

# Access to Files of Competition Authorities in follow-on damages actions:

Two years after Pfleiderer:

The state of play following the June 2013 last events

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Oxford, 22-23 June 2013

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# Introduction (1)

- **Issue not really new.** Access to files in the nineties:
  - A lot of debates within the EU,
    - Mainly, in administrative proceedings and access requested by sued firms
    - But, already, *Postbank*, CFI, 18 sept. 1996, T-353/94: used by a party of pieces of the Commission's file (SO) before a national court
  - Access in the context of treble damages actions in transatlantic relations.

## Introduction (2)

- A lot of change in the last decade, in the EU
  - Development of leniency programs: introduction of the mechanism of paperless to deal with the US discovery risk
  - Development of private enforcement... The US risk becomes a EU one...
- The first signals
  - 2004. Notice on cooperation with courts: § 26
  - 2005. *Austrian Banks* case (T-2/03): first use of regulation n° 1049/2001 in a cartel case
  - 2006. Leniency notice (§ 33) and 2008. Settlement notice (§ 39)

## Introduction (3)

- The *Pfleiderer* Case (2011) C-360/09:
  - The solution: National courts have to decide case-by-case on disclosure on leniency evidence.
  - Several readings:
- Institutional one...: Procedural autonomy v/ EU Competition Policy
- Competition one...: tension between public enforcement (need to protect leniency programmes) and private enforcement (a EU right for the victims of competition infringements)

## Introduction (4)

- A lot of interesting developments in different MS
  - Germany. *Pfleiderer and Coffee roasters*
  - UK. *National Grid*
  - France. *Caselaw (4 cases) + 2 new provisions*
  - Italy. *Caselaw (TAR Lazio, 2012, Alitalia)*
  - Netherlands
- A lot of caselaw before the EU judge on reg. 1049/2001 (mainly, merger control and state aids), in antitrust (CDC, T-437/08, EnBW, T-344/08, pending, C-365/12 P; comp. EFTA court (21 Dec. 2012))

## Introduction (5)

- **New recent elements at the EU level**
  - *ECJ, Donau*, C-536/11, 6 June 2013
  - Proposal directive, 11 June 2013 (COM (2013) 404 final)
- Necessary to clarify...: two steps
  - *De lege lata*: The present procedural patchwork (PPP)
  - *De lege ferenda*: Some ways of solution

# I. The present procedural patchwork

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1. Various factual situations
2. Various legal regimes

# 1. Various factual situations

- 3 series of elements to be checked

## 1) Procedures

- Follow on or parallel procedures? Mainly follow on (but some cases in France in parallel procedures in criminal cases)
- If follow on, previous decision of the CA

+ prohibition decision

\* cartel case? *Austrian Banks, CDC, EnBw, Pfleiderer, Donau... Brit. Dutch, Ger. Ital. cases*

\* non cartel case: EFTA (*DB Schenker*), F *Orange Caraïbes*

Very important, private enforcement already effective

+ commitment decision: *EU. E.On (ombudsman) F. Ma liste de courses, DKT*



# 1. Various factual situations

## 2) Requested pieces

- What pieces?
  - Any document of an ordinary administrative proceeding (SO...): *Postbank*; answers of other parties to the SO, integral version of the decision. *National Grid*
  - Specific documents: leniency applications, settlements...
- Where are they?
  - In the file of the Commission? Eg. *National Grid*
  - In the file of a NCA? Eg. *Pfleiderer*

# 1. Various factual situations

## 3) Position of the requesting party

- Already holds the pieces, but need of an autorisation to use them (*Postbank*, *F Orange Caraibes*; claimant often complainant, specific provision prohibiting the use of information, art. L-463-6 com. C.)
- Does not have the piece (cartel cases mentioned above)

## 2. Various legal regimes

- Explanation
  - Different rules for the Commission and the NCA
  - For the NCA, procedural autonomy principle: Confirmed by *Pfleiderer* and *Donau Chemie*
- Consequences
  - Various legal regimes: 1 + 28 (1<sup>st</sup> July) X 1,2,3...

## 2. Various legal regimes

### **2.1. For the claimant. 2 main issues.**

#### **2.1.1. On what legal basis?**

2 criteria to be taken into consideration:

- Piece in the file of the Commission (or EFTA A) or in the file of a NCA
- Direct access or indirect access through an order of the court

## 2. Various legal regimes

- **Requested pieces in the file of the Commission**
  - Direct way of access: reg. 1049/2001
    - + request to the Commission/DG comp. *Austrian Banks, CDC, EnBW*
    - + Ombudsman... not to be forgotten (some decisions, E.On, Marine Hoses)
  - Indirect way through the national court dealing with the damages action
    - + art. 15, § 1, reg. 1/2003. *National Grid*
    - + Nat. Rules, sincere cooperation pple, art. 4, § 3 TEU  
*comp. State Aids. Boiron (2006)*

## 2. Various legal regimes

- **Requested pieces in the file of a NCA**, mainly 2 legal basis
  - General texts on transparency (nat. equivalent of reg. 1049/2001): F, (loi Cada, 1978; one application) ; It (2012) ; NL
  - Nat. Rules of procedure (civil (Fr: art. 138 CPC) and/or criminal in cartel cases (D))

## 2. Various legal regimes

### 2.1.2. How? Modalities of examination

- Request and examination of the request:
  - Global or piece by piece (reg. 1049/2001).
  - Practical consequences:
    - + for the claimant: need to identify the relevant document  
(Fr. practice: quoting pieces in the decision: dec. n°12-D-24 et n°12-D-25)
    - + for the CA: workload (not be underestimated)

## 2. Various legal regimes

### 2.2) For the CA. Different rules on Exceptions

Clear link between justifications to deny access and method to be followed (case by case approach)

2.2.1. The Commission. Texts of transparency. Reg. 1049/2001: some exceptions (art. 4) but not adapted to antitrust.

Extension of *TGI* caselaw (in State Aids) to antitrust?

Pending appeal in *EnBW*



## 2. Various legal regimes

2.2.2. National application of ordinary procedural rules in line with the *Pfleiderer / Donau Chemie* caselaw?

- What exceptions? Justified by competition law. By nature. Leniency documents + Protection of confidentiality.

UK. *National Grid*. Cartel cases. protection of leniency applications + Confidentiality circle... but GC (ord.) 29 Nov. 2012, aff. T-164/12 R; suspension Com.'s dec. to transmit documents requested

Possible to rely on ordinary procedural rules?

- What method? Weighing of interests (*Pfleiderer*).

## 2. Various legal regimes

- **To conclude:** The impact of the *Donau* decision

Austrian law: consent of the leniency applicants requested:

Contrary to the principle of effectiveness...

But a step further than *Pfleiderer*

- Weighing of interests necessary (pt 31): no rigid rule  
absolute refusal to grant access, contrary to art. 101 TFEU  
rule of generalised access, not necessary, may lead to the infringement of other rights conferred by EU law (professional secrecy, business secrecy, protection of personal data) (pt 33).

## II- Towards some legislative solutions

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1. First national answers.
2. A EU common answer?

# 1. National answers

- **Discussions at the national level**

- Germany: draft 8th amendment, exclusion of leniency documents, but no element in the last version.
- Italy: work of the AGCM, with a distinction (documents already, or not, in possession of the requesting party)
- UK. BIS. 2012/2013
- France: texts already adopted

# 1. National answers: The French example

- Two reforms in 2011 and 2012

+ First step: May 2011: transparency rules (L. 1978) do not apply to files of the CA. General exclusion.

*(Comp. rev. of 1049/2001: MS opposed to exclusion)*

+ Second step: Nov. 2012: art. L 462-3 com. c.

*L'Autorité de la concurrence peut transmettre tout élément qu'elle détient concernant les pratiques anticoncurrentielles concernées, à l'exclusion des pièces élaborées ou recueillies au titre du IV de [l'article L. 464-2](#), à toute juridiction qui la consulte ou lui demande de produire des pièces qui ne sont pas déjà à la disposition d'une partie à l'instance.*

. Principle: FCA may transmit, but only if the pieces are not already in the hands of the requesting party (either claimant or defendant)

. Exception: All documents linked to leniency applications

# 1. National answers

- Some general remarks on the new text
- Interpretation issues: margin of discretion of the FCA, legitimate grounds to deny the access?
- Eurocompatibility issues
- . Presently: following the *Donau* decision: exclusion of all leniency documents, national judge cannot weigh the interests, but new text, only one additional way
- . In the future: does it fit with the draft proposal?

## 2. Common solutions

- Focus on leniency applications. Resolution of the NCA in May 2012
- Draft. June 2013

### 1. **Content**

Chapter 2. Disclosure of evidence, 3 series of provisions

- Principles. Art. 5
- Limits. Art. 6 and 7
- Sanctions. Art.8

## 2. Common solutions. Draft proposal

**The principles** (art. 5).

Minimum rules (broader disclosure authorized, § 8)

- **Conditions to be satisfied by the claimant**
  - § 1. *prima facie* evidence of the harm (adaptation of 2004 IP Directive)
  - § 2: pieces in the control of the other party or a third party both relevant and specified



## 2. Common solutions. Draft proposal

### The principles (2)

- **Powers of the court**
  - Order to the defendant **or a third party (CA ?)**
  - Order shall be proportionate: weighing of interests, § 3
  - Protection of confidentiality, § 4. Meaning? See, Recital 17
  - Necessary to give full effect to legal privileges and other rights not to be compelled to disclose evidence ( § 5): (English version different from French version!)

## 2. Common solutions. Draft proposal

**Limitations.** 2 categories, for evidence from a CA' file

- Limits on the disclosure (art.6)
  - Full exclusion. § 1: leniency corporate statements  
settlement submissions
  - Temporary exclusion till the final decision, § 2: information prepared for the proceedings of a CA, and drawn up by a CA
- Limits on the use (art. 7): parallel exclusions (§§ 1 et 2)
  - + information obtained through access to file in adm. proceedings, used only by the party (§ 3).

## 2. Common solutions. Draft proposal

### 2. First evaluation

- Positive. More complete than the 2009 « pre-draft
  - both disclosure inter partes and access to the file?
  - Commission's file also covered (def. of CA)
  - Limitations and exclusions well explained
- Negative? Territorial scope
  - Between MS. Only reference to reg. n° 1206/2001 (*but limits: see. International Antitrust. Conflict of Laws and Coordination*): Nothing on recognition of a nat. court order)
  - Outside EU, but difficult to cover in a directive...

# Conclusions

- Access to leniency applications: only one part of a more general issue
- Much ado about what?

Genuine needs of a claimant in a damages action?

- To establish the fault: solution: binding effect of the decision: chap. III
  - To establish the causal link and the harm: few things (?) to be found in leniency applications.... First solution: a detailed motivation of the final decision
- Access to file more useful in non cartel cases, like abuse of dominant position (often, economic analysis...) : F specific issue (economic analysis for the harm to economy, criterium of fine)