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Confidential Treatment and Follow-On Actions – Some Thoughts Following *Commission v. Pilkington*

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Pilkington v. Commission - Chronology

- Pilkington was addressee of Commission decision fining *Car Glass* cartel (November 2008)
- Non-confidential version on Commission website (February 2010)
- Commission proposed to publish final non-confidential version incorporating some information redacted in web version (28 April 2011)
- Pilkington objected to inclusion of three classes of information (30 June 2011)
 - customer names, product names, or descriptions of products or other information that would identify customers (category I)
 - quantities supplied to a customer, share of business of particular customer, pricing calculations or price changes (category II)
 - information identifying specific Pilkington employees
- Hearing Officer rejected Pilkington's application (9 August, 2012)
- Appeal and request for interim measures (19 October, 2012)
- Order by President of General Court (Jaeger) on interim measures (11 March 2013)
- Order by Vice President of ECJ (Lennaerts) (10 September, 2013)

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***Pilkington v. Commission* –Order of President of General Court**

- Application by plaintiffs in German court follow-on actions for leave to intervene rejected
 - Pilkington not a defendant in those actions
 - National court “*may reasonably be persuaded*” to stay action pending resolution of case in Luxembourg

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***Pilkington v. Commission* –Order of President of General Court (II)**

- Publication of Category I and Category II information would cause serious and irreparable harm to Pilkington
 - Consideration of specific confidentiality claims would require detailed factual assessment beyond scope of interim measures procedure
 - Alleged infringement of fundamental rights (Charter Article 7, ECHR Article 8) means that financial nature of harm does not make it irrevocable
- This harm outweighs public interest in disclosure
 - Private claimants can bring claims and seek stay – no showing that claims will be time-barred by delay in publication

“[T]he fact remains that the exercise of that right would merely be delayed if the interim measures sought by the applicant were granted, which would entail a temporal restriction on the exercise of the right, whilst the corresponding right of the applicant would be reduced to nothing if the application for interim relief were dismissed.”

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Pilkington v. Commission –Order of President of General Court (III)

- Irreparable harm to Pilkington outweighed public interest in immediate disclosure
 - *“a judgment ordering annulment delivered after publication of the information at issue would no longer have any practical effect for the applicant”* (para. 32)
 - Claim of confidentiality based on a fundamental right
 - Art 339 TFEU, Art 7 Charter of Fundamental Rights, Art. 8 ECHR
 - Prejudice to Pilkington outweighed impact on plaintiffs right to effective remedy
 - *“the fact remains that the exercise of that right would merely be delayed if the interim measures sought by the applicant were granted, which would entail a temporal restriction on the exercise of the right, whilst the corresponding right of the applicant would be reduced to nothing if the application for interim relief were dismissed.”*

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Pilkington v. Commission –Order of ECJ Vice President

- Rejects finding that invoking fundamental rights makes harm “irreparable”
 - But finds that financial harm is irreparable where at time of interim measures decision harm cannot be adequately identified or quantified
 - *“It would be impossible to identify the number and status of all the persons who in fact acquired knowledge of the information published and thus assess the actual impact which publication of the information might have . . .”* (Para. 55)

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Pilkington v. Commission –Order of ECJ Vice President (II)

- Rejected argument that GC approach would have negative effect on conduct of administrative proceedings
 - Delays If parties could suspend proceeding to obtain review of disputes over confidential treatment of information in Commission file or Statement of Objections
- Disclosure to third parties in administrative procedure does not give rise to same harm
 - Legal limits on use of information
 - “access to a version of the statement of objections which contains business secrets, such access is, in principle, granted to that party for the sole purpose of enabling him to participate effectively in those proceedings, so that he is not entitled to use the information contained in that document for other purposes.” (Para 57)*
 - the information is shared with a limited number of easily identifiable persons (harm is more readily quantified)

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Pilkington and Private Actions: Some Thoughts

- Clear impact for private actions identified by Commission
 - Parties can delay publication of detailed non-confidential version of decisions until Luxembourg appeals process has been resolved
 - Judges comfortable that plaintiff can “stay” and wait
 - This problem may be reduced as law on what constitutes confidential information becomes more clear

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Pilkington and Private Actions: Some Thoughts (II)

- The treatment by Judge Lennaerts of confidentiality in the administrative procedure is interesting
 - Suggests protection of confidentiality in administrative procedure is legally binding
 - because required to make administrative process effective and protect fundamental rights
 - Does this mean that unauthorised disclosure could create liability in national law for parties that disclose (or obtain) such information?
 - Is “confidentiality ring” sufficient protection?

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Pilkington and Private Actions: Some Thoughts (III)

- Judge Jaeger focus on fundamental rights (Art 7 EU Charter; Art. 8 ECHR) is significant
- This is “elephant in the room”
 - Luxembourg courts will not expand rights of plaintiffs if there is risk of adverse ruling in Strasbourg
- This can impact more generally on attempts to enhance availability of evidence from Commission investigations in private actions
 - Focus on fundamental right to confidential treatment will also impact on *Pfleiderer* type requests

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Broader Implications

- Protecting fundamental rights in confidentiality claims may delay true “follow-on” actions
 - *i.e.*, actions where defendant(s) were addressees of Commission decision and claim only relates to scope of infringement found in decision
- *Bank Austria* ruling that there is no protectable interest in secrecy regarding details of infringing conduct remains applicable
 - Broadly compatible with ECHR

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Broader Implications II

- Serious issues could arise where private actions involve parties or conduct outside scope of infringement found in Commission decision
 - *E.g.* where limitations period had expired
- Suggestion in *Bank Austria* that Commission has unlimited discretion to publish details of historical and commercial context of infringement may require re-examination after Treaty of Lisbon
- Commission cannot publish information showing infringement by party not addressee of decision (*Pergan*)
- Same limits will apply *a fortiori* to requests for access to file following *Pfleiderer*

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