

ACCESS AND CARTEL CASES

Ensuring Effective Competition
Law Enforcement

Helene Andersson

ACCESS AND CARTEL CASES

This book examines the legislative patchwork surrounding access to the European Commission's cartel case files.

Recent legislative changes have increased the value of the files and have also highlighted the inherent tension between a number of competing interests affecting their accessibility. The Commission is undoubtedly caught between a rock and a hard place, charged with the task of ensuring due process, transparency and effectiveness, while at the same time promoting both public and private enforcement of the EU competition rules. The author considers how best to ensure a proper balance between the legitimate but often diverging interests of parties, third parties and national competition authorities in these cases.

The book provides a unique and comprehensive presentation of the EU legislation and case law surrounding access to the Commission's cartel case files. The author examines the question of accessibility from three different perspectives: that of the parties under investigation, cartel victims and national competition authorities. The author also considers the EU leniency system and whether any legislative changes could make the attractiveness of the system less dependent on the possibilities for cartel victims to access the evidence contained in the Commission's case files.

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Law Enforcement*

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EU Commission, <i>Green Paper on damages actions for breach of the EC antitrust rules</i> , COM(2005) 672 final, 19 December 2005	3, 217–18

ABBREVIATIONS

Access Notice	Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004
AG	Advocate General
Antitrust Regulations	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty
Art(s)	Article(s)
Charter	European Charter of Fundamental Rights
Conduct of Proceedings	Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU
Damages Directive	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
DG COMP	Directorate-General for Competition
ECA	European Court of Auditors
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
ECN	European Competition Network
ECtHR	European Court of Human Rights

EEA	European Economic Area
EU	European Union
Hearing Officer's Mandate	Decision 2011/695 of the President of the European Commission on the function and the terms of the Hearing Officer [also 'the Mandate'].
ICN	International Competition Network
NCA	national competition authority
OECD	Organisation for Economic Cooperation and Development
para(s)	paragraph(s)
Procedural Regulation	Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Transparency Regulation	Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

Introduction

I. Aim and Scope of this Book

If the European Commission's cartel case files were to be auctioned, the bids would no doubt keep reaching record levels. As will be further explored in this work, recent legislative changes have not only increased the value of these files, they have also highlighted the inherent tension between a number of competing interests that are all firmly rooted in the European Union (EU) Treaties. More specifically, the aim to ensure an effective competition law enforcement may sometimes be difficult to reconcile with the equally important interest in ensuring an administrative system that is transparent and which guarantees both good administration and adequate fundamental rights protection. Furthermore, through the adoption of the directive on antitrust damages actions,¹ it has become equally apparent that the recent emphasis on private enforcement of the EU competition rules may undermine the European Commission's own enforcement activities, especially the application of its leniency programme. These tensions have surfaced during the last couple of decades and are fuelled by rapid, but not necessarily consistent developments in three different but to some extent overlapping areas within the EU legal system: the rules on (i) competition law enforcement, (ii) openness and transparency, and (iii) fundamental rights protection.

The problem can briefly be described as follows. After decades of dealing mainly with notifications of agreements, the European Commission ('the Commission') eventually decided that the time was ripe for it to reshape its enforcement policy and step up the fight against hard-core restrictions of the EU competition rules. By introducing a leniency programme designed to make cartel offenders come forward and admit their guilt in exchange for immunity from fines, and by abolishing the notification system applied under Regulation 17/62,² the Commission could now focus its resources on cartels and abuse of market power. Since then, reports on record fines make the news on a regular basis, and the Commission is viewed as a tough and diligent enforcer of the EU competition rules. This new and

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 ('the Damages Directive').

² EEC Council Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204.

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more aggressive enforcement policy reflects the widespread understanding that cartels and market abuse are harmful to the economy and should be punished. In recent years, there has been increased focus on achieving corrective justice, ensuring that those who have suffered loss from competition law infringements are duly compensated. Nowadays, the Commission is prone to stress that cartel activity is not a victimless infringement of a set of administrative rules but that the gains are made at the expense of customers or consumers, and should be transferred back to them.³ While EU competition law enforcement has traditionally mainly been handled by the Commission and the national competition authorities, recent legislative changes aimed at achieving both corrective justice and enhanced deterrence have led to a shift in the enforcement structure. Today, the EU cartel enforcement system is resting on two separate pillars – one public and one private.

A more aggressive public enforcement, combined with invigorated private enforcement of the EU competition rules, has not only affected the risks involved with engaging in cartel activity, it has also increased the value of the evidence held in the Commission's case files. The parties under investigation need to access the file in order to be able to safeguard their defence rights, but will at the same time seek to protect the evidence from being disclosed to third parties. On the other hand, both cartel victims and national competition authorities may have an obvious and legitimate interest in accessing the file and the documents contained therein. The recent developments in the areas of transparency and fundamental rights protection, which have gained in importance and are now firmly established at the top of the EU norm hierarchy, will impact the outcome of any attempts to access the evidence held by the Commission. However, as the rules are now framed and applied by the EU institutions, they are not necessarily ensuring either coherence or consistency. This book examines the legislative patchwork surrounding access to the Commission's cartel case files, and seeks to establish how to best ensure a proper balance between the often diverging – but legitimate – interests of the parties, of third parties and of national competition authorities. The following section will provide a more detailed background to the problems tackled throughout the book.

II. Setting the Scene

The EU legal system is undoubtedly in constant motion, but the speed at which it develops may vary. After decades of relatively slow development, the first steps to transform the three areas of EU competition law enforcement, transparency

³ A Renda, 'Private Antitrust Damages Actions in the EU: Chronicle of an Attempted Golpe' in HW Micklitz and A Wechsler (eds), *The Transformation of Enforcement – European Economic Law in Global Perspective* (Oxford, Hart Publishing, 2016) 273, 275.

and fundamental rights protection were all taken in the 1990s. Since then, we have witnessed a rapid and drastic development in these areas. Coincidentally, the year 2001 bears particular significance both for the development in the competition law enforcement area and in the area of openness and transparency. This was the year when the Court of Justice of the European Union ('the Court' or 'the ECJ') delivered its ruling in *Courage v Crehan*, establishing a right for victims of competition law infringements to seek compensation for any damage sustained. The Court thereby drew attention to a part of the EU competition law enforcement system that, up until then, had received scant attention.⁴ It was also the year when Regulation 1049/2001 ('the Transparency Regulation') was adopted and took effect.⁵ The Transparency Regulation has the explicit aim to guarantee openness and to give the fullest possible effect to the right of public access to documents held by the EU institutions.

While the Court's ruling in *Courage* was considered seminal already in 2001, few could imagine what would come in its wake. Not only was *Courage* soon to be followed by *Manfredi*,⁶ but the ruling did also prompt the Commission to launch a survey on the possibilities of being compensated for loss suffered due to competition law infringements. The report from the survey was a gloomy read, revealing a state of 'astonishing diversity and total underdevelopment' throughout the EU.⁷ Few victims obtained any compensation at all.⁸ As a response, the Commission later presented a proposal for a directive on antitrust damages actions. Following certain modifications, the European Parliament and the Council adopted the Damages Directive in November 2014.⁹ The Damages Directive introduces a framework designed to ensure an effective private enforcement system throughout the Union, spreading a second layer of remedies over the EU public enforcement system.¹⁰

All Member States have now transposed the Damages Directive into their legal systems and the rules are in full swing throughout the Union. The impact

⁴ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, EU:C:2001:465.

⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L45/43, entered into force on 3 December 2001.

⁶ Case C-295/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461. Here, the Court established that anyone who has suffered loss due to a competition law infringement should be entitled to compensation not only for the actual loss, but also for the loss of profit plus interest, that is compensation in full.

⁷ Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, Comparative Report, August 2004, prepared by D Waelbroeck, D Slater and G Even-Shoshan for the Commission ('the Ashurst Report'). See also the Commission's Green Paper, *Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final.

⁸ Green Paper on damages actions for breach of the EC antitrust rules, COM (2005) 672 final.

⁹ Directive 2014/104/EU (n 1).

¹⁰ J Drexler, 'The interaction Between Private and Public Enforcement in European Competition Law' in Micklitz and Wechsler (eds), *The Transformation of Enforcement* (n 3) 136.

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of the Damages Directive is endorsed and further reinforced by the ECJ, which is establishing a broad and comprehensive EU-wide basis for these damages, acknowledging, inter alia, liability for umbrella pricing,¹¹ liability of the parent for breaches by subsidiaries,¹² and alternative jurisdictions.¹³ As a consequence, the number of damages claims is picking up by the minute, and the value of the evidence held in the Commission's files is increasing at the same pace. Cartel cases are not only complex and fact intensive, they are also characterised by information asymmetry, and cartel victims may often experience great difficulties in accessing the evidence required. The question of when and in what circumstances third parties should gain access to the evidence held in the Commission's case files is thus of more practical importance than ever. It goes without saying that no private enforcement system will become truly effective unless those who have suffered damages are able to access the evidence necessary for them to prove their loss. Access is thus key to ensuring effective private enforcement. At the same time, companies targeted by the Commission's cartel investigations now have an obvious and urgent interest in keeping the case file out of reach of third parties. However, any efforts to this effect should, at least in theory, be harder to accomplish given the development of new rules in another area of EU law, namely, those on public access and good administration.

Indeed, the year 2001 was also the year when the EU introduced a legal framework governing its adherence to the principles of openness and transparency. The first steps towards a more transparent EU administration were taken in the wake of the Danish rejection of further EU integration in 1992. The Danish referendum on the Maastricht Treaty had spurred a heated debate on questions of 'democratic deficiency' and 'institutional autism', and calls were made for a closer contact between the EU institutions and the citizens of the Union. The Council and the Commission responded by producing codes of conduct governing access to their own internal documents.¹⁴ Further steps to enhance transparency soon followed. When the Treaty of Amsterdam entered into force in 1999, it included a right of access to the documents of the Parliament, the Council and the Commission.¹⁵ Following the resignation of the Santer Commission in 1999, prompted by allegations of corruption and maladministration, the need to adopt detailed rules on access to documents became even more urgent, and the Transparency Regulation was finally adopted in May 2001. As from this date, there are detailed provisions governing the European administration's adherence to the principles of openness

¹¹ Case C-557/12, *Kone AG and Others v ÖBB-Infrastruktur AG*, EU:C:2014:1317.

¹² Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, EU:C:2019:204.

¹³ Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF Trucks NV*, EU:C:2019:635.

¹⁴ L Rossi and P Vinagre e Silva, *Public Access to Documents in the EU* (Oxford, Hart Publishing, 2017) 1.

¹⁵ Art 255 of the Treaty Establishing the European Community [2002] OJ C325/1 (TEC), now Art 15 of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

and transparency, and the purpose of the Transparency Regulation is to ensure the fullest possible effect to the right of public access to documents.¹⁶

The Damages Directive and the Transparency Regulation are not the only legal acts of relevance to this study. In recent years, there has been rapid development in a number of other areas, which may also impact the Commission's obligation or incentives to disclose the documents held in its case files. The Commission's Leniency Notice¹⁷ and the European Charter of Fundamental Rights¹⁸ ('the Charter') are two legal instruments of relevance. While one is a soft law instrument and the other forms part of EU primary legislation, they may both have a significant impact on the Commission's incentives or possibilities to share the documents or information in its case files with parties or third parties.

One of the first steps taken by the Commission when reshaping the EU cartel enforcement system was the introduction of a Leniency Notice. Having witnessed the results from the introduction of leniency programmes and sentencing guidelines in the United States, the Commission decided to change its enforcement strategy. In 1996, it adopted a Leniency Notice designed to divide cartel infringers and to help uncover cartels. The adoption of the Notice proved to be a success, leading to a sharp increase in the number of uncovered cartels.¹⁹ Following a review of the Notice, the Commission decided to adopt a new Leniency Notice in 2002, where a lower evidence standard was applied and the scope of immunity was extended to undertakings already under investigation. As a result, leniency applications now serve as the direct cause for most cartel investigations, and there has also been a significant increase in the number of uncovered cartels.²⁰ Relevant to this study is the fact that the effectiveness of the leniency system is dependent on companies' willingness to voluntarily admit their guilt and submit incriminating evidence to the Commission. If companies fear that such measures will make them more vulnerable to private actions, thereby potentially putting them in a worse situation than should they refrain from reporting the cartel, the leniency programme may soon be on the brink of disuse.²¹ As will be further explored in this work, to the extent that the Commission has any margin of discretion, it must carefully assess these issues when deciding what information to share with the public.

¹⁶ For a more detailed exposition of the EU's road toward an open and transparent administration, see eg Rossi and Vinagre e Silva, *Public Access to Documents in the EU* (n 14) 1–41; and F Bignami, 'Three Generations of Participation Rights Before the European Commission' [2004] 68(1) *Law and Contemporary Problems* 61.

¹⁷ Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.

¹⁸ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (consolidated version).

¹⁹ J Ratliff, *EC Cartel Leniency Programme*, available at www.wilmerhale.com/files/Publication/515f785c-9663-44d7-bf82-45c19f099fd9/Presentation/PublicationAttachment/465fc5e4-addb-4a49-8bd7-4c4c179962cb/ECLINIENCY_Ratliff_Nov2004.pdf.

²⁰ See B Van Barlingen and M Barennes, 'The European Commission's 2002 Leniency Notice in Practice', *EC Competition Policy Newsletter*, no 3 2005, 6.

²¹ As is discussed in ch 9, there are indications that companies are becoming less inclined to apply for leniency.