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ACCESS BY NATIONAL COURTS AND PRIVATE PLAINTIFFS TO LENIENCY DOCUMENTS HELD BY THE COMMISSION

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ABSTRACT: A leniency application is an important source of information which can be very useful in supporting potential private claims. In the present article we will discuss access to leniency documents in the possession of the European Commission (“Commission”) by national courts and plaintiffs. Access to the Commission’s file can be effectuated either indirectly through article 15 (1) of Regulation (EC) No 1/2003 which acknowledges that national courts are entitled to obtain legal and economic information from the Commission or directly through Regulation (EC) No 1049/2001 (the so called ‘Transparency Regulation’) which legitimates requests for information from the main institutions of the European Union (“EU”), such as the Commission. We will submit that the immunity applicant should be protected in terms of access to evidence. Accordingly, evidence and any corporate statements provided to the European Commission by the immunity recipient shall not be revealed to private plaintiffs for the purpose of private actions. However, documents provided by other leniency applicants should be left open as they do not have the negative effect of disincentivizing leniency applications as long as some mechanisms for guaranteeing the protection of confidential information are assured.

SUMMARY: I. Introduction. II. Regulation (EC) No 1/2003. III. Access by National Courts under the Duty of Loyal Co-operation between the Commission and the Member States. IV. Regulation (EC) No 1049/2001. 1. The Exception ‘Undermine the Protection of the Purpose of Inspections, Investigations and Audits’. 2. The Exception ‘Undermine the Protection of Commercial Interests’. 3. The Doctrine of Administrative Burden. 4. GC and ECJ: conflicting views? V. Final Remarks.

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All views expressed in this paper are strictly personal and should not be construed as reflecting the opinion of any of the above mentioned persons. Comments are welcome at <alberto.saavedra@srslegal.pt>.