OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 16 December 2010 [1]

I — Introduction

1. In this preliminary reference, the referring court seeks clarification on whether, and if so to what extent, a national competition authority may disclose information, voluntarily communicated to it by members of a cartel pursuant to the authority's leniency programme, to an aggrieved third party for the purpose of the preparation by the latter of an action for damages in respect of alleged injury caused by the cartel. The Court is asked to examine in particular whether the disclosure of such information could undermine the effective enforcement of European Union (EU) competition law and the system of cooperation and exchange of information between the Commission and the national competition authorities of the Member States pursuant to Articles 11 and 12 of 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. [2]

2. In my view, the preliminary reference requires in particular the Court to weigh and balance the possibly diverging interests of ensuring the efficacy of leniency programmes established for the purpose of detecting, punishing and ultimately deterring the formation of illegal cartels pursuant to Article 101 TFEU, with the right of any individual to claim damages for harm suffered as a result of such cartels.

3. The present case thus requires the Court to assess the ostensibly conflicting interests of ensuring the effective enforcement of Article 101 TFEU and the possibility of an alleged injured party gaining access to information, [3] to be produced in evidence in a civil action for damages against a cartel member and which therefore may assist that party in securing their right to an effective remedy in civil proceedings for breach of Article 101 TFEU. The fundamental right to an effective remedy in such instances is guaranteed, in my view, by Article 47, in conjunction with Article 51(1), of the Charter of Fundamental Rights of the

1 — Original language: English.
2 — OJ 2003 L 1, p. 1.
3 — Held by an emanation of a Member State, in this instance, a national competition authority designated in accordance with Article 35 of Regulation No 1/2003.

European Union ('the Charter') [4] as interpreted in the light of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') [5] on the right to a fair trial and the case-law of the European Court of Human Rights thereon.

II — The main proceedings and the question referred for a preliminary ruling

4. By decisions of January 2008, which have in the interim become enforceable, the Bundeskartellamt of the Federal Republic of Germany (Federal Cartel Office), acting pursuant to, inter alia, Article 81 EC (now Article 101 TFEU), imposed fines totalling EUR 62 000 000 on the three largest European producers of decor paper (special paper for surface treatment of engineered wood) and on five individuals personally responsible for price-fixing agreements and agreements on capacity closure. Those decisions were based, inter alia, on information and documents which the Bundeskartellamt had received in the context of its leniency programme.

5. Pfleiderer AG ('Pfleiderer') is a purchaser of decor paper and is one of the world's three leading manufacturers of engineered wood, surface finished products and laminate flooring. It stated that it had purchased goods with a value in excess of EUR 60 000 000 over the previous three years from the producers of decor paper against which proceedings have been brought. In order to prepare for civil proceedings for the recovery of damages, it applied, by letter dated 26 February 2008, to the Bundeskartellamt for comprehensive access to the files relating to the 'decor paper' cartel proceedings imposing fines.

6. After Pfleiderer had received a version of the three decisions imposing fines, from which identifying information had been removed, and a list indicating the evidence collected in a search, it expressly requested, by way of a second application, access also to the leniency applications, the documents voluntarily transmitted by the immunity recipients and the evidence collected. By letter of 14 October 2008 the Bundeskartellamt informed Pfleiderer that it intended to accede

4 — In accordance with Article 6(1) TEU, '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

5 — Signed in Rome on 4 November 1950. In accordance with Article 6(3) TEU, '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. See also Article 52(3) of the Charter which provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

to that request only in part and to limit access to the file to a version from which confidential business information, internal documents and documents covered by point 22 of the Bundeskartellamt's Leniency Programme [6] had been removed.

7. Pfleiderer appealed against that decision to the Amtsgericht (Local Court) Bonn, seeking a decision by that court.

8. On 3 February 2009, the Amtsgericht initially made an order in which it essentially found in favour of Pfleiderer. The Amtsgericht stated that in accordance with Paragraph 406e of Strafprozessordnung (the German Code of Criminal Procedure, 'StPO'), [7] which governs access to files for victims in criminal proceedings and which applies by analogy to cartel proceedings concerning administrative offences pursuant to Paragraph 46(1) and the last part of the fourth sentence of Paragraph 46(3) of Gesetz über Ordnungswidrigkeiten (the German Law on Administrative Offences, 'OWiG'), a lawyer acting for the aggrieved party may be granted access to the files and to evidence held by the authorities in so far as he can demonstrate a legitimate interest in that regard. According to the referring court, Pfleiderer is to be considered an aggrieved party, as it must be presumed that it paid excessive prices, as a result of the cartel, for the goods which it purchased from the members of the cartel. A legitimate interest also exists where the person concerned has the preparation of civil proceedings for damages in mind when seeking access to files. Access is also to be granted to parts of the file which the applicants for leniency voluntarily provided to the Bundeskartellamt and which consequently relate to information within the meaning of point 22 of the Bundeskartellamt's Leniency Programme. In regard to confidential business information and internal documents (that is to say, notes on discussions of the Bundeskartellamt or correspondence in the framework of the European Competition Network (ECN) for the purpose of case allocation), the right of access is limited. The scope of the right of access is to be determined by balancing the conflicting interests and is restricted to those parts of the file which are required for the purpose of substantiating claims for damages.

6 — Point 22 of Notice No 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 7 March 2006 provides '[w]here an application for immunity or reduction of a fine has been filed the Bundeskartellamt shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, in so far as the leniency application and the evidence provided by the applicant are concerned.' Notice available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf.

7 — Paragraph 406e StPO, entitled 'Inspection of Files', provides: '(1) An attorney-at-law may inspect for the aggrieved person the files which are available to the court or, if public charges were preferred, would have to be submitted to it, and may inspect officially impounded pieces of evidence, if he shows a legitimate interest …
(2) Inspection of the files shall be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation appears to be jeopardised or if the proceedings would be considerably delayed thereby …'

9. Following an objection to that order, the Amtsgericht Bonn reversed the state of the proceedings to that which existed before the contested order was made. While it does not wish to revise its view of the law, the Amtsgericht considers that the intended decision will implicitly declare the current version of the Bundeskartellamt's Leniency Programme to be incompatible with Paragraph 406e StPO and Paragraph 46(1) OWiG. The Amtsgericht refers in particular to point 22 of the Bundeskartellamt's Leniency Programme.

10. However, the referring court considers that the intended decision could conflict with Articles 11 and 12 of Regulation No 1/2003 and with the second paragraph of Article 10 EC (now Article 4(3) TEU), in conjunction with Article 3(1)(g) EC. According to the referring court, Articles 11 and 12 of Regulation No 1/2003 oblige the Commission and the national competition authorities of the Member States to cooperate closely and provide for a mutual exchange of information, including confidential information, for use as evidence in proceedings for the enforcement of Articles 81 EC and 82 EC (now Articles 101 and 102 TFEU). The efficiency and functioning of those provisions may make it necessary to deny aggrieved third parties, in proceedings for the imposition of fines under EU competition law, access to leniency applications and to documents voluntarily transmitted by immunity recipients. If the Bundeskartellamt were obliged to reduce this level of protection in order to grant third parties access to leniency applications, contrary to point 22 of its leniency programme, this would have two serious consequences.

11. First, the Commission would no longer provide the Bundeskartellamt with information based on leniency applications. The other members of the ECN would also not pass on to the Bundeskartellamt any such information, in so far as the national competition authorities of the other Member States have made provision for protection against discovery, within the meaning of the ECN Model Leniency Programme,[8] in their respective national leniency programmes. This would not only have a significant adverse effect on cooperation within the ECN, but would also mean that an efficient case allocation within the ECN could no longer be possible. This would call into question the entire operating capacity of the ECN.

12. Second, there would be a risk that undertakings might be dissuaded from cooperating within the framework of the leniency programme and that, accordingly, cartels would not be reported and would remain

8 — Adopted on 29 September 2006; available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

undetected, because the leniency applicant would fear that the documents and information which it had voluntarily transmitted might be used directly against it in civil claims for damages. In that way the applicant for leniency would even be placed in a worse position than those cartel members which do not cooperate with the competition authorities.

13. In the light of these doubts the Amtsgericht decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of Community competition law – in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC – to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily provided in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC?'

III — Procedure before the Court

14. Written pleadings were submitted by Pfleiderer, Firma Felix Schoeller Holding GmbH & Co. KG and Firma Technocell Dekor GmbH & Co. KG, Arjo Wiggins Deutschland GmbH, the Belgian, Czech, German, Dutch, Cypriot, Spanish and Italian Governments, the Commission and the EFTA Surveillance Authority. A hearing was held on 14 September 2010. The Belgian, Cypriot and Dutch Governments did not submit observations at the hearing. Munksjö Paper GmbH submitted observations at the hearing.

15. Pfleiderer considers that the case in the main proceedings is purely a national dispute based on German procedural law. It claims that the Amtsgericht correctly decided that the refusal to grant access to the leniency information in question on the basis of point 22 of the Bundeskartellamt's Leniency Programme was incompatible with Paragraph 406e StPO. Pfleiderer considers that the question posed by the Amtsgericht should be answered in the negative as the EU rules on the matter are not sufficiently specific and the other possible interpretative instruments, such as the ECN Model Leniency Programme, not only lack precision, but lack the necessary binding character.

16. Firma Felix Schoeller Holding GmbH & Co. KG and Firma Technocell Dekor GmbH & Co. KG, Arjo Wiggins Deutschland GmbH, the Belgian, Czech, German, Dutch, Cypriot, Spanish and Italian Governments consider essentially that parties adversely affected by a cartel should not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily provided by leniency applicants to the national competition authority pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines pursuant to, inter alia, Article 101 TFEU.

17. The Commission considers essentially that a distinction should be drawn between the voluntary presentations by leniency applicants of their knowledge of a cartel and their role therein prepared especially to be submitted under a national leniency programme, [9] known as 'corporate statements', and the other pre-existing documents submitted by the leniency applicant. It considers that access should not be granted in respect of corporate statements to parties adversely affected by a cartel, for the purpose of bringing civil-law claims, as this would place the leniency applicant in a worse position in civil proceedings than other cartel members thereby undermining the effectiveness of the leniency programme. The Commission claims that access to the other documents submitted by the leniency applicant should be assessed on a case-by-case basis. The Commission draws an analogy with its practise in relation to the transmission of information in its possession to national courts in accordance with Article 15(1) of Regulation No 1/2003. [10]

18. The EFTA Surveillance Authority considers that given that most leniency programmes operated in the EU provide for an oral procedure [11] designed to protect corporate statements from discovery in civil damage procedures, neither the effectiveness of EU competition law nor any of its provisions preclude a national law which provides that a Member State grants access to leniency documents held by its national competition

9 — See by analogy point 31 of 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases ('the Leniency Notice'), OJ 2006 C 298, p. 17.

10 — See also Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101, p. 54. Point 26 provides that 'the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it... Therefore, the Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.'

11 — See for example point 32 of the Leniency Notice (cited in footnote 9). See also point 28 of the ECN Model Leniency Programme (cited in footnote 8).

authority to a potential plaintiff in a civil claim in damages against participants of a secret illegal cartel.

IV — Preliminary remarks

19. In my view it is fruitful to underscore a number of relevant matters relating to the main proceedings which emerge from the order for reference. Firstly, access to the particular information in question in the main proceedings is not being sought by a member of the public based on national transparency rules. Rather, it appears from the order for reference that Pfleiderer, in principle, enjoys specific procedural rights under German law concerning access to information held by the Bundeskartellamt relating to the cartel due to the fact that Pfleiderer is considered an aggrieved party which is presumed to have been injured by the cartel and has a legitimate interest in obtaining such access for the preparation of civil proceedings for damages. In such circumstances access is granted by a court under Paragraph 406e StPO not to Pfleiderer itself but to its lawyer. Therefore any analogy with the rules on transparency and public access to documents as provided for example in 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 [12] and the case-law of the Court thereon would appear inappropriate as this could incorrectly limit what appears to be a more extensive right of access to evidence enjoyed by an allegedly injured party such as Pfleiderer for the purpose of establishing a civil claim before the courts under Paragraph 406e StPO.

20. Secondly, the investigation of the specific infringement of competition law in question in the main proceedings was concluded with the adoption of a decision imposing a fine pursuant, inter alia, to Article 101 TFEU which is no longer subject to judicial review. In such circumstances, access to the contentious information cannot undermine the investigation of that particular infringement or influence the outcome of that investigation. The present case must therefore be distinguished from those cases where an injured third party seeks access to information held by a national competition authority prior to the adoption of a decision by such an authority in accordance with EU competition law. The issue remains, however, whether access to the category of information in question, namely information and documents voluntarily communicated in the context of a leniency programme, could undermine in general the investigative process relating to infringements of Article 101 TFEU and thus the enforcement of those provisions by the

12 — OJ 2001 L 145, p. 43. I would note that doubts as to the applicability by analogy of that regulation in the current context were raised by Firma Felix Schoeller Holding GmbH & Co. KG and Firma Technocell Dekor GmbH & Co. KG, the German and Spanish Governments and the Commission in their pleadings before this Court.

Bundeskartellamt and other national competition authorities in accordance with the powers and duties accorded them pursuant to Regulation No 1/2003.

21. Thirdly, the question referred by the Amtsgericht centres on access to information and documents submitted by a leniency applicant. It would appear from the order for reference that the Amtsgericht held that in regard to confidential business information and internal documents [13] the right of access is limited. There is no indication that the Amtsgericht wishes to review its finding on that matter. I shall therefore in this opinion examine the question of access to information and documents submitted by a leniency applicant on the basis that they do not contain any confidential business information or constitute internal documents.

V — Assessment

22. By its question, the Amtsgericht seeks guidance, inter alia, on the impact which access by an aggrieved third party [14] to information communicated by a leniency applicant to a national competition authority may have on the system of cooperation and exchange of information laid down in Articles 11 and 12 of Regulation No 1/2003.

23. Following the entry into force of Regulation No 1/2003, both the Commission and the competition authorities of the Member States [15] have powers to apply Articles 101 and 102 TFEU. [16] While the respective powers of the Commission and the competition authorities of the Member States to apply Articles 101 and 102 TFEU do not totally coincide, they overlap considerably giving rise to a decentralised system of enforcement which is based on parallel powers. The Commission is granted specific and detailed powers pursuant to Regulation No 1/2003 in order to apply Articles 101 and 102 TFEU. In contrast, the competition authorities of the Member States, and indeed the national courts [17] apply Articles 101 and 102 TFEU largely in accordance with their national legal order [18] by virtue of the principle of procedural autonomy,

13 — See point 8 above.

14 — In order to bring an action for damages.

15 — See Article 3(1) of Regulation No 1/2003 which imposes obligations on the competition authorities of the Member States and national courts to apply Articles 101 and 102 TFEU.

16 — See in particular Articles 4 and 5 of Regulation No 1/2003.

17 — In accordance with Article 6 of Regulation No 1/2003, national courts shall have the power to apply Articles 101 and 102 TFEU.

18 — See, however, Article 5 of Regulation No 1/2003 which specifies decisions which national competition authorities may take when applying Articles 101 and 102 TFEU.

provided they respect the principles of equivalence [19] and effectiveness. [20] In my view, in accordance, inter alia, with Article 4(3) TEU and Regulation No 1/2003, [21] the Member States must ensure the effective enforcement of Articles 101 and 102 TFEU within their territory. [22]

24. In order to limit the potential for discordant application of the parallel powers and notwithstanding the procedural autonomy in principle enjoyed by national competition authorities and courts, Chapter IV of Regulation No 1/2003, entitled 'Cooperation', establishes a number of procedural rules in order to ensure that the system of parallel powers operates in a coordinated and effective manner. The Commission and the national competition authorities in effect form a network [23] of public authorities applying the EU competition rules in close cooperation. [24] That chapter in particular has given rise to a system [25] among ECN members which provides, inter alia, for the division of work and allocation of cases between one or more national competition authorities and the Commission and the consistent application of EU competition rules. I consider that the national competition authorities must operate in a manner

19 — The principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of EU competition law or national competition law (see by analogy, Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41; Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 55; and Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 45). I would note that there is no indication in the file before the Court that any difference arises, depending on whether national competition law or Article 101 TFEU is applicable, in relation to the grant of access to a third party to information communicated by a leniency applicant to the Bundeskartellamt.

20 — See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 95; Case C-1/06 *Bonn Fleisch* [2007] ECR I-5609, paragraph 41; and Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 52. According to established case-law, a procedural rule laid down by the domestic legal system of a Member State must not render in practice impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, inter alia, Case C-542/08 *Barth* [2010] ECR I-3189, paragraph 17 and the case-law cited).

21 — See in particular Articles 5 and 6.

22 — Thus with the adoption and entry into force of Regulation No 1/2003, the national competition authorities must actively pursue the effective enforcement of Articles 101 and 102 TFEU in respect of undertakings in order to ensure the fulfilment of their obligations arising under those provisions. Moreover, in *CIF*, the Court stated that '[a]lthough Articles [101 and 102 TFEU] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4(3) TEU], which lays down a duty to cooperate, nonetheless require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings'; Case C-198/01 [2003] ECR I-8055, paragraph 45 and the case-law cited therein.

23 — The ECN.

24 — See recital 15 in the preamble to Regulation No 1/2003.

25 — See for example, Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) ('Cooperation Notice') and the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities (Joint Statement), available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf. The Cooperation Notice 'fleshes-out' in particular the practical modalities for the application of Articles 11 and 12 of Regulation No 1/2003. According to point 72 and the annex to the Cooperation Notice, national competition authorities are required to acknowledge and abide by the principles set out therein including the principles relating to the protection of applicants claiming the benefit of a leniency programme.

which ensures the effective fulfilment of their obligations of cooperation pursuant to Regulation No 1/2003.

25. While neither Regulation No 1/2003 nor indeed the Cooperation Notice contain any provision concerning the grant of access to third parties to information voluntarily submitted by a leniency applicant, [26] point 30 of the ECN Model Leniency Programme, provides that '[o]ral statements made under the present programme will only be exchanged between [Competition Authorities] pursuant to Article 12 of Regulation No 1/2003 if the conditions set out in the [Cooperation Notice] are met and provided that the protection against disclosure granted by the receiving [Competition Authority] is equivalent to the one conferred by the transmitting [Competition Authority]'. [27]

26. The ECN Model Leniency Programme is a non-binding instrument which seeks to bring about de facto or 'soft' harmonisation of the leniency programmes of the national competition authorities to ensure that potential applicants are not discouraged from applying for leniency as a result of the discrepancies between the leniency programmes within the ECN. The ECN Model Leniency Programme therefore sets out the treatment which an applicant can anticipate in any ECN jurisdiction once alignment of all programmes has taken place. In addition, the ECN Model Leniency Programme aims to alleviate the burden associated with multiple filings. Despite the non-legislative nature of this instrument and indeed other instruments such as the Cooperation Notice and the Joint Statement, their practical effects in relation in particular to the operations of national competition authorities and the Commission cannot be ignored. It is thus unfortunate that documents such as the ECN Model Leniency Programme and the Joint Statement are not published in the *Official Journal of the European Union* for the purposes of transparency and posterity.

27. In the light in particular of point 30 of the ECN Model Leniency Programme and in the absence of any EU legislative provision on the matter, I consider that different standards of disclosure to third parties by national

26 — Points 26 to 28 of the Cooperation Notice (cited in footnote 25) deal with the exchange and use by the Commission and national competition authorities of confidential information in accordance with Article 12 of Regulation No 1/2003, while points 37 to 42 of the Cooperation Notice deal in particular with the transmission of information resulting from a leniency application between the ECN members (Commission and national competition authorities) and the use of that information by those members. See also points 3 to 5 of the Explanatory Notes to the ECN Model Leniency Programme (cited in footnote 8).

27 — Point 28 of the ECN Model Leniency Programme provides for the possibility of submitting oral applications for leniency, while point 29 provides that no access to any records of the applicant's oral statements will be granted before the Competition Authority has issued its statement of objections to the parties. See also points 48 and 49 of the Explanatory Notes to the ECN Model Leniency Programme (cited in footnote 8).

competition authorities of information voluntarily communicated by leniency applicants could thus potentially affect the provisions on cooperation laid down by Regulation No 1/2003.

28. It would appear from the file before the Court, subject to verification by the referring court, that the Swedish competition authority cooperated with the Bundeskartellamt in the investigation of the infringement in question. However, there is no indication that any national competition authority other than the Bundeskartellamt was competent to apply Article 101 TFEU in respect of the cartel in question which could lead to multiple procedures before different authorities and the possibility of case reallocation in accordance with Article 11 of Regulation No 1/2003. [28]

Thus while multiple procedures before national competition authorities may have a propensity to arise in cases where cartel members are seeking leniency, as in the absence of a 'one-stop-shop' leniency procedure under EU law or a EU-wide system of fully harmonised leniency programmes [29] they may find it necessary to apply to all the authorities which are competent to apply Article 101 TFEU in respect of the infringement, there is no evidence of such circumstances prevailing in the main proceedings. I would also note that the referring court specifically indicated in the order for reference that Pfleiderer is not seeking access to information or documents held by the Bundeskartellamt which were communicated to the latter within the framework of Article 12 of Regulation No 1/2003. [30]

29. It would appear therefore that Articles 11 and 12 of Regulation No 1/2003 are not relevant for the purposes of the present proceedings and that the part of the question referred dealing with those provisions is, as indicated

28 — See also in particular points 16 to 19 of the Cooperation Notice (cited in footnote 25). Point 16 provides '[i]n order to detect multiple procedures and to ensure that cases are dealt with by a well placed competition authority, the members of the network have to be informed at an early stage of the cases pending before the various competition authorities.' Point 17 of the Cooperation Notice provides that Regulation No 1/2003 'creates a mechanism for the competition authorities to inform each other in order to ensure an efficient and quick re-allocation of cases. Article 11(3) of the Council Regulation lays down an obligation for NCAs to inform the Commission when acting under [Article 101 or 102 TFEU] before or without delay after commencing the first formal investigative measure. It also states that the information may be made available to other NCAs. The rationale of Article 11(3) of the Council Regulation is to allow the network to detect multiple procedures and address possible case re-allocation issues as soon as an authority starts investigating a case.'

29 — See point 38 of the Cooperation Notice (cited in footnote 25).

30 — Article 12 of Regulation No 1/2003 provides that the Commission and the competition authorities of the Member States shall have the power to exchange and use information for the purpose of applying Articles 101 and 102 TFEU.

by the Commission in its submissions, [31] hypothetical. [32] In my view, in the absence of any concrete facts whatsoever in the order for reference touching on the question of cooperation under Chapter IV of Regulation No 1/2003, it would be speculative for the Court to rule on the matter in the present proceedings.

30. The referring court also asks whether the intended grant by a national competition authority of access to information and documents voluntarily submitted by a leniency applicant to that authority to an injured party, which intends to bring an action for damages, might in the future jeopardise the effective enforcement of Article 101 TFEU by that authority.

31. It is clear that both the Commission and the competition authorities of the Member States play an important role in enforcing Article 101 TFEU in respect of illegal cartels. Given the secret nature of cartels prohibited by Article 101 TFEU, the actual detection and investigation and therefore the ultimate prohibition and punishment of these infringements, which often rank among the more serious infringements of competition law [33] due to their pernicious effects on the structure of competition, has proved difficult for both the Commission and national competition authorities. [34] In what I would consider a

31 — Pfleiderer considers that Articles 11 and 12 of Regulation No 1/2003 are not relevant in the present case. The EFTA Surveillance Authority noted in its submissions the purely domestic character of the case before the Amtsgericht when referring to the Cooperation Notice.

32 — The procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. See Case C-380/01 *Schneider* [2004] ECR I-1389, paragraphs 20 to 23 and the case-law cited therein.

33 — And which when detected and proved may lead to the imposition of not only heavy fines but also prison sentences on individuals in certain Member States.

34 — See by analogy, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 55 to 57, in which the Court held that since the prohibition on participating in anti-competitive practices and agreements and the penalties which infringers may incur are well known, it is normal that the activities which those practices and agreements involve take place in a clandestine fashion, for meetings to be held in secret, frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

matter of expediency [35] the Commission has since 1996, with the adoption of its Notice on the non-imposition or reduction of fines in cartel cases, [36] put in place a leniency programme whereby it rewards cooperation provided by cartel members which lead to the detection and punishment of cartels in the form of immunity from and reduction of fines. It is clear from the 2006 Leniency Notice [37] that the Commission considers that '[t]he interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices. … The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value.' [38] I consider that the benefit of such a programme extends beyond the detection and punishment of individual infringements but leads to a general climate of uncertainty among potential cartel members which may inhibit the actual formation of cartels.

32. Thus the Leniency Notice sets out in a transparent manner rules and procedures which allow leniency applicants to predict the treatment which they will receive from the Commission. That transparency and predictability, in my view, is necessary for the Commission's leniency programme to work effectively as uncertainty with regard to treatment by the Commission may discourage potential applicants. Moreover, the Court has stated that the cooperation provided by an undertaking to the Commission may justify a reduction in the fine under the Leniency Notice if it actually allows the Commission to achieve its task of establishing the existence of an infringement and putting an end to it. [39] An undertaking which cooperates with the Commission in accordance with the terms of the Leniency Notice derives a legitimate expectation that its fine will be reduced by a certain percentage. [40] Moreover, in accordance

35 — In using this term I do not intend to imply any wrongdoing by the Commission whatsoever. Rather it indicates that the Commission has adopted a course of action which it considers is ultimately beneficial to competition.

36 — I would note that Regulation No 1/2003 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 (OJ 2004 L 123, p. 18) do not provide for the operation of a leniency programme by the Commission.

37 — See footnote 9 above.

38 — See points 3 and 4 of the Leniency Notice (cited in footnote 9).

39 — See, to that effect, Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 399.

40 — See, *Dansk Rørindustri and Others* v *Commission*, cited in footnote 39, paragraph 188; see also point 38 of the Leniency Notice which provides that '[t]he Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission'.

with its Leniency Notice, the Commission does not in principle grant access to the leniency applicant's corporate statement. [41] In addition, the Commission accepts that such corporate statements [42] may be made orally. [43] The Leniency Notice does not, however, provide for the refusal of access to third parties to pre-existing documents [44] provided by a leniency applicant under that notice.

33. There is no express obligation pursuant to EU law for the national competition authorities to operate a leniency programme in respect of cartels which infringe Article 101 TFEU and EU law does not regulate

41 — See points 6, 7 and 33 of the Leniency Notice (cited in footnote 9). See also point 29 of the ECN Model Leniency Programme (cited in footnote 8). According to point 6 of the Leniency Notice, these voluntary presentations which are known as corporate statements 'have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article [101 TFEU] in cartel cases and thus its subsequent or parallel effective private enforcement.' See also point 47 of the Explanatory Notes to the ECN Model Leniency Programme which provides that '[t]he ECN members are strong proponents of effective civil proceedings for damages against cartel participants. However, they consider it inappropriate that undertakings which cooperate with them in revealing cartels should be placed in a worse position in respect of civil damage claims than cartel members that refuse to cooperate. The discovery in civil damage proceedings of statements which have been made specifically to a [competition authority "CA"] in the context of its leniency programme risks creating this very result and, by dissuading cooperation in the CAs' leniency programmes, could undermine the effectiveness of the CAs' fight against cartels. Such a result could also have a negative impact on the fight against cartels in other jurisdictions. The risk that an applicant becomes subject to a discovery order depends to some extent on the affected territories and the nature of the cartel in which it has participated …'

42 — Pursuant to point 9(a) of the Leniency Notice (cited in footnote 9) a corporate statement should include, in so far as it is known to the applicant at the time of the submission: – A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application. – The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel; – The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf; – Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel.

43 — See point 32 of the Leniency Notice (cited in footnote 9). See also point 28 of the ECN Model Leniency Programme (cited in footnote 8).

44 — The term 'pre-existing documents' is not specifically defined in the Leniency Notice. However, I consider that it consists of '[o]ther evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.' See point 9(b) of Leniency Notice (cited in footnote 9).

the question of access to the leniency file of those authorities. However, despite the absence of any express obligation pursuant to EU law for the competition authorities of the Member States to operate a leniency programme in respect of illegal cartels and the fact that Member States thus enjoy procedural autonomy in that regard, it would appear from the file before the Court that the overwhelming majority of the national competition authorities in the 27 Member States, including the Bundeskartellamt, currently operate some form of leniency programme. The order for reference states that the Bundeskartellamt's Leniency Programme is based on the ECN Model Leniency Programme. Given that the Bundeskartellamt has actively chosen to operate a leniency programme, in my view, it would appear, subject to verification by the referring court, that that national competition authority considered that such a programme was necessary in order to ensure the effective enforcement by it of, inter alia, Article 101 TFEU. [45] Indeed in the order for reference, the Amtsgericht indicated that '[t]he Bundeskartellamt's Leniency Programme, which was introduced in 2000, demonstrates that this can be a highly effective instrument in combating cartels. Between 2001 and 2008, a total of 210 leniency applications were made, relating to 69 separate sets of proceedings.' [46]

34. Where a Member State, through its competition authority(ies), operates a leniency programme in order to ensure the effective application of Article 101 TFEU, I consider that despite the procedural autonomy enjoyed by the Member State in enforcing that provision, it must ensure that the programme is set up and operates in an effective manner.

35. As regards the interaction of leniency programmes and civil-law actions for damages, the Leniency Notice, while indicating in advance the manner in which the Commission will exercise its discretion in imposing fines on cooperating cartel members, expressly states that cooperation pursuant to that notice does not provide cartel members with any immunity from the civil law consequences of its participation in an infringement of Article 101 TFEU. [47] Moreover, point 24 of the Bundeskartellamt's Leniency Programme provides that '[t]his notice has no

45 — The order for reference states in that regard that the Oberlandesgericht (Düsseldorf) in a ruling considered legitimate the premiss on which the Bundeskartellamt based its leniency programme, namely that the interest in fighting hardcore cartels is greater than punishing individual members of that cartel. The Oberlandesgericht (Düsseldorf) found that the Bundeskartellamt's Leniency Programme (cited in footnote 6) does not give rise to any legal concerns and that its programme falls within the margin of discretion enjoyed by that authority in imposing fines in accordance with Article 81(7) OWiG.

46 — It is not indicated in the order for reference whether and if so which of these cartels fell within the scope of Article 101 TFEU.

47 — See point 39 of the Leniency Notice (cited in footnote 9).

effect on the private enforcement of competition law.' [48]

36. Indeed, the right of persons injured to bring actions for damages for infringements of Articles 101 and 102 TFEU has been clearly underscored by the Court. It is thus settled case-law that Articles 101 and 102 TFEU produce direct effects in relations between individuals and create rights [49] for the individuals concerned which the national courts must safeguard. [50] While the rules concerning actions for damages for infringements of Articles 101 and 102 TFEU have not been harmonised at EU level, the Court has stated that the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) TFEU would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. [51] It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU. [52] The Court in *Courage and Crehan* also emphasised the deterrent effect of actions for damages. In that regard the Court stated that the existence of such a right of action strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU. [53]

48 — The Amtsgericht stated in the order for reference that 'a leniency application does not, … under … German law, cancel civil liability vis-à-vis third parties adversely affected by a cartel'.

49 — Articles 101 and 102 TFEU also impose obligations on individuals which national courts must enforce.

50 — See judgment of 30 January 1974 in Case 127/73 *BRT and SABAM* ('*BRT I*') [1974] ECR 51, paragraph 16; Case C-282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 39; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 23; and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 39.

51 — See *Courage and Crehan*, cited in footnote 50, paragraph 26.

52 — See *Manfredi and Others*, cited in footnote 50, paragraph 61. The Court stated that in the absence of EU rules governing the matter and in accordance with the principle of national procedural autonomy, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27, and *Courage and Crehan*, cited in footnote 50, paragraph 29).

53 — See *Courage and Crehan*, cited in footnote 50, paragraph 27. See also point 1.2 of the Commission's White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final ('White Paper').

37. In my view, the disclosure by a national competition authority of information voluntarily communicated to it by members of a cartel pursuant to the authority's leniency programme to an aggrieved third party could, in principle, assist the latter in the preparation of an action for damages for infringement of Article 101 TFEU before the national courts in respect of alleged injury caused by the cartel. [54] An action which not only may lead to the determination of the right to compensation of an injured party, but also to the application of Article 101 TFEU. [55] I therefore consider that despite the fact that a national competition authority is not a party to an action for damages, it should not [56] in the absence of overriding legitimate reasons of public or private necessity, deny an allegedly injured party access to documents in its possession which could be produced in evidence in order to assist the latter in establishing a civil claim against a member of a cartel for breach of Article 101 TFEU, as this could de facto interfere with and diminish that party's fundamental right to an effective remedy which is guaranteed by Article 101 TFEU and Article 47 [57] in conjunction with Article 51 of the Charter and Article 6(1) of the ECHR. It is therefore necessary to examine whether and if so in what circumstances a national competition authority may legitimately refuse to disclose information and documents submitted by a leniency applicant.

38. In my view, in such circumstances the disclosure by a national competition authority of all the information and documents submitted to it by a leniency applicant could seriously undermine the attractiveness and thus the effectiveness of that authority's leniency programme as potential leniency applicants may perceive that they will find themselves in a less favourable position in actions for civil damages, due to the self-incriminating statements

54 — At point 2.2 of the White Paper (cited in footnote 53), the Commission noted that '[m]uch of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant.'

55 — See *Courage and Crehan*, cited in footnote 50, paragraphs 26 and 27.

56 — Otherwise, national competition authorities by creating obstacles to access to information held by them which may be produced in evidence may hinder actions for damages.

57 — 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …'

and evidence which they are required [58] to present to the authority, than the other cartel members which do not apply for leniency. Thus while a potential leniency applicant may benefit from immunity from or a reduction in fines, that benefit may be perceived as being outweighed by an increased risk of liability for damages where access to the leniency file is granted, particularly in cases where cartel members are jointly and severally liable under national rules of civil procedure. A cartel member may therefore abstain from applying for leniency altogether or alternatively be less forthcoming with a competition authority during the leniency procedure. [59]

39. There is therefore an apparent tension between on the one hand, the effective operation of a leniency programme by a national competition authority and thus the public enforcement of competition law and on the other hand, the grant of access to a third party, for the purposes of assisting it in bringing an action for damages pursuant to Article 101 TFEU, to information provided by a leniency applicant. [60]

40. I consider that Regulation No 1/2003 and the case-law of the Court have not established any *de jure* hierarchy or order of priority [61] between public enforcement of EU competition law and private actions for damages. While no *de jure* hierarchy has been established, at present the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU. Indeed so reduced is the current role of private actions for

58 — In order to obtain leniency. There is of course no question of coercion as leniency applicants voluntarily opt to provide corporate statements and pre-existing evidence as a quid pro quo for obtaining leniency rather than being legally compelled to do so. See, a contrario, on the right not to incriminate oneself and the right to a fair trial, Eur. Court HR, *Saunders v. the United Kingdom* judgment of 17 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2044, §§ 69, 71 and 76.

59 — The 'chilling effect' which the disclosure by a competition authority to potential civil litigants of information submitted by a leniency applicant may have on the level of cooperation of that applicant cannot be ignored despite the fact that the Leniency Notice requires a leniency applicant, inter alia, to cooperate genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. See point 12(a) of the Leniency Notice (cited in footnote 9). National programmes most likely impose similar requirements. See point 13 of the ECN Model Leniency Programme (cited in footnote 8).

60 — To a national competition authority.

61 — Recital 7 in the preamble to Regulation No 1/2003 provides that '[n]ational courts have an essential part to play in applying the [EU] competition rules. When deciding disputes between private individuals, they protect the subjective rights under [EU] law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles [101 and 102 TFEU] in full.' The use of the term 'complements' does not necessarily indicate in my view any order of priority. In any event, the preamble to a Union act has no binding legal force. See Case C-134/08 *Tyson Parketthandel* [2009] ECR I-2875, paragraph 16 and the case-law cited.

damages in that regard that I would hesitate in overly using the term 'private enforcement'.[62]

41. Moreover, I consider that the tension in question is more apparent than real as in addition to the public interest in effective leniency programmes in order to detect and punish secret cartels, such programmes are also beneficial to private parties injured by such cartels.[63] Firstly, in the absence of effective leniency programmes many cartels may never come to light and their negative effects on competition in general and on particular private parties could therefore persist unchecked. Secondly, the detection and investigation of such cartels by national competition authorities on foot of a leniency application could lead to the adoption of decisions requiring, inter alia, the infringement be brought to an end and the imposition of penalties pursuant to national law.[64] Those decisions may in turn assist third parties injured by cartels in bringing civil actions for damages. In that regard, while there is no provision in Regulation No 1/2003 in relation to the weight to be afforded to decisions of national competition authorities[65] in national court rulings analogous to Article 16(1) of that regulation,[66] I consider that such decisions should at least be treated as corroborative evidence by national courts.[67] However, even in those jurisdictions where a civil litigant may not rely at all on a decision of a national competition authority which has become definitive as evidence before the national courts and must prove in its

62 — In its 2008 White Paper, the Commission noted that '[d]espite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of [EU] antitrust infringements only rarely obtain reparation of the harm suffered'. See point 1.1 (cited in footnote 53).

63 — See point 6 of the Leniency Notice (cited in footnote 9) which provides that '[p]otential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article [101 TFEU] in cartel cases *and thus its subsequent or parallel effective private enforcement*' (emphasis added) (cited at footnote 41 above).

64 — See Article 5 of Regulation No 1/2003.

65 — See point 2.3 of the White Paper (cited in footnote 53).

66 — Article 16(1) of Regulation No 1/2003 provides that '[w]hen national courts rule on agreements, decisions or practices under [Article 101 or Article 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission …' The Commission has suggested in the White Paper that national courts that have to rule in actions for damages on practices under Article 101 or 102 TFEU on which a national competition authority in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the authority's decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.

67 — The referring court indicated that in accordance with German law, the findings of fact in decisions imposing fines which have become definitive are binding in civil actions and thus the infringement does not have to be proven.

entirety, inter alia, the infringement of Article 101 TFEU, I consider that that decision is a good starting basis on which to develop an action not least because the decision will tend to explain in detail the workings of the cartel in question and the nature of the infringement of Article 101 TFEU.

42. I therefore consider that in order to protect both the public and indeed private interests in detecting and punishing cartels, it is necessary to preserve as much as possible the attractiveness of a national competition authority's leniency programme without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy.

43. As regards the case in question in the main proceedings, the referring court has not indicated in detail in the order for reference the nature of the information and documents submitted by the leniency applicants. Given, however, the fact that the referring court has stated that the Bundeskartellamt's Leniency Programme is based on the ECN Model Leniency Programme, I propose to examine in the present context the accessibility of voluntary self-incriminating statements or corporate statements [68] made by leniency applicants and pre-existing documents submitted by them.

44. In my view, the disclosure to civil litigants of the contents of voluntary self-incriminating statements [69] made by leniency applicants, [70] in the course of a leniency procedure and for the purpose of that procedure, in which the applicants effectively admit and describe to a competition authority their participation in an infringement of Article 101 TFEU, could substantially reduce the attractiveness and thus the effectiveness of a national competition authority's leniency programme. [71] This in turn could undermine

68 — It is unclear from the file before the Court, whether the leniency applicants made oral corporate statements. Given that I consider that such statements should not be disclosed, it is irrelevant whether they were made orally or in writing.

69 — Otherwise known as corporate statements.

70 — Which amount, in effect, to a confession or admission of guilt.

71 — Given that the statements in question relate in particular to the leniency applicant's individual participation in the infringing cartel, that applicant might be placed in a worse position in an action for damages than non-cooperating cartel members. In point 2.9 of the White Paper, entitled 'Interaction between leniency programmes and actions for damages', the Commission considered that it is important, for both public and private enforcement, to ensure that leniency programmes are attractive. The Commission therefore considers that in order to avoid placing the leniency applicant in a less favourable situation than the co-infringers, adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant. This protection would apply where disclosure is ordered by a court, be it before or after adoption of a decision by the competition authority (cited in footnote 53).

the effective enforcement by the national competition authority of Article 101 TFEU and ultimately private litigants' possibility of obtaining an effective remedy. Thus, while the denial of such access may create obstacles to or hinder to some extent an allegedly injured party's fundamental right to an effective remedy, I consider that the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and indeed private interests in detecting and punishing cartels.

45. In addition, it would appear, subject to verification by the referring court, that [72] leniency applicants could entertain a legitimate expectation that pursuant to the Bundeskartellamt's discretion on the matter, voluntary self-incriminating statements would not be disclosed. I consider that while the fundamental right to an effective remedy must be respected to the greatest extent possible, the leniency applicant enjoys an overriding legitimate expectation that such self-incriminating statements will not be disclosed.

46. I therefore consider that access to voluntary self-incriminating statements made by a leniency applicant should not, in principle, [73] be granted.

47. However, aside from such self-incriminating statements, alleged injured parties, such as Pfleiderer, should have access to all other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure [74] which would assist those parties in the establishment, for the purposes of a private action for damages, of the existence of an illegal act in breach of Article 101 TFEU, [75] damage to those parties and a causal link between the damage and the breach. [76] The documents in question are not in effect a product of the leniency procedure as they, unlike the self-incriminating corporate statements referred to above, exist independently

72 — In accordance in particular with point 22 of the Bundeskartellamt Leniency Programme (cited in footnote 6).

73 — There may be a need to create exceptions to such a rule in specific circumstances, for instance where the leniency applicant itself has disclosed the contents of its corporate statement to third parties. See for example point 33 of the Leniency Notice (cited in footnote 9).

74 — Other than business secrets and other confidential information such as internal documents.

75 — In those jurisdictions, such as the Federal Republic of Germany, where private litigants may in actions for damages rely on the final decision of the national competition authority or by a review court in order to establish an infringement of Article 101 TFEU, I consider that access to evidence or documents disclosed in the course of the leniency procedure by the leniency applicant should not be granted in that context as they are not necessary in order to give effect to the right to an effective remedy and a fair trial.

76 — In my view, the national competition authority should seek binding assurances that the information will be used solely for the purposes of the litigation in question.

of that procedure and could, at least in theory, be discovered elsewhere. I can see no cogent reason why access to such documents which are specifically destined and apt to assist in an action for damages should be refused. It would run counter to the fundamental right to an effective remedy if access to such documents could be denied by a national competition authority in circumstances such as those in the main proceedings.

VI — Conclusion

48. In the light of the foregoing observations, I propose that the Court should answer as follows the question referred by the Amtsgericht Bonn:

'Where a national competition authority operates a leniency programme in order to ensure the effective application of Article 101 TFEU, parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to self-incriminating statements voluntarily provided by leniency applicants and in which the applicants effectively admit and describe to the authority their participation in an infringement of Article 101 TFEU as this could substantially reduce the attractiveness and thus the effectiveness of the authority's leniency programme and in turn undermine the effective enforcement by the authority of Article 101 TFEU. While the denial of such access may create obstacles to or hinder to some extent an allegedly injured party's fundamental right to an effective remedy and a fair trial guaranteed by

Article 47, in conjunction with Article 51(1), of the Charter of Fundamental Rights of the European Union, the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and private interests in detecting and punishing cartels.

It would run counter to the fundamental right to an effective remedy and a fair trial guaranteed by Article 47, in conjunction with Article 51(1), of the Charter of Fundamental Rights of the European Union if access to other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure and which would assist parties allegedly adversely affected by a cartel in the establishment, for the purposes of a private action for damages, of the existence of an illegal act in breach of Article 101 TFEU, damage to those parties and a causal link between the damage and the breach, were denied by the national competition authority.'