



Private Enforcement of EU Competition Law

Eddy De Smijter

Deputy Head of the Private Enforcement Unit

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Competition



2012 Commission Work Programme

"Actions for damages for breaches of antitrust law:

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."



Collective Redress (1)

"as regards collective redress in competition policy [...] **claimants of minor and diffuse damages should have appropriate means of access to justice through collective redress and should secure fair compensation**"

(EP resolution of 2 February 2012 on the 2010 Commission Report on Competition Policy, paragraph 25 / 25(b))



Collective Redress (2)

"ADR mechanisms often depend on the trader's willingness to cooperate, and (...) the availability of an **effective judicial redress system** would act as a **strong incentive** for parties **to agree an out-of-court settlement**"

(EP resolutions of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', paragraph 25 and on the 2010 ACR, paragraph 22)



Collective Redress (3)

"the need for the Commission to **propose legislation**, without watering it down unnecessarily, **to facilitate individual and class-action claims for effective compensation** for damages resulting from breaches of EU antitrust law"

(EP resolution of 20 January 2011 on the 2009 Commission Report on Competition Policy, paragraph 15)



Collective Redress (4)

"any instrument applicable to collective redress must take full and proper account of the specificities of the antitrust sector"

(EP resolution of 2 February 2012 on the 2010 Commission Report on Competition Policy, paragraph 24)



Collective Redress (5)

"a limited number of rules relevant to consumer protection or **competition law** (...) could be laid down, for instance, in **separate articles or chapters of the horizontal instrument itself or in separate legal instruments**"

(EP resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', paragraph 17)



Collective Redress – interface public/private enforcement

"following the judgment of the Court in (...) *Pfleiderer*, the Commission must ensure that **collective redress does not compromise** the effectiveness of the competition law **leniency** system and the **settlement** procedure"

(EP resolutions of 2 February 2012 on Collective Redress, paragraph 28 and on the 2010 ACR, paragraph 23)



Interface public/private - 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."



Interface public/private – 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”



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”



ECN Resolution of 23 May 2012

“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.**”