

Disclosure and Discovery: The Cost of Applying for Leniency

**Fair Trade Center
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The core rule of leniency incentives

- **Leniency applicants should not be worse off in civil claims than non-cooperating defendants**
 - *“The Commission’s policy [is] that undertakings which voluntarily cooperate with DG Competition in revealing cartels should not be put in a significantly worse position in respect of civil claims than other cartel members that refuse any cooperation.”* (EU Commission pleading in *National Grid* litigation, 2011)
 - *“[T]he confidentiality policy is a necessary inducement to encourage leniency applications. If jurisdictions shared information obtained from an amnesty applicant with other competition and prosecuting authorities without the applicant's permission, then it would create a significant disincentive to entering the leniency program that would lead to fewer leniency applications.”* (Scott Hammond, Director of Criminal Enforcement, U.S. DOJ, 2004)
- **Effect: Protection of leniency submissions against disclosure in court or to civil plaintiffs**

The effects of increased disclosure

- **Increased disclosure of leniency material threatens to harm success of global cartel enforcement**
 - Due to recent policies and court rulings in US, UK, Australia, and EC, enforcement agencies are unable to guarantee the confidentiality of leniency material
 - Civil damage claims are appearing outside the U.S. and plaintiffs are using aggressive techniques to obtain leniency material from (i) companies cooperating with competition authorities, or (ii) directly from enforcers

What evidence is at risk of disclosure?

- Business records (emails, calendars, diaries, etc.)
- Enforcers' notes of attorney proffers
- Oral statements of corporate leniency applicants
- Witness statements to enforcers
- Audio and video recordings of interviews
- Index of agency evidence
- Provisional findings (e.g. statement of objections)
- Confidential unredacted final decisions (which may contain confidential business information)

Disclosure Risks in the U.S.

- **Documents Provided to the U.S. DOJ May be Disclosed to Civil Damage Plaintiffs**
 - Documents provided to the government are not subject to any privilege and confidentiality protections are limited.
 - *See In re: Pacific Pictures Corp.* No. 11-71844, 2012 WL 1293534 (9th Cir. Apr. 17, 2012) (Court affirmed prevailing view that providing documents to the government waives any legal privilege, even if produced in response to a subpoena and subject to a confidentiality agreement)
- **Documents Produced to Civil Damage Plaintiffs May be Disclosed to the U.S. DOJ**
 - U.S. DOJ can issue a grand jury subpoena to parties in a civil damage claim and obtain all documents produced in discovery.
 - *See In re: Grand Jury Subpoenas served on White & Case et al.*, 627 F.3d 1143 (9th Cir. 2010) (grand jury can subpoena foreign based documents subject to civil protective order).

Disclosure Risks in U.S.

- **Disclosure risks from the enforcement agencies**
 - In 2010 DOJ issued new criminal discovery policy requiring greater disclosure of evidence in criminal cases including business records, witness statements, and attorney proffers
 - AU Optronics TFT-LCD Trial – Over 500 pages of attorney proffer notes produced to defendants in the case.
 - With more cases going to trial the risk of disclosure increases
 - Protective orders offer limited protection of confidential information
- **Disclosure risks in civil class action damage claims**
 - With limited success plaintiffs have tried to obtain by discovery:
 - Written Submission to the EC (now done orally)
 - Copies of SO and Oral Hearing Transcript
 - All communications exchanged between DOJ and EC and JFTC
 - Final Unredacted EC Decision

ACPERA - Additional US Disclosure Risk

- ACPERA – Disclosure requirements for leniency applicants to civil damage plaintiffs
- In exchange for cooperation and disclosure, leniency applicants' damages are reduced to single actual damages, instead of triple damages with joint and several liability
- 2010 amendments to ACPERA require “timely” disclosure to satisfy cooperation obligations
- Factual disclosures to civil plaintiffs can be publicly disclosed in amended complaints

EU is caught between leniency policy and public right to information

- 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 EU Courts
- Member States are confronted with similar pressures
 - Is French civil disclosure ruling in MLDC - settlement
- Different protection of leniency applicant information across the EU – Legal certainty at risk
- Why care?
 - No legal certainty may impact public enforcement
 - Forum shopping based on document availability

Conflicting 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 & Art. 10 TEU; Art. 15 TFEU)

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)

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*

Balancing the interests is difficult

- 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!*

A legislative fix – balance 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
 - 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

Disclosure Risks in Other Jurisdictions

- **United Kingdom**

- In October 2011, OFT published proposed new leniency guidance, including when OFT can seek waiver of legal privilege on interview notes from internal investigation.
 - Poses significant and troubling intrusion on legal privilege and will impede ability to conduct internal investigation and uncover facts.

- **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. *ACCC v. Prysmian & Ors*, [2011] FCA 938.

Best Practices to Avoid & Limit Disclosure

- Understand, and confirm, each jurisdiction's disclosure policies (don't be surprised by later disclosures)
- Paperless disclosures
- Exercise caution when disclosing to enforcement agencies
 - Assume that anything you provide (even an oral presentation) may later be disclosed in a criminal trial or civil damage suit.
- Disclosures should be consistent across jurisdictions
 - Provide a single consistent recitation of the facts
- Seek discovery stays in civil damage claims
- Seek protective orders in enforcement actions to limit the use and disclosure of material

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