The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight?

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More than ten years after its introduction in 1996, the European Commission Leniency Program (Leniency Program) continues to be the most effective tool in the European Commission’s (Commission)
enforcement of E.U. antitrust law. The Leniency Program is governed by a Leniency Notice that sets out the policies and procedures for applications and determinations of leniency. While few may question the role of the Leniency Program, many antitrust commentators and practitioners are concerned about the future of the Commission's program in light of the inconsistent application of U.S. civil discovery rules to Leniency Program submissions.

The discovery of the Leniency submissions in private civil actions in the United States is one of the key issues facing current E.U. antitrust law for two reasons. First, discovery creates a disincentive for cartel members to cooperate with the Commission in dismantling secret cartels, thus hampering the effectiveness of the Leniency Program. The economic benefits derived from cooperation with the Program are offset by the potential economic harms in the form of damages in a private civil action in the United States. Second, discovery of Leniency submissions creates the perverse result of placing undertakings that cooperate with a Commission investigation by disclosing their infringement in a worse position than those that keep evidence and knowledge of their infringement secret.

On several occasions, the Commission has expressed its concern regarding the discovery of Leniency submissions in U.S. federal courts. The Commission's arguments are predicated on the principle of international comity, which allows courts and administrative agencies to strike a balance between the different, but not necessarily conflicting, interests of the sovereigns involved in the discovery process. Nevertheless, there is cause for concern since U.S. courts generally address the principle of international comity on a case-by-case basis, creating a lack of certainty as to "how [U.S.] courts will apply their wide discretion in ordering dis-

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1. See Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. (C 207) 4 [hereinafter Commission Notice] (establishing the E.U. Antitrust Leniency Program); see also infra text accompanying note 50 (discussing the effectiveness of the Leniency Program).
3. Patricia Carmona Botana, Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs, 13 COLUM. J. EUR. L. 47, 74 (2006); see also New Leniency Notice, supra note 2, ¶ 6.
covery of (no pre-existing) statements and submissions specifically prepared by undertakings for the Commission’s antitrust procedures. This “resulting uncertainty” potentially undermines the effectiveness of the Leniency Program and the related ability of the Commission to successfully detect and punish cartels.

In a recent case that addressed the issue of discovery of Leniency Program submissions in U.S. Courts, Magistrate Judge Bernard Zimmerman of the U.S. District Court for the Northern District of California held that the plaintiff, Kumho Petrochemical Company, was not entitled to receive the highly confidential submissions that defendant, Flexsys America’s European affiliate, made in connection with the Leniency Program. Judge Zimmerman offered a comprehensive overview of the comity analysis involved in determining whether discovery of a Leniency applicant’s submissions was proper.

This Note provides a European perspective on the issues raised by In re Rubber Chemicals Antitrust Litigation (Rubber Chemicals), and expresses concern regarding the inconsistent approach taken by U.S. courts to the discoverability of the Leniency submissions. This Note also warns that this inconsistency may have a chilling effect on participation in the E.U. Leniency Program and may thus impede enforcement of European anti-cartel law. Part I briefly describes cartels and the anti-cartel policy adopted by the E.U. Commission. Part II discusses the E.U. Leniency Program and the provisions governing the discoverability of Leniency documents. Particular emphasis is dedicated to the Leniency Program’s incentives affecting, and fostering, cartel members’ cooperation, as well as to the central role played by the program in the enforcement of E.U. antitrust law. Part II also examines the impact of U.S. discovery rules on the recently adopted Settlement Procedure in cartel cases in the European Union. Part III offers an overview of the U.S. discovery rules and their application to documents located abroad. Part IV provides a synthesis of the principle of international comity as it is understood through U.S. case law, as well as through the international agreements entered into by the United States and the European Union.
Part V discusses the merits of the District Court's order in the Rubber Chemicals case and its implications for future cases. Part VI highlights the harmful effects that the inconsistent construction of the comity principle, and the subsequent application of U.S. discovery rules to Leniency documents, has on the international fight against cartels, and advocates a prompt change in the U.S. judiciary's approach to discovery of E.U. Leniency documents.

I. SECRET CARTELS AND E.U. ANTI-CARTEL POLICIES

"United we stand, divided we fall.

Unity gives strength."11

Cartels are agreements or concerted practices between two or more undertakings aimed at coordinating their competitive behavior in the market in order to maximize their profits.12 A cartel scheme allows an undertaking to realize future gains otherwise hard to achieve in a competitive market by limiting output, or fixing the price of goods or services, or both, at the consumer's expense.13 At the same time, a cartel succeeds only to the extent that its members abide by the cartel rules, thus preserving the cartel equilibrium.14 No deviation is allowed. In particular, each undertaking must share the total cartel gain with the other members as agreed in the cartel agreement, usually in a manner that reflects the individual member's industry size and market power.15

Undertakings can coordinate their industrial or marketing strategies in an almost limitless number of illegal ways. They can fix purchase prices, selling prices, and other contractual conditions, or they can agree on the allocation of production quotas, sales, customers, and the relative share of the market.16 They can also rig bids in public and pri-
vate auctions, restrict imports and exports, or engage in other anti-
competitive conduct. Each of these types of conduct represents a
"straightforward redistribution of income and capital, on the same ba-
sis as a credit card fraud or a bank robbery." Cartels, thus, result in the
misallocation of resources, increased prices for products and services,
the reduction of quality, and a slowing of innovation. As was color-
fully suggested, the "cartel bear undermines efficiency and ultimately
makes the economy and society poorer."

Antitrust agencies may prevent this undesirable outcome by adopting
a preventive approach, a deterrent-punitive approach, or a combination of
the two. The method by which antitrust agencies determine the optimum

of agreement would always or almost always tend to restrict competition and decrease output." (citation omitted)).

17. The anticompetitive conduct set forth in Article 81(1) of the E.C. Treaty is not ex-
haustive, and E.U. Member State courts and antitrust agencies, as well as the E.U.
Commission and the E.U. courts, have examined other conduct for possible antitrust viola-
tions. See, e.g., Ivo Van Bael & Jean-Francois Bellis, Competition Law of the

text/sp2007_06_en.pdf.

19. Id.

20. Id.

21. See Botana, supra note 3, at 48; see also Massimo Motta & Michele Polo, Leniency
an optimum fining policy exists in the promotion of private enforcement actions. Private
enforcement plays a substantially different role in Europe than it does in the United States. See
Margaret Bloom, Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remes-
dies? A Post-Empagran Perspective from Europe, 61 N.Y.U. ANN. SURV. AM. L. 433, 440
(2005). The reason for this lies in the different approaches as to the appropriate balance be-
tween public and private enforcement of antitrust laws. While in Europe, private actions for
damages are complementary to antitrust agency enforcement, the U.S. legal framework over-
whelmingly favors private suits to the point that such suits represent, together with the
provision of criminal sanctions, the core of the antitrust enforcement. Id. at 440–41. The Euro-
pean Union is slowly but deliberately educating the stakeholders involved in antitrust
infringement actions—including national courts—about the likely benefits derived from wider
promotion of private actions for antitrust damages. See Commission White Paper on Damages
available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_-
paper/whitepaper_en.pdf; Commission Staff Working Paper Accompanying the White Paper
available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_-
paper/working_paper.pdf; Commission Staff Working Document Accompanying the Document
to the White Paper on Damages Actions for Breach of the EC Antitrust Rules: Impact Assess-
antitrust/actionsdamages/files_white_paper/impact_report.pdf (arguing that a number of measures facilitating antitrust damages actions would have a beneficial impact on the en-
forcement of antitrust laws in Europe, such as ensuring adequate compensation for victims of
anticompetitive conduct, enhancing deterrence of unlawful conduct, and generating a positive
overall economic effect); Commission Green Paper on Damages Actions for Breach of the
level of prevention and deterrence leads to substantial differences in terms of the nature and level of sanctions. Thus, certain jurisdictions, such as the United States, Canada, Japan, Australia, Korea, and Brazil, and, within the European Economic Area (EEA), Austria, Estonia, France, Germany, Ireland, Norway, and the United Kingdom, impose criminal sanctions (including custodial sentences), while others, such as the European Union, merely rely on the threat of monetary or administrative sanctions.

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25. See Commission Regulation 1/2003, art. 23(2)(a), 2003 O.J. (L 1) 1, 17 (hereinafter Commission Regulation 1/2003). The deterrent effect of fines is achieved if, and when, they make price-fixing unprofitable for an undertaking. Since only roughly ten percent of cartels are discovered, undertakings decide whether to collude, not on the basis of the nominal fine, but on the basis of the fine discounted by the probability of being caught and fined—the expected fine. See Cento Veljanovski, Cartel Fines in Europe: Law Practice and Deterrence, 30 WORLD COMPETITION 65, 81–82 (2007). Thus, for a fine to be a deterrent, it should be multiplied by such a factor to cause an expected fine equal to the overall consumer loss. See id. (concluding that the current E.U. Commission fining system is under-deterrent and that fines should be, on average, seventeen times higher than those imposed). With the possible under-deterrence in the E.U. system, the U.S. criminal system might be preferable, as it punishes the real authors of the antitrust violations and does not expose an undertaking to large fines that could push it out of the market.
The E.U. Commission adopted the "combined non-criminal" approach to antitrust infringement. Since her appointment as European Commissioner for Competition Policy in 2004, Neelie Kroes has identified cartel-busting as the Commission's priority in its enforcement of antitrust law. The underlying Commission strategy is based on the synergy created by the joint application of the Guidelines on the Method of Setting Fines and the Leniency Notice. The rationale behind the Commission's strategy is that an antitrust system based only, or predominantly, on preventive mechanisms, based on the economic analysis of publicly available data or information provided by third parties, would be excessively expensive and often impractical. By the same token, a purely deterrent system would be simply inefficient, because no fine can restore the loss to the consumer or remedy the harm

26. See Commission Regulation 1/2003, supra note 25, arts. 23–24; see also Neelie Kroes, Competition Comm'r, Reinforcing the Fight Against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a More Competitive Europe, Commission/IBA Joint Conference on EC Competition Policy, Brussels, speech/07/128 (Mar. 8, 2007) (explaining that "the most visible deterrent signal we are sending out is through our fines"). The synergies derived from the combination of a preventive and deterrent approach were further strengthened by the adoption, in 2006, of the New Leniency Notice and the new Guidelines on the Method of Setting Fines. See discussion infra Part II.B. The new Guidelines have been strongly criticized as unreasonably raising the average level of fines. See Veljanovski, supra note 25, at 85 (concluding that the new method of setting fines is unsatisfactory, as the resulting level of fines "do[es] not reflect the harm caused by cartels . . . nor [is it] likely to deter price-fixing"). Some also suggest that, compared to systems with mere administrative fines, such as the European Union, the threat of criminal sanctions and individual criminal liability strengthens the effectiveness of leniency programs. This is so because individuals are incentivized to disclose a cartel since they are exposed, not only to a monetary loss, but also to a loss which is not reimbursable by their companies, such as freedom and reputation. See R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Int'l Anti-Cartel Enforcement, Address Before the ICN Cartels Workshop 12–13 (Nov. 21, 2004), available at http://www.usdoj.gov/atr/public/speeches/206428.pdf.

27. See Neelie Kroes, Competition Comm'r, EC Antitrust Rules: An Overview of Recent Developments, Speech Held Before the Hellenic Competition Commission, Athens, speech/06/566 (Oct. 5, 2006).


29. New Leniency Notice, supra note 2; see also Kroes, supra note 26. In fine-tuning the interplay between preventive and deterrent mechanisms, the E.U. Commission did not follow the U.S. view that leniency or amnesty programs associated with the threat of criminal sanctions and imprisonment for executives are arguably more effective than those associated with mere monetary sanctions. See Botana, supra note 3, at 49.

30. See Wils, Optimal Antitrust Fines, supra note 22, at 39. The cost-benefit analysis applied to regulated markets is slightly different. The existence of regulatory mechanisms has a double effect: on the one hand, it assures the availability of a comprehensive set of market data and constant monitoring of the industry; on the other hand, it diminishes the need for antitrust interventions, as anticompetitive conduct is less likely to occur.
to competition, and companies may, nonetheless, find participation in a cartel profitable.

Alternatively, an antitrust system characterized by an adequate leniency program and sufficiently deterrent monetary sanctions is likely to result in the disclosure of existing secret cartels, the detection and punishment of a greater number of undertakings, and the prevention of future anticompetitive conduct. Combined with these benefits is the reduction of the relative cost of public enforcement of the antitrust rules for each individual infringement.

II. THE E.U. LENIENCY PROGRAM

Socrates: [Tell] me whether you think that a city, or an army, or a band of robbers or thieves, or any other company which pursue some unjust end in common, would be able to effect anything if they were unjust to one another?

Thrasymachus: Of course not . . .

Socrates: [When] we say that any vigorous joint action is the work of unjust men, our language is not altogether accurate. If they had been thoroughly unjust, they could not have kept their hands off one another. Clearly, they must have possessed justice of a sort, enough to keep them from exercising their injustice on each other at the same time as on their victims. For the thorough

31. See Veljanovski, supra note 25, at 79–80. It is noticeable that in the European Union, unlike in the United States, antitrust fines reflect neither the gain reaped by the violator nor the loss suffered by the victim; rather, the fine is a function of the gravity and duration of the infringement, as well as of a number of aggravating and attenuating circumstances detailed in the Commission’s Guidelines on the Method of Setting Fines. See generally id. Some authors define the E.U. fining system as arbitrary, and note that a large fine may have downside effects that should be carefully considered. For example, a fine can be so high as to infringe the general principles of E.U. law, such as proportionality. In extreme, but nevertheless realistic, cases, a very high fine can cause an undertaking to go bankrupt. See id. at 85 (noting that a pure deterrent fining system also faces more practical problems, namely, “the firm’s ability of the firms to pay, the enforcement costs, and their political and public acceptability”); see also Motta & Polo, supra note 21.

32. See Veljanovski, supra note 25, at 80–81. While the duration of the infringement is a critical factor in determining the fine, as the fine cannot exceed ten percent of the company’s turnover, the deterrent effect of the duration factor in the calculation of the fine will be obviated in circumstances when the undertaking has already reached that ten percent ceiling. See Commission Regulation 1/2003, supra note 25, art. 23(2)(a).

33. Motta & Polo, supra note 21, at 349.

villains who are perfectly unjust, are also perfectly incapable of action.\textsuperscript{35}

The E.U. Leniency Program is "by far the most important investigative tool in the fight against cartels."\textsuperscript{36} It is a "key measure for the European Commission"\textsuperscript{37} and an opportunity for companies who are party to a secret cartel to disclose their illegal conduct to the E.U. Commission in exchange for immunity from, or a reduction of, the fine otherwise imposed for the violation of anti-cartel laws.\textsuperscript{38}

The critical factor in the race to immunity is the point in time at which the undertaking submits documentary evidence to the Commission.\textsuperscript{39} Only the first undertaking to cooperate with the Commission is granted immunity.\textsuperscript{40} In particular, the Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission’s view will enable it to:

(a) carry out a targeted inspection in connection with the alleged cartel; or

(b) find an infringement of Article 81 EC in connection with the alleged cartel.\textsuperscript{41}

In order to qualify for a reduction of a fine, an undertaking “must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission’s possession and must meet the cumulative conditions set out [in the Notice].”\textsuperscript{42}

The Leniency Program relies on a Trojan horse strategy. Through the complicity of the cartel members, it exploits the weaknesses inherent in the same collusive conduct that it seeks to control. Each member of a

\textsuperscript{35} CARLTON & PERLOFF, supra note 11, at 211 (quoting Plato).

\textsuperscript{36} Submission by the Directorate General for Competition of the European Commission, supra note 6, at 3.


\textsuperscript{38} New Leniency Notice, supra note 2, ¶ 4–5. Consistent with previous Leniency Notices, the New Leniency Notice distinguishes between immunity from, and reduction of, fines. Id.

\textsuperscript{39} See id. ¶ 8.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id. ¶ 24.
cartel is tempted to cheat on the cartel agreement, and thus gain higher profits, by, for example, increasing the output or cutting the cartel’s price. This inherent instability of cartels, and the related difficulty in the enforcement of the cartel arrangements, is the major cause of their failure.

The Leniency Program takes advantage of the inherent instability of cartels by increasing the incentives for a member to cheat on the cartel arrangement. More specifically, the rationale of the Leniency Program is twofold: first, it creates a “race for immunity,” so that the first undertaking to provide the Commission with inside information on the cartel is granted full immunity from fines, while the undertakings that follow may only be granted a reduction of the fine; second, “the mere apprehension that a member of a cartel might go to the authorities and secure immunity tends to destabilize the activity of the cartel itself.”

Absent the Leniency Program, the likelihood that cartel members would spontaneously stop colluding is low. In fact, assuming that all cartel members find compliance with the cartel arrangement profitable—i.e., nobody cheats—there would be little reason for an undertaking to terminate its participation in the collusive practices. One reason for termination may be a change in the undertaking’s management, where the new managers are risk-averse. In this case, the new executives might adopt a corporate policy of full compliance with the law—even if the company ought to forego the “extra” gain from the cartel. Also, absent the incentives of a leniency program, when government antitrust agencies announce the launch of a sector inquiry, undertakings may cease collusion because of an increased risk of detection.

43. See Carlton & Perloff, supra note 11, at 223–28. Each member of the cartel has different incentives to cheat on the agreed price or output, and not all members may find deviation or cheating profitable. For example, a firm tends to lower prices in order to increase sales if it sustained high fixed costs due to the construction of a new plant not long before the formation of the cartel and has substantial unutilized capacity. However, if a firm operates at full capacity, it has no incentive to cheat on the output arrangements.

44. Id. The enforcement of cartels involves substantial monitoring costs, and its success depends on several factors, including reliable methods of detecting and punishing cheating.

45. Id. The likelihood that a cartel will succeed is low when its members decide to cheat, even if the market is characterized by a small number of firms trading in homogeneous products with little substitutability, an inelastic demand curve, and no threat of entry.

46. Id. at 159. The Leniency Program exploits the dynamics of game theory and recreates a prisoner’s dilemma pattern, in which deviation is more profitable than collusion, but the full gain is available only to one colluder. See id. (providing an analysis of the game theory); Botana, supra note 3, at 57.

47. New Leniency Notice, supra note 2, ¶¶ 8, 23.

However, from an antitrust policy viewpoint, the situations in which an undertaking terminates its collusive conduct due to the objective benefits of the Leniency Program differ substantially from situations in which the termination is driven by the risk aversion of management. Only in the former case does the termination of collusion allow public agencies to uncover the infringement to its full extent and to punish all of the cartel members. However, in the latter case, there is no such outcome, since termination takes place secretly because an undertaking would otherwise face a substantial fine.\textsuperscript{49}

\begin{enumerate}
\item \textbf{A. The E.U. Leniency Program and the New Leniency Notice}
\end{enumerate}

Since its introduction in 1996, the Commission's Leniency Program has been the most effective tool in the Commission's fight against cartels.\textsuperscript{50} The Program allowed the E.U. antitrust agency to initiate several investigations into a number of industries, to dismantle secret cartels, and to punish a large number of undertakings.\textsuperscript{51}

In 2002, the E.U. Commission published a revised version of the Leniency Notice,\textsuperscript{52} which has been even more successful than its predecessor. Since the 2002 Leniency Notice entered into force, 167 companies have filed applications for immunity from, or a reduction of, fines.\textsuperscript{53} In only fifty-one cases did the Commission grant conditional immunity, while twenty-three applications were either rejected or not considered further.\textsuperscript{54}

On December 8, 2006, with four years of experience in applying the 2002 Leniency Notice, and in line with the European Competition

\textsuperscript{49} Moreover, undertakings still face the risk of investigation and subsequent punishment, at least until the infringement is prescribed. See François Arbault & Francisco Peiró, \textit{The Commission's New Notice on Immunity and Reduction of Fines in Cartel Cases: Building on Success, COMPETITION POL’Y NEWSL.} (Competition Directorate-Gen. of the Eur. Comm’n, Brussels, Belg.), June 2002, at 15, 19.

\textsuperscript{50} Guersent, \textit{supra} note 37, at 45; \textit{see also} Lowe, \textit{supra} note 48, at 3.

\textsuperscript{51} Under the 1996 Leniency Program, approximately 100 companies filed applications for immunity or a reduction of fines, and, by October 2004, the Commission had issued twenty-eight formal decisions in cartel cases in which companies had cooperated under the Leniency Program. See Bloom, \textit{supra} note 21, at 438 (citing Guersent, \textit{supra} note 37, at 45).

\textsuperscript{52} Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3 [hereinafter 2002 Leniency Notice].


\textsuperscript{54} \textit{See id.} at 1–2. In particular, the Commission received eighty-seven applications for immunity and eighty applications for a reduction of the fine. \textit{Id.} at 1. Besides the fifty-one conditional immunities and the twenty-three rejections or decisions not to consider further, the Commission either found that the Leniency applicants did not meet the immunity threshold or transferred the case to a national authority. \textit{Id.}
Network’s Model Leniency Program, the Commission adopted the New Leniency Notice. The purpose of this new Notice was to further strengthen the effectiveness of the Leniency Program by providing undertakings with more comprehensive information and assistance in filing Leniency applications. Although criticism of the New Leniency Notice exists, the 2006 New Leniency Notice introduced several innovations that made the disclosure of infringement, and subsequent cooperation with the Commission, more attractive to price-fixers.

Among the innovations is the introduction of a “marker,” which allows undertakings to preserve their position in the Leniency ranking. An undertaking that applies for a marker has to provide much less information than necessary for a standard application for immunity. If the undertaking then supplements its application with information about the infringement within a certain period of time, the application is deemed filed as of the date of the marker. Also, the New Leniency Notice

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56. New Leniency Notice, supra note 2.


"Secret cartels undermine healthy economic activity. To root out cartels we need heavy sanctions to deter cartels and an efficient leniency policy providing incentives to report them. These changes will further strengthen the effectiveness of the Commission’s leniency programme in the detection of cartels and offer clearer guidance for business."


60. Compare id. (application for a marker), with id. ¶ 16 (application for formal immunity).

61. Id. Unlike the U.S. leniency program, the New Leniency Notice did not introduce the concept of “amnesty plus”—better termed, perhaps, “penalty plus”—which allows undertakings that do not qualify for leniency in an on-going investigation to disclose the existence of a second cartel. See generally U.S. Dep’t of Justice, Corporate Leniency Policy (Aug. 10, 1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm. If the undertaking
adopted an *ad hoc* administrative procedure to protect the Leniency documents in the Commission's file, and, in particular, the corporate statements.\textsuperscript{62}

Overall, the new Leniency Notice improved the program in two ways: by providing new incentives for undertakings to cooperate with the E.U. Commission, and by guaranteeing greater protection for the confidential corporate submissions.\textsuperscript{63}

**B. Information Provided Under the New Leniency Notice and the Evidentiary Value of the Corporate Statements**

The New Leniency Notice defines the notion of "evidence" to include corporate statements in "the form of written documents signed by or on behalf of the undertaking or . . . made orally" and "other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission."\textsuperscript{64}

cooperates in the second investigation, it can receive leniency for the second offense as well as a substantial reduction in the fine for its participation in the first infringement. The "amnesty plus" normally leads to a snowball effect because undertakings, by disclosing other cartels related to different product markets, are also granted advantages in relation to the first product for which they failed to qualify for immunity. \textit{See} Bertus Van Barlingen, \textit{The European Commission’s 2002 Leniency Notice After One Year of Operation, COMPE\-ITION POL’Y NEWSL.} (Competition Directorate-Gen. of the Eur. Comm’n, Brussels, Belg.), Summer 2003, at 16, \textit{available at} http://ec.europa.eu/comm/competition/publications/cpn/cpn2003_2.pdf. The result obtained through "amnesty plus" can be compensated only partially through the strategy currently used by undertakings subject to an inspection. Such undertakings consider whether to disclose any other cartels as soon as possible, at least for neighboring product markets, and thus obtain an important advantage in terms of time over the other participants of the same cartel. In particular, this practice does not benefit the undertaking with respect to the first proceeding—\textit{i.e.}, the one in which the undertaking was not granted immunity. \textit{See} Mark Jephcott, \textit{The European Commission’s New Leniency Notice—Whistling the Right Tune}, 23 E.C.L.R. 378, 381 (2002) (commenting on "amnesty plus"); Donal McElwee, \textit{Should the European Commission Adopt “Amnesty Plus” in Its Fight Against Hardcore Cartels?}, 25 E.C.L.R. 558 (2004) (same).


64. \textit{New Leniency Notice, supra} note 2, \textit{ ¶} 9(a) n.2, 9(b). The New Leniency Notice, similar to the 2002 Leniency Notice, abandoned the distinction adopted by the 1996 Leniency Notice between “information, documents or other evidence.” \textit{Commission Notice, supra} note 1, \textit{ ¶} D(II); \textit{cf.} \textit{New Leniency Notice, supra} note 2, \textit{ ¶} 9 (omitting the distinction). The New Leniency Notice, however, identifies three categories of evidence for the purpose of establishing the degree of collaboration of the undertakings: the first is "evidence contemporaneous to the infringement." \textit{New Leniency Notice, supra} note 2, \textit{ ¶} 9–11. It recognizes that evidence formed at the time of the infringement is, by its very nature, more reliable than that which came into existence after, and thus deserves special consideration. The second category of evidence refers to the concept of "significant added value." \textit{Id.} \textit{ ¶} 24. The New Leniency Notice requires, \textit{inter alia}, that in order to qualify for the reduction of the fine, undertakings must
Corporate statements are evaluative documents in which the undertaking describes the functioning of the cartel based on its own participation. Such statements differ from all other documents that an undertaking may provide to the Commission, such as minutes of corporate meetings, agreements, emails, and any other kind of corporate record or information classified as “pre-existing documents.” Corporate statements are submissions voluntarily provided to the Commission that did not exist prior to the administrative proceedings and that were prepared solely for submission in the Leniency Program. They cannot be “found” by the Commission during a dawn-raid, and are distinct from the statements released by the company in answering the Commission’s traditional requests for information.

Corporate statements have great evidentiary value, especially in cartel cases, in which the probability that the Commission will find a “smoking gun” is extremely low, as undertakings typically develop complex and fine-tuned techniques to keep their collusion secret. The European Court of First Instance (CFI) has recognized the evidentiary nature of corporate statements, stating that “no provision or any general principle of the Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings . . . .” As discussed in Part III, a problem arises from these

provide evidence that has a “significant added value” with respect to the evidence already in the Commission’s possession. Id. It identifies the notion of “added value” as “the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the alleged cartel.” Id. ¶ 25. Similar to a gap found in the 2002 Leniency Notice, the New Leniency Notice lacks guidance as to when such “added value” must be considered “significant.” See Bertus Van Barlingen & Marc Barennes, The European Commission’s 2002 Leniency Notice in Practice, COMPETITION POL’Y NEWSL. (Competition Directorate-Gen. of the Eur. Comm’n, Brussels, Belg.), Autumn 2005, at 13–14. Finally, the New Leniency Notice, for the first time, introduced the concept of “compelling evidence” as evidence that “will be attributed a greater value than evidence such as statements which require corroboration if contested.” New Leniency Notice, supra note 2, ¶ 25. This new distinction will likely generate further confusion and will lower the attractiveness of the program, as an undertaking will cooperate with the Commission only if it can expect an adequate chance of being granted a reduction of the fine.

66. Id. ¶ 6.
67. Id. ¶ 31.
68. See Van Barlingen & Barennes, supra note 64, at 9.
69. Id.
70. Joined Cases T-67, 68, 71, & 78/00, JFE Eng’g Corp. v. Commission, 2004 E.C.R. II-2501, II-2587. The problem often associated with the corporate statements is determining whether, and to what extent, the Commission may rely on corporate statements that are either unsupported by other evidence or contradicted by submissions from other members of the cartel. In JFE Engineering, the Court of First Instance (CFI) stated that “. . . an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.” Id.
corporate statements in connection with the broad interpretation of U.S. federal civil discovery rules, which leaves open the question of whether the defendant is required to produce everything in her possession or custody, or everything under her control. As the second view is the prevailing one, a Leniency applicant must produce, among other things, a copy of the Leniency application, which includes the corporate statements.

C. The Discoverability of Corporate Statements Under the Leniency Notice

The New Leniency Notice acknowledges and warns that discovery of Leniency documents is likely to impair the position of Leniency applicants in civil actions for damages relative to those undertakings that do not cooperate with the E.U. Commission. In turn, this situation would harm the public interest of the Commission in enforcing antitrust rules.

All of the information provided by undertakings in the Leniency Program, including the corporate statements, form the Commission’s administrative file and are covered by the general rule of professional secrecy. The Commission may use the information solely for the purpose for which the information was gathered, and must not disclose it to third parties.

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71. FED. R. CIV. P. 26(a)(1)(b).
72. New Leniency Notice, supra note 2, ¶ 6.
73. Id.
74. See EC Treaty art. 287; Commission Regulation 1/2003, supra note 25, art. 28; Council Regulation 259/68 Laying Down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and Instituting Special Measures Temporarily Applicable to Officials of the Commission, art. 17, 1968 O.J. Spec. Ed. (L 56) 1, (European Economic Community, European Atomic Emergency Community, European Coal and Steel Community).
75. Submission by the Directorate General for Competition of the European Commission, supra note 6, at 4–5.
It should be noted that third-party claimants have no access to the Commission's file or any documents therein. It follows that the only risk of Leniency document disclosure comes from the possibility that a party to the administrative proceeding may be compelled to produce the content of their Leniency application. There is also a distinction between the generality of the documents in the Commission's file and the corporate statements. The Commission will only transmit a corporate statement

... to the competition authorities of the Member States pursuant to Article 12 of Regulation No 1/2003, provided that the conditions set out in the Network Notice are met and that the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.

Furthermore, the Commission

may refuse to transmit information to national courts for 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 jeopardizing the accomplishment of the tasks entrusted to it.

Thus, without the consent of a Leniency applicant, the Commission will not transmit information to a national court voluntarily submitted by that applicant.

While pre-existing documents, which are the most conspicuous part of the Commission's file, are discoverable without constraint, the New

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76. See Commission Notice on the Rules for Access to the Commission File in Cases Pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004, ¶¶ 30–32, 2005 O.J. (C 325) 7, 12 [hereinafter Commission Notice on the Rules for Access to the Commission File]; see also id. ¶ 3, at 7 ("The term access to the file is used in this notice exclusively to mean the access granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections.").

77. As discussed infra Part II.C, even if the defendant claims that none of the Leniency documents are in her possession—perhaps because she filed an oral leniency—it is likely that she may, nonetheless, be compelled to produce the documents anyway because she can request the Leniency documents from the Commission.

78. New Leniency Notice, supra note 2, ¶ 9.

79. Id. ¶ 35.

80. Commission Notice on the Co-operation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, ¶ 26, 2004 O.J. (C 101) 54, 58.

81. Id.

82. But see New Leniency Notice, supra note 2, ¶ 40 ("The Commission considers that normally public disclosure of documents and written or recorded statements received in the
Leniency Notice sets forth specific rules regarding access to corporate statements. In particular, it entitles only the addressees of the statement of objections to access the corporate statements. Other parties, such as third-party complainants, are denied access. The parties who have access to these statements are prohibited from making a mechanical copy of the documents, and the information that they obtain may be used solely "for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings."

This provision, however, while shedding light on a critical, often overlooked, issue, is not entirely unequivocal in the law. It clearly refers to the administrative proceedings before the Commission and the judicial enforcement of the antitrust rules before the CFI and the European Court of Justice (ECJ). Yet, private actions for damages in civil courts of the E.U. Member States simply represent a different—complementary—way to enforce competition rules. Accordingly, the provisions of the Leniency Notice are not an absolute ban on a third-party claimant's request for discovery of the Leniency application or of use of it as evidence in a civil action for damages. While true in principle, as a matter of practice, the possibility for discovery of the Leniency documents for use in private enforcement of E.U. antitrust law is currently limited to England and Wales. None of the other E.U. Member States provides litigants with as powerful a tool as discovery of these documents.

context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations . . .").

83. Id. ¶ 33.
84. Id.
85. Id.
86. Id. ¶ 33, 34. This particularly high level of protection of the corporate statements is secure as long as the Leniency applicant does not disclose their contents. Id. ¶ 33.
87. See Commission Regulation 1/2003, supra note 25, art. 16 (granting Commission decisions binding precedential effect in Member State courts).
88. With reference to the private enforcement of antitrust law in the United Kingdom, it is worth mentioning the recent judgment by the Competition Appeal Tribunal (CAT) in Emerson Elec. Co. v. Morgan Crucible Co. [2007] CAT 28 (U.K.). In Emerson Electric, the claimants brought an action against Morgan Crucible, a member of a graphite cartel that had filed a Leniency application with the E.U. Commission and was granted immunity from fines. Id. ¶ 12, 17; see also Commission Decision of 3 December 2003 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, ¶ 13, 2004 O.J. (L 125) 45 (granting Morgan Crucible immunity for being the first undertaking to report the cartel). One issue before the tribunal was whether a damages action could proceed against the member of a cartel while appeals against the E.U. Commission's decision, brought by other cartel members, were pending before the CFI. Id. Emerson Elec. Co., [2007] CAT 28, at ¶¶ 49–50. The CAT had ruled previously that claimants seeking to recover antitrust damages from a Leniency applicant need to obtain permission from the tribunal in order to proceed with the claim. Id. ¶ 66. On November 16, 2007, the CAT permitted the claim to proceed, finding that a further delay in the discovery process could compromise the future availability
With the aim to frustrate motions to compel discovery of the Leniency submissions, the New Leniency Notice permits undertakings to submit oral corporate statements. In practice, corporate executives appear at the Commission’s offices and dictate to the officials all that they know about the infringement. The Commission records the speech and transcribes it to allow the undertaking to check its accuracy. Although providing the undertaking with a written copy of the oral submissions could subvert the purpose of the oral procedure, checking the transcript is fundamental to avoiding potential challenges or litigation over the most important evidence of the infringement.

The oral leniency procedure can frustrate any future discovery request, as the undertaking is given no copy of the transcript for its personal file, and the U.S. civil courts should consider the transcripts to be working documents of the Commission’s officials. Some commentators, however, argue that the documents are still under the control of the undertaking, since the latter has the right to request them from the Commission. Accordingly, a U.S. court could order the undertaking to obtain a copy of the documents from the Commission.

The anti-discovery goals pursued by the Commission in its oral leniency procedure may be frustrated, moreover, by its own administrative practice of statements of objections. Parties to administrative proceedings receive a written version of the statement of objections in which the Commission supports its findings by quoting relevant portions of corporate statements provided by Leniency applicants. Hence, although the

of certain documents. Emerson Elec. Co., [2007] CAT 28 at ¶ 17. The ruling is particularly relevant not only for the likely negative impact on the efficient enforcement of the Leniency Program, which could derive from the unlimited and unconstrained discovery of evidence regarding an infringement for which there is an outstanding appeal, but also the joint and several liability for antitrust infringements. Id. ¶ 15.

89. New Leniency Notice, supra note 2, ¶ 32.
90. Id.
91. Id.
92. Because, at that point, the undertaking not only has control over the documents, but, arguably, materially possesses them.
93. See New Leniency Notice, supra note 2, ¶ 32 (stating that noncompliance with the requirement to the accuracy of the transcript “may lead to the loss of any beneficial treatment under [the] Notice”).
94. See Nordlander, supra note 5, at 657–58.
95. Moreover, the U.S. Federal Rules of Civil Procedure (the Rules) contain other provisions that can frustrate the bans of, and limits to, the discovery of the Commission’s file set forth in the New Leniency Notice, such as depositions and interrogatories. See discussion infra Part III.
97. See Submission by the Directorate General for Competition of the European Commission, supra note 6, at 4.
oral submissions are not discoverable as documents, their content may be disclosed in a document—the statement of objections—that eventually may be provided to the statement's addressees and, in a non-confidential version, to third-party claimants that join the Commission's proceedings.\textsuperscript{98} The Commission, aware of the adverse effect of this practice, began replacing the verbatim quotations of corporate statements with a summary of their contents.\textsuperscript{99} In any event, the statement of objections continues to be subject to discovery. Accordingly, the guarantees provided by oral leniency are temporally limited, since they "expire" as soon as the Commission serves the members of a cartel with the statement of objections.\textsuperscript{100} At that point, it is difficult to deny discovery on the basis of the provisions of the New Leniency Notice, since the cartel members physically possess the statement of objections and, thus, are deemed to have control over it. Comity then remains the only defense available to the defendant seeking to avoid discovery of the corporate statements.

Finally, there are at least two methods that could frustrate the intended limit in the New Leniency Notice to discovery of the Commission's file. First, the power of the U.S. federal courts to order the production of certain documents is not limited by foreign laws or "blocking statutes"—including the new Leniency Notice—that prohibit disclosure.\textsuperscript{101} Second, even if corporate statements are not available, a plaintiff could still serve a notice of deposition on the management or employees of the Leniency applicant under Rule 27 of the Federal Rules of

\textsuperscript{98} So far, it appears that there is no alternative way for the statement of objections to provide the Commission's position regarding a possible infringement to persons or undertakings before adopting a decision that negatively affects their rights. The Commission's obligation to issue a statement of objections derives from the addressee's right of defense, which requires that they be given the opportunity to make their position known regarding any objection that the Commission may make. Commission Regulation 773/2004, \textit{supra} note 96. Also, note that the addressees of the statement of objections have no access to the parties' replies to the statement of objections. \textit{See} Commission Notice on the Rules for Access to the Commission File, \textit{supra} note 76, \S\ 27.


\textsuperscript{100} Note, also, that the Commission's proceedings may last from one to several years, making it impossible to predict the duration of the oral leniency "guarantee" against potential motions to compel discovery.

\textsuperscript{101} Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. Iowa, 482 U.S. 522, 544 n.29 (1987); \textit{see also} discussion \textit{infra} Part III.
Civil Procedure (the Rules), or an interrogatory under Rule 33, seeking the information provided to the Commission in the Leniency procedure.\textsuperscript{102}

D. Noncompliance with the New Leniency Notice’s Provisions on Discoverability

As discussed in Part II(D), the New Leniency Notice provides that information obtained from the Commission's file may be used only for the purposes of judicial or administrative proceedings applying the European Community's competition rules.\textsuperscript{103} Using the corporate statements in a different manner during a proceeding could be regarded as a lack of cooperation, and it may cause the undertaking to lose the advantages that it obtained under the program.\textsuperscript{104} If any alternative use is made after the Commission has adopted its final decision, “the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking.”\textsuperscript{105} If the illegal disclosure or use of the Leniency documents involved an external counsel, the Commission may solicit the bar of that counsel to take disciplinary action.\textsuperscript{106} As stated by the European Commission Directorate-General for Competition (DG COMP), “documents obtained from the European Commission by means of access to [the Commission’s] file, may not be used for any other purpose, may not be disclosed and are to be preserved from disclosure and/or discovery procedures.”\textsuperscript{107}

E. Commission Regulation on Settlement Procedure in Cartel Cases

In June 2008, the Commission adopted Regulation (EC) No. 622/2008, which provides—for the first time in Europe—a settlement procedure in cartel cases.\textsuperscript{108} The purpose of the settlement procedure is to minimize those costs and resources utilized in investigating potential violations of Article 81 of the E.C. Treaty, thereby reaching greater effi-

\textsuperscript{102} See Nordlander, supra note 5, at 658.
\textsuperscript{103} New Leniency Notice, supra note 2, ¶ 34.
\textsuperscript{104} See Raw Tobacco Italy, supra note 99, ¶ 9.3.1 (revoking immunity granted to Deltafina under the 2002 Leniency Notice because the company disclosed its collaboration with the Commission to third parties).
\textsuperscript{105} New Leniency Notice, supra note 2, ¶ 34.
\textsuperscript{106} Id.
\textsuperscript{107} See Submission by the Directorate General for Competition of the European Commission, supra note 6, at 5.
ciency in terms of timely punishment, deterrence, and reduction of follow-on litigation. The procedure enables undertakings subject to cartel investigations to engage in settlement discussions with the Commission and to acknowledge their involvement and liability for actions in the cartel in exchange for a ten percent reduction in the fine.

The settlement agreement is not an alternative to the Leniency Program. In fact, the Notice on Settlement Conduct states that the two procedures may apply to the same conduct and within the same proceeding. The benefits that may be awarded under the two procedures are cumulative, provided that the conditions required by each are satisfied.

However, the settlement procedure may not lead to negotiation as to the existence of the infringement, or the appropriate sanction, and a final decision establishing liability for infringement of E.U. antitrust law is issued in every case. From the point of view of an undertaking subject to cartel investigations, the settlement procedure may lead to substantial benefits, such as: (i) minimization of the time and costs associated with the administrative procedure; (ii) a ten percent reduction in the fine; (iii) the possibility of coupling this reduction with the benefits derived from a Leniency application; and (iv) the chance to influence the Commission's decision in a more effective fashion than that which is available through the "standard" procedure.

The Settlement Regulation provides the chance to submit oral settlements—subject to the same procedure provided by the New Leniency Notice for oral Leniency—and protects the settlement submissions in exactly the same way that the New Leniency Notice protects the corporate statements. In particular, access to the settlement submissions is granted only to the addressees of the statement of objections who have not requested settlement, and these submissions may only be used "for the purposes of judicial or administrative proceedings for the application

110. Id.
111. Id. ¶ 20.
112. Id. ¶ 32.
113. Id. ¶ 1.
114. Id.
115. Id. ¶¶ 1, 33. Note, also, that if an undertaking applies for immunity from, or a reduction of, fines after the time limit set by the Commission for the settlement procedure, the Commission may disregard the application. Id. ¶ 13.
116. Id. ¶¶ 2, 3.
117. Id. ¶ 38.
118. Compare id. ¶ 35, with New Leniency Notice, supra note 2, ¶ 33 (setting forth the same limited access to settlement submissions and corporate statements, respectively).
III. THE DISCOVERY RULES OF THE U.S. FEDERAL RULES OF CIVIL PROCEDURE

The application of the U.S. Federal Rules of Civil Procedure to the discovery of Leniency documents is not straightforward. Since the United States is one of the signatory countries to the Hague Convention on the Taking of Evidence in Civil or Commercial Matters, when the discovery of evidence located abroad is at issue, the threshold issue is whether the plaintiff must follow the procedures set forth in the Hague Convention or those set forth in the Federal Rules of Civil Procedure.

The U.S. Supreme Court addressed this issue in Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa (Aerospatiale). The Court determined that, where a district court has jurisdiction over a foreign litigant, "the Hague Convention procedures for the taking of evidence are not the exclusive means for discovery." According to the Supreme Court, the Hague Convention procedures aim to "facilitate the transmission and execution of Letters of Request" and "improve mutual judicial co-operation in civil or commercial matters." These procedures are not mandatory, and the application of the principle of international comity compels a balancing of the interests of the foreign nation and the United States. The Court did not,

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119. Id. ¶ 35; see also id. ¶¶ 36-40 (describing other procedures that restrict access to information in settlement submissions).

120. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention]. The general purpose of the Hague Convention is to provide the party initiating the proceeding with a tool equivalent to that available to it in its domestic jurisdiction. See James P. Springer, An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases, 22 GEO. WASH. J. INT'L L. & ECON. 277, 313 (1989). Moreover, the Hague Convention aims to ensure that discovery closely adapts to the practices and procedures of the requesting sovereign, so that the evidence obtained will be usable in the requesting State. Id. at 314.

121. See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 (1987) ("We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.").

122. Id. at 544-46.

123. Id. at 544.

124. Id. at 534.

125. Id. at 546; see also Hannah L. Buxbaum, Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from Aerospatiale, 38 TEX. INT'L L.J. 87 (2003); Patricia Anne Kuhn, Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided
however, provide clear guidance for balancing, as it stated that district courts should decide whether to use the Hague Convention procedures on a case-by-case basis, based on which procedure is likely to be the most effective. With this lack of clarity, "the lower courts... found the Aerospatiale comity analysis cumbersome and unhelpful and have almost uniformly refused to order extraterritorial discovery pursuant to the Hague [Convention]."

The U.S. federal civil discovery rules set forth in the Federal Rules of Civil Procedure are powerful procedural tools, as they can impose on a party the heavy burden of producing everything that is relevant to the litigation, including self-incriminating documents. From a strategic viewpoint, the discovery rules represent a strong incentive to sue, especially when combined with the prospect of treble damages. The discovery of the defendant’s documents offsets, or substantially lessens, the plaintiff’s cumbersome task of providing the court with evidence of the defendant’s wrongdoing. Nevertheless, discovery vastly increases the time and cost of litigation, and while at the pre-trial stage, it represents the main leverage inducing a defendant to settle, even when the case could be successfully litigated.

126. Aerospatiale, 482 U.S. at 543-44; see also id. at 546 ("The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the government whose statutes and policies they invoke.").
128. See Nordlander, supra note 5, at 648-49.
129. Id. at 648.
130. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-35 (1984) ("It is clear from experience that pretrial discovery has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties."). In discussing discovery in securities cases, which face similar evidentiary issues to those that arise in discovery for antitrust cases, the Supreme Court stated, The potential for possible abuse of the liberal discovery provisions of the federal rules may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of the Federal Rules of Civil Procedure and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

The set of provisions governing U.S. civil discovery are far from isolated and unrelated to one another, but, rather, represent "an integrated mechanism for narrowing the issues and ascertaining the facts."\textsuperscript{131} The unique nature of U.S. discovery rules derives from the broad scope of rules twenty-six through thirty-seven of the Federal Rules of Civil Procedure and their construction by U.S. courts. Discovery rules are construed liberally in order to "achieve the purpose for which they are intended."\textsuperscript{132} The intended purpose of the Rules is to allow a party to "prepare for trial in a manner that will promote the just, speedy, and inexpensive determination of the action as is enjoined by Rule 1."\textsuperscript{133} In particular, a broad interpretation of the discovery rules should minimize the risk of "surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify, and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial."\textsuperscript{134} The basic assumption that justifies such a broad interpretation of the discovery rules is that the acquisition of evidence is different, and distinct, from the subsequent potential admissibility and use of that evidence at trial.\textsuperscript{135}


\textsuperscript{132} 8 Wright et al., supra note 131, § 2001.

\textsuperscript{133} Id.; see Fed. R. Civ. P. 1 ("[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

\textsuperscript{134} 8 Wright et al., supra note 131, § 2001; see also Hickman v. Taylor, 329 U.S. 495, 500 (1947). In Hickman, the Court stated,

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure . . . . The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

\textit{Id.}

\textsuperscript{135} See 8 Wright et al., supra note 131, § 2008 ("[There] is an explicit recognition that the question of relevancy is to be more loosely construed at the discovery stage than at trial, where the relevance question for purposes of admissibility is governed by the Federal Rules of Evidence.").
Rule 34(a) defines the scope of the production of documents, stating,

A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information . . . or

(B) any designated tangible things . . . . 136

However, there is concern about U.S. courts' application of Rule 34, since the current standard is that "[d]ocuments that are not trial-preparation material are freely discoverable on request under Rule 34." 137 Moreover, Rule 34 does not provide a clear standard to identify the documents for production, since it only requires a party making the document request to "describe with reasonable particularity each item or category of items to be inspected." 138 Accordingly, courts require that "the designation be sufficient to apprise a person of ordinary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced." 139

More generally, Rule 26 governs the specific discovery mechanisms and contains the general provisions on the duty of disclosure, delimitates the scope of discovery, and coordinates the use of other discovery rules. 140 The plaintiff may seek discovery of "any nonprivileged matter that is relevant to any party’s claims or defense . . . ." 141 The precise definition of what is relevant to a litigation is not always clear, and Rule 26 is not susceptible to strict interpretation. 142 However, Rule 26(b)(2) sets forth important limitations on discovery, stating that

136. FED. R. CIV. P. 34(a).
137. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2205 (2d ed. 1994); see also FED. R. CIV. P. 26(b)(3)(a) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . . .").
139. 8A WRIGHT ET AL., supra note 137, § 2211.
140. FED. R. CIV. P. 26; see also 8 WRIGHT ET AL., supra note 131, § 2001.
141. FED. R. CIV. P. 26(b)(1).
142. 8 WRIGHT ET AL., supra note 131, § 2008 ("The boundaries defining information that is relevant to the subject matter involved in the action are necessarily vague and it is practically impossible to state a general rule by which they can be drawn."); see also Nordlander, supra note 5, at 648.
[a] court must limit the frequency or extent of discovery otherwise allowed . . . if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.¹⁴³

Although the Leniency documents are not explicitly covered by those exemptions, Rule 26 "grants [a] court discretion to limit discovery on several grounds,"¹⁴⁴ including the principle of international comity.¹⁴⁵ Thus, through Rule 26, courts could exempt Leniency documents from discovery on the basis of comity considerations.

IV. THE PRINCIPLE OF INTERNATIONAL COMITY

A. The Principle of International Comity in U.S. Courts

The principle of international Comity aims to avoid the conflict of laws between States when the interests of more than one sovereign are

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143. FED. R. CIV. P. 26(b)(2)(c) (emphasis added).
145. Id.; see also Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543-44 (1987). Another doctrine employed in opposing discovery of Leniency documents is investigative privilege. See In re Vitamins Antitrust Litig., Misc. No. 99-197, 2002 U.S. Dist. LEXIS 25825, at *36-38 (D.D.C. Dec. 28, 2002). However, in Vitamins, the court rejected the claim based on investigative privilege and adopted the Special Master's argument that the European Commission may invoke the privilege only with respect to documents in its possession. Id. at *37-38, 64-65. Since the requested corporate statements were in the defendant's possession, and not the Commission's, the Commission could not invoke investigative privilege. Id. at *38. Under the New Leniency Notice, undertakings may submit oral statements, the transcription of which remains with the E.U. Commission, and undertakings are not provided with a copy, potentially shielding them from discovery. New Leniency Notice, supra note 2, ¶ 32. Nevertheless, the Commission faces the obstacle that U.S. courts may order discovery even if the information requested is subject to a non-disclosure law—so-called "blocking statutes"—in the foreign jurisdiction. See Aerospatiale, 482 U.S. at 544; see also Nordlander, supra note 5, at 657-59 (analyzing the E.U. Commission's arguments regarding the investigative privilege in opposing discovery of the Leniency program in a U.S. civil claim).
involved.\textsuperscript{146} While this purpose is widely shared by the members of the international community, its exact content and scope are subject to different interpretations.\textsuperscript{147} The doctrine of international comity has long been debated in U.S. courts.\textsuperscript{148} One of its early applications relates to the limits of the extraterritorial reach of the Sherman Act in cartel cases, where, although the anticompetitive conduct had occurred outside of U.S. territory, it affected U.S. trade or commerce.\textsuperscript{149} In cases presenting such "diversity" patterns, the principle of international comity provides guidance in determining whether U.S. courts have subject-matter jurisdiction in a particular case.\textsuperscript{150} The principle of international comity compels national courts to give due regard to the interests of foreign sovereigns when enforcing the rights of citizens of their own State that will affect interests of other sovereigns.\textsuperscript{151} Therefore, courts should act in a manner that exhibits respect for the jurisdiction, laws, or judicial decisions of another country.\textsuperscript{152} The Supreme Court in \textit{Aerospatiale} stated that comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.\textsuperscript{153}

\textsuperscript{147} \textit{Aerospatiale}, 482 U.S. at 543–44.
\textsuperscript{148} See Sam Foster Halabi, \textit{The "Comity" of Empagran: The Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction Over International Cartels}, 46 HARV. INT'L L.J. 279 (2005); Martinez, \textit{supra} note 125.
\textsuperscript{149} See Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Discussion of the extraterritorial application of U.S. antitrust law originated in the very language of section 1 of the Sherman Act, which permits the application of the Act to agreements that restrain trade within the United States "or with foreign nations." 15 U.S.C. § 1 (2000); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). The subsequent Foreign Trade Antitrust Improvements Act (FTAIA) shed light on the scope of U.S. jurisdiction over cartel cases. Foreign Trade Improvements Act of 1982, 15 U.S.C. § 6(a) (2000). In fact, the FTAIA adopted even more sibylline language, providing U.S. federal district courts with subject-matter jurisdiction over conduct that "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce and that "give[s] rise to a claim under the provisions of [the Sherman] Act . . ." \textit{Id.}
\textsuperscript{150} Halabi, \textit{supra} note 148, at 286.
\textsuperscript{151} \textit{In re Rubber Chems. Antitrust Litig.}, 486 F. Supp. 2d 1078, 1081 (N.D. Cal. 2007).
\textsuperscript{152} \textit{Id.}
The Supreme Court has recognized that the Restatement (Third) of Foreign Relations Law of the United States (the Restatement) provides a framework for comity analysis. Although the Court acknowledged that the Restatement may not "represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states," the Court stated that it addressed "[t]he nature of the concerns that guide a comity analysis . . . ." In particular, the Restatement provides a list of factors that courts must consider in their comity analysis, including,

1. the importance to the . . . litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

This list of factors has been used, and further elaborated on, by the U.S. Department of Justice (DOJ) and the Federal Trade Commission in their 1995 Antitrust Enforcement Guidelines for International Operations. The Guidelines provide that, in their comity analysis, courts should assess

1. the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;

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154. See Aerospatiale, 482 U.S. at 544 n.28.
155. Id.
3. the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;

4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;

5. the existence of reasonable expectations that would be furthered or defeated by the action;

6. the degree of conflict with foreign law or articulated foreign economic policies;

7. the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and

8. the effectiveness of foreign enforcement as compared to U.S. enforcement action.158

The relative weight given to each factor in a court's comity analysis will depend on the specific facts and circumstances of each case.159

B. The Principle of International Comity in United States-European Community Agreements


The 1991 Competition Laws Agreement sets forth a detailed mechanism of early notification and consultation regarding both merger and non-merger policy decisions that may affect important interests of the other party to the Agreement.162 It also lists several factors to consider when balancing the competing interests in cases in which the enforcement activity in one jurisdiction may adversely affect important interests

158. Id.
159. Id.
162. 1991 Competition Laws Agreement, supra note 160, art. II.
of the other jurisdiction.\textsuperscript{163} Most importantly, Article VIII of the Agreement regulates the disclosure of confidential information and limits the right of each party to access such information "if disclosure of that information (a) is prohibited by the law of the Party possessing the information or (b) would be incompatible with important interests of the Party possessing the information."\textsuperscript{164} The 1998 Comity Principles Agreement recognizes that the 1991 Competition Laws Agreement "contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement" and interprets the principle of positive comity in such a way as to strengthen the effectiveness of the 1991 Competition Laws Agreement.\textsuperscript{165}

In applying these limits to the disclosure of information provided by Leniency applicants, it is evident that corporate statements in particular should be exempt from disclosure, since they meet both of the thresholds set forth in Article VIII of the 1991 Competition Laws Agreement. Under the New Leniency Notice, the information provided by Leniency applicants cannot be disclosed or used for any purpose other than the enforcement of Article 81 of the E.C. Treaty.\textsuperscript{166} Clearly, private actions for damages in the United States do not constitute enforcement of Article 81. Moreover, information provided by Leniency applicants cannot be disclosed to third parties—including U.S. courts—without the applicant's consent, because this would "undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of [Transparency] Regulation (EC) No 1049/2001 of the European Parliament and of the Council."\textsuperscript{167} Finally, the Commission has a critical interest in not disclosing information provided for the purpose of the New Leniency Notice, as it would likely undermine the effective enforcement of E.U. competition law by dramatically decreasing the incentives for undertakings to cooperate in the Commission's anti-cartel activity.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} art. VI(3).
\item \textsuperscript{164} \textit{Id.} art. VIII(1); see also \textit{id.} art. VIII(2). Article VIII(2) states,
\begin{quote}
Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.
\end{quote}
\item \textsuperscript{165} 1998 Comity Principles Agreement, \textit{supra} note 161, pmbl.
\item \textsuperscript{166} \textit{See} New Leniency Notice, \textit{supra} note 2, \S\ 34.
\item \textsuperscript{167} 2002 Leniency Notice, \textit{supra} note 52, \S\ 32; \textit{see also} INT'L COMPETITION NETWORK, ANTI-CARTEL ENFORCEMENT TEMPLATE II (Sept. 16, 2005), \textit{available at} http://ec.europa.eu/comm/competition/international/multilateral/template.pdf.
\item \textsuperscript{168} \textit{See} New Leniency Notice, \textit{supra} note 2, \S\ 6.
\end{itemize}
From an antitrust policy perspective, the foregoing considerations require that the Commission's administrative file be exempt from the general rule of disclosure. Stated in other words, U.S. agencies should be prevented from obtaining this particular type of information, the disclosure of which is "prohibited by the law of the Party possessing the information," or would otherwise "be incompatible with its important interests."\(^{169}\)

The fundamental weakness of this interpretation of the 1991 Competition Laws Agreement is that the latter only applies to the relationships between administrative agencies and is not binding on U.S. courts. However, a construction of the 1991 Competition Laws Agreement respectful of important E.U. antitrust policy considerations would urge U.S. courts to interpret the meaning of its provisions in light of the legal and cultural environment in which they are enforced. Currently, in the United States, administrative agencies and private plaintiffs both enforce antitrust rules.\(^{170}\) The United States, more than any other jurisdiction, has a litigious culture that promotes private antitrust actions for damages.\(^{171}\) As a consequence, interpreting the provisions of the 1991 Competition Laws Agreement in such a way that they only apply to cases of public enforcement of the antitrust laws may substantially limit the scope of the provisions to a residual part of litigation and significantly weaken the overall effectiveness of the 1991 Competition Laws Agreement.

A suggested alternative interpretation of Article VIII of the 1991 Competition Laws Agreement is that it does not represent a technical or procedural rule regulating the disclosure of a particular type of information between agencies, but a set of policy provisions whose purpose is deeply shared by the policymakers of the United States and Europe. Accordingly, U.S. courts should look to those provisions as guidance in deciding whether to compel discovery of Leniency documents in a particular case.\(^{172}\)

\(^{169}\) 1991 Competition Laws Agreement, supra note 160, art. VIII(1).

\(^{170}\) See Bloom, supra note 21, at 433.

\(^{171}\) Id. at 436.

\(^{172}\) In addition to the comity justification, there are other compelling reasons that suggest the non-discoverability of the Leniency documents. Leniency applicants and, in general, addressees of a statement of objection, are themselves subject to a number of limitations regarding access and disclosure of the information on file with the Commission. See supra Part II.C.
C. The Principle of Comity and Discovery of the Leniency Documents on File with the E.U. Commission

U.S. federal courts have examined comity limits on the discovery of Leniency documents on file with the E.U. Commission in only two cases: In re Vitamins Antitrust Litigation (Vitamins)\textsuperscript{173} and In re Methionine Antitrust Litigation (Methionine).\textsuperscript{174} Nonetheless, the comity analysis resulted in two diametrically opposed opinions.\textsuperscript{175}

In Vitamins, the Special Master recommended granting plaintiffs' motion to compel discovery of the Leniency documents, finding that the E.U. Commission's comity concerns were "insufficient to protect the defendants' submissions to these authorities from disclosure standing on their own and when they are weighed against the U.S. interests in open discovery and enforcement of its antitrust laws."\textsuperscript{176}

In contrast, the U.S. District Court for the Northern District of California, in Methionine, denied a motion to compel discovery, finding that the E.U. Commission's interests outweighed the plaintiffs' interests in obtaining the unredacted copy of the defendant's Leniency application.\textsuperscript{177} The Methionine court agreed with the Special Master that production of the corporate statement might have a chilling effect on antitrust enforcement in the European Union.\textsuperscript{178} Nonetheless, the weight of the opinion should not be overestimated, as the comity analysis was heavily influenced by the minimal value that the discovery of the full, unredacted version of the defendant's Leniency application would have added to the already exhaustive information possessed by the plaintiff.\textsuperscript{179}

\textsuperscript{175} Although the Methionine court carried out a comity analysis, its opinion was strongly influenced by the exceptional circumstance that the plaintiffs already possessed a redacted copy of the defendant's corporate statement. \textit{Id}.
\textsuperscript{176} Vitamins, 2002 U.S. Dist. LEXIS 25815, at *125.
\textsuperscript{177} Methionine, Report of Special Master, at 13.
\textsuperscript{178} \textit{Id}.
\textsuperscript{179} Nordlander, \textit{supra} note 5, at 652.
V. THE CALIFORNIA DISTRICT COURT'S ORDER IN IN RE RUBBER CHEMICALS ANTITRUST LITIGATION

A. The Relevant Facts

The California District Court’s order in In re Rubber Chemicals Antitrust Litigation follows the Vitamin and Methionine cases with an important analysis of the comity principles in relation to the discovery of Leniency submissions.

In 2002, Flexsys N.V. (Flexsys) disclosed to the DG COMP the existence of anti-competitive practices in the rubber chemicals industry and solicited immunity from fines pursuant to the Leniency Program. After a three-year investigation, the Commission found that eight companies, including Flexsys, had infringed Article 81(1) of the E.C. Treaty by participating in agreements and concerted practices “consisting of price fixing and the exchange of confidential information in the rubber chemicals sector”—antioxidants, antiozoants, and primary accelerators—in the EEA and in worldwide markets. The Commission imposed fines totaling €88.61 million, and Flexsys was granted immunity from fine under the 2002 Leniency Program.

In 2006, Kumho Petrochemical (Kumho) brought a civil antitrust suit against Flexsys America LP, its European affiliate, Flexsys, and other companies, alleging that they unlawfully excluded Kumho from the U.S. rubber chemicals market. During discovery, Kumho filed a motion to compel production of Flexsys America’s documents relating to the investigations of suspected anticompetitive conduct in the rubber chemicals sector conducted in the United States, Canada, and the European Union.

Flexsys objected to Kumho’s requests on a variety of grounds but finally produced documents relating to the U.S. and Canadian investigations, as well as all of the business information and pre-existing documents that had been provided to the European Commission. Those

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182. The companies involved in the sanctioned cartel were Flexsys N.V., Bayer AG, Crompton Manufacturing Company Inc. (formerly Uniroyal Chemical Company Inc.), Crompton Europe Ltd., Chemtura Corporation (formerly Crompton Corporation), General Química SA, Repsol Química SA, and Repsol YPF SA. Id. ¶ 1.
183. Id. ¶¶ 2, 30. The cartel’s actions also affected markets in Canada and the United States. See Rubber Chems., 486 F. Supp. 2d at 1080.
185. Id. ¶ 23.
186. Rubber Chems., 486 F. Supp. 2d at 1080.
187. Id.
188. Id.
189. Id. at 1080–81.
documents totaled some 38,000 pages.\textsuperscript{190} The only documents that Flexsys refused to produce were the communications and corporate statements it provided to the E.U. Commission under the Leniency Program (European documents).\textsuperscript{191}

B. Analysis of the Case

The order of the California district court is one of the few cases in which a U.S. court performed the comity analysis in a way that gave significant weight to the interests of the E.U. Commission in preserving and enhancing the enforcement of E.U. antitrust laws. Similar to the Vitamins and the Methionine cases, the California district court applied the Aerospatiale multi-prong test.\textsuperscript{192} This test requires courts to balance several competing factors, which are:

(1) the importance to the . . . litigation of the documents or other information requested;

(2) the degree of specificity of the request;

(3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information; and

(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.\textsuperscript{193}

Judge Zimmerman carried out a comprehensive comity analysis of all of the interests involved in the litigation.\textsuperscript{194} The court recognized that,

\begin{itemize}
\item \textsuperscript{190} Defendant Flexsys America L.P.'s Memorandum in Opposition to Plaintiff Korea Kumho Petrochemical Co., Ltd.'s Motion to Compel Production at 3, \textit{In re Rubber Chems.} Antitrust Litig., 486 F. Supp. 2d 1078 (N.D. Cal. 2007).
\item \textsuperscript{191} \textit{Rubber Chems.}, 486 F. Supp. 2d at 1081.
\item \textsuperscript{192} See supra text accompanying note 157.
\item \textsuperscript{193} Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.28 (1987) (citing \textit{Restatement}, supra note 156, § 442); see also Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992). The court stated,
\begin{quote}
[T]his list of factors is not exhaustive. Other factors may be considered, such as the extent and the nature of the hardship that inconsistent enforcement would impose upon the person, . . . [and] the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
\end{quote}
\textit{Richmark}, 959 F.2d at 1475 (internal quotation and citations omitted).
\item \textsuperscript{194} \textit{Rubber Chems.}, 486 F. Supp. 2d at 1082–84.
\end{itemize}
The E. U. Leniency Program

while comity is not "a matter of absolute obligation," a court undertaking review "should exercise special vigilance to demonstrate due respect for any sovereign interest expressed by a foreign state."195 Although it is true that the Federal Rules of Civil Procedure authorize discovery of any evidence that is relevant to any party's claim or defense, Rule 26 grants courts the discretion to limit discovery on several grounds—comity is one of them.196

Plaintiffs in Rubber Chemicals attempted to refute the applicability of comity by arguing that the E.U. Commission is a mere administrative enforcer of European law and, thus, it is not entitled to comity.197 The court rejected this argument, relying on Supreme Court precedent that the Commission is not just the administrative and executive arm of the European Union,198 but also the entity responsible for a "wide range of subject areas covered by the European Union Treaty ... includ[ing] the treaty provisions, and pursuant regulations, governing Competition."199 Accordingly, the E.U. Commission represents a tribunal within the meaning of 28 U.S.C. § 1782(a), and is entitled to comity.200

Having determined this, the magistrate judge then applied the Aerospatiale test.201 As to the first factor—importance of the documents requested—the court "fail[ed] to see the importance or relevance of the E.C. documents," since these documents pertained to the defendant's participation in a conspiracy to exclude competitors from the European rubber chemicals market.202 Moreover, as to the infringement that intersected with U.S. and Canadian markets, defendants had already produced all documents relating to the investigations by the DOJ and the


196. Rubber Chems., 486 F. Supp. 2d at 1081.

197. Id. at 1081–82. The plaintiffs also argued that the letter filed with the court by Kirtikumar Mehta, Director of DG Competition, did not accurately state the Commission's view. Id. at 1082. The court rejected this claim, finding that the "DG Competition, operating under the Commission's aegis, is the European Union's primary antitrust law enforcer." Id. (quoting Intel Corp., 542 U.S. at 250). Therefore, the court held that "[f]ar from being a mere 'bureaucrat,' ... Mr. Mehta seems analogous to the head of the Justice [D]epartment's Antitrust Division," and, accordingly, Mehta's letter expressed the views of the Commission. Id.

198. Id. at 1081.

199. Id. (citing Intel Corp., 542 U.S. at 250).


201. Rubber Chems., 486 F. Supp. 2d at 1082.

202. Id. at 1083.
Canadian Competition Bureau. The production of these documents was significant in the court’s appraisal, as “courts are less inclined to ignore [a] foreign state’s concerns where . . . the evidence sought is cumulative of existing evidence.” The court found that the European documents not submitted were not relevant under this prong of the Aero-
spatiale test.

As to the second factor—the specificity of the request—the court cited the well-established rule that “generalized searches for information whose disclosure is prohibited under foreign law are discouraged.” However, plaintiffs’ request for the European documents was sufficiently specific, and Flexsys did not object on this ground. Thus, the court found that the specificity threshold had been met.

With regard to the third factor—whether the information originated in the United States—the court held that the European documents did not originate in the United States, as they were prepared by Flexsys, N.V.—not Flexsys America—and Commission officials in Belgium. The fact that Flexsys could access these documents in the United States was “not dispositive” of the issue for the court.

The court then considered the fourth factor in the comity analysis—whether the information could be obtained through different means. The court found in favor of the defendant, holding that Kumho’s request consisted, in large part, of information it already possessed. In particular, the court considered whether the Commission’s decision itself provided a significant amount of information on the conspiracy. The court deemed it unlikely that the information provided in the European documents could be more relevant than that submitted to the DOJ in the course of its investigation. The court reasoned that since “Kumho as-
sert[ed] that Flexsys [had] conspired to keep it out of the U.S. market, . . . any admission made to DOJ likely involves an admission of wrong-
doing within the [United States].” Moreover, the court ruled that when

203. Id. at 1080–81.
204. Id. at 1082 (citing Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992)).
205. Id. at 1083.
206. Id. (citing Richmark, 959 F.2d at 1475).
207. Id.
208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
"the information sought can easily be obtained elsewhere, there is little or no reason to offend foreign law." 216

Finally, the court analyzed the last, and most complex, factor in the comity analysis—whether noncompliance with the discovery request would undermine important interests of the United States, or, in contrast, whether compliance would undermine important interests of the State in which the information is located. 217 The answer to these questions required a balancing of the principle of comity with the policies underlying the Federal Rules of Civil Procedure. 218 Moreover, as the Ninth Circuit Court of Appeals stated when performing a similar analysis, courts must consider "expressions of interest by the foreign state," "the significance of disclosure in the regulation . . . of the activity in question," and "indications of the foreign State's concern for confidentiality prior to the controversy." 219 The court recognized the importance of the letter filed by DG COMP as expressing the Commission's "strong objection to the production of the statements sought by Kumho." 220 The court also weighed the legal constraints imposed on Flexsys by E.U. law, which prevented the company from disclosing the information sought by Kumho. 221

Moreover, while minimizing the fact that the Commission's investigation had already concluded when Kumho sought discovery, and, thus, there was no concern about the antitrust proceedings, the court assessed whether producing the European documents would undermine the Commission's ability to prosecute future investigations. 222 Based on all of these concerns, the Court concluded,

[A]ny marginal benefit that the plaintiff would gain from disclosure is outweighed by the impact that disclosure will have on the Commission's interests in the effective enforcement of its competition laws and its cooperation with the U.S. to enforce those

216. Id.
217. Id. at 1083–84.
218. Id. at 1084; see also Restatement, supra note 156, § 442.
220. Rubber Chems, 486 F. Supp. 2d at 1084. The Court noted, "The Commission states that given the crucial investigative and evidentiary value of corporate statements and voluntary submissions, the protection of these documents is 'indispensable to ensure the viability and efficacy of the Leniency Programme,' which the Commission has described as the E.U.'s most effective tool in combating illegal cartels." Id.
221. Id.
222. Id.; see also New Leniency Notice, supra note 2, ¶ 40 ("The Commission considers that normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests . . . even after the decision has been taken." (emphasis added)).
After considering the Commission’s “clear position and articulated reasons” why production would impair the Leniency Program, and performing a comity analysis considering the “sensitive balance” between the “conflicting interests of comity and discovery,” the court determined that “principles of comity outweigh the policies underlying discovery.” Accordingly, the court issued an order denying the motion to compel discovery of the European documents.

VI. CONCLUSION

The threat of discovery of Leniency documents, and the associated actions for damages, are critical factors affecting the enforcement of the Leniency Program. The undertakings’ primary leverage for collaborating with public agencies in the dismantling of secret cartels is the chance to be awarded immunity from, or a reduction of, the fine. Unlike the U.S. antitrust system, that of the European Union does not criminalize anticompetitive practices, nor does it rely on a well-developed private enforcement of antitrust rules.

The U.S. government is aware of the interplay between private and public enforcement, as well as the disincentives that discovery of documents submitted to antitrust agencies under a leniency program are likely to have on private enforcement. In fact, in 2004, Congress passed the Antitrust Criminal and Penalty Enhancement Act, which attempts to offset some of the potential disincentives created by the federal civil discovery rules. The Act provides that, in cases following antitrust criminal convictions, undertakings that qualify for the U.S. leniency program and cooperate with plaintiffs are subject to single damages actions—instead of treble—and are not jointly and severally liable for the damages potentially awarded by the courts. Not surprisingly, the same rationale does not apply to European leniency applicants.

224. Id.
225. Id.
226. New Leniency Notice, supra note 2, ¶ 3.
227. See Bloom, supra note 21, at 440, 444.
229. Id. at 666–67, § 213.
230. In principle, nothing would prevent the U.S. enforcer from positively weighing the fact that an undertaking has previously collaborated, or is still collaborating, with the E.U. Commission under its Leniency Program in dismantling a global cartel. The approach of the
As the Supreme Court has recently acknowledged in *F. Hoffmann-La Roche Ltd. v. Empagran*, "a harmony [between the laws of nations and the way that they are enforced is] particularly needed in today’s highly interdependent commercial world."

A single agency on its own has little chance to succeed in the fight against cartels that are increasingly global in scope. The DOJ acknowledged that "effective prosecution of an international cartel requires coordination of investigative strategies with foreign enforcement agencies." With close cooperation comes "an increasingly greater risk of detection, prosecution, and punishment by antitrust authorities ... around the world."

As discussed above, the need for cooperation has been formalized in several bilateral agreements, and is constantly discussed within a number of international institutional contexts, such as the Organization of Economic Cooperation and Development and the International Competition Network, in which both the United States and the Commission play a central role. The Achilles heel of the existing international network, however, is that none of the agreements, recommendations, or guidelines is binding on the parties. Moreover, there is no way to enforce potential noncompliance with those acts.

In practice, the meeting of minds of the European Union and the United States as to a common construction of the principle of comity is undermined by the wide discretion of U.S. courts, which still address the issue on a case-by-case basis. This approach exposes Leniency applicants to an inherent risk that U.S. courts might consider comity reasons insufficiently strong to prevent discovery of Leniency documents in civil actions for damages. In turn, the resulting uncertainty may have a

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234. *See supra* Part IV.B.
236. *Id.*
237. *Id.* The only means by which to make agreements or recommendations somehow binding is retaliation.
239. *Id.*
chilling effect on the Leniency Program and the E.U. Commission’s ability to fight cartels, as the potential whistleblowers will carefully balance the risk of exposure to treble damages actions with the advantages of E.U. immunity. U.S. courts should acknowledge the foregoing considerations and consistently interpret the principle of international comity in an effort to strengthen international cooperation against cartels.

240. Id.