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Disclosure of Evidence Arising out of Cartel Investigations

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What evidence do civil plaintiffs seek?

1. Enforcement agencies' transcriptions of oral statements
2. Witness statements taken by enforcement agencies
3. Documents provided by leniency applicants to agencies
4. Other documents in the agency files (replies to information requests; inspections documents)
5. Agency evidence inventory (index; statement of contents)
6. Provisional findings (e.g., statement of objections)
7. Confidential final Decision (unredacted – whether business secrets or information provided by leniency applicants)

How do plaintiffs seek disclosure of evidence?

1. Right of access to file: Damage claimant acting as a complainant in an enforcement proceeding
2. EU “Transparency” Regulation 1049/2001
3. Disclosure of NCA file through Member State courts
4. Disclosure of EU file through Member State courts (discovery in *inter partes* civil damages litigation)
5. Damage claimant acting as an intervener before EU Courts (in re appeal of EU Decision)
6. Disclosure in non-EU courts: in criminal cases, disclosure obtained by defendant, but rendered public
7. Disclosure in non-EU courts: *inter partes* damages litigation

The EU Response to Pfleiderer and Issues beyond the European Union

How does increased disclosure impact effective public enforcement?

Pressure points on the Commission

- EU law on disclosure and transparency is in flux
 - *Pfleiderer* ruling; Reg. 1049/01 case law
 - Access to file before EC, rights of intervention in European Courts
- Member States are confronted with similar pressures
 - French civil disclosure ruling in *MLDC web-coupons* damages litigation (third party order against Autorité de la Concurrence)
- Different protection of leniency applicant information across the EU – Legal certainty at risk
- Absence of legal certainty may impact effectiveness of public enforcement
- ECN cooperation cannot solve the problem alone
- Forum shopping based on document availability

Other pressure points...

- Transparency rules being used in an attempt to challenge protection of EC leniency statements and confidential information grounded in other sources of EU law
- EC caught between confidentiality obligations and disclosure requests
 - Redaction of business secrets & information of leniency applicants
 - Pressure to release information to enable civil cases
 - Balancing of interests is complex and time consuming, e.g.,
 - *Bathroom fittings & fixtures* decision of 23.6.2010, not yet published
 - *Prestressing steel* decision of 30.6.2010 published on 13.3.2012
 - *Air Cargo* decision of 9.11.2010 still to be published
 - *Automotive Glass* decision of 12.11.2008... three years later!

What are the conflicting but legitimate objectives of the EU Institutions?

1. Openness and transparency in public administration
 - “closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen” (Art. 1 TEU; see also Art. 10 TEU and Art. 15 TFEU)
 - Chef de file: Secretariat-General
2. Protection of business secrets in competition procedures
3. Protection of public enforcement
 - Protection of leniency programs
 - Leniency Notice (§§ 33-34); Letter by DG Competition to NY Eastern District in *Air Cargo* litigation; EC *Amicus Curiae* in *National Grid* UK litigation
 - Protection of settlement submissions
 - Settlement Notice (§§ 35-40)
 - Chef de file: DG Competition
4. Protection of private enforcement
 - T-437/08 *CDC*, para 77: “actions for damages before the national courts can make a significant contribution to the maintenance of effective competition (*Courage*) ...”
 - “Action for damages” disclaimer in all EC press releases of cartel decisions
 - Chef de file: DG Competition

Policy objectives must be balanced against reality..

- What can the EU win in court?
 - Victories
 - C-139/07 *Commission v Technische Glaswerke Ilmenau* (Reg. 1049/01 in State aid case)
 - Non-EU courts have ruled against disclosure on comity grounds
 - Losses
 - T-437/08 *CDC v Commission* (Reg. 1049/01 in cartel cases)
 - Uncertain? No presumption, but does not deal with the substance
 - C-404/10 P-R *Commission v Éditions Odile Jacob* (Reg. 1049/01; merger)
 - Who carries the water.... *Service Juridique*

A legislative fix – The balance between public and private enforcement ?

- Disclosure in *inter partes* litigation
 - AG Kokott: *Pfleiderer* put the ball “in the EU legislature’s court”
 - Legislative solution to ensure uniform approach:
 - Commission hopes to propose Directive on Civil Actions in 2012
 - Earlier draft shielded from disclosure: corporate statements and settlement submissions, not leniency documents
- A regulation to clarify how Commission may deal with disclosure claims for EU leniency submissions?
- Disclosure claims against the EU Institutions:
 - Current reform of Reg. 1049/01
 - In December 2011, the EP voted draft pushing for broader classification of “document” and fewer exceptions to transparency obligations
 - Member States (except Nordics) protective of enforcement interests
 - Access to antitrust files represents only less than 10% of overall applications to the EC under Reg. 1049/01
 - *Pfleiderer* has helped focus debate and EC demands
 - Compromises needed between Council and MS; Timing uncertain

International arena: Expansive disclosure rulings

- Increased disclosure of oral statements and interview materials produced by leniency applicants:
 - United Kingdom: in October 2011, OFT published proposed new leniency guidance, including on when OFT can seek waiver of legal privilege on interview notes from internal investigation; Is there ever privilege for internal investigation notes (*Tesco* case)
 - Australia: in August 2011, Federal court ruled that ACCC cannot rely on public interest immunity to avoid disclosing enforcer's notes from proffer meetings in cartel investigation
 - United States: in 2010 DOJ issued new criminal discovery guidance, leading in 2011 to disclosure of DOJ's proffer notes in *LCD* investigation

The effects of disclosure on enforcement...

1. Less immunity applications?
 - Increased disclosure risks may affect willingness of immunity applicants to come forward in certain “marginal” jurisdictions to avoid additional disclosure
2. Less effective enforcement?
 - Increased risk of disclosure of proffers could lead applicants to more narrowly circumscribe proffer statements to ensure that these do not reveal more than what will eventually come out in witness testimony
3. A move to witness testimony for the EU?
 - Narrower proffer statements may cause applicants to circumscribe oral statements in the EU, increasing pressure on the EU to request witness testimony in order to get the same level of information as other jurisdictions

Disclosure leads to less effective enforcement

4. Less information exchange waivers?
 - Increased disclosure of leniency applicant materials in certain jurisdictions could lead applicants to seek to limit information exchange waivers given to enforcement authorities so as to avoid information flowing to the disclosing jurisdiction, and from there to plaintiffs or other (non-immunity) enforcement jurisdictions

5. Less internal investigations & less immunity applications?
 - Requirement that applicants waive legal privilege over internal investigations notes and interviews could cause companies to limit internal investigations (and less unlawful conduct might be found and reported) or perhaps to segregate investigations (e.g. different packages for the EC and the OFT)

How can agencies respond to these challenges?

- Agencies must state their position on disclosure to leniency applicants – Certainty and predictability!
- Agencies should develop tools to allow for limited disclosure where required (e.g., protective orders in criminal proceedings)
- To protect their enforcement programs, agencies should defend their position on disclosure in court proceedings
- Where agencies do not prevail, move quickly to seek better legal basis for protecting public enforcement
- Consider carefully whether to take a case forward, if disclosure will undermine “market perception” of the agency’s leniency programme

Contact Details

For further information on this topic see: http://www.lw.com/upload/pubContent/_pdf/pub4546_1.pdf

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