign proceeding be 'ending' or 'imminent,' it should be only 'within reasonable contemplation.' Whilst some US courts take into account the actions an applicant has taken in the foreign jurisdiction to obtain the discovery, generally § 1782 discovery cannot be refused if a foreign tribunal has not yet considered the discovery request. Moreover, the scope of discovery that foreign litigants may seek in the US under § 1782 has been expanded in a recent decision of the US Court of Appeals for the Second Circuit, which held that a district court may issue a subpoena under § 1782, even if the evidence sought would not be admissible in the foreign proceeding because there was no statutory basis for any admissibility requirement.[149]

A plaintiff can obtain evidence from subsidiaries all over the world if a parent company is incorporated in the US or can be found in the district of the US court in which the § 1782 application is made.[150] Therefore, discovery obligations can be imposed on US entities in response to requests from foreign litigants even if evidence in question is located abroad the US so long as evidence is within the possession, custody, or control of a person located in the US.

Interestingly, German courts and German litigants are amongst the most frequent users of § 1782: there are at least 28 US judicial decisions in German-related matters involving applications under § 1782.[151] One of the reasons for high demand for discovery among German plaintiffs is that documents may be requested in any format including category of documents or communications concerning 'bases or rationales.'[152] Access to testimony of executives and corporate representatives

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147 *Intel*, *supra* n. 101, at 262.

148 *Id.*

149 *Brandi-Dohrn*, *supra* n. 145.

150 Lawrence S. Schaner & Brian S. Scarbrough, *Obtaining Discovery in the USA for Use in German Legal Proceedings. A Powerful Tool: 28 U.S.C. § 1782*, 2012(4) Anwaltsblatt (AnwBl) 324, available at <https://jenner.com/system/assets/publications/9165/original/AnwBl_2012_320.pdf?1334951861> (accessed Aug. 21, 2015) (citing: *In re Iwasaki Electric Co.*, No. M19-82, 2005 WL 1251787, at **2–3 (S.D.N.Y. May 26, 2005) ; *In re Application of Gemeinschaftspraxis Dr. Med Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006); *Minatec Finance S.A.R.L. v. SI Group Inc.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 (fn. 8) (N.D.N.Y. Aug.18, 2008); *In re Application of Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003); *Schmitz*, *supra* n. 141, at 85 (fn. 6)).

151 Schaner & Scarbrough, *supra* n. 150, at 322.

152 *In re Application of Gemeinschaftspraxis Dr. Med Schottdorf*, *supra* n. 150, at *3 (fn. 9).

through depositions, which also can be obtained under § 1782,[153] contributes to proof in cartel litigations.

Though courts tend to limit discovery rather than deny it completely, discovery under § 1782 is not endless. Except the cases where the requirements for mandatory and discretion factors are not met, courts can deny § 1782 discovery if such discovery can jeopardize another State's sovereign rights and circumvent criminal procedure,[154] where the discovery violated the Fed. R. Civ. P., for example, the applicant sought privileged and / or confidential information[155] or the discovery requests were vague and overbroad,[156] duplicative, vexatious, or unreasonably cumulative[157] or irrelevant.[158]

The application procedure is quite simple: an interested person has to submit an application in the US district court for the district wherein the person from whom discovery is sought resides or can be found.[159] A typical application consists of: (i) an application with some background to the foreign proceeding and justification for the need for the discovery including explanation of how the mandatory statutory elements and the discretionary factors are met; (ii) a supporting affidavit or declaration from a person who is familiar with the foreign proceeding, including counsel of applicant; (iii) a draft of the proposed discovery; and (iv) a proposed order that the district court can sign granting discovery.[160] Prior notice to the person from whom discovery is sought or the adverse party before the foreign tribunal is not required but the person from whom discovery is sought can object and seek US court redress.

To summarize, the design of § 1782 allows a plaintiff to request evidence in the US for the cartel private enforcement in the European Union if evidence to prove damage by anticompetitive behaviour or causality between the infringement and the damage are located in the US or a person or a company that are able to provide testimony, documents, or electronic evidence can be found in the US and

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153 *Minatec*, *supra* n. 150; *Cryolife, Inc. v. Tenaxis Medical, Inc.*, No. C08-05124 HRL, 2009 WL 88348 (N.D. Cal. Jan. 13, 2009).

154 *Schmitz*, *supra* n. 141; *In re Application of Schmitz*, *supra* n. 150.

155 Schaner & Scarbrough, *supra* n. 150, at 323 (citing: *In re Heraeus Kulzer GmbH*, No. 09-MC-00017, 2009 WL 2981921 (E.D. Pa. Sep. 11, 2009) (no showing of substantial need for confidential information); *In re Application of Heraeus Kulzer*, No. 09-CV-183 RM, 2009 WL 2058718 (N.D. Ind. Jul. 9, 2009); *In re Letters Rogatory from 9th Criminal Division, Regional Court, Mannheim, Federal Republic of Germany*, 448 F. Supp. 786 (S.D. Fla. 1978)).

156 *In re Application of Heraeus Kulzer*, *supra* n. 155, at **2–3.

157 *Bayer AG v. Betachem, Inc.*, 173 F.3d 188 (3d Cir 1999).

158 Schaner & Scarbrough, *supra* n. 150, at 323 (citing *Kang v. Noro-Moseley Partners*, No. 07-10310, 2007 WL 2478579 (11th Cir. Sep. 4, 2007)).

159 *Id.* at 321.

160 *Id.*

applications meet the set of mandatory and discretional facts. Recent judgements of the US courts can boost application of § 1782 in foreign antitrust actions. For example, even the strictest rules of disclosure in Germany do not create any obstacle for courts to accept evidence obtained pursuant to § 1782 and in some cases German lawyers prefer to apply for discovery in the US instead of home jurisdiction.[161]

4.2. The 'Forum of Choice' for Cartel Private Actions

The choice of jurisdiction for filing claims for damages for breach of competition law also simplifies disclosure of evidence and, consequently, enhances chances to win. The UK is reported to remain the 'forum of choice' for private actions due to generous disclosure rules and the courts' rapidly growing experience in considering the complex economic, legal and procedural issues.[162] The recent developments and practice in antitrust litigation in England and Wales become increasingly interesting by the use of 'anchor defendants' and the disclosure of leniency materials in the context of follow-on cartel damages claims. Establishment of the Competition Appeal Tribunal (CAT) where private antitrust damages actions can be brought on a par with the High Court[163] also significantly strengthen the attractiveness of the UK courts in antitrust disputes.[164]

The English court's jurisdiction to hear an antitrust damages claim is determined by the Brussels Regulation.[165] Pursuant to Art. 6(1) in relation to claims involving multiple defendants in a number of EU Member States, claimants can bring a claim in the courts of the Member State where any one of the defendants is domiciled if the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.' In tort claims (which include antitrust claims), a defendant domiciled in an EU Member State can be sued in the courts of 'the place where the harmful event occurred.'[166] Therefore, the jurisdiction of the UK courts is established if a defendant domiciled in the UK.

Furthermore, the UK courts accept jurisdiction against defendants domiciled in other EU Member States if claimants have used UK-domiciled subsidiaries as 'anchor defendants' (which may not have been subject to the EC infringement decision) rather than their foreign parent companies to which the infringement decision had

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161 Schaner & Scarbrough, *supra* n. 150, at 323.

162 *EU Parliament Backs Cartel Evidence Release Proposals But Leniency Corporate Statements to Remain Confidential*, *supra* n. 60.

163 Competition Act, 1998, c. 41 (Eng.), Chs. I and II.

164 Israel et al., *supra* n. 7.

165 Council Regulation (EC) No. 44/2001 of 22 December 2000 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN> (accessed Aug. 21, 2015).

166 *Id.* Art. 5(3).

been addressed.[167] For example, in *Provimi*[168] the High Court accepted jurisdiction to hear an EU-wide cartel claim brought against the UK subsidiaries of foreign parent companies, notwithstanding that, unlike their foreign parents, the UK subsidiaries were not addressees of the EC's infringement decision because 'the legal entities that are part of the one undertaking . . . have no independence of mind or action or will,' so '[t]here is no question of having to "impute" the knowledge or will of one entity to another, because they are one and the same.'[169] Later this conclusion has been repeated in *Cooper Tire*[170] in which the claimants (tyre manufacturers who had bought synthetic rubber in Europe) sought to establish jurisdiction through three UK anchor defendants (subsidiaries of foreign companies who were addressees of the EC's decision) on the basis that they had implemented the cartel by selling products at cartel prices. In 2011, the High Court in *Toshiba Carrier* confirmed that the claims against the UK anchor defendants were properly constituted (with 'knowledge' of the cartel on the part of the UK-domiciled defendants, on the same basis as *Cooper Tire*).[171] Therefore, claimant-friendly approach to establishing jurisdiction taken by the High Court motivates plaintiffs to bring their private antitrust claims in the UK.[172]

Practically, availability of evidence and choice of jurisdiction are inseparably linked. The US courts are often chosen by European plaintiffs due to widely used effective doctrine, which means that any State may impose liabilities for conduct outside its borders if consequences of an act are within its borders: Sherman Act 1890 can be applied to conduct involving trade with foreign nations if such conduct has a direct, substantial and foreseeable effect on trade or commerce in the US.[173] For instance, Nokia stand-alone action against LCD cartel in the US[174] has been settled in the US because there was no government action specific to Nokia purchases and plaintiffs had to prove their case themselves; in the US they immediately got access to millions of pages of documents. In that case, discovery determined the result of litigation.[175]

Thus, while the European disclosure does not contribute to the development of cartel private enforcement, in some cases the European plaintiffs have a chance to exercise their right for compensation for damages, if they turn their gaze upon

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167 Israel et al., *supra* n. 7.

168 *Provimi Ltd. v. Aventis Animal Nutrition SA & Ors.*, [2003] EWHC 961 (Comm.).

169 *Id.* para. 31.

170 *Cooper Tire & Rubber Co. Europe Ltd. & Ors. v. Dow Deutschland, Inc. & Ors.*, [2010] EWCA Civ. 864.

171 *Toshiba Carrier UK Ltd. & Ors. v. KME Yorkshire Ltd. & Ors.*, [2011] EWHC 2665 (Ch.), para. 45.

172 Israel et al., *supra* n. 7.

173 Sherman Act, 15 U.S.C. §§ 1–7 (1890), Sec. 6a, at <http://www.linfo.org/sherman_txt.html> (accessed Aug. 21, 2015).

174 *Nokia Corp. et al. v. AU Optronics Corp. et al.*, No. 3:09-cv-05609 (N.D. Cal.).

175 E-mail from Valarie Williams to Natalya Mosunova (Aug. 5, 2014).

other jurisdictions. First, the evidence may be requested through the use of § 1728 U.S.C. in the US. Second, plaintiffs can choose the friendliest jurisdiction in the case of litigation against cartels which have affected the economy of several states. However, practically these effective and proven facilities are available only to a limited number of plaintiffs who have corporate budgets for the high fees of international law firms. Consequently, information asymmetry, *i.e.* inability to obtain evidence to protect victims' interests, is preserved for individuals and small businesses. The Conclusion will present possible measures to promote the availability of evidence after analysis of findings of the study.

5. Conclusion

The research shows that disclosure of evidence in the EU is inefficient and does not facilitate cartel private enforcement, but the US discovery cannot be directly transferred to the European jurisdictions and that the follow-on actions are the only effective tool to promote cartel private enforcement in the EU.

In spite of all efforts carried out in the last decade, the Directive[176] provides a very strict regime of disclosure when plaintiffs effectively will not only have to get court approval for gathering documents from defendants, but also specify documents very precisely and prove that this evidence is relevant and necessary in the litigation. Therefore, these rules are unlikely to protect consumers' interests and, in fact, they suppress any attempts to sue for damages. Considering the obvious superiority of cartels' forces over victims' resources, it is little wonder that the vast majority of European plaintiffs give up attempts to obtain compensation for damages at this stage.

The findings of the second research question regarding potential operability of the US discovery in the EU demonstrate inapplicability of the US rules in the EU regardless of their effectiveness for cartel private enforcement in the US. Indeed, the remaining weaknesses of disclosure in cartel cases are not a consequence of the Directive. The main obstacle to making disclosure rules in the EU more victim-friendly and access to evidence easier is that the majority of the Members States employ civil law systems. The fundamental differences between civil law and common law families would entail highest costs of borrowing of the US discovery rules for the EU.

Facilitating follow-on actions could neutralize the pitfalls of disclosure in the EU. Consequently, efforts of competition authorities in the EU to promote the private cartel enforcement could be shifted more to follow-on actions than to stand-alone actions because the dependence of parties on the court's discretion without transparent criteria, the parties' obligation to provide a lot of evidence at the very early stage and paradoxical demands to indicate the exact type of documents out of their possession make stand-alone actions in the EU hardly possible. This

[176] *Supra* n. 54.

approach would be reinforced by the European competition law priorities which are designed to provide single market integration rather than to compensate consumers' damages.

The ambiguous attitude to disclosure of leniency materials could be clarified for promotion of follow-on action in Europe too. The ideas set forth in *Pfleiderer* to delegate to the national courts the decision on whether or not leniency documents are subject to disclosure have not been used in Member States and have been rejected in the Directive. The leniency programme of the EU, considering weakness of private enforcement, remains the main tool to detect and deter cartels in Europe and in this context the confidence of whistleblowers is worth protecting. However strict and uncompromising, European restrictions on disclosure of leniency documents become illusory because the design of the US disclosure rules and priority of consumers' rights effectively allow victims from the EU to sue in the US and obtain all necessary documents in the US proceeding when it is impossible in the courts of the EU Member States.

That is why convergence of the US and EU positions on disclosure of leniency materials could bring more certainty both to plaintiffs and defendants in cartel litigations and, consequently, facilitate the development of the European cartel private enforcement in terms of follow-on actions. In this regard, the findings in *National Grid*[177] provide transparent criteria for leniency material disclosure: unavailability of information from other sources and relevance to the issue in question. A more detailed test for discoverability follows from the *Twombly*[178] decision that a request to disclose must contain specific allegation of facts rather than assumptions. Well-articulated principles of disclosure of leniency materials would prevent 'fishing expeditions' and increase the number of compensated victims in follow-on actions. Therefore, interrelation between the two main remedies for detecting and deterring cartels – disclosure of evidence and leniency programme – provide the basis for further research.

Nowadays, the proposed solutions are rather practical. Victims of cartels can seek protection of their rights in other jurisdictions either by obtaining evidence in the United States for use in the European courts,[179] or by their choice of jurisdiction for their actions. Despite some concerns on protection of confidentiality, the case law and statistics on the number of European applicants in the US courts show the attractiveness and safety of discovery in the US.

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177 *Supra* n. 89.

178 *Supra* n. 29.

179 28 U.S.C. § 1782(a) (2000).

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Information about the author

Natalya Mosunova (Moscow, Russia) – Head of Legal Department, Adecco Group Russia (2/3 Paveletskaya sq., Moscow, 115054, Russia; e-mail: natalia.mosunova@adecco.com).