Leniency programmes and the problematic use of confidential information

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Summary

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1. Enforcement of EU Competition Law: public & private

2. Legal framework. Charter of Fundamental rights (confidentiality, access to files, right of defence)

3. Scope of confidentiality

4. Public enforcement & Confidentiality Issues

5. Private enforcement & Confidentiality Issues.

6. Conclusions
1. Over the last years we have seen an important change in the way the EU and Member States (NCAs) are enforcing Competition Law.

2. TRADITIONAL ENFORCEMENT: PUBLIC ENFORCEMENT (COMMISSION + NCAS)
   - Protection of Public and general interests
   - Guarantee effective competition between undertakings
   - Enforcement by sanctions
   - Coercive measures
   - DETERRENT EFFECT + INHIBITORY EFFECT
1. Enforcement of EU Competition Law: public & private

- NEW ENFORCEMENT: PRIVATE ENFORCEMENT
  - Main aim: COMPENSATORY EFFECTS
  - Actions for Damages in respect of alleged injury caused by a cartel
  - PRIVATE INTERESTS ENTER INTO PLAY
  - JUDICIAL RESOLUTION: CIVIL or COMMERCIAL COURTS
  - POSSIBLE CONFLICTS BETWEEN PUBLIC & PRIVATE INTERESTS
2. Legal framework. Charter of Fundamental rights

- TEU art 6.
- Charter of FR:
  - A) Transparency
    - Article 41 Right to good administration. Includes right to access to files, while respecting the legitimate interests of confidentiality and professional business secrecy
  - Article 42 Right of access to documents

- B) Professional secrecy
  - Article 16 freedom to conduct a business
  - Article 17 Right to property

- Are protected as GENERAL PRINCIPLES OF EU LAW (EUCJ Varec, 14 February 2008, C-450/06)
3. Scope of confidential information

- Professional and business secrecy

- Regulation 1049/2001, public access to documents
  - Exceptions (art 4): “the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property

- EUGC Systran v. COM, 16 december 2010 (T-19/07):
  - Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter’s interests.
  - In order that technical information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Last, the interests liable to be harmed by disclosure of the information must be objectively worthy of protection.
3. Scope of confidential information

- It must therefore be considered that technical information which forms part of a undertaking’s business secrets and which has been communicated to the Commission for specific purposes cannot be disclosed to a third party for other purposes without the authorisation of the undertaking concerned.

- Extends to judicial procedures, EUCJ, Varec (C-450/06):
  - “the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors’ business secrets”
4. Public enforcement & Confidentiality Issues

• Regulation 1/2003, art 27.2
  - The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. **The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 and 14.** Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement.

• Problems: Right to access & right of defence:
  - Right to be heard is part of the right of defence so unjustified denial of access constitutes a violation of right of defence (EUGC Alrosa, 11 july 2007, T-170/06)
  - Access to file is not unlimited, EUGC, *Solvay v COM*, T-186/07
4. Public enforcement and confidentiality issues

- The right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that may be relevant for its defence.

- Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.

- As regards incriminating evidence, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows:
  • first, that the Commission relied on that document to support its objection concerning the existence of an infringement and,
  • second, that the objection could be proved only by reference to that document.
  • It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if that uncommunicated document had to be disallowed as evidence.

- By contrast, where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the Commission’s decision. It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents for its defence, by showing in particular that it would have been able to invoke evidence which was not consistent with the Commission’s assessments at the stage of the statement of objections and therefore could have had an influence, in any way at all, on its assessments in the decision.
5. Private enforcement and confidentiality issues

- Private interests involved: compensatory aim of parties
- Are private interests part of the goal of public enforcement?
- Effectiveness of leniency programmes?
- Confidentiality of documents obtained in regard leniency problems

- EUCJ, Pfeiderer, C-360/09: LEADING CASE: Whether the disclosure of information voluntarily communicated to a NCA by members of a cartel pursuant to a national leniency programme, for the purpose of preparation of an action for damages in respect of alleged injury cause by the cartel, COULD UNDERMINE THE EFFECTIVE ENFORCEMENT (PUBLIC) OF EU COMPETITION LAW.
5. Private enforcement and confidentiality issues

• Should leniency programmes and civil law actions interact?
• Are civil law actions a new way of protecting public interests?
• Do public interests converge with private ones when EU Competition Law is enforced?
• Could leniency programmes constitute a limit for the right of defence of undertakings and individuals?
5. Private enforcement and confidentiality issues

• Need to balance access to file and confidential information obtained in the context of a leniency programme.

• When Regulation 1049/2001 has entered into play the EUGC has given a strict approach to confidentiality issues (EUGC Hydrogene Peroxide T-437/08 & EUGC EN BN Energie v COM T-344/08)
  – Access to index of COM file. Could it fall within the scope of commercial secrecy?
  – Could access to file be limited on public interests grounds?
  – What is the reasoning COM should give for denial access to file in a leniency programme when the term public interest is the basis for the denial?
5. Private enforcement and confidentiality issues

- All exceptions to the right of access must be interpreted and applied strictly, the fact that the documents requested concern a protected interest cannot, in itself, justify application of the exception invoked, since the Commission must establish that their disclosure was actually likely to undermine the protection of the purpose of its investigations concerning the infringements in question.

6. CONCLUSIONS

• Public enforcement does not or should not pursue the same aims and objectives of private enforcement.
• When public enforcement is in action the jurisprudence has given a narrow margin of appreciation to COM to declare the confidentiality. Specially when COM is enforcing Regulation 1/2003. Need to balance wide public powers with individual rights.
• When private enforcement has been the main action taken by parties to enforce EU Competition Law, EUCJ interpreting confidentiality and access to file has given a double solution. A) When it comes in the scenario Reg 1049/2001 has declared that denial to access has to be SUFFICIENTLY JUSTIFIED by COM; B) When national Courts are in a judicial process about damages actions is up to them within national legislation to grant access by weighting the interests protected by EU Law.
• Soft law is not enough for leniency programmes and to solve the problems with the confidentiality, acces to files and right of defence of parties.
• Different standard when Regulation 1049/2001 is borught up in a judicial process.
• Possible conflicts between national courts and COM? Need for strenghten cooperation.