



EU-China Trade Project (II)

Beijing, China

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Session 4:

Assistance of Competition Authorities
and Access to Evidence for Claimants in
Private Actions

Interaction between public and private enforcement Striking the right balance

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Outline

1. Preliminary remarks

2. The role of courts and competition authorities in EU competition law

- 2.1. Public and private enforcement – complementary tools
- 2.2. Roles of national courts for the application of EU competition law
- 2.3. Ensuring coherent application of EU competition law
 - Case coordination tools
 - Guidance and assistance tools for national courts

3. Access to evidence for claimants

- 3.1. Interaction Public and Private Enforcement
- 3.2. Avenues for claimants to obtain evidence
- 3.3. Public Access: The law and recent developments
- 3.4. Access to leniency related information: Case law
- 3.5. Access to leniency related information: Policy initiatives

4. Conclusions

1. Preliminary remarks

The 2 topics of Session 4:

- Is it the role of competition authorities to provide assistance to claimants in private proceedings?
- What kind of access for claimants to information that is not in their hands?

The approach under European Union law

- Duty of loyal cooperation between the European Commission as competition authority and national courts: neutral assistance to courts on matters of facts, economic assessment and interpretation of the law
- Access to evidence: Striking the right balance between access to information for victims of antitrust infringements and the functioning of public enforcement (leniency programmes)

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The role of courts and authorities

2.1. Public and private enforcement – complementary tools

Decentralised application of EU competition law by

- the European Commission (subject to review by the European Court of Justice)
- national competition authorities (subject to review by national courts)
- national courts

Right to compensation of damages under EU law

- national courts

2.2. Roles of national courts

- Public enforcement: national courts as review courts for public enforcement decisions (or: courts acting as competition authorities)
- Private enforcement: national courts deciding on disputes between private parties

The role of courts and authorities

2.3. Ensuring coherent application of EU competition law

a) Case coordination tools

- between the European Commission and national competition authorities
 - European Competition Network
- between the European Commission and national court
 - '*Masterfoods*' rule (European Court of Justice – ECJ, Case C-344/98 (2000); Art. 16 of Regulation 1/2003)
 - Information requests from national courts to the EU Commission (Art. 15 (1) of Regulation 1/2003)

The role of courts and authorities

2.3. Ensuring coherent application of EU competition law - continued

b) Guidance and assistance tools for national courts

- Requests by national courts for Preliminary Rulings from the European Court of Justice (Art. 234 TFEU – Treaty on the Functioning of the European Union)
- Requests by national courts for Opinions from the European Commission (Art. 15(1) of Regulation 1/2003)
- Amicus curiae observations of the European Commission before national courts on its own initiative (Art. 15(3) of Regulation 1/2003)

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Access to evidence

3.1. Interaction Public and Private Enforcement

- 'follow-on' actions: most actions for damages known to the European Commission are brought after a competition authority has established an infringement of antitrust rules (as opposed to 'stand-alone' actions)
- potential tension between public and private enforcement
 - claimants frequently seek access to information in the files of competition authorities
 - in turn: perceived reluctance of leniency applicants to come forward with voluntary information should they later face the risk of disclosure
 - need to strike the right balance

Access to evidence

3.2. Avenues for claimants to obtain evidence

- Public version of enforcement decisions
- Access to file for parties to public proceedings (to protect the rights of defence)
- Public access to documents
- Requests from national courts to competition authorities in the context of private proceedings
- Disclosure between parties of private proceedings (*inter partes* disclosure)

Access to evidence

3.3. Public Access – The law

Art. 15 TFEU – Treaty on the Functioning of the European Union: Any citizen shall have the right of access to documents of the European Union's institutions

Regulation 1049/2001 on public access to European Parliament, Council and Commission documents

- Principle of widest possible access
- Exceptions include protection of
 - commercial interests of natural or legal persons
 - the purpose of investigations by an institution
 - the decision-making process of an institution
- Exceptions shall be interpreted narrowly

Access to evidence

3.3. Public Access – Case law of the European Court of Justice (ECJ)

- general presumption that disclosure of documents exchanged between the European Commission and undertakings
 - undermines, in principle, the protection of the purpose of investigations and that of commercial interests of the undertakings involved
 - irrespective of whether public proceedings are pending or closed (ECJ Cases C-404/10 P *Odile Jacob* and C-477/10 P *Agrofert*, 2012)
- context of the cases: merger proceedings
- antitrust: pending case raising similar issues (C-365/12 P *EnBW*)

Access to evidence

3.4. Access to leniency related information – Case law

The *Pfleiderer* case (ECJ judgment 2011; Case C-360/09)

- Request for preliminary ruling by a German court whether provisions of EU competition law preclude access to leniency documents for parties adversely affected by a cartel
- European Court of Justice: recognised as interests protected by EU law both
 - the right of victims to seek compensation for harm suffered following an infringement of EU competition law and
 - the effectiveness of leniency programs
- Conclusions of the European Court of Justice:

"it is, in the absence of EU legislation, for the national court to weight the interests protected by EU law and to decide on a case-by-case basis and according to national law whether to grant such access"

Access to evidence

3.4. Access to leniency related information – decisions by national courts

- Germany (AG Bonn, *Pfleiderer*, 2012):
 - corporate statement and pre-existing documents protected
- Germany (OLG Düsseldorf, *coffee roasters*; 2012):
 - access to non-confidential version of the decision; no further access to the file
 - leniency statements protected in view of fact that German courts (1) are bound by competition authorities findings of an infringement and (2) national courts can estimate the harm caused by the infringement
- United Kingdom (High Court; *National Grid/GIS cartel*; 2012):
 - following voluntary disclosure of pre-existing documents: no reason to give full protection to whatsoever document
 - ordered very limited disclosure of some paragraphs of the confidential version of the decision and some parts of replies to requests for information by the European Commission

Access to evidence

3.5. Access to leniency related information – policy initiatives

Resolution of the European Competition Network (23 May 2012)

- Response to the risk of diverging jurisprudence by national courts
- *"... as far as possible under the applicable laws in their respective jurisdictions and **without unduly restricting the right to civil damages**, competition authorities take the joint position that **leniency materials should be protected against disclosure** to the extent necessary to ensure the effectiveness of leniency programmes"*

Access to evidence

3.5. Access to leniency related information – policy initiatives (continued)

Legislative Project by the European Union

The European Commission intends to propose legislation to

- regulate the interaction between public and private enforcement of EU antitrust rules;
- ensure an effective exercise of the EU right to compensation

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Thank you for your attention!

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