



***EU-China Trade Project (II)***

中国-欧盟世贸项目(二期)



A project funded by the  
EUROPEAN COMMISSION  
欧盟资助项目

# Proving Competition Law Private Claims – *An EU Perspective*

Private Actions for Damages for Breaches of Competition Law: Relevant Perspectives and Experiences from the European Union and its Member States

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24 May 2013

**Support to China's Sustainable Trade and Investment System**

支持中国可持续贸易和投资体系

# Overview

- Role of competition private actions
- Follow on vs. Standalone actions
- Routes to evidence
- *Pfleiderer* and *National Grid*
- Proving damages



# Role of competition private actions



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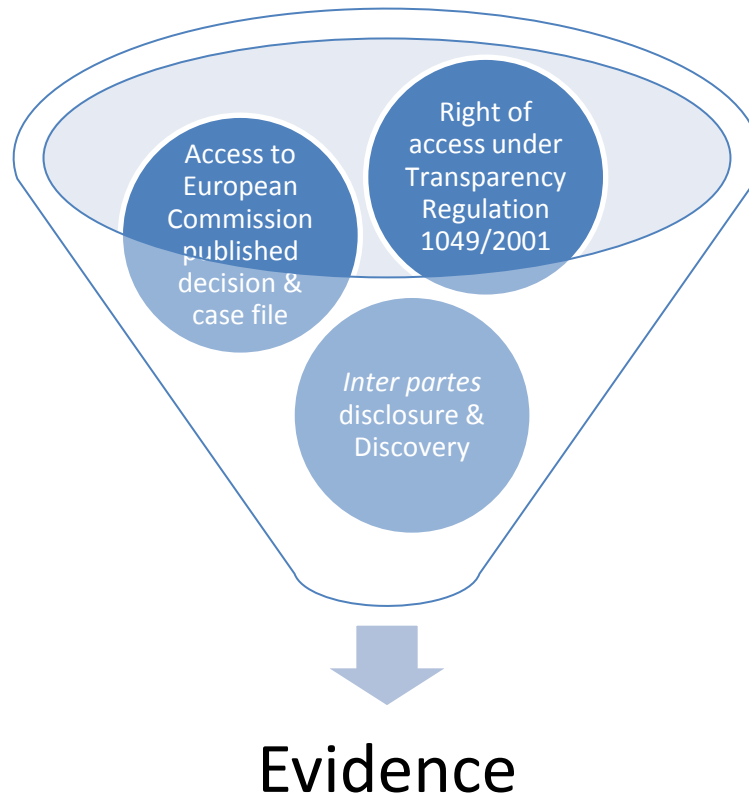
# Follow on vs. Standalone Actions

- Private actions are increasing across the EU
  - Most actions are in Germany, the Netherlands and the UK
  - The private claim is brought before a national court or tribunal of a Member State
- Most private actions involve follow on claims
  - Private claim is based on a finding of a competition law infringement by a public enforcement authority (e.g. a court, tribunal or administrative authority)
- Very few private actions involve standalone claims
  - Private claim is *not* based on prior public enforcement
  - There is an additional requirement to establish competition law infringement
- The major obstacle in private actions, whether follow on or standalone, is availability of evidence



# Different Routes to Evidence

## Three main routes



# Routes to Evidence (1)

- Evidence in EC decision
  - Non-confidential version of published EC infringement decision
- Access to EC case file
  - As complainant in EC proceedings?
- Transparency Regulation 1049/2001
  - Right of access to documents held by EU institutions
  - Right is *not* absolute and is subject to exceptions (e.g. protect commercial interests, protect the purpose of investigations)
    - Exceptions should be interpreted and applied restrictively
    - EC must carry out a concrete, individual examination of each requested document in its case file: Case T-2/03 *Verein für Konsumenteninformation*
    - EC must conduct a concrete, individual examination of the content of requested documents: Case T-344/08 *EnBW*
    - EC must consider the nature of the document to which access is sought – in this case file index: Case T-437/08 *CDC*



# Routes to Evidence (2)

- *Inter partes* disclosure
  - Binding effect of EC decisions on national courts of Member States
  - Effect of NCA decision on national court depends on rules applicable in a Member State
  - Disclosure of evidence in a party's possession depends on court procedural rules applicable in a Member State
  - Exchange of Witness Statements and Expert Reports (e.g. economic evidence to prove/disprove an infringement, evidence of forensic accountants on quantum of damages)
  - Limited discovery opportunities, apart from the UK



# Pfleiderer and National Grid (1)

- Case C-360/09 *Pfleiderer*
  - Preliminary reference from the Amtsgericht Bonn to the Court of Justice (CJEU)
  - Preliminary reference related to access to documents in the context of a leniency application
  - Pfleiderer, a purchaser of decor paper, sought access to prepare for its private claim against participants in the *Decor Paper* cartel
  - Bundeskartellamt denied Pfleiderer's request for documents related to leniency application in the *Decor Paper* cartel
  - Pfleiderer appealed refusal decision before Amstgericht Bonn





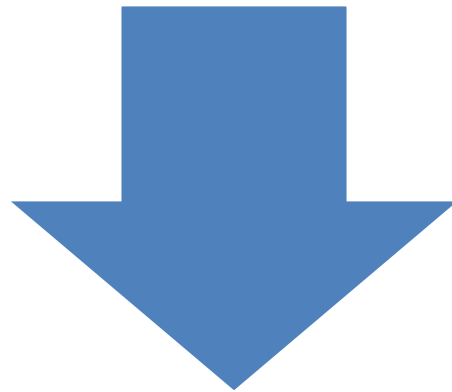
# Pfleiderer and National Grid (2)

- Case C-360/09 *Pfleiderer* (cont'd)
  - EU competition law does not automatically prevent the disclosure of a leniency applicant's submission to a NCA
  - Each Member State should determine its own rules with respect to requests to leniency documents given to NCA
  - Case-by-case analysis is required by national courts as to the disclosure of leniency documents submitted to a NCA
  - Balance interests of public enforcement vs. private action
  - In *Pfleiderer*, Amstgericht Bonn ruled against disclosure of leniency documents applying CJEU's balancing test



# Pfleiderer and National Grid (3)

## The CJEU's balancing test in *Pfleiderer*

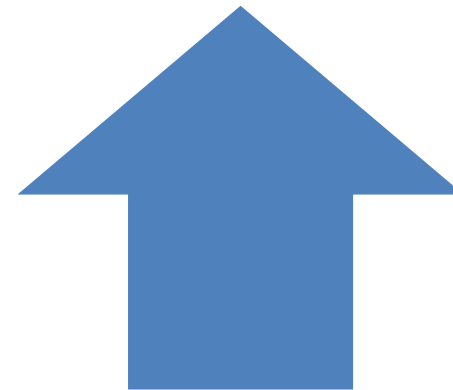


### Effective Public Enforcement

*"Leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of [the EU competition rules]," para. 25*

### Effective Private Action

*"Any individual has the right to claim damages for loss caused to him... [a]ctions for damages before national courts can make a significant contribution to the maintenance of effective competition in the [EU]," paras. 28-29*



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# Pfleiderer and National Grid (4)

- *National Grid vs. ABB*
  - National Grid, a UK utility company, brought an action for damages in the UK High Court against several companies held liable by the EC in the *Gas Insulated Switchgear* cartel
  - National Grid sought disclosure from ABB and Siemens of the confidential version of the EC decision; responses to Statements of Objection; and responses to requests for information
  - EC was invited to submit observations (Art. 15(3), Reg. 1/2003)
  - Mr. Justice Roth ordered disclosure of only limited sections of the confidential version of the EC decision, and very limited passages from responses to information requests
  - *Structured balancing test: is the information available from other sources, and what is the relevance of the information?*



# Proving damages: recoverability (1)

- *Manfredi* established general principles to be observed for recovery of damages
  - Domestic legal system of each Member State sets the criteria for determining the extent of damages
  - But, subject to principles of equivalence and effectiveness
  - Damages should compensate
  - Exemplary damages are possible, but a Member State may prevent unjust enrichment (cf. Case C-453/99 *Courage and Crehan*, para. 30)



# Proving damages: recoverability (2)

- Cases C-295/04 -298/04 *Manfredi*:

*“It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) [i.e. overcharge less any deductions for passing-on defence] but also for loss of profit (lucrum cessans) plus interest,” para. 95. Emphasis added.*



# Proving damages: quantification

- The “but for” test: establishing claimant’s actual economic position vs. position absent infringement
- Calculating damages:
  - Evidence from EC / NCA’s decision but claimant must show that suffered claimed loss
  - Evidence of actual loss in other cartel cases
  - Evidence from witness statements
  - Comparative analyses involving comparison of prices before and after infringement
  - Cost-based analyses involving comparison of cost structures during infringement period, profits, claimant’s financial situation
  - Economic simulation models



# Conclusion

- Right to compensation for loss arising from a competition law infringement is firmly established in the EU
- The principal challenge for successful competition law private actions is availability of evidence
  - Claims are typically fact-intensive
  - Claims typically require complex factual and economic evidence
  - Discovery rules differ across Member States
- Essential elements of claim must be established
  - Infringement
  - Infringement resulted in claimed loss (i.e. damages/causation)
  - Supporting case with strong legal, factual and economic argument and evidence are critical for a successful claim



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