reasonable period, for example, which – as I have already mentioned – constitute an infringement of a fundamental right even if they have not affected the content of the Commission's decision and therefore do not lead to its annulment» (emphasis added).

[90] Opinion of Advocate General *Mengozzi* of 19 July 2012, C-286/11 P *Commission ⁄. Tomkins*, point 43.

[91] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1) [emphasis added].

[92] Opinion of Advocate General *Kokott*, *Solvay*, point 166. See also point 177: «the Court of Justice should, where possible (in other words, in cases involving fines) continue to adopt the approach it outlined in *Baustahlgewebe*» (emphasis added).

[93] Emphasis added.

[94] Opinion of Advocate General *Léger*, *Baustahlgewebe*, point 70: «on ne saurait contester l'idée que le double degré de juridiction n'est qu'un aspect de la protection juridictionnelle. Le respect du principe d'impartialité, qui s'oppose à l'appréciation par une juridiction de son propre comportement, doit donc, en l'espèce, primer». (No English translation available).

[95] Opinion of Advocate General *Mengozzi* of 26 October 2006, C-354/04 P *Gestoras Pro Amnistía ⁄. Council*, points 177-178.

III.

Clelia Lacchi und Allison Östlund, Luxemburg*

General Presumptions of Non-disclosure of Leniency Documents: a New Approach to the Interaction between Public and Private Enforcement of Antitrust Law?

(Commission ⁄. EnBW Energie Baden-Württemberg AG, ECJ (Third Chamber), Judgment of 27 February 2014, C-365/12 P)

On 27 February 2014, the Court of Justice of the European Union delivered a judgment on access to the European Commission's documents in the context of leniency programmes. Specifically, this case focused on whether and to what extent a third party to a cartel investigation may obtain access to those documents under Regulation No. 1049/2001 in order to bring an action for the damages which it alleges to have suffered due to the anticompetitive practice censured, under Article 101 TFEU, by the European Commission. By its judgment, the ECJ clarified that general presumptions of non-disclosure could be relied on by the Commission in order to withhold leniency documents from third parties to the cartel proceedings.

(1) Facts and Procedure

The present case was brought in November 2007 by *Energie Baden-Württemberg AG* («EnBW»), a German energy distribution company, in the context of European Commission enforcements proceedings under Article 101 TFEU (ex Article 81 EC) against *inter alia* Siemens AG and ABB Ltd. Considering itself to have suffered damages as a result of ***concerted practices and cartels*** between these operators of gas insulated switchgear («GIS»), ***EnBW***, a third party to the antitrust procedure, ***requested access under Regulation No. 1049/2001***[1] ***to all documents in the Commission's case-file relating to the relevant proceedings***. After having its application rejected in its entirety by the Commission, which considered that all of the requested documents fell within the exceptions contained in Article 4(2) and (3) of Regulation No. 1049/2001, EnBW proceeded in August 2008 to bring an action for annulment before the General Court.[2]

Four pleas in law were submitted to the General Court, including various infringements of the exceptions contained in Article 4 of Regulation No. 1049/2001.[3] Article 4(2) of the Regulation lays down the possibilities for EU institutions to refuse access to documents in order to protect commercial interests of a natural or legal person (first indent) and the purpose of inspections, investigations and audits (third indent). According to Article 4(3), an institution shall refuse the disclosure of a document for internal use or received by another institution, when a decision has not yet been taken, and of a document containing opinions for internal use as part of deliberations and preliminary consultations, even after a decision has been taken, if it would «seriously undermine the institution's decision-making process».[4] Under both paragraphs 2 and 3 of Article 4, these exceptions can only be relied upon insofar as there is no «overriding public interest in disclosure».[5] Since the founding purpose of Regulation No. 1049/2001 is to grant the widest possible access to EU institutions' documents, any limitation on access must be interpreted strictly, according to the case-law of the Court of Justice of the European Union («ECJ»).[6]

Since the Commission had not undertaken a concrete examination of the risks of disclosure of the individual documents, the essential question in the proceedings before the General Court was whether the Commission was justified in dispensing with such an examination. It is settled case-law that there is no need to carry out an individual examination of the relevant documents where it is ***obvious*** that access either must be granted or must be refused, where the refusal concerns a bundle of documents containing the same type of information and, in exceptional cases, where individual examination of the documents would entail an unreasonable administrative burden (e.g. due to the quantity of documents to be examined).[7] In these situations, the Commission is entitled to use so-called general presumptions of non-disclosure applying to certain categories of documents and to employ considerations of a generally similar kind concerning documents of the same nature.

The Commission had relied on all these exceptions, finding that the refusal to deny access was obvious as all of the documents were «manifestly covered in their entirety» by an exception, that certain categories of documents could be considered together since they contained the same type of information, and that the applicant should have been more specific in its request due to the workload brought about by the size of the case-file.[8]

The ECJ ***had already recognised the possibility to rely on general presumptions of non-disclosure in State aid and merger proceedings***. However, the General Court found that, in the context of cartel proceedings, no analogy could be made to the previous case-law concerning the application of general presumptions of non-disclosure to requests for access. The reason for this was that, in contrast to the previous cases, Regulations No. 1/2003[9] and 773/2004[10] actually provide a right of access to documents for complainants, albeit with certain restrictions.[11] These restrictions, in themselves, require a case-by-case examination which is difficult to reconcile with the use of general presumptions of non-disclosure.[12]

The General Court then proceeded to examine whether the documents within each category contained the same type of information and were «manifestly covered in their entirety by the exception relied on»,[13] the relevant exceptions being contained in Articles 4(2) and (3) of Regulation No. 1049/2001. The General Court objected that when non-disclosure is decided for certain categories of documents, this decision must be based on the nature of the information provided in the relevant documents, and any categorisation must therefore be content-based.[14] The categories relied upon by the Commission were not useful for the purpose of distinguishing between the various legal bases for non-disclosure and certainly, according to the General Court, had little to do with the Commission's fears about deterring future cooperation in the leniency programme.[15] For these reasons, the General Court rejected the Commission's use of these exceptions as a basis for presumptions of non-disclosure.

The Commission subsequently appealed against the judgment of the General Court to the ECJ, alleging, in substance, that the General Court had failed to have regard to an harmonious interpretation of Regulation No. 1049/2001 in relation to Regulations No. 1/2003 and 773/2004, that it had committed an error of law in considering that it was not possible to apply general presumptions to those documents and that it had misinterpreted some of the provisions concerning the exceptions to access to documents laid down in Article 4 of Regulation No. 1049/2001.[16]

(2) **Judgment**

Upon appeal, the ECJ examined whether the General Court had applied properly the principles governing access to documents in assessing whether the Commission was justified in dispensing with a concrete, case-by-case examination, of the requested documents. In its judgment of 27 February 2014, the ECJ set aside the previous decision of the General Court and, contrary to the latter, pointed out that general presumptions of non-disclosure, which apply to certain categories of documents, may be used by the Commission in order to refuse access to a set of documents related to an antitrust procedure.[17] This is also the case in the context of a leniency procedure, when a third party to the procedure asks the Commission for access to leniency documents in the case-file.

The ECJ also had reason to consider the possibility of rebutting general presumptions by recourse to an overriding public interest in disclosure, stressing that in order to rebut such general presumptions, the party requesting access shall demonstrate the existence of an overriding public interest in disclosure under Article 4(2) and (3) of Regulation No. 1049/2001. For this purpose, the interested party should specifically show in what way access to all the requested documents is

necessary in order to bring an action for damages before a national court. It should also demonstrate that disclosure would allow the party to obtain the evidence needed in order to establish its claim for damages, and that there was ***no other way of obtaining that evidence***, other than from the Commission.[18]

The examination of the ECJ was structured in two stages. First, it evaluated whether it was possible to apply the settled case-law concerning general presumptions also to cartel proceedings.[19] Second, it examined the conditions under which, in the present situation, it was possible to rebut those presumptions.[20]

(a) Applying general presumptions of non-disclosure in leniency proceedings and the interplay between Regulation No. 1049/2001 and Regulations No. 1/2003 and 773/2004
The ECJ concluded, contrary to the General Court, that the ***Commission may presume that in proceedings concerning cartels, the disclosure of the relevant documents might undermine the protection of commercial interests as well as the protection of the purpose of investigations***, within the meaning of Article 4(2) of Regulation No. 1049/2001.[21] In so doing, it extended the principles established in its previous case-law related to State aid and merger control investigations.

Yet, the ECJ stressed that it is necessary to deal with the interaction between Regulation No. 1049/2001 and the rules governing concerted practices and cartels in EU competition law, namely Regulations No. 1/2003 and 773/2004. The latter Regulations set out extremely restrictive rules on access to documents for parties to a proceeding, while they do not give any right to access to third parties.[22]

In this context, the ECJ observed that if a wider access were given under Regulation No. 1049/2001, the purpose of Regulations No. 1/2003 and 773/2004 would be compromised.[23] Consequently, the ECJ stated that a general presumption of non-disclosure arises from the provisions of the latter regulations governing access to documents, a presumption which may be employed in order to refuse access to cartel files. Since this general presumption is applicable to the documents in the relevant proceedings, the Commission does not have to carry out a specific, individual examination of each of the documents the disclosure of which might undermine the interests protected by Article 4 of Regulation No. 1049/2001. In this regard, the ECJ considered it irrelevant that Regulations No. 1/2003 and 773/2004 require a case-by-case assessment and that those documents were provided voluntarily in the context of a leniency programme.[24] In fact, in accordance with the Opinion in the same case by Advocate General *Cruz Villalón*, the ECJ concluded that the existence of specific rules, limiting the right of access to such documents, makes it possible to presume that disclosure may affect the purpose of cartel proceedings.[25]

(b) Rebutting general presumptions: Under which conditions may private enforcement be considered an overriding public interest in disclosure within the meaning of Article 4 of Regulation No. 1049/2001?
After having established the applicability of a general presumption to refuse access on the basis of Article 4(2) of Regulation No. 1049/2001, the ECJ examined the possibility to rebut such a presumption through the demonstration of the existence of an overriding public interest in disclosure.

The ECJ pointed out that any person seeking compensation for the loss caused in violation of Article 101 TFEU ***has to show not only the intention to bring an action for damages, but also why access to certain documents of the Commission's file is necessary*** in order to prove the loss which they allege to have suffered.[26] This is, in the ECJ's view, the only hypothesis under which the interest in obtaining compensation for the loss suffered due to a breach of Article 101 TFEU might constitute an overriding public interest within the meaning of Article 4(2) of Regulation No. 1049/2001, capable of rebutting a general presumption of non-disclosure.[27] Only in this case should the Commission weigh up, on a case-by-case basis, the respective interests in favour of disclosure and in favour of the protection of those documents, taking into account all the relevant factors in the case.[28]

It is worth noting that Advocate General *Cruz Villalón* observed, in his Opinion in the present case, that the ECJ's case-law in *Donau Chemie*[29] and *Pfleiderer*[30] should be taken into account even though it does not pertain to Regulation No. 1049/2001.[31] In contrast to the ECJ's subsequent findings, the Advocate General pointed out that ***the Commission had not indicated how granting access could undermine the specific leniency programme***, while EnBW asserted that particular documents requested were necessary in order to succeed in an action for the alleged damages caused by the censured

cartel. Consequently, Advocate General *Cruz Villalón* considered that the Commission was not justified in giving a refusal on principle to grant access to those documents instead of making the assessment on a case-by-case basis, taking into account all the relevant factors in the case, as required by the aforementioned case-law.[32]

Concerning the application of the exception related to the protection of the decision-making process of EU institutions laid down in the second subparagraph of Article 4(3) of Regulation No. 1049/2001, the ECJ applied *mutatis mutandis* the same examination. It considered that the disclosure of those documents could undermine the decision-making process of the Commission, given that, at the time of the request for access, proceedings for annulment of the GIS decision were pending before the General Court and, consequently, that the Commission may at a later time have been in a position to open a new investigation and adopt a new decision under Article 101 TFEU. For this reason, those documents were covered by a general presumption that the purpose of the second subparagraph of Article 4(3) of Regulation No. 1049/2001 could be undermined if access were given.[33] Furthermore, the ECJ stressed that, also in this second case, there is nothing in the judgment under appeal which is capable of rebutting such a general presumption.[34]

For those reasons, the ECJ decided to set aside the judgment of the General Court.

(3) **Comment**

Studying cases concerning access to documents is like groping in the dark. Even though the understanding of cases of this type hinges on the relevant documents' confidential nature, as an outsider you have only the decision-maker's descriptions and categorisations to rely on. This makes life a little more difficult for a researcher, but for an individual requesting access it indeed makes life a lot more difficult.[35] In fact, it places the claimant in a weaker position *vis-à-vis* his public counterpart, who is in possession of the same documents and therefore, contrary to the claimant, has all the necessary information in order to make a good case. This is the most important reason why authorities' refusals to grant access to documents, on appeal, must be treated with great care and also with the claimant's informational deficits in mind.

For outsiders, like ourselves, ***this is a problem of transparency***, whereas for an individual who is concerned by the relevant documents' content, this is ***a problem of judicial protection***. This is so because interested third parties' access to documents is in many cases not an autonomous right; rather, it may be a crucial precondition in order to exercise other rights.[36] In the *EnBW* case, the disclosure of the Commission's leniency file aimed at bringing an action before the national judge to repair the loss suffered due to an anticompetitive practice, the compensation of which has since long been recognized by the ECJ as an individual right under EU law.[37]

The legal background of the *EnBW* case is the development, by way of case-law and secondary legislation, of various approaches to this difficult problem.[38] Different situations have been provided with differing solutions, justified by the legal basis of the request, the nature of the material and the holder of the requested documents. A recent wave of case-law from the EU courts dealing with these questions has been welcomed by legal scholars for filling a statutory gap. ***The case-law has however also been criticised, due to its variance and ambiguity, for creating new uncertainties***.[39] The uncertainty derived from two factors. The first factor was that the ECJ's case-law concerning the relationship between Regulation No. 1049/2001 and other field-specific secondary legislation governing access to the Commission's case files only dealt with access to State aid and merger investigation files whereas neither the matter of access to leniency files nor more generally to cartel investigations had previously reached the ECJ (that is, before *EnBW*).[40] The second factor was that the ECJ, in its case-law concerning third parties' access to national authorities' leniency files, took a severe view on systematic or categorical refusals based on national legislation, leaving us wondering whether the same view is to be equally applied to the context of Commission investigations.

What is ground-breaking about *EnBW* is that, when seized to rule on the conditions under which the Commission should grant access to leniency documents to a third party seeking to bring an action for damages, the ECJ was finally able to resolve these two problems. The ECJ, for the first time, had the opportunity to rule on the relationship between Regulation No. 1049/2001 and specific legislation concerning antitrust procedures, namely Regulations No. 1/2003 and 773/2004, the use in the context of leniency files of general presumptions of non-disclosure and the rebuttal of such presumptions. This paper will explore these issues by giving special attention to

the implications of the present judgment in the interaction between public and private enforcement of antitrust proceedings.

(a) The relationship between Regulation No. 1049/2001 and specific legislation concerning antitrust procedures, namely Regulations No. 1/2003 and 773/2004

Under Regulations No. 1/2003 and 773/2004, access to the Commission's file is given under limited conditions, above all as far as third parties are concerned. Article 27(2) of Regulation No. 1/2003 and Article 15(1) of Regulation No. 773/2004 solely grant access to the defendants in antitrust proceedings whereas, according to Article 8 of Regulation No. 773/2004, complainants whose complaints have been rejected by the Commission are granted limited and conditional access[41] and third parties who are not complainants can only be granted the same access at the Commission's discretion.[42] In this regard, it seems that those provisions collide with the purpose to give the fullest possible effect to the right of access to documents under Regulation No. 1049/2001.[43] The difficulty is that cartel investigation case-files, including leniency documents, simultaneously fall within the scope of Regulations No. 1049/2001, 1/2003 and 773/2004.[44] Moreover, the preparatory works of Regulation No. 1049/2001 do not allow this issue to be solved, as a matter of *lex specialis,* by allowing more specialised provisions to prevail.[45]

In the framework of Regulations No. 1/2003 and 773/2004, the point has been made that granting complainants and, by consequence, other third parties access to leniency files under Regulation No. 1049/2001 would allow these categories of individuals more far-reaching access that the defendants themselves.[46] The argument is logical on its face but a second glance reveals its main shortcoming: if third parties could rely on Regulation No. 1049/2001, then reasonably defendants can do this for the same purpose.[47]

The result of this ***collision of norms*** is what we have seen in recent litigation before the EU courts, for example in *Technische Glaswerke Ilmenau* («*TGI*»), *Verein für Konsumenteninformation*, *Odile Jacob* and *Agrofert*:[48] requests for access to the Commission's investigation files tend to rely on Regulation No. 1049/2001 in order to circumvent other more specific but less beneficial rules.[49] When the ECJ, in this previous case-law, examined the interplay between Regulation No. 1049/2001 and the rules of EU competition law, it stressed that the claimants should not be granted a wider access than the one established by the specific regulations governing those proceedings.[50] The ECJ's findings in *EnBW* did little to change this. Although the General Court had found that the provisions in Regulations No. 1/2003 and 773/2004 were not applicable to a Commission procedure that had already been closed,[51] the ECJ reaffirmed that a harmonious interpretation of the two sets of secondary legislation do not confer on interested third parties generalised access on the basis of Regulation No. 1049/2001.

The ***main drawback*** of the position taken by the ECJ in this case is, in our view, that the «harmonious interpretation» triggers a general presumption of non-disclosure that places cartel investigation files in a category of documents which, equally with State aid and merger investigation files, ***cannot be effectively accessed*** on the basis of Regulation No. 1049/2001 even after the Commission has concluded its investigation and delivered a statement of objections.[52] Here we would like to remind the reader that Regulation No. 773/2004, albeit not prescribing access for interested third parties, does not preclude it either.[53] In a similar context,[54] it has been suggested that the purpose of Regulation No. 1049/2001 has been turned on its head by the ECJ's introduction of a new rule, namely that in the hypothesis of a concurrent application of Regulation No. 1049/2001 and specific legislation in a certain field of EU law, when there is no specific rule governing access to a document, it is not possible to have access to the document under Regulation No. 1049/2001.[55]

(b) Applying general presumptions of non-disclosure

In the present case the ECJ, contrary to the General Court, reaffirmed the legitimate use of general presumptions of non-disclosure of leniency documents, in order to ensure that ***the integrity of the leniency programme should not be jeopardised***.[56] This particular use of general presumptions goes back to the State aid case *TGI*,[57] in which the ECJ found that when a bundle of documents from a procedure file are requested by a third party under Regulation No. 1049/2001, it is still possible to presume that the requested documents were covered by an exception contained in Regulation No. 659/1999 and in the case-law concerning access to State aid investigation case-files.[58] Furthermore, general presumptions have been created by the ECJ's interpretation in order to ensure that the purpose of specific legislation, concerning other fields of law and specifically restricting individuals' access to documents, is not circumvented by a party

choosing to rely on the more general Regulation No. 1049/2001.[59]

The ECJ applied the same reasoning in *Odile Jacob* and *Agrofert*, pointing out, in the light of a combined reading of Regulations No. 1049/2001 and 139/2004, that it follows from the specific rules of the latter concerning mergers that general presumptions of non-disclosure should be applied, within the meaning set out in Article 4(2) of Regulation No. 1049/2001.[60]

The extension of general presumptions of non-disclosure to concerted practices and cartels indicates that, in cases involving the interplay between Regulation No 1049/2001 and specific regulations in the field of EU competition law, ***the ECJ has chosen to give priority to the effectiveness of public enforcement over concerns relating to private enforcement***. The chosen approach would, in our view, be less objectionable but for the position taken by the ECJ only months earlier, in *Donau Chemie.* In *Donau Chemie*, the ECJ pointed out that national jurisdictions shall demonstrate that there is a risk that the disclosure of a document may actually undermine the public interest related to the effectiveness of a leniency programme.[61]

Clearly the participants in leniency programmes may have a legitimate expectation that the Commission will not disclose information provided confidentially.[62] In this regard, one might observe that an assessment on a case-by-case basis for each document could not take into consideration the sensitive nature of leniency programmes, given that these programmes could be undermined by a simple hypothetical risk that victims of a cartel receive the evidence supporting their action for damages.[63] However, the refusal, through the use of general presumptions of non-disclosure, to give access to the documents in a leniency file ***might provide a double advantage for leniency applicants***. In fact, on the one hand, they will benefit from the immunity from fines and, on the other hand, they would evade payments of compensation for damages in a civil action.[64]

It is in this context that the importance of the *EnBW* judgment should be analysed. In both *Pfleiderer* and *Donau Chemie*, the ECJ underlined the need for an examination of each document asked for, by taking into account the specific circumstances of each case.[65] Due to the interconnection between leniency programmes at EU and national level, such a criterion, which is required for national jurisdictions, could have been expected to affect also the Commission's examination when deciding on access to documents.

The ECJ, however, applied a different standard in *EnBW*, involving the use of general presumptions of non-disclosure. Accordingly, the Commission is not obliged to provide an examination of any document in a file but can, within the limits of Article 4 of Regulation No. 1049/2001, presume that their disclosure will, in substance, ***decrease the effectiveness of leniency procedures***. Nevertheless, one might ask how the Commission can actually verify that the interest, which some companies might have in the non-disclosure of certain documents, is linked to the specific interests protected by Regulation No. 1049/2001, rather than the interest in avoiding that actions for damages could be brought against them before national courts.[66]

Thus, it seems that the ECJ adopted a new approach in assessing the interaction between private and public enforcement. Indeed, the necessity of weighing up the interests involved in order to verify whether there is a risk that the access to a given document may actually undermine the public interest related to the effectiveness of the national leniency programme is interpreted, in *EnBW*, in the sense that it is possible to presume that the disclosure itself of a document concerning a leniency file may actually undermine the effectiveness of these programmes.

The question remains ***whether this judgment will have an effect on leniency documents held by national competition authorities***. In the wake of the *EnBW* case, one can imagine that some adjustments to the principles laid down in *Pfleiderer* and *Donau Chemie* are appropriate. Otherwise there is a risk that national authorities' refusals to grant access to case-files are treated more harshly than the Commission's similar refusals.[67]

Furthermore, it is worth observing that national judges might have to decide in cases concerning national competition authorities' documents as well as documents from the Commission.[68] In the latter case, however, they will apply national legislation and not Regulation No. 1049/2001. Consequently, the implementation of the right of access to the same type of documents will diverge depending on whether the request is addressed to the Commission directly or to national courts. In this regard, the Commission, in its observations submitted as *amicus curiae* in a case before the English High Court relating to the same decision

as that at issue in *EnBW*, considered that the national judge should apply the *Pfleiderer* principles also with regard to its documents concerning a leniency procedure.[69]

(c) Rebutting general presumptions and potential implications of the case

The consequence of establishing a general presumption of non-disclosure is not that disclosure is automatically ruled out. As the ECJ has held on several occasions,[70] an applicant requesting a document covered by such a general presumption retains the possibility of overcoming this presumption by demonstrating either that the invoked presumption is not applicable in the present case, or that there is an «overriding public interest in disclosure» within the meaning of Article 4(2) and (3) of Regulation No. 1049/2001.

What is interesting about *EnBW* is the divergent ways in which Advocate General *Cruz Villalón* and the ECJ dealt with the matter of rebuttal, once they had both endorsed the Commission's use of general presumptions. On its face, the reasoning of the ECJ looks similar to that of the Advocate General. However, having recalled the possibility to rebut a general presumption, as foreseen in *TGI*,[71] the Advocate General in a later part of his Opinion suggested that a possible solution for appropriately calibrating the level of case-file confidentiality would be to introduce a requirement that interested parties, in order to be granted access, be able to «adequately prove that they need it in order to bring an action for damages».[72]

This suggestion can be interpreted in two ways. In his Opinion, Advocate General *Cruz Villalón* proposed to reject the part of the Commission's appeal related to the protection afforded to investigations. Keeping in mind that the Advocate General had already upheld the use of general presumptions based on Article 4(3) of Regulation No. 1049/2001, this may be taken to imply that he considered the general presumption to have been successfully overcome by the applicant. This reading would be supported by the Advocate General's reference to the fact that, without those documents, the applicant would not have stood a chance to succeed in bringing an action for damages concerning the losses that it claimed to have suffered.[73] An alternative interpretation would be that the above-mentioned requirement, described as a sufficient, albeit not ultimate, safeguard for confidentiality protection, should be endorsed by the legislator rather than applied by the ECJ when dealing with rebuttals of general presumptions.

The ECJ, in any event, followed the Advocate General in requiring that applicants demonstrate the absolute necessity of accessing specific documents, and even took a step further by requiring them to prove that the same information could not be obtained from any other source and that without such information any claims for damages would be deprived of all prospects of success.[74] ***Surprisingly, the ECJ relied on Donau Chemie*** for the purpose of laying down this strict standard and concluding that the applicant had failed to meet it.[75]

It therefore seems appropriate to ask whether this standard can possibly be derived from *Donau Chemie*. Indeed, in *Donau Chemie*, the ECJ had emphasised the difficulties that claimants encounter when their actions for damages rely solely on confidential information held by the competent competition authorities.[76] However, these difficulties were used as an illustration of the importance of gaining access to these documents in order to ensure the effective judicial protection of the right to compensation.[77] We would therefore suggest that, to the extent that the case can at all be transposed to the context of interpreting Regulation No. 1049/2001, *Donau Chemie* should be read as placing the burden on the authority possessing the requested documents to demonstrate on a case-by-case basis that the interest in confidentiality justifies non-disclosure, and not as placing the burden on the individual to prove the opposite.

A dual standard has in this way been introduced by the ECJ, by placing the burden on national authorities of justifying non-disclosure on a case-by-case basis and of proving that there is a risk that disclosure will actually undermine the leniency programmes, while at the same time placing the burden of justifying an indispensable need for disclosure on the individual litigating against the Commission.

It is also worth mentioning another problem of a more general nature. Pursuant to Regulation No. 1049/2001, access to documents must be the general rule and non-disclosure the exception, in line with the Regulation's purpose of ensuring the widest possible access to documents.[78] Accordingly, general presumptions of non-disclosure are admitted insofar as the possibility to rebut them is effective. Against this background, one might wonder whether it is appropriate to require an applicant to present evidence about the public interest in disclosure of a document which, for obvious reasons, he is precluded from examining.

This allows the authority in possession of a given document (in the present case, the Commission) to require an applicant to answer questions about the document's content and evidentiary value; questions which ultimately only the authority itself is capable of answering by consulting its case-file.[79]

In terms of the judicial protection of individuals as well as the private enforcement of competition law, this problem is even more striking. Indeed, the examination required in order to decide whether to give access to documents takes place in two different moments of the procedure. In proceedings concerning the Commission's documents, firstly individuals (which are not aware of the content of documents in the Commission's file) should prove an indispensable need for a specific document, pursuant to the criteria set out in *EnBW*, in order to obtain evidence for an action for damages. Subsequently, the Commission will be able to weigh up, on a case-by-case basis, the respective interests involved, taking into account all the relevant factors in the case.[80] Conversely, as far as national authorities' documents are concerned, when receiving a request for access to documents, the national judge (who has knowledge of the content of the relevant documents) proceeds to weigh up, in the same way, those two diverging interests. It follows that there seems to be a problem of circulation of evidence concerning leniency programmes, which will affect the claimants' rights of defence.

In the light of all the foregoing considerations, concerning the Commission's documents, the ECJ promotes the confidentiality protection of leniency documents. Due to the different approach for national competition authorities' documents, however, this area is characterised by a lack of clarity. As a consequence, these uncertainties might reinforce the reluctance of companies to participate in leniency programmes, as well as fail to provide an effective means for individuals to have access to evidence and bring an action for damages for infringements of competition law. In such circumstances, the Commission's proposal for a directive on Antitrust Damages Actions[81] ***may, once adopted, remove a number of difficulties which victims of antitrust violations face*** when they file a claim for damages. It would also introduce useful guidelines for courts and parties in order to provide further clarifications in a context where elements of transparency, private enforcement and public enforcement have difficulties finding their place.

* Clelia Lacchi, LL.M., and Allison Östlund, LL.M., both Ph.D. candidates in European Law, University of Luxembourg.

1 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access European Parliament, Council and Commission documents (Regulation No. 1049/2001). OJ 2001 L 145/43.
2 GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission*.
3 *Ibid.,* para. 25.
4 Article 4(3), second subparagraph of Regulation No. 1049/2001.
5 Article 4(2) and (3) of Regulation No. 1049/2001.
6 ECJ of 1 February 2007, C-266/05 P *Sison ⁄ Council* para. 63; ECJ of 18 December 2007, C-64/05 P *Sweden ⁄ Commission* para. 66.
7 CFI of 13 April 2005, T-2/03 *Verein für Konsumenteninformation ⁄ Commission,* paras. 75 and 112; ECJ of 1 July 2008, C-39/05 P and C-52/05 P *Sweden and Turco ⁄ Council,* para. 50; ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*, paras. 54-55.
8 GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission*, paras. 48-50.
9 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (Regulation No. 1/2003) OJ 2003 L 1/1.
10 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (Regulation No. 773/2004) OJ 2004 L 123/18.
11 Article 8 of Regulation No. 773/2004.
12 GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission*, paras. 59-61.
13 *Ibid.,* para. 64.
14 *Ibid.,* para. 74.
15 *Ibid.,* para. 76.
16 ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 33.
17 *Ibid.,* paras. 94 and 115.
18 *Ibid.,* paras. 106-108 and 130-132.
19 *Ibid.,* paras. 82-94.
20 *Ibid.,* paras. 100-109.
21 *Ibid.,* para. 94.
22 Article 27(2) of Regulation No. 1/2003, Articles 8 and 15(1) of Regulation No. 773/2004.
23 ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 88.
24 *Ibid.,* paras. 93-97.
25 *Ibid.,* paras. 92-93. Opinion of Advocate General *Cruz Villalón* of 3 October 2013, C-365/10 P, points. 52-53.
26 ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 132.
27 *Ibid.,* para. 108.
28 *Ibid.,* para. 107.
29 ECJ of 6 June 2013, C-536/11 P *Bundeswettbewerbsbehörde ⁄ Donau Chemie AG and others*.
30 ECJ of 14 June 2011, C-360/09 *Pfleiderer AG ⁄ Bundeskartellamt*.
31 Opinion of Advocate General *Cruz Villalón* of 3 October 2013, C-365/10 P, points. 68-70.
32 *Ibid.,* paras. 76-79.
33 ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 114.
34 *Ibid.,* para. 118.
35 *Brouwer/Blockx*, Access to Documents Relating to EU Competition and State Aid Cases Pursuant to Regulation 1049/2001: Towards a Rebuttable Presumption as a 'Fig

Leaf' for Intransparency?,Todays Multilayered Legal Order: Its Functioning and Future: Liber Amicorum in honour of Arjen W.H. Meij, (2011), p. 49.

[36] *Bouhier*, Droit de la concurrence: le principe de l'accès aux documents à la clôture des procédures, RAE [2011/3] 599.

[37] ECJ of 20 September 2001, C-453/99 *Courage and Crehan,* para. 36.

[38] ECJ of 6 June 2013, C-536/11 P *Bundeswettbewerbsbehörde ⁄ Donau Chemie AG and others*; ECJ of 14 June 2011, C-360/09 *Pfleiderer AG ⁄ Bundeskartellamt;* ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*; ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob*.

[39] *Le Soudiéer*, L'engagement progressif de la Cour de justice en faveur de l'accès des entités lésées par une entente au dossier des autorités nationales de concurrence: un glissement inopportune, RAE, [2013/2] (421) 422.

[40] ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding.*

[41] See also p. 104 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, which entitles complainants to access confidential version of the Commission's Statement of objections.

[42] Article 103 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.

[43] Article 1 of Regulation No. 1049/2001.

[44] In the capacity of being a «document» within the meaning of Article 3 (a) of Regulation No. 1049/2001.

[45] *Speltdoorn*, The Technische Glaswerke Ilmenau Ruling: A Step Backwards for Transparency in EU Competition Cases?, Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh, (2012), p. 452.

[46] *Brouwer/Blockx,* note 35, p. 45.

[47] See, to this effect, CFI of 9 September 2008, T-403/05 *MyTravel,* para. 89.

[48] ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*; CFI of 13 April 2005, T-2/03 *Verein für Konsumenteninformation ⁄ Commission;* ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob;* ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*.

[49] *Bellis/Nassogne*, L'application du règlement sur le contrôle des concentrations, Journal de droit européen, n. 191, [7/2012], 225.

[50] ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*, para. 58; ECJ of 21 September 2010, C-514/07, C-528/07 and C-532/07 *Sweden and API ⁄ Commission*, para. 100; ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob*, para. 122; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*, para. 63; ECJ of 14 November 2013, C-514/11 P and C-605/11 P *LPN and Finland*, para. 58.

[51] GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission.*

[52] ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 99.

[53] Points 103-104 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU.

[54] ECJ of 29 June 2010, C-139/07 *Commission ⁄ Technische Glaswerke Ilmenau.*

[55] *Brouwer/Blockx*, note 35, p. 49.

[56] *Lenaerts*, Due process in completion cases, 2013, pages 9-14, available at http://www.ikk-2013.de/pdf/Lenaerts.pdf.

[57] ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*.

[58] GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 56; ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob*; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*; ECJ of 21 July 2011, C-506/08 *Sweden ⁄ MyTravel and Commission*.

[59] ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob*; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*.

[60] ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob;* ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*.

[61] ECJ of 6 June 2013, C-536/11 P *Bundeswettbewerbsbehörde ⁄ Donau Chemie AG and others*, paras. 47-48.

[62] *Lacchi*, L'accesso dei soggetti lesi ai documenti acquisiti nei programmi antitrust di clemenza: la sentenza Pfleiderer, Giustizia Civile, [11/2011], 2523 (2533).

[63] *Hacker*, Droit d'accès au dossier: faut-il à tout prix privilégier le droit à la réparation des victimes d'une entente?, RAE, [2013/2] 413 (419).

[64] *Hacker, idem*, 417.

[65] ECJ of 6 June 2013, C-536/11 P *Bundeswettbewerbsbehörde ⁄ Donau Chemie AG and others*, para. 34; ECJ of 14 June 2011, C-360/09 *Pfleiderer AG ⁄ Bundeskartellamt,* para. 31.

[66] In the same sense, GC of 22 May 2012, T-344/08 *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 147.

[67] *Le Soudéer*, note 39.

[68] *Meyring/Barten,* Le droit de la concurrence et la transparence : une quadrature du cercle ?, Journal de droit européen, n° 194, [10/2012], 294 (295).

[69] Observations of the European Commission, Claim. No. HC08C03243, para. 10.

[70] ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*, para. 62; ECJ of 28 June 2012, C-404/10 P *Commission ⁄ Éditions Odile Jacob*, para. 126; ECJ of 28 June 2012, C-477/10 P *Commission ⁄ Agrofert Holding*, para. 68; ECJ of 14 November 2013, C 514/11 P and C 605/11 P *LPN and Finland,* para. 66.

[71] Opinion of Advocate General *Cruz Villalón* of 3 October 2013, C-365/10 P, point 64; ECJ of 29 July 2010, C-139/07 P *Commission ⁄ Technische Glaswerke Ilmenau*, para. 62.

[72] Opinion of Advocate General *Cruz Villalón* of 3 October 2013, C-365/10 P, point 78.

[73] Opinion of Advocate General *Cruz Villalón* of 3 October 2013, C-365/10 P, point 75.

[74] ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 132.

[75] ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, paras. 106-108, 132.

[76] ECJ of 6 June 2013, C-536/11 *Donau Chemie*, para. 32.

[77] ECJ of 6 June 2013, C-536/11 *Donau Chemie*, para. 33.

[78] Article 1, Regulation No. 1049/2001.

[79] See, to this effect, *Brouwer/Blockx*, note 35, p. 49.

[80] ECJ of 27 February 2014, C-365/12 P *EnBW Energie Baden-Württemberg AG ⁄ Commission*, para. 107.

[81] 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. COM(2013) 404, 11.6.2013.