



The Interplay between Leniency and Follow-on Damages Litigation

Eddy De Smijter
Deputy Head of the Private Enforcement Unit

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Competition



Overview

- The summer of 2011: case law on access to evidence
 - Germany: Pfeleiderer
 - The UK: National Grid
- 2012: policy initiatives to remedy the insecurity
 - pm: the 2008 Commission White Paper
 - The UK public consultation document
 - The Commission legislative proposal



The summer of 2011 - Pfleiderer

- The facts
- The ECJ preliminary ruling (14 June 2011)

It is for the national courts, on the basis of their national law [and taking into account all the relevant factors in the case], to determine the conditions under which access [to documents relating to a leniency procedure] must be permitted or refused by weighing the interests protected by EU law.
- The AG Bonn decision (18 January 2012)

"The refusal to grant access to the file does not unduly prejudice the interests of the claimant (...), nor does it, in this specific case, make it excessively difficult or practically impossible to obtain damages."



The summer of 2011 – National Grid

- The UK High Court (4 and 13 July 2011)
- The Commission amicus curiae (3 November 2011)
- The UK High Court (4 April 2012)
 - Does *Pfleiderer* apply to disclosure of leniency material in the Commission's file?
The *Pfleiderer* principles (balancing of different EU interests) also apply
Agree
 - Can a national court order disclosure of such documents or should it ask the Commission (Article 15 of Regulation 1/2003)?
The national court can itself order disclosure
Thanks
 - What are the factors which militate in favour or against an order being made?
A leniency applicant should not be worse off
In this case, he is not
Is disclosure proportionate (relevant and no other available sources)?
In this case, it is to some extent



Policy initiatives – The 2008 White Paper

- “adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers”
- “limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners”



April 2012: the UK public consultation

- “we are minded to protect certain aspects of leniency documents from disclosure. Broadly speaking, these documents would be those directly involved in the leniency application and which would not have been created if the company had not been seeking leniency”
- “we are minded to protect whistle-blowers from joint and several liability, limiting their liability to damage they directly cause”



2012 CWP: a legislative initiative on antitrust damages actions

“the objective of this legislative initiative would be to ensure effective damages actions before national courts for breaches of EU antitrust rules **and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU.**”