

The Interaction Between Public and Private Enforcement

New Challenges in EU Competition Law and Enforcement
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The aims of public and private enforcement

Public Enforcement

- + Punishment; Deterrence

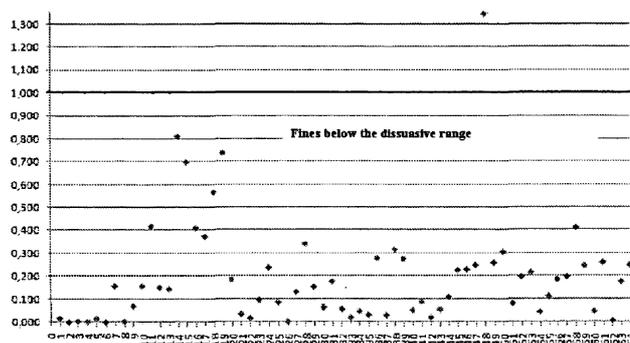
Private Enforcement

- + Compensation; Deterrence

...but deterrence is the most important objective.

Will damage claims be deterrence enhancing?

Figure 15
Actual Fines/Lower Dissuasive Fines



E Combe and C Monnier, 'The Myth of Overenforcement' (2011)

Follow-on vs Stand-alone: A Muddled Picture

- + EU: vast majority of private actions are follow-on cases. Stand-alone actions fail because of a lack of evidence. (Sarra and Marra 2008).
- + Germany: high rate of stand-alone cases, but nearly all concern dominance. Only around 3% concerned price fixing (S Peyer 2012).
- + In UK, 37% follow-on and 63% stand-alone (Rodger 2013)
- + In US around 90% of antitrust actions are stand-alone cases, but many are not strictly speaking competition law cases.
- + Follow-on actions are generally underestimated because many are settled before they reach court.
- + Arguably proposed EU and UK reforms (especially collective actions) will mainly benefit follow-on rather than stand-alone actions.

Leniency: a period of heightened uncertainty

- ✦ In effect, immunity no longer means immunity. Whistleblower could pay the penalties it avoids (and more) in subsequent damages.
- ✦ **Pfleiderer**, **National Grid** and **Donau Chemie** have had the effect of increasing uncertainty for firms seeking to uncover infringements in return for leniency. Danger of inconsistencies in balancing exercise between national courts.
- ✦ UK Government decided not to take action in this area to allow European Commission to decide on EU wide approach. (BIS January 2013)

Less information and poorer decision making?

- ✦ If greater private enforcement (and access to leniency documents) does weaken incentive to apply for leniency, competition authorities will have to respond strategically to this.
- ✦ Access to leniency documents in US has largely created a paperless leniency process and an even greater incentive to enter plea bargain (90%+ of firms do). Very little information is available at the end of this process.
- ✦ Increase in settlements and tendency to give technical admission of guilt while publically maintaining innocence.
- ✦ Harder to scrutinise enforcement and ensure fairness.

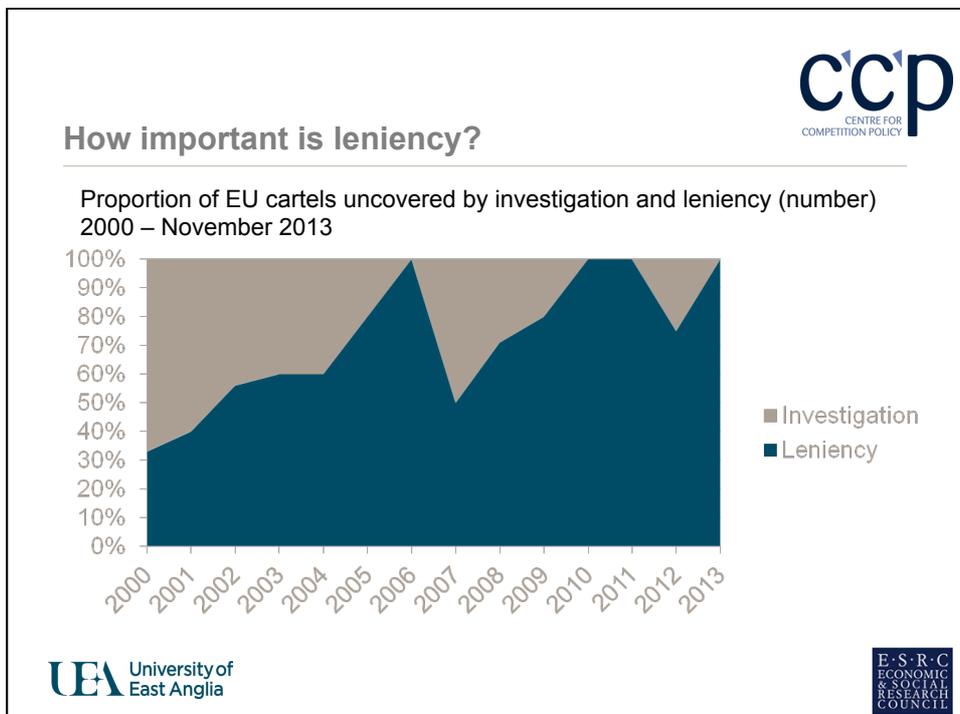
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...or a possible drop in leniency applications?

- ✦ Proposed EU Directive on Damages (June 2013) provides for absolute protection against disclosure of leniency corporate statements and settlement submissions in follow on private damage actions.
- ✦ Even protecting whistleblower from private actions altogether will not necessarily protect the leniency programme.
- ✦ Same problem in relation to cartel offence.
- ✦ How do you know you will be first through the door?

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Worst Case Scenario

- ✦ Introducing measures that fail to adequately stimulate private enforcement, while doing enough to undermine leniency programmes.
- ✦ The result will be less deterrence than we had to begin with.