Reconciling Leniency and Cartel Damages Action

Prof.Dr. Albrecht Bach

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Reconciling presupposes a conflict

Four approaches to deal with the conflict

1. Political approach: denying the problem, complementary nature
2. Positivist approach: Reconciliation is operated by Directive and national legislation
3. Nostalgic approach: We didn't have the problem in the past
4. Analytical approach

Source of the problem: Struggle for ressource „facts“

Depending on information

- CA and potential plaintiffs depend on the same resource: facts on infringement
- Facts are basis to prove infringement and to fine
- Facts are needed to bring a case for damages: *da mihi factum*

Asymmetry of information

- Facts are known to infringers
- Secret to enforcers
- Secret to potential plaintiffs

Leniency programs provide facts to CAs

- CA could obtain facts through own investigations
- Leniency applications deliver abundant facts „free agency building“
- CAs became dependent on leniency programs for their enforcement activities
- Any perceived danger to functioning of leniency programs becomes a threat to public enforcement

Plaintiffs seek information where it is

- Obtaining information from infringers requires at least some form of disclosure
- Obtaining information from CA
  - Seems natural path absent disclosure rules
  - “traffic accident”-type approach: victims should be able to rely on public investigations to facilitate redress
- *Pfleiderer* and *EnBW*: plaintiffs seeking access to file

Two fatal assumptions

Access to files containing leniency applications will endanger leniency programs because

1. companies will refrain from future applications
2. immunity applicants will be #1 target for cartel damage actions.

Assumption 2 is falsified, immunity applicants are typically one of several defendants.

Assumption 1 is difficult to reconcile with US experience under ACPERA requiring satisfactory cooperation with claimant, providing full account of known facts and furnishing of all documents relevant to civil action

Leniency applicants always evaluate exposure to damages

- Leniency application automatically creates exposure to follow-on claims
- Relation between potential fines and damages will guide decision on leniency application
- “Gambling on detection risk” likely if damages to be compensated are much higher than 50% of fines (difference between #1 and #2 in leniency race)
- Level of uncertainty higher for exposure to damages than for exposure to fines

Comparing levels of uncertainty

Evaluating risk of fines:

[affected t/o * factor * duration] * leniency factor * 0.9

Evaluating exposure to damage claims:

[Affected sales?] [affected customers?]* [years]* [overcharge?] * [likelihood of claim?]*[level of pass-on?]*[procedural opportunities?]

Damages Directive: a selfish approach

- Drafted by an enforcer ignoring civil litigation
- Strongly biased in favour of enforcers interests
- Avoiding risks associated for enforcers with judicial balancing between access to file (including leniency applications) required in Pfleiderer and Donau Chemie
- Foreclosing a practically proven path for access to hidden information by reducing access to CA's files to the maximum

No access to file

- Per se excluded: access to leniency applications and settlement submissions (…cannot at any time order to disclose…)
- Strict subsidiarity: no other party reasonably able to provide the evidence (Article 6 para 10)
- Biased proportionality test: need to safeguard effectiveness of public enforcement to be particularly considered
- German proposal attempts to further protect documents “in close connection” with leniency application

But there is the binding effect

- Effect depending on level of substantiation and level of publication of decisions
- Increasing number of settlement decisions due to multiple leniency applicants
  - Summary decision
  - Degree of substantiation becomes part of settlement
- Fundamental differences between facts needed to prove infringement and facts relevant for substantiated damage claim

But there is disclosure

- Article 5 (2) is mere statement of principle
- Sharp contrast to level of details on restrictions
- No workable disclosure mechanism imposed by EU law
- Voluntarily ignoring the disruptive nature of disclosure rules for continental Europe
- Jeopardizing level playing field as one of Directive's fundamental aims

Directive created need for re-balancing

- Foreclosing CA files as source of information created unbalance
- Limited possibilities for rebalancing due to the character of the Directive
- 3 possible agents for re-balancing
  - National Legislators
  - Competition Authorities
  - National Courts

National legislators

- Most effective tool for re-balancing are rules on disclosure which are
  - Workable
  - Efficient
  - Predictable

Competition Authorities

- Should take their own approach seriously
- If access to file is limited to their decision, then decisions have to be
  - Available, i.e. largely public
  - Sufficiently detailed on mechanisms of infringement
  - Mindful of effects on private enforcement, in particular refraining from sweeteners which further tilt the balance (“some”, “regarding certain purchases” …)

National Courts

- Entrusted with difficult task to develop solutions to allow for appropriate access to information held by private parties
  - Time consuming, disputed and increasing uncertainty
  - Leading to specific (local or national) solutions and thus to uneven playing field
- Should rely on established mechanisms to deal with information disparities created by the opposing party, in particular the use of presumptions

Resumé

- The Directive created a need for re-balancing
- There is – albeit limited – room for re-balancing
- The importance of a workable disclosure system for effective redress cannot be overestimated

Thank you for your attention!

Prof. Dr. Albrecht Bach
OPPENLÄNDER Rechtsanwälte Partnerschaft mbB
Börsenplatz 1
70174 Stuttgart

T + 49 (0) 711 / 6 01 87 – 150
F + 49 (0) 711 / 6 01 87 – 222

bach@oppenlaender.de

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