

Claimants' access to information held by public antitrust agencies

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IMEDIPA - 3rd International Conference on
Competition Law and Policy

30 May 2009

Overview

- I. Conflicting interests between claimants and antitrust agencies
- II. Imperfect means of access to antitrust files
- III. What's next: diminished access to antitrust files but improved access to evidence through national courts

I. Conflicting interests between claimants and antitrust agencies

A. Claimant's incentives to access antitrust agencies' files



B. Antitrust agencies' reluctance to give access to their file

I.A. Claimant's need to access antitrust agencies' files (1)

In theory access to evidence through courts is quite open:

1. Discovery where it exists
2. Where it does not exist: Rules allowing production through judicial orders, *e.g.*:
 - France (Art. 10, 11, 138-142 and 145 of Code of Civil Procedure)
 - Italy (Art. 115 and 120 of Code of Civil Procedure)
3. Principle of effectiveness: Proactivity is required (C-526/04, *Laboratoires Boiron*, para 55)
4. Cooperation between national courts and Commission (art. 15(1) of Regulation No 1/2003 and *Notice on cooperation*)
5. If evidence is located in another EU Member State: Regulation No 1206/2001

I.A. Claimant's need to access antitrust agencies' files (2)

Access to evidence through courts much more limited in practice:

1. Judicial discretion, see *e.g.*,
 - France (Art. 10 of Code of Civil Procedure)
 - Italy (Art. 116 of Code of Civil Procedure)
2. Strict rules on burden of proof

Practical difficulties \Rightarrow claimants turn to antitrust agencies' files in case of follow-on actions

- Not necessarily sufficient (need to prove causal link and scope of damage)
- But potentially useful

I.B. Antitrust agencies' reluctance to give access to their file

Three main reasons:

1. Protection of leniency programs
 - Avoid deterring leniency applicants
 - See *Leniency Notice* (para 33-34); *Report on the functioning of Regulation No 1/2003* (para 19); *White Paper* (Section 2.9)
2. Protection of settlement submissions (Settlement Notice, para. 35-40)
3. Administrative burden

II. Imperfect means of access

A. Acting as a complainant: open but not fully effective



B. Relying on general regulations on access to public documents: misuse of transparency?

II.A. Acting as a complainant: quite open in theory (1)

Before the Commission:

- Proof of a “*legitimate interest*” (Art. 7(2) of Reg. No 1/2003)
- “*there is nothing to prevent a final customer who purchases goods or services from being able to satisfy the notion of legitimate interest*” (Case T-213/01, *Österreichische Postsparkasse v Commission*, para 114)
- Access to non-confidential version of the Statement of Objections (“SO”) (Art. 6(1) of Reg. No 773/2004)
- Use only “*for the purposes of judicial or administrative proceedings for the application of those Treaty provisions*” (Art. 8(2) of Reg. No 773/2004)
- Applies to damages actions (Case T-12/07 R, *Polimeri Europe v Commission*)

II.A. Acting as a complainant: quite open in theory (2)

Before National Competition Authorities (examples)

1. Access to the SO (no access to the file) : Office of Fair Trading
2. Full access to the file (except confidential information)
 - French Competition Authority
 - Bundeskartellamt
 - Autorita garante' della Concorrenza e del Mercato
 - Comisión nacional de la Competencia

II.A. Acting as a complainant: not a fully effective option

Not fully effective:

1. Often limited to SO, sometimes even less (EC settlement procedure)
2. Limitations on use (See *e.g.*, Art. L. 463-6 of the French Commercial Code)
3. No access to leniency applications nor settlement submissions
4. Excludes confidential information
5. If has not started proceedings, claimant must be aware of them before the adoption of the final decision

II.B. Bypassing limitations through general regulations on access to documents (1)

Main basis: Regulation No 1049/2001 (other examples at national level but not really used)

Very wide scope:

- General right of access
- Applicable “*in all areas of activity of the European Union*” (Art. 2(3)), including competition law (Case T-2/03, *VKI v Commission*)

Main relevant exceptions (Article 4(2) and 4(3)):

- Protection of commercial interests
- Protection of “*the purpose of inspections, investigations and audits*”
- Protection of decisional process (even after adoption of the decision)

II.B. Bypassing limitations through general regulations on access to documents (2)

Scope of exceptions is limited

- *In concreto* assessment is needed (See *e.g.*, Joined Cases T-391/03 and T-70/04, *Franchet & Byk v Commission*)
- Very limited number of documents are *per se* excluded (Case T-36/04, *API v Commission*)
- Size of the file is not an excuse (Case T-2/03, *VKI v Commission*)
- Even if exception *prima facie* applicable, must not be superseded by “*overriding public interest*” (Art. 4(2) of Reg. No 1049/2001)

⇒ *very* high annulment rate before the EC Courts

II.B. Bypassing limitations through general regulations on access to documents (3)

Legal uncertainty on right to access leniency applications:

- **Commission** argues are excluded from access (*Leniency Notice*, para. 40; *Commission Staff Working Paper*, para 299)
- **Ombudsman** seems to concur (Draft Recommendation 3699/2006/ELB)
 - Facilitating damages actions can be an “*overriding public interest*” justifying access (increases deterrence)
 - Concrete assessment of “*overriding public interest*” is needed:
 - Do the documents contain information that is useful to the claimant (damage; causal link)?
 - Can the national court obtain the documents (e.g., through Article 15(1) of Regulation No 1/2003)?
 - Documents obtained through leniency applications and replies to Art. 18 requests: probably not accessible (difference with documents obtained during dawn raid).

II.B. Bypassing limitations through general regulations on access to documents (4)

Above all, the EC Courts' case law is unclear:

- *in concreto* approach (See *e.g.*, Joined Cases T-391/03 and T-70/04, *Franchet & Byk v Commission*)

vs.

- systemic approach (See *e.g.*, Case T-403/05, *MyTravel v Commission*)

II.B. Bypassing limitations through general regulations on access to documents (5)

Increasing number of appeals:

- Case T-344/08, *EnBW v Commission* (Gas Insulated Switchgear cartel - access requested to certain documents)
- Case T-380/08, *Netherlands v Commission* (Bitumen cartel - access requested to complete, uncensored version of the decision)
- Case T-437/08, *CDC v Commission* (Hydrogen Peroxide cartel - access requested to the table of contents of the file)

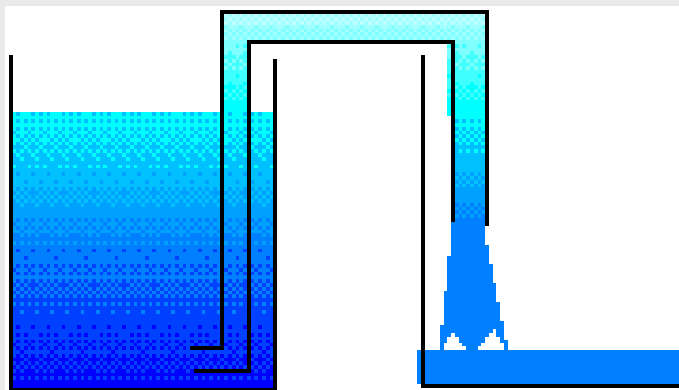
Is it a misuse of Regulation No 1049/2001?

- Legally, is difficult to challenge (Regulation is very broad and the EC Courts apply the law)
- As a matter of principle, more questionable (See *Staff Working Paper*, para 90 and 104 and footnote 105)
- Quite typically a matter for the EC legislator

III. What's next: diminished access to antitrust files but increased judicial access

- A. Restricting the scope of Regulation No 1049/2001
- B. Increasing access to evidence through national courts

Access through Reg. 1049/2001



Access through courts

I.A. Restriction of the scope of Regulation No 1049/2001

- Commission Proposal of April 2008 (COM(2008) 229 final) - New Art. 2(6):
 - *“Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive.”*
 - *“Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.”*
- Counter Proposal by Parliament (March 2009): suppresses proposed amendment
- Final outcome is uncertain

I.B. Increased access through national courts

White Paper and draft Directive: minimum level of disclosure *inter partes* under judicial control (potentially applicable to third parties)

4 conditions:

1. Fact pleading: show plausibility of claim
2. Subsidiarity
3. Precision
4. Proportionality

Communicating vessels

- Condition of subsidiarity shows that access through courts and through Regulation No 1049/2001 are closely interrelated:
 - Openness of Regulation No 1049/2001 may diminish availability of access to evidence through national courts
 - Access through Regulation No 1049/2001 is not supposed to be relevant to assess the availability of evidence: should be stated expressly in the Directive
- Potential snowball effect in favour of access to evidence through national courts

