

Access to Evidence and Leniency Materials

Florian Wagner-von Papp*

I Introduction

Better access to evidence is considered an important precondition for more vigorous private enforcement in Europe. Accordingly, rules on access to evidence make up a substantial proportion of Directive 2014/104/EU (the ‘Damages Directive’ or the ‘Directive’).¹ This chapter argues that the Directive’s provisions by themselves will not result in a level playing field as far as the practice of access to evidence is concerned, because they only *enable* national courts to order disclosure, but do not *mandate* disclosure. This lack of bite may, however, only be apparent. It is possible that the EU legislator had, as Baldrick would say, ‘a cunning plan’: to legislate for a harmonised ability to order disclosure as a Trojan Horse so as to introduce mandatory disclosure based on the principle of effectiveness. After all, the Court of Justice for the European Union (CJEU) decided already a decade ago that the principle of effectiveness may require any national court ‘to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document’.² Before the Damages Directive, it was a question for national law to decide whether national courts had the power to order disclosure, which could then be ‘upgraded’ to an obligation to order disclosure where required by the principle of effectiveness. Now that the Damages Directive mandates as a matter of European Union law that ordering disclosure must be a ‘procedure[] available’ to any national court in the European Union, the decision whether disclosure is to be ordered in any given case is one that can, and has to be, resolved largely under EU law standards.

There seems to be a convention that any commentary on access to evidence in competition cases has to begin with the statements that antitrust cases are ‘fact intensive’, and information relevant to the infringement and its effects on the

* I would like to thank the editors for their patience, and Alex Mills, Konstanze von Papp, Wouter Wils and the participants of the ENTraNCE for Judges training at the European University Institute, Florence, Italy, for very helpful comments.

¹ Chapter II (Articles 5 to 8) and recitals 14 to 33 of Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] *Official Journal of the European Union* L 349/1. See also Directive Articles 13 and 14(1) *in fine*. There have been accompanying changes in Regulation (EC) No 773/2004 (Commission Regulation (EU) 2015/1348 of 3 August 2015, amending Regulation (EC) No 773/2004, [2015] OJ L208/3 relating to the Conduct of Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty) and the notices on access to the file (Communication from the Commission — Amendments to the Commission Notice on the Rules for Access to the Commission File in Cases Pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, [2015] OJ 256/3), leniency (Communication from the Commission — Amendments to the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, [2015] OJ 256/1), settlement (Communication from the Commission — Amendments to the Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases [2015] OJ C256/2), and cooperation with national courts (Communication from the Commission — Amendments to the Commission Notice on the Cooperation between the Commission and Courts of the EU Member States in the Application of Articles 81 and 82 EC, [2015] OJ C256/5).

² CJEU, Case C-526/04 *Laboratoires Boiron*, ECLI:EU:C:2006:528 paras 55, 57.

market will often be distributed asymmetrically; generally it will be in the hands of the infringers and not in those of the injured party.^{3, 4}

Faced with such a situation of asymmetric information, legal regimes can react in a variety of ways. A first option is to do nothing about the asymmetric distribution, which means that the injured party will only succeed in those cases where the information is exceptionally available to it. A second option is to exempt the injured party from proving certain facts altogether. This can be achieved, for example, by establishing rebuttable or irrefutable legal presumptions that reverse the burden of proof and so put the onus on the party that is more likely to possess the information.⁵ A third option, a 'softer' version of the second, is to leave the burden of proof formally with the injured party, but to allow it to rely on certain inferences drawn from proven or uncontroversial facts, unless the infringer adduces evidence that shows that drawing the inference would be inappropriate.⁶ Similarly, it is possible to lower the standard of proof

³ Recitals 14 and 15 of the Damages Directive; Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final of 2 April 2008 (the 'White Paper') 4–5; Commission Staff Working Paper accompanying the White Paper, SEC(2008) 404 of 2 April 2008 (the 'Commission Staff Working Paper') paras 65–66; A Bruns, 'Private Enforcement of Competition Law: Evidence', in J Basedow, JP Terhechte & L Tichý (eds), *Private Enforcement of Competition Law* (Baden-Baden: Nomos 2011) 127, 130; G Bauer & K Kitzberger, 'Production of Evidence in Central and Eastern Europe' in Basedow, Terhechte & Tichý (eds), op cit, 153, 154; JA Sanner, *Informationsgewinnung und Schutz von Unternehmensgeheimnissen in der privaten Kartellrechtsdurchsetzung* (Baden-Baden: Nomos 2014) 150, 184–96. Even though the fact intensity and asymmetry of the distribution of information may be particularly high in competition cases, these issues are, of course, pervasive in other areas of law as well; cf R Verkerk, *Fact-Finding in Civil Litigation* (Antwerp: Intersentia 2010) 185.

⁴ I assume here, for easier readability, the standard situation in which the information asymmetry is in favour of the infringer. In other situations, the asymmetry may be in favour of the injured party, for example in relation to the pass on of overcharges (see also the second sentence of Article 13 and Article 14(1) of the Directive). The Damages Directive provides for the possibility of two-way disclosure (first and second sentence of Article 5(1) of the Directive, respectively), including disclosure from third parties. The issues to be considered need not be mirror images, however. A German court considered, for example, that the infringer may be sued by indirect and direct purchasers concurrently or successively. In such a case, the indirect purchasers will supply the infringer with evidence of pass on, so that the infringer may not depend on disclosure of information by the direct purchasers to the same degree as purchasers who seek disclosure from the infringer. Federal Court of Justice (BGH), 28 June 2011, KZR 75/10 — *ORWI* para 72.

⁵ The best-known example for an irrefutable presumption in competition cases are rules which provide that an infringement decision by a competition authority establishes the existence of an infringement. The Directive now establishes that final decisions by National Competition Authorities (NCAs) irrefutably establish the existence, nature, and scope of an infringement before courts in the *same* Member State (Article 9(1) of the Directive with recital 34); for details see ch 7. Moreover, according to Article 16 of Regulation 1/2003, national courts may not take decisions 'running counter' to Commission decisions, which at a minimum leads to a binding effect with regard to the operative part of the Commission decision, most importantly the finding of an infringement. For a discussion under what circumstances a court decision would 'run counter' a Commission decision, see AP Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Oxford, Hart Publishing, 2008) 115–139, and idem, 'Private Enforcement in the EU with Emphasis on Damages Actions' in I Lianos & D Geradin (eds), *Handbook on European Competition Law – Enforcement and Procedure* (Cheltenham, Edward Elgar, 2013) 228, 258–9. Even before the Directive, national laws in many (but not all) Member States accorded a binding effect to the finding of an infringement both in Commission decisions and NCA decisions, either only those of their own Member State (as is the case in the UK, sections 47A and 58A of the Competition Act 1998 for follow-on actions in the High Court and before the Competition Appeals Tribunal, respectively) or those of the NCAs in all Member States (as is the case in Germany, § 33(4) of the Gesetz gegen Wettbewerbsbeschränkungen (GWB)); for a discussion of the pros and cons of the UK versus the German solution see E Truli, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules: The Binding Effect of Decisions Adopted By National Competition Authorities' (2009) *European Competition Journal* 795–821. While the White Paper (n 3, 5–6) and the Commission Proposal (Article 9 of the Commission Proposal, COM(2013) 404 final of 11 June 2013) had essentially followed the German approach, under the compromise and final versions of the Directive Member States have to treat decisions of NCAs in other Member States only (at least) as prima facie evidence (Article 9(2)). Claimants in follow-on actions still face problems in proving the existence of harm, its quantum, and causation. However, the Directive again provides some assistance by establishing a rebuttable presumption of the existence of harm in cartel cases, Article 17(2), by requiring Member States to provide for an allocation of the burden of proof and a setting of the standard of proof that complies with the principle of effectiveness and to enable courts to estimate the quantum, Article 17(1), and by enabling NCAs to assist courts, Article 17(3).

⁶ The gradations currently differ depending on the rules of civil procedure in the Member States. In common law countries, this is the domain of 'presumptions of fact' (as opposed to 'presumptions of law'), sometimes subdivided into narrower categories of presumptions of fact in the narrower sense (where it is up to the fact finder to decide whether an inference from one fact to another should be drawn), evidential presumptions (where the party against whom the presumption works can counter the presumption with evidence showing that the presumed state of affairs is *equally likely* not to have existed),

for the injured party.⁷ A fourth option is to address the asymmetry directly by imposing a duty on the party that has the information (including third parties such as authorities or other courts) to disclose it to the injured party.

This chapter is primarily concerned with the fourth of these options. However, the interaction between access to evidence and disclosure rules⁸ on the one hand, and the allocation of the burden and the setting of the standard of proof on the other hand should be kept in mind: A change of the burden or standard of proof will influence the urgency of any need for disclosure and thus may affect the interest balancing and exercise of discretion that determines whether disclosure should be ordered.⁹ From a comparative perspective, shifting the burden or standard of proof may therefore be functional equivalents to disclosure rules, and these rules interact with the access to evidence rules when it comes to determining the proportionality of a request.

The European discussion about access to evidence has many dimensions, and on each of these dimensions the arguments are sufficiently ambivalent to equip both proponents and opponents of more disclosure with ammunition.

First, there is the comparison to the United States. On the one hand, the wide-ranging discovery procedure in the United States is without question one of the factors that enable plaintiffs to pursue private enforcement actions so effectively in that jurisdiction. On the other hand, the costliness of the discovery procedure is considered to be a problem by many in the United States, with frequent allegations of ‘discovery abuse’ and ‘discovery blackmail’,¹⁰ a concern that motivated European institutions to argue for a more restrictive regime,¹¹

and persuasive presumptions (where the countervailing evidence has to make it *more likely* that the presumed state of affairs did not exist). In Germany, the party bearing the burden of proof may under certain circumstances — in particular cases of structural information asymmetry — be excused from a detailed burden of production unless the other party denies pleaded facts in a sufficiently substantiated manner (‘abgestufte Darlegungs- und Beweislast’ or ‘staggered burden of production and persuasion’). See, in the antitrust context, BGH in *ORWI* (n 4 above) paras 70–7.

⁷ See Article 17(1) of the Directive, providing that the standard of proof required for the quantification of harm must be such as not to render the enforcement of the right to damages practically impossible or excessively difficult.

⁸ I will use ‘disclosure’ and ‘discovery’ interchangeably, but will prefer ‘disclosure’ in the European context (where the Directive and the post-*Woolf Reform* English Civil Procedure Rules use the term ‘disclosure’ to include both the ‘discovery’ and the ‘inspection’ stages, cf HK Woolf, *Access to Justice – Interim Report* (1995) ch 21 para 10, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/interim/chap21.htm>) and ‘discovery’ in the US American context. ‘Access to evidence’ is wider in that it also comprises ways to access evidence under the Transparency Regulation, Freedom of Information Acts, Access to the File rules etc. Note that this departs from the terminology used in the *Ashurst comparative report*, which used ‘discovery’ to describe ‘compulsory (pre-trial) disclosure of all documents relevant to a case’, distinguishing the ‘general duty of disclosure of relevant information and [...] the ability of judges to order production of specific documents’ (Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report*, prepared by D Waelbroeck, D Slater and G Even-Shoshan (31 August 2004) 1–63).

⁹ The partial substitutability of disclosure rules and modifying the burden or standard of proof is discussed in the Commission Staff Working Paper, n 3, paras 91–2; Eddy De Smijter, ‘Private Enforcement: Public Enforcer’s Perspective’ in F Wijckmans and F Tuytschaever (eds) *Horizontal Agreements and Cartels in EU Competition Law* (Oxford: Oxford University Press 2015) paras 8.139–8.140; in particular for Germany: Sanner, n 3, 298–351; P von Dietze & E Brödermann, ‘Germany’ in AA Foer & JW Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Cheltenham: Edward Elgar 2010) 328, 337; and more generally GM Beckhaus, *Die Bewältigung von Informationsdefiziten bei der Sachverhaltsaufklärung* (Tübingen: Mohr Siebeck 2010) 86–8, 138–61. The interaction between disclosure rules and the allocation of the burden of proof also becomes evident in Articles 13 and 14(1) of the Damages Directive.

¹⁰ *Bell Atlantic v Twombly*, 550 US 544, 558–9 (2007) (mentioning the high cost of discovery in antitrust cases, reportedly amounting to up to 90% of litigation costs, and stating that ‘the threat of discovery expense will push cost-conscious defendants to settle even anemic cases [...]’); FH Easterbrook, ‘Discovery as Abuse’, (1989) 69 *Boston University Law Review* 635–48; see also, from an economics perspective RD Cooter & DL Rubinfeld, ‘Reforming the New Discovery Rules’, (1995) 84 *Georgetown Law Journal* 61–89; RD Cooter & T Ulen, *Law & Economics*, 6th International edn (Boston: Pearson 2012) 398.

¹¹ Commission Staff Working Paper, n 3, paras 93–97.

and that has led to a reform of the US rules that went into effect in December 2015.¹²

Secondly, there is a wide divergence of approaches not only between the United States and Europe, but also within Europe. While no European jurisdiction has a discovery procedure that is as wide-ranging as the one in the United States, European common law jurisdictions have more extensive procedural disclosure requirements than European civil law jurisdictions, despite some tentative converging trends in recent years. Common law jurisdictions consider disclosure rules indispensable tools for eliciting the truth. Civil law jurisdictions by and large consider them as an infringement of the rules on the burden of proof and substantiated fact-pleading, as well as an alleged right of a party not to have to give evidence against itself.¹³

Thirdly, there is a tension between the Commission's desire to empower claimants by giving them more access to evidence, and the need to safeguard the public enforcement of competition law, in particular leniency programmes and settlements. While this tension was recognised from the outset, the judgments in *Pfleiderer* and *Donau Chemie* have shifted the Commission's focus from empowering private claimants to safeguarding public enforcement. This was and remains one of the most controversial points of the Damages Directive: does it go too far in privileging leniency applicants and settling parties, or does it not go far enough?¹⁴

Fourthly, and closely related to the last point, access to evidence is not limited to disclosure between the parties to litigation. Not only can, and do, disclosure rules also compel disclosure from persons who are not parties to the litigation,¹⁵ but there is also the possibility of acquiring information from public authorities under separate legal rules such as the Transparency Regulation,¹⁶ national Freedom of Information Acts, rules granting access to the file,¹⁷ rules on the taking of evidence for another tribunal,¹⁸ and rules on the exchange of information between courts or between public authorities and courts.¹⁹

The Directive seeks to find a compromise across all these dimensions. Starting from the not necessarily uncontroversial premise that private enforcement is to be strengthened in the EU,²⁰ and recognising that incriminating information will

¹² Below text to n 68.

¹³ N Jalbert-Doury, 'France', in Foer & Cueno, n 9, 321; C Steinle, 'Kartellschadensersatzrichtlinie – Auf dem Weg zum Sanktions-Overkill?', (2014) *Europäische Zeitschrift für Wirtschaftsrecht* 481.

¹⁴ Below text to and following n 322.

¹⁵ Now Article 5(1) of the Directive; in England, non-party disclosure has only been introduced in by the Civil Procedure Rules 1998 (CPR), Part 3.17 (before the CPR 1998, only *subpoena duces tecum*, now witness summons, were available under more restrictive conditions); in Germany, §§ 142, 144 of the *Zivilprozessordnung* (Civil Procedure Code, ZPO) enable courts to order disclosure from parties and non-parties alike; the same is true for France, articles 11, 138–42 *nouveau code de procédure civile* (ncpc). These rules appear to be representative for other European jurisdictions as well.

¹⁶ Regulation (EC) 1049/2001.

¹⁷ In Germany, claimants have sought access to the file in criminal (or quasi-criminal) proceedings under § 406e of the Criminal Procedure Code (StPO), which is applicable to likely victims of a crime (or administrative offence), and under § 475 StPO (for others who can show a legitimate interest). In administrative proceedings, claimants have successfully invoked a right to an exercise of discretion by the authority. See below n 402.

¹⁸ See, eg, Regulation (EC) 1206/2001; the Hague Convention; 28 USC § 1782. See below text accompanying nn 425, 435.

¹⁹ Eg, Article 15 of Regulation (EC) 1/2003; in Germany, § 273 of the Civil Procedure Code (ZPO) with § 474 of the Criminal Procedure Code (StPO) has been used with some success (see below text to and following n 430).

²⁰ Some commentators consider the nearly exclusively public enforcement model in the EU preferable to a mixed system of public and increased private enforcement, for fear that increased private enforcement will impact negatively on public enforcement, and because the compensation function is not well served because of the complexities that the passing on of overcharges creates. See, eg, DA Crane, 'Why Leniency Does Not Undermine Compensation', in C Beaton-Wells and C

often be in the hands of the infringer, the Directive sensibly requires Member States to enable judges to order disclosure (Article 5). The Directive seeks to avoid the (perceived or real) danger of abuse of the US discovery system by relying on a fact-pleading system, establishing a proportionality requirement, and placing national courts in the position of gatekeepers. In particular, and in contrast to the 2013 Commission Proposal, the Directive no longer establishes any explicit duty on the national courts to order disclosure.²¹

Article 6 deals with the specific case that disclosure of evidence included in the file of a competition authority is sought; the provision attempts to strike a balance between effective private enforcement and safeguarding the effectiveness of public competition law enforcement. Article 7 establishes limits on the use to which evidence from the file of a competition authority can be put. The absolute protection of leniency statements and settlement submissions (Articles 6(6), 7(1)), as well as the temporary protection of information that was prepared for the proceedings of or by a competition authority, and of withdrawn settlement submissions (Article 6(5), 7(2)) is meant to safeguard the effectiveness of public competition law enforcement.²²

Article 8 requires Member States to introduce penalties for the destruction of relevant evidence, the failure to comply with a disclosure or protective order, and the breach of the limits of use of evidence.

For common law jurisdictions, the disclosure rules in the Directive bring changes mainly with regard to the absolute protections that replace the case-by-case balancing approach required by the *Pfleiderer/Donau Chemie* case law — provided these absolute protections in the Directive are in conformity with primary EU law.²³ Conversely, the Directive's minimum standards *facilitating*

Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Oxford: Hart Publishing 2015) 263; W Möschel, 'Behördliche oder privatrechtliche Durchsetzung des Kartellrechts?' (2007) *Wirtschaft und Wettbewerb* 483. While some concede that at least the compensation function is best served by private enforcement (WPJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3), others would prefer to have public enforcement fulfill the compensation function as well (eg T Kapp, 'Abschaffung des Private Enforcement bei Hardcore-Kartellen' in S Bechtold et al (eds), *Recht, Ordnung und Wettbewerb* (Baden-Baden: Nomos 2011) 319, 331–40, with a proposal to substitute a system of disgorging illegal gains through public enforcement and distributing them to victims for the current combination of fines and private enforcement system. The German legislator codified case law in Germany in the 8th Amendment to the Act against Restraints of Competition that a termination order may include the order for restitution of the illegal gains (§ 32(2a) GWB as amended). For a comparative overview of the already existing practice of 'public compensation' see A Ezrachi & M Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: From Policy Justifications to Formal Implementation' (2012) 3 *Journal of European Competition Law & Practice* 536–44; see also the *Deutsche Bahn* commitment decision, Commission, 18 December 2013, Case COMP/AT.39678/*Deutsche Bahn I* and Case COMP/AT.39731/*Deutsche Bahn II*, paras 91–3 (though taking pains to justify the one-time 4% payment as a termination of the margin squeeze rather than a restitution of overcharges). *Contra* AA Foer and JW Cuneo, 'Toward an Effective System of Private Enforcement', in Foer and Cuneo, n 9, 588–9 (arguing that competition authorities lack incentives to pursue such claims vigorously and may have conflicting interests); Sanner, n 3, 151–2.

²¹ Contrast the wording of Article 5(2) of the Commission Proposal (n 5) ('Member States shall ensure that national courts order disclosure' where the evidence is relevant and sufficiently specified) with the wording of Article 5(2) of the Directive ('Member States shall ensure that national courts *are able to* order disclosure [...]'). But see recital 15, which still considers that 'it is appropriate to ensure that claimants are afforded the *right to obtain the disclosure* of evidence [...]' (emphasis supplied). As will be discussed below (text around n 202), there may be an implicit duty to order disclosure due to a reduction of the court's discretion to zero to conform to the principle of effectiveness under the *Laboratoires Boiron* case law.

²² See also the general requirement for national courts to consider the need to safeguard the effectiveness of public enforcement in Article 5(4)(c).

²³ Department of Business Innovation and Skills, *Consultation: Implementing the EU Directive on Damages for Breaches of Competition Law* (January 2016) para 7.26: 'Disclosure is a well-established concept in the UK. The primary change here will be to provide for statutory protection for leniency documents, and is likely to require amending the Civil Procedure Rules.' See already F Wagner-von Papp, 'Implementation of the Damages Directive in England & Wales' (2015) *Concurrences* 29, 31–2 paras 9–17. Also compare the case *Sainsbury's Supermarkets v Mastercard Inc and ors*, in which

disclosure largely either reflect the status quo in common law jurisdictions or are less demanding. Where the Directive reflects the status quo, there is of course no need for these jurisdictions to change anything, and even where the Directive is less demanding than the rules in the common law jurisdictions, the Directive generally provides only a minimum standard, so that more demanding regimes remain free to provide for wider disclosure (Article 5(8)).

In continental European jurisdictions, in contrast, the provisions in the Directive that enable courts to order disclosure have often been criticised as going too far and being incompatible with traditional civil procedure rules.²⁴ Similarly, commentators from common law jurisdictions have suggested that the Directive will ‘introduce on an EU-wide level a system similar to discovery as known in the common law’.²⁵

Such concerns, or hopes, are misplaced.²⁶ There is, on the contrary, a question whether the disclosure rules in the Directive will actually have the effect of changing the current restrictive practice of continental courts. As will be discussed below, courts all over the world seem to be resilient against legislative changes in this area. This is both the experience in common law jurisdictions that have tried to limit costly discovery²⁷ and in civil law jurisdictions that have tried to entice courts to order more extensive disclosure.²⁸ In both cases, the courts have sidelined these legislative attempts to effect a changing of course and have largely persisted with their prior practice.²⁹ Similarly, the CJEU decision in *Laboratoires Boiron* and its progeny that mandates making full use of existing procedural instruments where this is required by the principle of effectiveness³⁰ has not motivated many civil courts to make the most of the existing provisions on disclosure. The problem in all these examples is that while the legislator indicates the direction towards more or less disclosure, the decision is ultimately left to the discretion of the court; and courts tend to exercise their discretion in line with their previous practice.

The chapter is structured as follows. Parts II and III give some background to the discussion about disclosure rules, by providing an overview of the law and

the High Court would have allowed disclosure under the English rules while the Commission in its opinion clarified that if the Damages Directive were already in effect, the disclosure would be impermissible, and that the Damages Directive’s weighting of the interests should already be taken into account in the interest balancing, even before it is implemented. Opinion of the European Commission in application of Article 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty—CT.00928—Interchange Fee Litigation before the High Court of Justice, Chancery Division: *Sainsbury’s Supermarkets Ltd v MasterCard Incorporated and Others* (Claim No HC 2012-000063), C(2015) 7682 final. For a discussion of the compatibility of the absolute protections with primary law, see below text to and following n 340.

²⁴ See, eg, Steinle, n 13, 482 (complaining that ‘such wide-ranging powers of investigation are not compatible with continental legal tradition and the self-perception of many civil judges’ (author’s translation)).

²⁵ D Ashton and D Henry, *Competition Damages Actions in the EU: Law and Practice* (Cheltenham: Edward Elgar 2013) para 4.059.

²⁶ See already *R Becker* ‘Kartellrechtliche Schadensersatzklagen à l’américaine?’ in W Möschel and F Bien (eds) *Kartellrechtsdurchsetzung durch private Schadensersatzklagen* (Baden-Baden: Nomos 2010) 59; F Wagner-von Papp, ‘Der Richtlinienentwurf zu kartellrechtlichen Schadensersatzklagen’, (2009) *Europäisches Wirtschafts- und Steuerrecht* 445, 452.

²⁷ Such as the United States with various changes to Rule 26 of the Federal Rules of Civil Procedure since 1983 (text following n 71) and the United Kingdom in the *Woolf* and *Jackson* reviews (text following n 97).

²⁸ Such as Germany, with the reform of §§ 142, 144 Civil Procedure Code (ZPO) in 2001/02, and France, where a similar reform took place already in the 1970s (resulting in articles 11, 138–42 nouveau code de procédure civile (ncpc)).

²⁹ Below text accompanying and following nn 88 (US), 123 (England) and 183 (Germany).

³⁰ See below text accompanying n 202.

economics of disclosure (Part II) and of disclosure in a comparative perspective (Part III). Part IV examines the disclosure provisions of the Directive in greater detail. Part V briefly describes ways to access information other than through disclosure in the damages action itself, in particular in the form of access to the file, public access to documents, and exchanges of information between authorities and courts. Part VI concludes with a look into the future of disclosure in the European Union.

II A Brief Law & Economics Perspective

The starting point for the discussion about the Law & Economics of discovery is generally the legislature's objective when they introduced the 1938 discovery provisions in the US Federal Rules of Civil Procedure (FRCP): to facilitate settlements in order to avoid costly trials. Trials become necessary mostly because claimants or defendants are relatively optimistic as to the expected outcome of the trial; and this relative optimism is based on incomplete information.³¹ Accordingly, defendants' willingness to pay may be too low, or claimants' reservation prices may be too high, to reach a settlement. The cooperative surplus that would be available for distribution if both parties assessed their position on the basis of complete evidence may disappear entirely where one or both parties rely on biased information. At first glance, one might therefore think that forcing both parties to share their information should result in more settlements by reducing relative optimism of the parties.³² However, information that reduces the other party's relative optimism will usually be *voluntarily* disclosed even in the absence of compulsory disclosure rules, because each party has an incentive to release information favourable to itself that *reduces* the other party's expected payoff.³³ Discovery rules serve, instead, to compel the revelation of information unfavourable to oneself.³⁴ Such information, however, will not *reduce* relative optimism but will instead make the requesting party even *more* optimistic: far from narrowing the gap between the claimants' willingness to accept and the defendants' willingness to pay, such compelled disclosure of information favourable to the other party will *widen* this gap.³⁵

³¹ See, eg, RD Cooter & DL Rubinfeld, 'An Economic Model of Legal Discovery', (1994) 23 *Journal of Legal Studies* 435, 436; Cooter & Ulen, *Law & Economics* (n 10) 391–9.

³² Cf Proposition 1 of Cooter & Rubinfeld (n 31) 441.

³³ Cooter & Rubinfeld (n 31) 436, 443–4; Cooter & Ulen (n 10) 393–5 ('bad news is free'). But see EH Cooper, 'Discovery Cost Allocation: Comment on Cooter and Rubinfeld' (1994) 23 *Journal of Legal Studies* 465, 473, that the bad news may also be saved as a surprise at trial (although, one should add, that this may entail the risk of preclusion).

³⁴ BL Hay, 'Civil Discovery: Its Effects and Optimal Scope' (1994) 23 *The Journal of Legal Studies* 481, 485–7, points out that some unfavourable information may be disclosed where there is an unraveling effect. Such an unraveling effect, however, depends on knowledge by the other party what the worst case scenario is, and that it would be costless or sufficiently cheap for the party possessing the information to signal that it belongs to a different (stronger) type. For many kinds of information that can be uncovered in discovery, these requirements may not be met. See also *ibid*, 488–94 (for evidence that would emerge at trial) and 496–7 (for evidence that would not emerge at trial).

³⁵ Cooter & Rubinfeld (n 31) 444 and Cooter & Ulen (n 10) 394–5 point out that this decreases the probability of out-of-court settlements and increases the probability of a trial, *unless* a trust-increasing effect of the revelation of information dominates (see text accompanying n 36), because the range of values for which the parties are willing to settle is reduced and this range moves closer to the objective expected value of the claim. JL Schrag, 'Managerial Judges: An Economic Analysis of the Judicial Management of Legal Discovery' (1999) 30 *RAND Journal of Economics* 305, points to another settlement-reducing effect of discovery: an early settlement offer by one party could be considered as a signal that there is detrimental evidence to be found, so that the other party may invest more into discovery. Hay, n 34, 499, adds that the parties may interpret disclosed evidence differently. Given what we know about confirmation bias, it seems indeed likely that parties to the litigation will interpret available evidence each in their favour, thus reducing the probability of settlement.

One positive effect of compelled disclosure on settlements, and one that could potentially outweigh the negative effect from the widening expectation gap, is that the credibility of the voluntarily released favourable information or of the assurance of the absence of unfavourable information may increase.³⁶

An arguably practically more important effect of compelled disclosure is that the value of a settlement or judgment will usually come closer to the objective expected value of the claim; if all else is equal, the *error costs* should be reduced.³⁷ It should be borne in mind, however, that this presupposes that the effect of compelled disclosure is always to *improve* the value of information. *Cooter & Rubinfeld* have pointed out—as has *Kötz* from a comparative perspective³⁸—that pre-trial discovery procedures, in so far as depositions or witness statements are concerned, tend to reduce spontaneity of testimony.³⁹ If spontaneous testimony is more truthful than prepared or rehearsed testimony,⁴⁰ the effect on error costs becomes more ambiguous. This latter point does not, however, concern disclosure of pre-existing *documents*, whose evidentiary value is fixed.

While the cost of errors generally decreases with more disclosure if all else is equal, and the reliability of the information may be increased, the *administrative costs* rise with more disclosure.⁴¹ These administrative costs for disclosure are likely to be high in practice, in particular because much of the information that is sifted is irrelevant but nevertheless has to be checked by the disclosing party for relevance and privilege, and, to the extent it could be relevant but is not privileged, again by the requesting party, as well as possibly by translators and experts.⁴²

As the comparative part will show, a particular problem that inflates discovery costs is that part or most of the discovery costs are externalised to the responding party; this has traditionally been true especially under the American cost rules,⁴³ but to a more limited extent is true even for Europe.⁴⁴ This externalisation of discovery costs is the main target of economic analyses.⁴⁵

³⁶ Cf *Cooter & Ulen* (n 10) 395 in fn 9; *Cooper*, n 33, 473.

³⁷ *Cooter & Rubinfeld* (n 31) 444–6; *Cooter & Ulen* (n 10) 397. But see below text accompanying n 52.

³⁸ H Kötz ‘Civil Justice Systems in Europe and the United States’ (2003) 13 *Duke Journal of Comparative and International Law* 61, 65–6.

³⁹ *Cooter & Rubinfeld* (n 31) 446. See also *Timothy Duncan Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile) [43]:

‘Like all the Bank’s witnesses, the presentation of their witness statements was a model but that is primarily due to the drafting no doubt done with the considerable assistance of their instructed litigation solicitors. This practice of drafting of witness statements and their substitution for evidence in chief makes evaluation of witnesses evidence on the issue of credibility more difficult.’

⁴⁰ *Cooter & Rubinfeld* (n 31) 446 (‘When desperate, tell the truth’).

⁴¹ *Cooter & Ulen* (n 10) 397 are more cautious. They agree that it is *more likely* that administrative costs rise with discovery, but consider that discovering information in the pre-trial phase is less costly than discovering it at trial. However, most of the information that is sifted in the discovery process would not even be considered at trial in the absence of discovery (which increases error costs, but reduces the administrative cost).

⁴² See *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741, [2007] *Business Law Review* 1753 [36]–[55] (while that case concerned a patent action, most of the considerations by Jacob, LJ, were of a general nature, see *ibid* [44]). See also the quotations in n 98

⁴³ Text following n 82.

⁴⁴ Text following n 148.

⁴⁵ See references in n 92; see also BH Kobayashi, ‘Law’s Information Revolution as Procedural Reform: Predictive Search as a Solution to the in Terrorem Effect of Externalized Discovery Costs’ (2014) *University of Illinois Law Review* 1473, 1476–7 (with references in fn 15).

Where discovery requests need not be targeted to specific pieces or categories of evidence, but relate instead to all relevant information, the administrative costs are inflated for three additional reasons.

First, there is a principal-agent relationship between clients and their lawyers. Even to the extent the parties internalise the disclosure costs and so have an incentive to keep costs down, the incentives are not necessarily identical for the members of their legal team who are likely to be the ones actually deciding on the breadth of any disclosure requests.⁴⁶ Where billing is by the hour, the legal team may have an interest in using time-intensive broad disclosure as a ‘revenue stream’⁴⁷ or, as one in-house put it less delicately, a ‘cash cow’.⁴⁸

Secondly, even where lawyers are their clients’ faithful agents, they are faced with the possibility of broad disclosure requests by the opposing side. They may escape such broad requests if they successfully negotiate with the opposing side for limited disclosure. In order to assess the exposure that would come with disclosure, and consequently how much effort to put into the negotiations for limited disclosure to balance marginal cost with marginal benefit, the lawyers essentially have to anticipate the broadest possible request as a worst case and review the documents even before such a request is made.⁴⁹

Thirdly, where it is the responding party that has to determine relevance, there is an incentive to be less accurate in the search. In particular, the search is likely to be overinclusive when it comes to only marginally relevant or non-relevant material in the disclosed documents (false positives, type I errors), and underinclusive when it comes to relevant documents (false negatives, type II errors). The overinclusivity increases the costs for the requesting party in sorting the wheat from the chaff; the underinclusivity reduces the positive effects of disclosure. As Kobayashi has pointed out, these increased error costs are ‘cross-party agency costs’: the responding party is forced to act as an agent for the requesting party.⁵⁰ The usual cost of agency of shirking is compounded by the fact that the responding lawyers are not only agents for the requesting party (due to, and limited to, the disclosure obligation), but also for their own client.

⁴⁶ Kobayashi, n 45, 1478 (with further references in n 23).

⁴⁷ A RAND study on e-discovery speculated that one of the reasons why predictive coding was not gaining ground in the United States may be that ‘[a]nother barrier to widespread use could well be resistance to the idea from outside counsel, who would stand to lose a historical revenue stream.’ See NM Pace and L Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (RAND Corporation 2012) xix.

⁴⁸ See Pace and Zakaras, n 47, 36–7, where they report anecdotally that

‘in-house counsel and their external law firm colleagues may not always be in precise alignment, with the potential for billing opportunities for review resulting in the law firms, at least according to one in-house contact, viewing the company’s litigation demands as lucrative “cash cows,” [...] It was asserted that, without close supervision of outside counsel’s discovery-related decisions, “the whole thing can become a runaway train wreck.”’

See already M Rosenberg and WR King, ‘Curbing Discovery Abuse in Civil Litigation: Enough is Enough’ (1981) *Brigham Young University Law Review* 579, 582:

‘[L]awyers have experienced a pleasing convergence of two strong motivations: their professional urge to leave no stone unturned in preparing the case through pretrial discovery, and their economic interest in increasing the number of billable hours they devote to the case.’

Similarly Kötzt, n 38, 72: ‘They [scil: litigators in US pretrial discovery] tend to leave no stone unturned, provided, of course, as is often the case, that they can charge their fees by the stone.’

While these sources refer to the situation in the US, there is little to suggest that the incentives for law firms in the UK would be substantially different. See also n 154.

⁴⁹ Theoretically, of course, they would have to factor the expected costs of this exercise into the equation, which should lead to slightly less document review in anticipation of the request, but realistically defendants’ lawyers will not risk overlooking a smoking gun (however rare it may be).

⁵⁰ Kobayashi, n 45, 1477–8. See already Cooper, n 33, 467.

For these reasons—cost externalisation, principal-agent problems between lawyers and clients, anticipation of requests, and cross-party agency costs—administrative costs of disclosure can become very high. This, in turn, can result in ‘discovery blackmail’, where non-meritorious claims are settled simply to avoid the high costs of discovery.⁵¹ To the extent this happens, discovery *increases* the error costs that it is supposed to reduce.⁵²

Another aspect is that the knowledge of having to disclose information in possible future litigation creates an *incentive to avoid the production or retention* of incriminating discoverable information.⁵³ Paradoxically, then, the possibility of disclosure may lead to *less* rather than *more* available evidence; or at least the marginal increase of available evidence following the introduction of a disclosure regime could be lower than expected.

One could object that this is less of a concern in the specific context of damages actions for competition law infringements, where the competition authorities have extensive powers of investigation in the public enforcement procedure anyway. For example, in cartel cases undertakings already have an overwhelming incentive to avoid the production and retention of incriminating information because of the spectre of an inspection. This objection has to be qualified for two reasons. First, if it is true that leniency programmes are used strategically by cartelists, this may lead to a countervailing incentive for the cartelists to retain information about the cartel.⁵⁴ Secondly, even where cartels have an incentive to destroy directly incriminating information, the possibility that disclosure may be ordered in the future in private enforcement cases also provides an incentive to reduce the production and retention of information *generally* and not only of directly incriminating information. A restrictive document retention policy that expunges information in regular intervals reduces the administrative burden and disruption in the case of a disclosure request for all businesses. It is arguably the case that undertakings’ document retention policies in common law jurisdictions, where discovery is a realistic danger, are more focused on the deletion of information after a specified time than is the case in civil law jurisdictions, where retention policies currently tend to be laxer. In competition cases, this could mean that the production and retention of information that may be used as *circumstantial* proof both by competition authorities and private claimants (such as travel receipts of competitors’ sales managers to common destinations), or evidence that might help in the quantification of claims, could become more difficult to obtain because they have been destroyed in the course of routine housekeeping.

The negative effect on the production of information plays a substantial role in particular when it comes to the disclosure of information in the files of a competition authority—the more access to information in the file is granted, the more the parties will insist on oral procedures, such as oral leniency statements. Similarly, the rise of settlements and commitment procedures can partially be

⁵¹ See above n 10.

⁵² Hay, n 34, 510–15; Kobayashi, n 45, 1475.

⁵³ This consideration is partly reflected in the Directive’s provisions on destruction of relevant evidence in Article 8.

⁵⁴ On gaming leniency programmes, see, eg, C Harding, C Beaton-Wells and J Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?’ in Beaton-Wells and Tran, n 20, 233, 254–9.

explained by the desire of undertakings that have infringed competition law to keep the paper trail as short as possible.

The most important factors on the two sides of the scale are arguably the increased administrative costs for compliance with disclosure orders on the one hand, and increased accuracy, that is, reduced error costs on the other hand. It is important to remember ‘that the position may not be entirely black or white (disclosure or not) in all cases. Intermediate positions may be possible.’⁵⁵ There is broad agreement even in common law jurisdictions that disclosure should be limited so as to be ‘proportionate’, although there is no general agreement as to the reference points and standards for proportionality.⁵⁶ From an economic perspective, the question is, with a grain of salt, whether the marginal costs of disclosure are lower or higher than the marginal reduction in error costs and the resulting private and social benefits.⁵⁷ The comparative part will show that limits to disclosure are generally introduced by judicial supervision and case management, even though it has been criticised that judges systematically lack the relevant information in order to assess the relative values of the marginal cost of disclosure and, in particular, of the expected marginal reduction of error costs.⁵⁸

III A Brief Comparative Perspective

A full legal comparison of disclosure requirements is beyond the scope of this chapter. A brief overview is, however, necessary for two reasons. First, the Directive’s goal was to emulate the effectiveness of the US American private enforcement system without duplicating its ‘excesses’. Therefore, a comparison between the US discovery procedure and the Directive’s system is necessary to assess whether this goal has been attained. Secondly, as indicated in the introduction, my hypothesis is that the current practice in the various jurisdictions will be an important predictor for how the Directive’s provisions will be implemented and applied. This requires a brief look into the differences in the current practice of the Member States.^{59, 60}

⁵⁵ *Nichia v Argos*, n 42, [55] (Jacob, LJ); see also *ibid*, [73]–[74] and [77] (Rix, LJ), and [90] (Pill, LJ).

⁵⁶ See below text to and following n 68 (proportionality in the US) and n 123 (proportionality in England).

⁵⁷ See below n 91.

⁵⁸ Easterbrook, n 9, 638–41; see also *Twombly*, n 10, 559 (‘It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” [...], given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side’).

⁵⁹ In this comparative part, I largely confine myself to the US, England, and Germany. This raises the same question that Reinhard Zimmermann once faced in a different context, and I give the same answer: ‘Why just the legal systems of these three countries? The cynic may be inclined to say that they happen to be the ones with which the author is most familiar. And in a way, of course, the cynic is right. Nevertheless, I do not think that the choice is unjustifiable from a more objective point of view.’ (R Zimmermann, *The Law of Obligations* (Oxford: OUP 1990/1996) xiii). My ex-post rationalisation is this: The US is the obvious starting point and yardstick for both effective discovery and ‘excesses’ of private enforcement. England and Germany are European representatives of, respectively, a disclosure-friendly common law and a restrictive civil law jurisdiction. At the same time, they are the two large jurisdictions within the EU that have seen a sharp rise in private enforcement in recent years. D Geradin and L-A Grelier, ‘Cartel Damages Claims in the European Union: Have we only Seen the Tip of the Iceberg?’ in N Charbit and E Ramundo (eds), *William E Kovacic: An Antitrust Tribute – Liber Amicorum* vol II (New York: Institute of Competition Law 2014) 257, 260: ‘[S]ome Member States, essentially Germany, the Netherlands and the UK, have attracted a quickly growing number of cartel damages actions [...]’. Similarly R Gamble, ‘The European embrace of private enforcement: this time with feeling’, (2014) 35 (10) *European Competition Law Review* 469, 478; M Hviid & J Peysner, ‘Comparing Economic Incentives across EU Member States’, in B Rodger (ed), *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU* (Alphen aan den Rijn: Kluwer Law International 2014) 195, 220; B Rodger, ‘Editorial — Private Enforcement and

Lord Mance has put the comparison in a nutshell: ‘Disclosure remains a key area in which English common law differs both from the more exhaustive procedures of American common law and from the less exhaustive rules of civil law jurisdictions.’⁶¹ The following section elaborates on this pithy summary.

A Discovery in the United States

Since the 1938 reform of the Federal Rules of Civil Procedure (FRCP), discovery in the United States is widely considered the most extensive (and arguably expensive⁶²) version of disclosure.⁶³ It is difficult to generalize the costs for discovery in antitrust cases because of the sensitivity to the facts of the case. To give an indication of the order of magnitude, one 2012 study looking at the costs for electronic discovery included in its (non-random) sample two antitrust cases, in which discovery expenditures were \$2.17 million and \$8.37 million, respectively.⁶⁴ For actions in federal courts, *sedes materiae* are FRCP 26–37.⁶⁵ Until December 2015, the general scope of discovery under the federal rules extended to:

[a]ny nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.⁶⁶

With effect from 1 December 2015, the rule has been amended. First, the amendment has eliminated ‘subject-matter discovery’ entirely. Secondly, the

Collective Redress: the Benefits of Empirical Research and Comparative Approaches’, (2011) 8(1) *Competition Law Review* 1, 4. Beside Germany, the UK and the Netherlands, other jurisdictions with ‘considerable enforcement experience’ are France and Italy, as well as Austria, Belgium and Spain. B Rodger, ‘The Empirical Data Part 2: Provisions Relied Upon, Remedies and Success’, in Rodger, *Competition Law, Comparative Private Enforcement*, 121–56; H Schweitzer, ‘Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen’, (2014) *Neue Zeitschrift für Kartellrecht* 335. For a survey of recent actions in these three jurisdictions see M Kuipers, S Tuinenga, S Wisking, K Dietzel, S Campbell and A Fritzsche, ‘Actions for Damages in the Netherlands, the United Kingdom, and Germany’ (2015) 6 *Journal of European Competition Law & Practice* 129.

⁶⁰ For disclosure rules in other jurisdictions see the comparative overview of EU jurisdictions in B Vreck, ‘Overview of Europe’ in Foer & Cuneo, n 9, 275, 283–4; N Jalabert-Doury, ‘France’ in Foer & Cuneo, n 9, 314, 321; G Barone & R Amore, ‘Italy’ in Foer & Cuneo, n 9, 353–4; DL Scheurleer, H Speyart, F Wiers & J Fanoy, ‘Netherlands’ in Foer & Cuneo, n 9, 370–1 (on Dutch discovery, see also: I Tzankova, M van Maanen and M Rijnhart, ‘A Dutch View on Discovery: Short and Sweet’, (2014) 81 *Defense Counsel Journal* 229–37); P Callol, ‘Spain’ in Foer & Cuneo, n 9, 378, 385–7; M Glader & P Alstergren, ‘Sweden’ in Foer & Cuneo, n 9, 393, 405–7; and the national reports in P Taelman, *International Encyclopaedia for Civil Procedure* (Wolters Kluwer, Looseleaf, 1991 ff), eg WH Rechberger, ‘Austria’ (August 2011), *ibid*, para 174; see also the overview of Central and Eastern European countries in Bauer & Kitzberger (n 3) 156–62; G Cumming, B Spitz & R Janal, *Civil Procedure Used for Enforcement of EC Competition Law by the English, French and German Civil Courts* (Alphen aan den Rijn: Kluwer Law International, 2007) 91ff, 187ff, 241ff; G Cumming & M Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (Alphen aan den Rijn: Wolters Kluwer, 2010) 200 ff, 260 ff.

⁶¹ J Mance (n 42) vii.

⁶² See Pace and Zakaras, n 47, and the account in EC Gainor, ‘Initial Disclosures and Discovery Reform in the Wake of Plausible Pleading Standards’, (2011) 52 *Boston College Law Review* 1441, 1441–53, with further references.

⁶³ For an overview of discovery in US antitrust actions, see, eg, ABA Section of Antitrust Law, *Antitrust Discovery Handbook* 3rd edn (ABA Publishing 2013); J Goldberg and DE Gustafson, ‘Pretrial Discovery in Civil Litigation’, in AA Foer & RM Stutz, *Private Enforcement of Antitrust Law in the United States* (Cheltenham: Edward Elgar 2012) 180–210.

⁶⁴ Pace and Zakaras, n 47, 17–18 (for the methodology of the study see *ibid*, 5–9; the cases stem from the period between 2007 and 2009).

⁶⁵ For third-party discovery, see also FRCP 45.

⁶⁶ FRCP 26(b)(1) (before the 2015 amendment).

amendment moved the proportionality requirement, which had previously been contained in the discretionary limitations to discovery,⁶⁷ into the definition of the scope of discovery:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* Information within this scope of discovery need not be admissible in evidence to be discoverable.⁶⁸

i 'Notice pleading' and Limitations of Discovery

In contrast to Europe, where disclosure follows a substantiated pleading of facts, in the US discovery follows mere 'notice pleading'.⁶⁹ In civil law jurisdictions, there is a perception that notice pleading in the US is satisfied by 'a rather broad and rudimentary statement [...] that gives the defendant a rough idea of the kind of redress sought (normally damages) and the factual bases', that 'the subsequent pre-trial stage is designed for the parties' collection of facts and evidence [...] without relevancy restriction', and that '[a]s a consequence, a plaintiff may initiate proceedings and avail himself of pre-trial discovery without having a real case and on the mere basis of suspicion or conjecture'.⁷⁰ This is a caricature. While it remains true that US discovery is substantially broader and easier to obtain than in England and Wales—not to mention continental European jurisdictions—, it must be noted that the criticism of discovery excesses and abuses has led to gradual changes in US law and practice over time.⁷¹

First, as mentioned above, FRCP 26 was changed numerous times to allow for greater judicial supervision to curb discovery abuse since 1983, most recently with effect from 1 December 2015.

Since 1983, courts had wide discretion to limit discovery (on request or on their own motion).⁷² Until December 2015, this was the case where they found that:

⁶⁷ Below text accompanying n 73.

⁶⁸ FRCP 26(b)(1) (as amended on 29 April 2015, effective from 1 December 2015; emphasis added). For a description of the rule-making process, and a positive assessment of the changes, see the remarks by the Chief Justice of the US Supreme Court, J Roberts, '2015 Year-End Report on the Federal Judiciary', <<http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>>. For comment on the reform from a defence lawyers' perspective, see, eg, JJ Jablonski and AR Dahl, 'The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Impementing a Safe Harbor for Preservation', 82 *Defense Counsel Journal* 411–33.

⁶⁹ Specifically, FRCP 8(a) requires in the relevant part as part of the pleading: '(2) a short and plain statement of the claim showing that the pleader is entitled to relief'. Under the precedent governing until *Bell Atlantic v Twombly*, 550 US 544 (2007), namely *Conley v Gibson*, 355 US 41 (1957), this statement was to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests', *Conley*, 47, and the relevant test for granting a motion to dismiss was whether 'no set of facts exists under which the complaint's claims could entitle the plaintiff to relief'. *Twombly* explicitly 'retired' the 'no set of facts language' of *Conley*, but it is still the case that the pleadings need only give 'fair notice' (see *Twombly*, n 10, 555 in fn 3, quoted below n 79; *Erickson v Pardus*, 551 US 89, 93–4 (2007)).

⁷⁰ A Bruns, 'Private Enforcement of Competition Law: Evidence', in J Basedow, JP Terhechte & L Tichý (eds), *Private Enforcement of Competition Law* (Baden-Baden: Nomos 2011) 127, 133.

⁷¹ Goldberg & Gustafson (n 63) 210 (concluding that even before the 2015 amendment 'the discovery and discovery disputes are subject to court supervision and control' and that 'the recent trend is for courts to be more restrictive in applying the discovery rules').

⁷² See, eg, *Crawford-El v Britton*, 523 US 574, 598 (1998) ('Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.');

the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.⁷³

Since 1 December 2015, proportionality considerations are made even more explicit and prominent in Rule 26, and are now already included in the definition of the scope of discovery.⁷⁴

Moreover, while the US system at least ostensibly continues to require only notice pleading (as opposed to the fact-pleading requirements in European jurisdictions), one should not overlook that *Twombly*⁷⁵ and *Iqbal*⁷⁶ have raised the pleading requirements and at least narrowed the gap between notice- and fact-pleading systems. *Twombly* was motivated by the desire to curb discovery excesses. To overcome a motion to dismiss, and so to reach the discovery stage, plaintiffs now have to allege facts that are 'enough to raise a right to relief above the speculative level'.⁷⁷ The exact ramifications of the heightened *Twombly/Iqbal* standard are still not clear.⁷⁸ At a minimum, it was a move in the direction of a fact-pleading standard.⁷⁹ While *Twombly* has made clear that it is no longer sufficient to show that there is *some* set of facts on which relief can be granted, given the majority's vacillation it is unclear what exactly plaintiffs have to show:

[W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."⁸⁰

Conn 2010) ('the court will consider the specific facts of the case to make a common sense decision about whether or not the discovery in question goes too far.').

⁷³ FRCP 26(b)(2)(C)(iii) in the version applicable until December 2015.

⁷⁴ See FRCP 26(b)(1), as amended 29 April 2015, text accompanying n 68 above.

⁷⁵ Above n 10.

⁷⁶ *Ashcroft v Iqbal*, 556 U.S. 662 (2009).

⁷⁷ See *Twombly* (n 75) 555:

'While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [...], a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do [...]. Factual allegations must be enough to raise a right to relief above the speculative level.'

(internal citations omitted).

⁷⁸ For a discussion of the *Twombly/Iqbal* standard in the antitrust context see, eg, JL Rubin, 'Procedural Defenses Short of Trial', in AA Foer & RM Stutz, *Private Enforcement of Antitrust Law in the United States* (Cheltenham: Edward Elgar 2012) 145, 158–66; also cf P Gilbert & V Romanenko, 'Proposals for Reform', *ibid*, 365, 367–9 (describing the uncertainty following *Twombly* and proposals of legislative reform); for a discussion of diverging empirical assessments of the effects of *Twombly* and *Iqbal* see JB Gelbach, 'Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery', (2012) 121 *Yale Law Journal* 2270; JB Pearl and JH Ehlers, 'A Cost-Cutting Solution to the Discovery Burdens of Antitrust Disputes', *CPI Antitrust Chronicle* May 2013(1) (noting, with further references, that 'the *Twombly* Court's solution has not worked as intended; data shows that the raised pleading standard has had a minimal effect, if any, on the dismissal rates of antitrust complaints').

⁷⁹ *Twombly*, n 10, 555 in n 3:

'While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out in detail the facts upon which he bases his claim," *Conley v Gibson* [...], Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.'

(Emphasis in the original).

⁸⁰ *Ibid*, 556.

Yet,

[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.”⁸¹

Overall, it seems that the opinion asks for more specificity in the factual allegations in the pleadings than used to be the case, and it is difficult to see how something could be ‘plausible’ without a ‘probability requirement’ of some sort. If this is correct, then any remaining difference between the ‘notice pleading’ in the US and the ‘fact pleading’ in Europe is one of degree only.⁸²

ii The Influence of the ‘American’ Cost Rule

One of the most problematic features of the US discovery system is not to be found in the discovery rules at all, but in the rules on allocating litigation costs.⁸³ Under the American rule, each party generally bears its own attorney’s fees; costs lie where they fall. In antitrust actions, s 4(a) of the Clayton Act additionally provides that the successful *plaintiff* may recover ‘the cost of suit, including reasonable attorney’s fees’.⁸⁴ While the costs of actual copies made for disclosure may be recoverable,⁸⁵ the much larger ancillary costs incurred in the preparation, such as reviewing documents for privilege, generally are not.⁸⁶

Since the responding party’s (or, because of the Clayton Act’s one-way fee-shifting rules, at least the defendant’s) costs usually lie where they fall, the costs of complying with discovery requests are for the most part externalities for the requesting party. The parties, and in particular plaintiffs, have little incentive to keep costs low. They leave ‘no stone unturned’.⁸⁷

As mentioned above, the function of reining in excessive discovery costs has been delegated to the court, which has broad discretion.⁸⁸ Additionally, a 2015 amendment to the FRCP clarifies that a court may make a protective order allocating the costs of discovery to the other party.⁸⁹ However, the Rule Advisory Committee Notes to the 2015 Amendment explain that ‘[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.’⁹⁰

⁸¹ Ibid, 557.

⁸² While fact pleading in Europe requires the pleading of sufficiently specific facts (usually before there is any disclosure), the degree of specificity required in the fact pleading will vary depending on facts that are reasonably available to the party.

⁸³ Cooter & Rubinfeld (n 31) 437, 452–4, 455–9; Easterbrook, n 9, 648; Hay, n 34, 500–01.

⁸⁴ 15 U.S.C. § 15(a).

⁸⁵ 28 U.S.C. § 1920.

⁸⁶ See, eg, *CBT Flint Partners v Return Path*, 737 F3d 1320 (Fed Cir 2013). For a discussion how this distinction applies to eDiscovery, see KC Wildfang and SP Slaughter, ‘Funding Litigation’ in Foer and Stutz, n 63, 257, 262–3 (discussing, with references to case law, whether file conversion into standardised formats and locating and extracting information is more akin to producing paper copies or searching for the information in documents).

⁸⁷ See the quotation from Rosenberg and King in n 48; Gainor, n 62, 1448.

⁸⁸ Text accompanying nn 72–74.

⁸⁹ FRCP Rule 26(c)(1)(B), as amended 29 April 2015 (in effect since 1 December 2015).

⁹⁰ Committee Notes on Rules — 2015 Amendment, https://www.law.cornell.edu/rules/frcp/rule_26. The presumption that the responding party bears the costs is long established in the case law, see *Oppenheimer Fund v Sanders*, 437 US 340, 358 (1978). An eight-factor test for cost-shifting has sometimes be applied, which considers:

‘(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data;

US courts, however, have hitherto been reluctant to intervene to limit discovery or order cost-shifting, although the recent rule change could mean that they will become slightly more assertive. Possible explanations for the courts' reluctance to limit discovery are that they are accustomed to the wide-ranging discovery procedure and do not wish to deny a discovery request that could possibly shed new light on the matter. As *Easterbrook* observed, courts are not usually in a good position to make an ex ante assessment whether the expected benefit of disclosure is likely to exceed the expected (private or social) costs of disclosure.⁹¹ It has long been argued that it would be preferable to internalise the discovery costs with the party that makes the request, at least largely.⁹² The recent rule change gives courts a nudge in this direction. However, cost-shifting and discovery limitation for proportionality has been possible under the FRCP for a long time; it was just that the courts did not feel inclined to implement these measures. If courts continue to view these measures with skepticism, the Rule Advisory Committee Notes quoted above⁹³ give courts enough wriggle-room to decline to shift costs or limit discovery. As *Easterbrook* remarked nearly 30 years ago: 'The source of "discovery abuse" does not lie in the rules regulating discovery. It cannot be fixed by tinkering with Rule 26, Rule 37, or any of their companions.'

iii Summary of Discovery in the United States

- In the US there is a notice-pleading system, but one which after *Twombly* arguably differs only in degree from the European fact-pleading systems.
- Drivers of the very extensive discovery in the US are the American rule on litigation costs, which gives parties and especially their lawyers the incentive to 'leave no stone unturned',⁹⁴ the principal-agent problem between lawyer and client and the cross-party agency costs.⁹⁵
- The courts' reluctance to make use of their powers to limit disproportionate discovery, which they have had for decades, is arguably owed to the cultural norm in favour of extensive disclosure that judges have internalised since discovery was broadened in 1938. Changing the rules repeatedly to avoid

(5) the relative benefits to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.'

Rowe Entertainment v William Morris Agency, 205 FRD 421, 428–429 (SDNY 2002); *Zubulake v UBS Warburg*, 217 FRD 309, 361 (SDNY 2003). In contrast to the Committee Notes, defence lawyers have argued that the change to Rule 26(c)(1)(B) means 'that "requester pays" rulings are likely to become more common as courts enforce "proportional discovery".' Jablonski and Dahl, n 68, 421.

⁹¹ *Easterbrook*, n 9, 638–41. Some of his concerns may have been alleviated by the higher specificity required from pleadings after *Twombly* (above n 10). Hay, n 34, 501–09, points out that not only the private benefits, but also the social benefits of disclosure have to be weighed against the (private and social) costs. Similarly Cooper, n 33, 470, who draws attention to the fact that benefits may occur in future litigation (eg, where collateral estoppel is involved). Cooper also points out (at 467) that this problem of prediction is not confined to judges: 'the demanding party often has no idea what to expect.'

⁹² Cooter & Rubinfeld (n 31) 452–4, 455–9 (noting, at 454, that cost-shifting may deter meritorious claims, but countering this by (i) pointing to contingency fee arrangements which reduce the problem (ibid), and (ii) crafting a 'qualified' cost-shifting rule, under which the responding party bears the cost up to a pre-specified threshold, and only costs exceeding this threshold, if reasonably incurred, are shifted to the requesting party (ibid, 455–7)); *Easterbrook*, n 9, 645–8. But see AB Spencer, 'Rationalizing Cost Allocation in Civil Discovery', Spencer, A. Benjamin, *Rationalizing Cost Allocation in Civil Discovery* (January 29, 2015), *Virginia Public Law and Legal Theory Research Paper No 6*, <http://ssrn.com/abstract=2557613> (noting that requester-pays rules may also have their disadvantages, such as cost-inflating practices by the responding party, and ultimately recommending closer judicial involvement and case management).

⁹³ Above n 90.

⁹⁴ Above n 87.

⁹⁵ Above nn 46–50 and accompanying text.

'over-discovery' since 1983 have shown only limited effect in counteracting this ingrained cultural norm. The transfer of the proportionality test from the limits to discovery into the scope of discovery, which came into effect on 1 December 2015, and the clarification that judges have the power to order the shifting of the discovery costs to the other party (while emphasising that this clarification does not mean this should become 'common practice') are therefore also unlikely to lead to a sea change.⁹⁶

B Disclosure in England & Wales

Disclosure rules in England & Wales have also undergone substantial reform over the last two decades.⁹⁷ Lord Woolf, along with many commentators, considered English discovery to be 'a monumentally inefficient process, especially in the larger cases'.⁹⁸ He recommended limiting disclosure in standard cases by limiting the scope of discoverable material and by subjecting any disclosure to an explicit proportionality test (the 'overriding objective'). These reforms were largely implemented in the Civil Procedure Rules 1998.⁹⁹ Complaints about the wide scope and high cost of disclosure, however, continued even after the *Woolf* reforms, and less than a decade after the implementation of the *Woolf* reforms, Lord Justice Jackson revisited the issue in his report.¹⁰⁰ The result was the introduction of a 'menu option' in multi-track cases, requiring the court to choose between ordering no disclosure, full-fledged disclosure, or intermediate solutions, depending on what kind of disclosure it considers appropriate.¹⁰¹

The discussion on CPR disclosure that follows is directly relevant for standalone and follow-on actions brought in the High Court. Indirectly, it is also relevant for disclosure in the Competition Appeal Tribunal (CAT). The CAT has its own rules on disclosure in the Competition Appeal Tribunal Rules 2015 (CAT Rules 2015).¹⁰² While there are significant differences, with regard to disclosure the CAT Rules 2015 are, to a large extent, parallel to the CPR. The importance of

⁹⁶ But see Chief Justice Roberts' assessment that they 'mark significant change, for both lawyers and judges, in the future conduct of civil trials'. Roberts, n 68, 5.

⁹⁷ For a description of the modern disclosure rules see, eg, PR Hibbert, *Civil Evidence for Practitioners* 4th edn (London Sweet & Maxwell 2014), in particular ch 4–6; P Matthews & HM Malek, *Disclosure* 4th edn (London: Sweet & Maxwell, 2012); for a very concise account, see N Andrews, 'Civil Procedure', in A Burrows, *English Private Law* 3rd edn (Oxford: OUP 2013) paras 22.53 et seq; specifically in the competition law context: M Brealey & N Green (gen eds), *Competition Law Litigation* (Oxford: OUP 2010) paras 9.02–9.52 (and 9.53–9.69 on access to evidence other than disclosure).

⁹⁸ Lord Woolf, *Interim report*, n 8, ch 21 para 17 (see also paras 3–7). Also cf the assessments of pre-*Woolf* reform discovery by Baron Steyn that '[t]he discovery process often runs riot. It is the experience of Commercial judges that usually 95 per cent of the documents contained in the trial bundles are wholly irrelevant and never mentioned by either side. The discovery process adds greatly to the duration and cost of litigation [...]. It contributes to the tyranny of modern civil litigation.' (J Steyn, 'Foreword to the First Edition', in: Matthews & Malek, *Disclosure*, n 97, xii). See also the assessments by Lord Bingham, who mentioned the possibility that compulsory disclosure can be used 'to wear down an opponent by subjecting him to disproportionate and unfruitful work and expense' (T Bingham, 'Foreword to the Second Edition', in Matthews & Malek, n 97, ix), and by Lord Mance that disclosure in English law is 'capable of occupying time, incurring cost and giving rise to difficult issues of case management and law' (J Mance, 'Foreword to the Third Edition' in Matthews & Malek, n 97, vii).

⁹⁹ The Civil Procedure Rules 1998, SI 1998/3132 (L 17), in force since April 1999. The Civil Procedure Rules will be cited as CPR in their version current in January 2016.

¹⁰⁰ R Jackson, *Review of Civil Litigation Costs: Final Report (December 2009)* (The Stationery Office 2010) 368–74; R Jackson, *Review of Civil Litigation Costs: Preliminary Report Vol II (May 2009)* (The Stationery Office 2010) 373–400.

¹⁰¹ Rule 31.5(7) CPR.

¹⁰² The Competition Appeal Tribunal Rules 2015, SI 2015/1648 (in force since 1 October 2015). See the disclosure rules in the procedure for claims under s 47A of the Competition Act 1998, as amended, in Rules 60–5.

private actions in the CAT is likely to increase substantially now that the provisions of the Consumer Rights Act 2015 and its Schedule 8 have come into force.¹⁰³ First, under Schedule 8's provisions, the CAT now has jurisdiction to hear standalone actions as well (and not only follow-on actions as was previously the case).¹⁰⁴ Second, the Act harmonizes the limitation period for actions brought in the CAT with those in the High Court, so that in England and Wales the six-year period in s 2 of the Limitation Act 1980 is applicable regardless whether the claim is brought in the High Court or the CAT.¹⁰⁵ Third, the CAT is given the power to issue injunctions with the same enforceability as those of the High Court.¹⁰⁶ Fourth, collective proceedings will be available in the CAT.¹⁰⁷ Fifth, as Barling J explained in making the first order of transferring a case from the High Court to the CAT, the CAT can rely on specialist resources in reaching its decisions.¹⁰⁸ It is, therefore, likely that in the future most competition cases will either be commenced directly before the CAT or will be transferred to it.

The discussion that follows will nevertheless deal with each issue first under the CPR before turning to the CAT Rules 2015. Given the parallelism of the disclosure rules, it is likely that the new CAT Rules will draw on the longer and broader experience with the CPR.

i The Scope of Discoverable Material

a CPR

Before the *Woolf* reforms, disclosure in England & Wales used to be similarly broad in terms of discoverable material as US discovery. The *Peruvian Guano* test considered as relevant:

every document [...] which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.¹⁰⁹

¹⁰³ The Consumer Rights Act 2015 (c 15) received Royal Assent on 26 March 2015. The entry into force of the competition provisions in the Act was conditioned on an order of the Secretary of State, s100(5). The relevant s 81 and Schedule 8 of the Consumer Rights Act 2015 came into force on 1 October 2015 pursuant to article 3 of The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015, 2015 SI 1630 (c 94).

¹⁰⁴ s 47A of the Competition Act 1998, as introduced by Schedule 8, para 4 of the Consumer Rights Act 2015. The CAT's lack of jurisdiction for standalone claims had created problems, for example, where some defendants had been addressees of a decision and others not. See, eg, *Emerson Electric Co & Ors v Mersen UK Portslade Ltd (sued as and formerly Le Carbone (Great Britain) Ltd)* [2012] EWCA Civ 1559, [2013] Bus LR 342.

¹⁰⁵ s 47E of the Competition Act 1998, as introduced by Schedule 8, para 8 of the Consumer Rights Act 2015. Previously, in the High Court the six-year period of the Limitation Act 1980 was applied, while in the CAT, a two-year period was applicable (Rule 31 of the CAT Rules 2003). The shorter period in the proceedings before the CAT famously had the result that the claim against the defendants that had not appealed the Commission decision was held to be time-barred in *Deutsche Bahn AG & ors v Morgan Advanced Materials plc (formerly Morgan Crucible Co plc)* [2014] UKSC 24, [2014] 4 ECLR 33 [28], [29]. The Damages Directive now provides for additional suspension or interruption of the limitation period in Article 10(4).

¹⁰⁶ s 47D of the Competition Act 1998, as introduced by Schedule 8, para 7 of the Consumer Rights Act 2015; see also para 24 of Schedule 8.

¹⁰⁷ ss 47B–47E and 49A–49E of the Competition Act, as introduced by Schedule 8 paras 5–12.

¹⁰⁸ *Sainsbury's Supermarkets Ltd v Mastercard Inc and ors* [2015] EWHC 3472 (Ch).

¹⁰⁹ *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63 (emphasis in the original), interpreting the test under the Rules of the Supreme Court (RSC) (1875) Order XXXI rule 12, subsequently RSC (1965) Order 24.

Crucially, under the *Peruvian Guano* test it was even sufficient that ‘it is a document which may fairly lead [the party] to a *train of inquiry*’ which, in turn, advances his own or damages the other party’s case.¹¹⁰ While RSC Order 24 allowed courts to limit discovery on application of one of the parties, among other things for cost-saving reasons, and so gave courts ‘considerable control over discovery’,¹¹¹ Lord Woolf noted that in practice ‘the culture of giving discovery is so entrenched that few such applications are made.’¹¹²

The cost implications and potential abuse of the discovery procedure, and in particular the breadth of the ‘relevance’ definition, belonged to the main targets of the *Woolf reforms*. Lord Woolf complained that ‘[t]he result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents [...]’.¹¹³ Lord Woolf recommended a narrower definition of materials that should be discoverable in standard cases.

The English CPR have largely implemented these recommendations in 1998. ‘Standard disclosure’ under CPR 31.6 now provides for disclosure only of

- (a) the documents on which [the party] relies; and
- (b) the documents which –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party’s case; or
 - (iii) support another party’s case; and
- (c) the documents which he is required to disclose by a relevant practice direction.¹¹⁴

The court may, however, still order disclosure of documents that satisfy the *Peruvian Guano* test but exceed the narrower bounds of CPR 31.6, or make any other order it deems appropriate, at any case management conference.¹¹⁵

b CAT Rules 2015

Where a claimant brings a stand-alone or follow-on claim under the amended s 47A of the Competition Act 1998, the CAT may ‘at any point give directions as to how disclosure is to be given’, including ‘what searches are to be undertaken, of where, for what, in respect of which time periods [...] and the extent of any search for electronically stored documents’.¹¹⁶ As the CAT has explained, under the corresponding rule of the CAT Rules 2003,¹¹⁷ this means that disclosure

¹¹⁰ Ibid (emphasis added).

¹¹¹ Woolf, *Access to Justice – Interim Report*, n 8, ch 21 para 14.

¹¹² Woolf, *Access to Justice – Interim Report*, n 8, ch 21 para 13.

¹¹³ Woolf, *Access to Justice – Interim Report*, n 8, ch 21 para 17.

¹¹⁴ CPR 31.6 For the differences between the old and the new test and the further development of the test, see, eg, Brealey & Green, n 97, para 9.21; Matthews & Malek, n 97, paras 1.30–1.35. However, relevance does continue to be the test for CPR 31.5(3), which provides that ‘before the first case management conference each party must file and serve a report verified by a statement of truth, which – (a) describes briefly *what documents exist or may exist that are or may be relevant* to the matters in issue in the case [...]’.

¹¹⁵ CPR Rule 31.5(7) (in the post *Jackson* review version).

¹¹⁶ Rule 60(3) of the CAT Rules 2015.

¹¹⁷ SI 1372/2003.

is not automatic. It needs to be ordered by the Tribunal, usually upon a request by a party to the proceedings. The Tribunal must be satisfied that the disclosure sought is necessary, relevant and proportionate to determine the issues before it.¹¹⁸

There are few explicit limitations on the CAT's discretion with regard to the scope of disclosure. The discretion is limited by the CAT Rules' 'governing principles' which are parallel to the CPR's 'overriding objectives', and provide that the CAT 'shall seek to ensure that each case is dealt with justly and at proportionate cost'.¹¹⁹ In the context of disclosure, the CAT shall have regard to 'the need to limit disclosure to that which is necessary to deal with the case justly' in addition to the governing principles.¹²⁰ The CAT further decided that the 'object of a disclosure application [under the CAT Rules 2003] is to obtain production of specified documents. Accordingly, the application must specifically identify the documents sought; it must not be of a fishing or speculative nature.'¹²¹ It should be noted, however, that even the 2003 Rules provided for orders for classes of documents to be disclosed, and that the 2015 Rules have, if anything, expanded the CAT's discretion.

The CAT Rules 2015 provide, again in parallel to the CPR, for disclosure before proceedings start and for non-party disclosure.¹²²

In the case of collective proceedings and settlements, the CAT has the general powers to order disclosure described above. Rule 89 adds that the CAT may order disclosure to be given 'by any party [...] to any other party; by the class representative to any or all represented persons; and by any represented person to any other represented person (including a person within a different sub-class), the class representative or the defendant.'

ii Proportionality

With regard to actions in the High Court, the *Woolf reforms* sought to limit disclosure by subjecting it to the 'overriding objective' of dealing 'with cases justly and at proportionate cost'.¹²³ However, it is widely acknowledged that the *Woolf reforms* did not fully achieve their intended effect, and the problem of disproportionate disclosure costs persisted in legal practice.¹²⁴ While the costs of disclosure will, of course, vary widely depending on the scope of the disclosure

¹¹⁸ *Claymore Dairies Ltd and ors v OFT (Recovery and Inspection)* [2004] CAT 16 [113]; followed in *Albion Water Ltd and another v Water Services Regulation Authority* [2008] CAT 3 [29], [42], [43].

¹¹⁹ Compare Rule 4 of the CAT Rules 2015 with CPR 1.1. The CAT had already applied the same standard under the CAT Rules 2003 in analogy to the CPR's overriding objectives: *HCA International Ltd v CMA*, [2014] CAT 11 [16] (the case concerned the disclosure of raw data and specifics of the econometric model used, but in the context of the review of a decision by a competition authority; as it turned out, there were indeed mistakes in the CMA's statistical analysis, see the summary of facts in *HCA International Ltd v CMA* [2015] EWCA Civ 492).

¹²⁰ Rule 60(2)(b) of the CAT Rules 2015. The CAT's duty is not particularly strict: Rule 60(2) makes this duty subject to the CAT's directions under Rule 60(3) and to the proviso 'unless the Tribunal otherwise thinks fit'.

¹²¹ *Albion Water Ltd and another v Water Services Regulation Authority* [2008] CAT 3 [41].

¹²² Rules 62, 63 of the CAT Rules 2015; cf CPR 31.16 and 31.17. For an application for non-party disclosure under the CAT Rules 2003 cf *Deutsche Bahn and ors v Morgan Crucible Company and ors* [2014] CAT 15 (order of 9 September 2014).

¹²³ CPR Rule 1.1(1), as amended by Rule 4 of the Civil Procedure (Amendment) Rules 2013, SI 2013/262. In the original CPR 1998, the proportionality criterion was contained in Rule 1.1(2).

¹²⁴ *Nichia v Argos*, n 42, [36]–[55], especially [44], in which Jacob LJ notes: 'Following the Woolf reforms, and notwithstanding their changes, practitioners (and I think not just in patent actions) carried on much as they did before. The cost of patent and large commercial actions did not reduce: if anything it went up.' Similarly, Matthews & Malek (n 97, para 1.03) note that the 'concerns over the cost and complexity of the disclosure continue to be very real' even after the *Woolf Reforms* (see also *ibid* paras 1.04, 1.33); Brealey & Green, n 97, para 9.21 ('In practice, however, the reduced obligation of disclosure has not had anything like the effect that might have been contemplated in 1999.').

and circumstances of the case, the costs of standard disclosure in competition cases are currently in the order of magnitude of, and may exceed, £1m–£2m.¹²⁵

The *Jackson* review found disproportionate disclosure costs in particular in multi-track and other ‘high stakes’ cases,¹²⁶ a category that de facto comprises all substantial competition cases. Lord Justice Jackson proposed that the CPR provide for a ‘menu option’, a range of options for disclosure orders which the court may choose depending on what it considers appropriate taking the overriding objective into account. Possible orders range from no disclosure at all to the full *Peruvian Guano* disclosure and similarly extensive options, such as the ‘key to the warehouse orders’, where the parties grant access to the other party to search for relevant documents themselves.¹²⁷ The revised CPR rule 31.5(7) now incorporates this menu of possible disclosure orders.¹²⁸

It remains to be seen whether courts will use this opportunity to limit disclosure to a greater degree than the powers they already had under RSC (1965) Order 24 or the increased opportunities to intervene after the *Woolf* reforms. There are some indications that courts in competition cases make use of the new powers to achieve more targeted and ‘phased’ disclosure.¹²⁹

The CAT already applied a proportionality test to disclosure under the 2003 Rules.¹³⁰ The CAT Rules 2015 specify that the governing principle of ‘dealing with a case justly and at proportionate cost includes, so far as is practicable [...] (c) dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party’.¹³¹

iii Differences between English Disclosure and US Discovery

Even before the *Woolf* and *Jackson* reviews, however, some features of English law resulted in less extensive discovery in England than in the United States. Discovery requests from the United States have often been considered to be ‘fishing expeditions’ in England.¹³² Interestingly, the *Woolf* reform, which

¹²⁵ In *Infederation Ltd v Google Inc et al* [2013] EWHC 2295 (Ch) para 23, Google’s solicitors estimated its costs for standard disclosure to be more than £2m. In *Hutchinson 3G Ltd v O2 (UK) Ltd and ors*, [2008] EWHC 55 Comm, [2008] UKCLR 83 [36] and [60] the court noted that the costs of the pre-action disclosure sought by the applicant in that case, with relatively broad categories of documents covering a seven-year time period, would be in the order of magnitude of £1m.

¹²⁶ ‘High stakes’ cases included cases where the amount in controversy was more than £1m.

¹²⁷ *Jackson*, n 100.

¹²⁸ Introduced by Rule 11 of the Civil Procedure (Amendment) Rules 2013, SI 2013/262, in force since 1 April 2013. See also Lord Justice Jackson’s paper for the Civil Justice Council Conference on 21st March 2014, <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Jackson+LJ+paper+CJC+conference+21+March+2014.pdf>, para 3.13; *idem*, Controlling the Costs of Disclosure, Seventh Lecture in the Implementation Programme, The Lexisnexis Conference on Avoiding and Resolving Construction Disputes, paras 4.7 and 4.8 (24 November 2011), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>.

¹²⁹ *Infederation Ltd v Google Inc et al* [2013] EWHC 2295 (Ch), [2014] 1 CMLR 13 [37]–[38] (limiting Google’s disclosure to the material documents within the category of 35,000 documents already disclosed to the European Commission, and deferring disclosure on one of the five allegations; see also [33]–[36], achieving further efficiencies through case management, specifically by bi-/trifurcating the trial on the issues of abuse on the one hand, and dominant position and quantum of damages on the other).

¹³⁰ See the quotation from the *Claymore* decision in the text to n 118, and the references in n 118.

¹³¹ Rule 4(2)(c) of the CAT Rules 2015. The CAT had already applied these factors (and the others mentioned in Rule 4(2) of the CAT Rules 2015) in its analysis under the CAT Rules 2003 by applying the CPR’s overriding objectives by analogy: *HCA International Ltd v CMA*, [2014] CAT 11 [16].

¹³² See *Smith v Phillip Morris Companies Inc and Ors* [2006] EWHC 916 (QB) [37]–[40]; see also the discussion in *Rio Tinto Zinc Corporation and ors v Westinghouse Electric Corporation* [1978] AC 547, [1978] All ER 434, 440–2 (Lord

generally sought to *limit* disclosure, *extended* English disclosure in two ways that brought English disclosure slightly closer to US discovery.

First, English law before the *Woolf* reforms did not allow for disclosure requests addressed to others than the parties to an action. Information from non-parties could only be obtained under more restrictive conditions witness summons.¹³³ This was the difference that had caused friction between US and the UK, for example, in the *Westinghouse* case.¹³⁴ The *Woolf* reforms narrowed the gap to US law by making non-party disclosure possible in principle.¹³⁵

Secondly, before the *Woolf* reforms, discovery was exclusively available after proceedings start and after fact pleading. The US system allows plaintiffs to go searching for the relevant evidence by way of discovery in order to build a viable case, provided they have given notice of the claim to the defendant—and, one should add, have survived the inevitable motions to dismiss, which is no longer trivial after *Twombly*.¹³⁶ Here, also, the *Woolf* reforms extended the availability of English disclosure into the period before proceedings are started.¹³⁷

This introduction of disclosure orders before proceedings are started had the potential of importing both advantages and disadvantages of the US discovery system. On the one hand they could have become a potent weapon for stand-alone cases. On the other hand, where the proceedings have not yet started and the issues accordingly have not yet been defined in the pleadings, it is even more difficult for courts to define the scope of appropriate disclosure, which raises an obstacle to any meaningful judicial control for proportionality.¹³⁸ While English courts in deciding on an application for pre-action disclosure will not engage in a detailed analysis of the issues that may potentially emerge in future litigation, and instead look at the ‘big picture’,¹³⁹ ‘applicants have to show that it is more probable than not that the documents are within the scope of standard disclosure in regard to the issues that are likely to arise’.¹⁴⁰ Where only classes of documents are specified, in principle *all* documents in the class have to meet the test for standard disclosure.¹⁴¹

However, the CPR strongly imply that such disclosure before proceedings are started is the exception, not the rule. Even before reaching the threshold of the exercise of discretion, the court has to determine whether the case meets the jurisdictional threshold, namely whether disclosure is ‘desirable in order to (i)

Wilberforce), concluding that English courts are ‘not to countenance “fishing” expeditions’ (quoting Lord Goddard CJ in *Radio Corporation of America v Rauland Corporation* [1956] 1 All ER 549, 554, [1956] 1 QB 618, 649). The main difference highlighted in the *Westinghouse* case, however, was that English law at the time did not allow for non-party disclosure; this has changed since the introduction of the CPR 1998, above n 15.

¹³³ Above n 15.

¹³⁴ *Rio Tinto v Westinghouse*, n 132, [1978] All ER 434, 440–1, quoting Devlin J in *Radio Corporation of America v Rauland*, n 132.

¹³⁵ CPR 31.17.

¹³⁶ See above text to and following n 75.

¹³⁷ CPR 31.16.

¹³⁸ In the US context, see Easterbrook, n 9, 638, who stated (albeit on the basis of notice pleading pre-*Twombly*): ‘The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details.’

¹³⁹ *Hutchinson 3G*, n 125, [7] (citing *Total E & P Soudan v Edmonds* [2007] EWCA Civ 50 para 29).

¹⁴⁰ *Hutchinson 3G*, n 125, [44].

¹⁴¹ *Hutchinson 3G*, n 125, [38] (but see *ibid* [47]–[52], leaving open the alternative interpretation that it is sufficient if the documents in the class are ‘likely to’ or ‘may well’ be subject to standard disclosure). However, documents in a class of documents that would by themselves not be relevant may be relevant as necessary ‘background knowledge’ against which other, relevant, documents in the class must be seen (see below n 258).

dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs.’¹⁴² The combination of a jurisdictional threshold question of ‘desirability’ and the separate step of the exercise of discretion means that the ‘circumstances must be outside the “usual run”’.¹⁴³ ‘Fishing expeditions’ are to be avoided.¹⁴⁴ All these restrictions make English disclosure before proceedings have started less amenable to being used as a fishing expedition than US discovery, but they also make English procedure a much less potent tool for stand-alone claims.

Even though the introduction of non-party disclosure and disclosure before proceedings have started may have moved English disclosure very slightly towards the US position, English law still has a narrower scope than US law.¹⁴⁵ One feature that should significantly limit disclosure excesses in England when compared to the US is the ‘English’ (or ‘European’) cost rule, under which it is generally the unsuccessful party that is ordered to pay the costs.¹⁴⁶ The court has discretion to make an order allocating the costs differently.¹⁴⁷ From an *ex ante* perspective, a party contemplating a disclosure request has to consider the possibility that it may lose the action, in which case it will most likely have to bear the costs. Even if it wins the action, there is the possibility that the court allocates the costs of, especially unreasonable, disclosure requests to the requesting party.¹⁴⁸ These rules internalise the costs of disclosure at least partially with the requesting party; each party will have to consider at least the costs of disclosure requested multiplied by the probability of being the unsuccessful party. In the case of non-party disclosure and disclosure before proceedings have started, the costs are generally fully internalised, because the default is that they are borne by the party making the request.¹⁴⁹ The party considering a request will have to weigh the expected benefits of disclosure against the costs for requesting and complying with the request.

Despite this partial or full internalisation of the costs in England, both the *Woolf* and the *Jackson* reviews found disclosure requests to lead to disproportionate costs, and the order of magnitude of absolute costs of disclosure appears similar in England and the United States.¹⁵⁰ Three explanations for the high costs despite internalisation seem plausible. First, it could be that the partial externalisation of costs that results from the general ‘loser pays’ rule allows optimistic parties to incur higher costs than they would otherwise incur.¹⁵¹ Also, even where the

¹⁴² CPR Rule 31.16(3)(d).

¹⁴³ *Hutchinson 3G*, n 125, [55].

¹⁴⁴ *Cf HCA International v CMA*, n 119, [30].

¹⁴⁵ See, eg, *Smith v Phillip Morris*, above n 132.

¹⁴⁶ CPR Rule 44.2(2)(a).

¹⁴⁷ CPR Rule 44.2(2)(b).

¹⁴⁸ The court may award costs for particular steps taken in the proceedings, CPR Rule 44.2(6)(e). For the limitation of cost awards see CPR Rule 44.3, 44.4 (limiting recovery to costs reasonably incurred and reasonable in amount, and in the case of costs assessed on the standard basis to those proportionate to the matters in issue).

¹⁴⁹ CPR Rule 46.1(2) (the court has discretion to impose the costs otherwise, Rule 46.1(3)). The *Jackson* review considered introducing a *general* rule imposing the costs of disclosure (including standard disclosure) on the party making the request, and found some advantages of such a rule in terms of avoiding excessive costs, but ultimately considered such a rule superfluous in the light of the existing scope for discretion in the cost allocation. *Jackson, Final Report*, n 100, 373–4, paras 3.17–3.19.

¹⁵⁰ See text to n 64 and in n 125.

¹⁵¹ *Easterbrook*, n 9, 647.

requesting party has to pay the out-of-pocket costs of compliance with a disclosure order, some of the costs of compliance remain to be externalities, namely those resulting from the disruption caused by complying with the order.¹⁵² Secondly, the inflated costs could be due to the principal-agent problem between clients, as principals, and their lawyers, as agents.¹⁵³ The *Jackson* review—while avoiding to spell out this principal-agent problem too explicitly—tried to address the issue by making the cost implications more transparent for clients upfront through cost management.¹⁵⁴ A third explanation could be that it is a misperception that the disclosure costs are *disproportionately* high. It may be that actually the costs are only high in absolute terms, but not disproportionately high in comparison to the marginal value of the uncovered information to the requesting party, given the high stakes. If that is the case, then even full cost internalisation with the requesting party would lead to the same high costs of discovery.¹⁵⁵

v Orders for Further Information

In addition to disclosure of documents, CPR Part 18 empowers the court to order a party to clarify matters or provide further information. Requests by the first party for such an order against the second party should be ‘concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet’.¹⁵⁶ The second party may object that such a request ‘can only be complied with at disproportionate expense’, and explain why that is the case.¹⁵⁷ Unless the court allocates costs differently in its order, costs lie where they fall.¹⁵⁸

In *National Grid*, Mr Justice Roth ruled that requests for further information were more efficiently dealt with after document disclosure had taken place and witness statements had been prepared.¹⁵⁹ However, after disclosure had taken place, the information asymmetry in cartel cases meant that in these cases it was particularly appropriate to have the infringers provide further information under CPR Part 18 in addition to the, often deliberately, ‘opaque and cryptic’ documents.¹⁶⁰

Similar to CPR Part 18, the CAT may give directions ‘requiring clarification of any matter in dispute or additional information in relation to any such matter.’¹⁶¹

vi Summary for England & Wales

¹⁵² Easterbrook, n 9, 645.

¹⁵³ Text to n 46.

¹⁵⁴ Jackson, *Final Report*, n 100, 414, paras 6.10–6.11 (pointing out that ‘[c]lients are somewhat keener on cost management than solicitors’).

¹⁵⁵ Indeed, in *Hutchinson 3G*, n 125, the Court made much of the high cost (estimated to be £1m) even though the applicant for disclosure before proceedings have started internalises nearly all of these costs.

¹⁵⁶ Practice Direction 18 — Further Information (‘PD 18’), para 1.2.

¹⁵⁷ PD 18 para 4.2(2).

¹⁵⁸ CPR Rule 44.10 and PD 18 para 5.8(2).

¹⁵⁹ *National Grid v ABB & ors* [2012] EWHC 869 (Ch) [73]–[79].

¹⁶⁰ *National Grid v ABB & ors* [2014] [EWHC] 1555 (Ch), 2014 WL 1220027 [40].

¹⁶¹ CAT Rules 2015, Rule 53(2)(d).

Disclosure in England & Wales has traditionally been not as wide-ranging as the US discovery rules since 1938, and the *Woolf* and *Jackson* reviews have — for the most part — sought to limit disclosure even further. The *Woolf* reforms were aimed at reducing the scope of discoverable material and introducing the ‘overriding objective’ of proportionality. While they also extended disclosure in that they allowed for disclosure before proceedings have started, this exceptional form of disclosure falls far short of US practice both in terms of availability and scope. Despite the *Woolf* reforms’ aim of limiting disproportionate discovery, it is widely accepted that they did not have the desired effect.

The changes following the *Jackson* review introduced further opportunities for the courts to limit disclosure by introducing the ‘menu option’, which leaves the ‘if’ and ‘how’ of disclosure in multi-track claims nearly entirely to the discretion of the court. Despite some early signs that the changes made following the *Jackson* review may lead to slightly more targeted disclosure,¹⁶² it is too early to say whether the courts will in practice make greater use of the powers introduced following the *Jackson* review than of the discretionary powers that already existed under RSC Order 24 and the CPR 1998, or whether the legal culture of accepting wide-ranging and costly disclosure will remain unabated.

C Access to Evidence in Germany

Germany — like many other civil law jurisdictions in Europe¹⁶³ — has always been very restrictive with regard to disclosure obligations, and despite some legislative changes in 2001 that were meant to widen the scope for disclosure, this remains true to this day.¹⁶⁴

i The Traditionally Restrictive Stance

Even the traditional disclosure obligations in continental jurisdictions are not quite as restrictive as they are sometimes depicted. The traditional position on procedural disclosure in many Civil Law countries is, or was, to allow a party to request disclosure of a document only if either the *other* party made reference to the document, or if the requesting party had a substantive claim for disclosure.¹⁶⁵ The first of these alternatives is of very little practical relevance: a party is unlikely to refer to a document that would be detrimental to its own case.¹⁶⁶ What is sometimes underestimated is the breadth that ‘substantive claims’ for information disclosure may have, although it is true that many

¹⁶² See n 129.

¹⁶³ See references in n 60.

¹⁶⁴ For monographic treatments of disclosure in Germany in the competition law context see Sanner, n 3; JP Westhoff, *Der Zugang zu Beweismitteln bei Schadensersatzklagen im Kartellrecht* (Baden-Baden: Nomos 2010). For monographic treatments of German disclosure rules more generally see, eg, Beckhaus, *Bewältigung von Informationsdefiziten*, n 9; A Kapoor, *Die neuen Vorlagepflichten für Urkunden und Augenscheinsgegenstände in der Zivilprozessordnung* (Baden-Baden: Nomos 2009); S Huber, *Entwicklung transnationaler Modellregeln für Zivilverfahren* (Tübingen: Mohr Siebeck 2008) (comparative analysis with the aim of promoting harmonization); D Adloff, *Vorlagepflichten und Beweisvereitelung im deutschen und französischen Zivilprozess* (Tübingen: Mohr Siebeck 2007).

¹⁶⁵ For Germany see §§ 422, 423 Civil Procedure Code (*Zivilprozessordnung*, ZPO).

¹⁶⁶ Beckhaus, n 9, 92.

provisions giving a substantive claim are not well suited for the antitrust context.¹⁶⁷

However, case law has developed a (secondary) claim for information under § 242 of the Civil Code provided (i) there is a pre-existing 'legal relationship' between the party requesting the disclosure and the party in possession of the information, (ii) the requesting party lacks information about the existence or extent of a primary claim (for example a claim for damages) through no fault of its own, (iii) the information is relevant to the primary claim, and (iv) the party in possession of the information can produce it without undue burden.¹⁶⁸ The 'legal relationship' may consist of a contractual or extra-contractual relationship. In the latter case, however, all requirements for the extra-contractual claim must be fully established, with the exception of the showing of harm, whose existence need only be probable.¹⁶⁹ The requested information must be *relevant* for the enforcement of the primary claim, and the burden of the duty to disclose must be *proportionate* to the added value.¹⁷⁰

The claim for information under § 242 BGB may become pertinent in competition cases in particular in two scenarios: first, where the claimant is a direct customer of the party in possession of the information so that there is a contractual relationship between the two,¹⁷¹ and, secondly, where there is a potential tort claim under § 33 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), the existence of harm is probable, and the other elements of the claim are proven.¹⁷² The requirements of the second category will in particular be met where follow-on claims are concerned.¹⁷³ In the cases that seem to be the paradigm of the Damages Directive, namely follow-on actions in cartel cases, the claimant may well have a

¹⁶⁷ For a comprehensive list of substantive claims for disclosure see the overview in Beckhaus, n 9, 7–69. Most of these are, however, completely or mostly irrelevant for antitrust actions. For example, § 809 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) requires that there is a pre-existing potential claim against the party in possession in relation to tangible property (which may include documents) whose inspection is sought. While this provision used to be helpful in intellectual property cases (nowadays, the special provisions implementing the Enforcement Directive apply), in competition cases there will usually be no 'claim in relation to tangible property'. § 810 BGB requires that a document was drafted 'in the interest' of the party demanding access, or that it documents a legal relationship or negotiations between the requesting party and another person. For the inadequacy of these provisions for the antitrust context see, eg, Sanner, n 3, 220–32, in particular 225–6 and 230–2; R. Wilhelmi 'Zugang zu Beweismitteln und Auskunftsanspruch: Die Regelungen des deutschen Rechts und des Weißbuchs im Vergleich' in W. Möschel and F. Bien (eds), *Kartellrechtsdurchsetzung durch private Schadensersatzklagen* (Baden-Baden: Nomos 2010) 99, 104–5. Where commercial accounts are concerned, §§ 258, 259 of the Commercial Code (HGB) may provide an additional, procedural, basis for discovery requests; this may become relevant where the quantification of damages is concerned (Sanner, n 3, 273–8, noting that the potential of these norms is not fully used in practice).

¹⁶⁸ The long line of cases goes back to Reichsgericht, 4 May 1923, II 310/22, RGZ 108, 1, 7; more recently, eg, BGH 6 February 2007, X ZR 117/04, (2007) *Neue Juristische Wochenschrift* 1806, 1807. For in-depth discussions, see, eg, Beckhaus, n 9, 40–69; Sanner, n 3, 232–48.

¹⁶⁹ BGH, 2 February 1995, I ZR 16/93, (1995) *Neue Juristische Wochenschrift* 1420, 1421–3. For the discussion in the literature if this requirement has already been, or should be, abandoned, see Sanner, n 3, 236–9, and Beckhaus, n 9, 66–9, both with numerous references.

¹⁷⁰ Beckhaus, n 9, 46–54.

¹⁷¹ Sanner, n 3, 247–8. For an example of a claim for information based on § 242 BGB between seller and buyer in a somewhat atypical competition case, see LG Dortmund, 10 July 2008, 13 O 126/06 Kart, *Wirtschaft und Wettbewerb/Entscheidungssammlung* DE-R 2425 — *Übertragung von Stromversorgungsanlagen*.

¹⁷² Sanner, n 3, 245–6. For an example in a competition-law context BGH, 27 April 1999, KZR 54/97, (1999) *Wirtschaft und Wettbewerb* 725, 729 — *Taxi-Krankentransporte* (in a boycott case), and OLG Düsseldorf, 16 June 1998, U (Kart) 15/97 — *Global One*, (1998) *Wirtschaft und Wettbewerb* 713, 718–9.

¹⁷³ Sanner, n 3, 245; Wilhelmi, n 167, 109; see also M. Dreher, 'Der Zugang zu Entscheidungen mit Bindungswirkung für den kartellrechtlichen Schadensersatzprozess' (2008) *Zeitschrift für Wettbewerbsrecht* 325, 332–3 (for broader application of the claim under § 242).

claim for information under § 242 BGB, provided the claimant can show that it suffered harm with a sufficient probability.¹⁷⁴

Despite the expansion of information duties under § 242 BGB, and the sometimes liberal interpretation of substantive claims for disclosure, it remains true that under the prevailing view there is no 'general duty of information'.¹⁷⁵ In particular the requirement of a 'legal relationship' between the parties in § 242 BGB makes this claim unsuitable at least for stand-alone actions against others than contractual partners.¹⁷⁶ Even where § 242 BGB applies, the court has a substantial margin of appreciation in determining whether the primary claim is sufficiently certain to exist (unless a follow-on claim is at stake), whether the requested information is relevant, and in particular, when the disclosure of information would constitute an 'undue burden' on the other party.¹⁷⁷

In parallel to the substantive claim for information, case law has developed the procedural instrument of the 'secondary burden of evidence production' (*sekundäre Darlegungslast*). This instrument was developed for cases where the party bearing the burden of proof does not have access to information about the circumstances in question because of a structural information asymmetry. If, in such a case, it is possible and proportionate for the other party to shed light on the circumstances, this other party may not simply deny the truth of the pleadings submitted by the party bearing the burden of proof. Instead, the other party has to substantiate why the pleaded facts do not accord with the truth. If such substantiation is not forthcoming, or if the party bearing the burden of proof is able to undermine the force of this substantiated denial, the court may consider the pleadings as proven. This instrument has, for example, been discussed in the *ORWI* case.¹⁷⁸ While this instrument, like the substantive claim under § 242 BGB, may indirectly compel the disclosure of information, it does not result in a duty to disclose *documents*.¹⁷⁹ It is therefore more akin to the further information requests in English law.¹⁸⁰

Despite these substantive and procedural crutches, the restrictive discovery rules have long been criticised in Germany due to the hardship that may result for bona fide claimants that lack access to relevant information through no fault of their own. This led to legislative intervention in 2001.

ii The 2001 Reform of Procedural Disclosure

¹⁷⁴ Sanner, n 3, 245–8, noting, however, that even where the claim for information exists, the verifiability of the information may be a problem; Wilhelmi, n 167, 106 and, for requests addressed to third parties, 111–2.

¹⁷⁵ There is an old debate on whether courts should extend § 242 BGB to such a general duty of information, which would lead to a certain approximation to common law disclosure. However, the proponents of such a general duty have not made much headway.

¹⁷⁶ Sanner, n 3, 246–8, 249.

¹⁷⁷ Beckhaus, n 9, 68, 69. The Federal Court of Justice has clarified that this margin of appreciation is not unlimited: BGH, 6 February 2007, X ZR 117/04, (2007) *Neue Juristische Wochenschrift* 1806, 1807–9.

¹⁷⁸ BGH in *ORWI* (n 4 above) [70]–[77] (holding that the instrument should be used only with caution where the *infringers* want to rely on it for the proposition that the overcharge was passed on from the direct to indirect purchasers; implying that it may be used more easily by direct or indirect purchasers *against* the infringer).

¹⁷⁹ BGH, 26 June 2007, XI ZR 277/05, BGHZ 173, 23 [16]. To what extent the substantive claim under § 242 BGB can entail the production of documents is controversial. See Sanner, n 3, 243–4 in n 889.

¹⁸⁰ CPR Part 18 and CAT Rules 2015, Rule 53(2)(d). See above text near n 156.

The German legislature revised the procedural disclosure rules in 2001.¹⁸¹ This reform of § 142 of the Civil Procedure Code enabled courts, on application by the parties or on their own motion, to order a party or third party to disclose documents in their possession, provided *either* of the parties has made reference to the documents.¹⁸²

The wording of the provision seems to give courts nearly unfettered discretion in ordering disclosure of documents, and this *could* have led to a revolution in disclosure practice in Germany.¹⁸³ Once again,¹⁸⁴ however, legislative reform could not easily overcome a deeply ingrained culture in the courts. In contrast to the common law regimes, these attitudes were here in favour of *restrictive* disclosure to avoid any appearance of allowing ‘fishing expeditions’ (*Ausforschungsbeweis*) — a term used in a much broader sense than in England (not to mention the United States).

Even though the courts did not give an expansive reading to § 142 ZPO, it should be noted that the Federal Court of Justice has not adopted the view of those commentators who had sought to emasculate the reform completely.¹⁸⁵ Some had argued that the systematic placement of § 142 ZPO in the civil procedure code meant that the disclosed documents were for informational purposes only and could only be used to clarify undisputed facts, not to prove disputed facts. The Federal Court of Justice rejected this view.¹⁸⁶ Others argued that only a reference to the document by the party *not* bearing the burden of proof could trigger an order under § 142 ZPO; again, the Federal Court of Justice rejected this view.¹⁸⁷

However, the prevailing view is nevertheless that most of the high thresholds that had been established in previous case law should be retained. In particular, documents must be identified sufficiently precisely, and their content must be pleaded with sufficient specificity before disclosure may be ordered.

The contours of the reformed § 142 ZPO remain sketchy to this day. One reason is that the explanatory memorandum accompanying the Government Bill¹⁸⁸ and the rest of the legislative history of the reform are not very helpful for its interpretation. The legislative history indicates that the legislator wanted to

¹⁸¹ Gesetz zur Reform des Zivilprozesses of 27 July 2001 (2001) *Bundesgesetzblatt* Part I, no 40, 1887; for the explanatory memorandum accompanying the Government Bill, see *Bundestags-Drucksache* no 14/4722 of 24 November 2000 (in particular 78–9).

¹⁸² Where the disclosure order is addressed to third parties, they do not have to disclose documents if this would be an undue burden or if they have a right to refuse testimony under §§ 383–385 ZPO. § 144 ZPO extends the power to order disclosure to objects other than documents. Electronic files are not covered by § 142, but by § 144 ZPO. In the following, I will not discuss § 144 ZPO separately; its requirements and application are largely parallel to § 142 ZPO, and I am sure that even readers who made it to this footnote are not particularly interested in the few remaining differences. If you are interested because you are involved in litigation, get a lawyer. If you are interested for the sake of it, get a life.

¹⁸³ Sanner, n 3, 253; see also Beckhaus, n 9, 94–122 (discussing the legislative text, which provides for a ‘mostly unconditional duty to produce documents’). G Wagner, ‘Urkundenedition durch Prozeßparteien: Auskunftspflicht und Weigerungsrechte’ (2007) 62(14) *JuristenZeitung* 706–19, advocates expanding the use of § 142 ZPO so as to create a disclosure regime. J Zekoll and J Bolt, ‘Die Pflicht zur Vorlage von Urkunden im Zivilprozess: Amerikanische Verhältnisse in Deutschland?’ (2002) *Neue Juristische Wochenschrift* 3129, had pointed out early on that § 142 ZPO would not result in a sea change.

¹⁸⁴ See above for the attempts of US and English legislatures to rein in discovery (text following n 71 and n 97).

¹⁸⁵ For a detailed discussion of these arguments, see Beckhaus, n 9, 94–105.

¹⁸⁶ BGH, 26 October 2006, III ZB 2/06, (2007) *Neue Juristische Wochenschrift* 155.

¹⁸⁷ BGH, 26 June 2007, XI ZR 277/05, BGHZ 173, 23 [19], [20]; BGH, 15 June 2010, XI ZR 318/09, (2010) *Wertpapier-Mitteilungen* 1448 [25].

¹⁸⁸ Gesetzentwurf der Bundesregierung (Government Bill), ‘Entwurf eines Gesetzes zur Reform des Zivilprozesses’, *Bundestags-Drucksache* no 14/4722 (24 November 2000) 78–9.

effect only a gradual change in disclosure practices, not a revolution, but it gives no indications where the dividing line between reform and revolution lies.¹⁸⁹

Not astonishingly, the lack of clarity about the contours of the provision has led to an uneven application.¹⁹⁰ Some courts ventured into new territory by reducing the demands on the probability of the existence of the underlying claim or the precision of the identification of the documents or of the description of their content.¹⁹¹ Generally, however, commentators and courts stayed away from, or actively decried, such unconventional uses of § 142 ZPO, and this restrictive view has been confirmed by the Federal Court of Justice.¹⁹² A survey in 2006 found that about a third of all first-instance judges had *never* ordered disclosure under §§ 142, 144 ZPO, and a further 60% stated they had ‘rarely’ used these provisions.¹⁹³ And even where the provisions were used, it was unclear whether these were true cases of coercive disclosure or merely formalised cases of what would have been voluntary disclosure cases before the reform.

Under the strict standards that continue to be applied by the courts, it will be difficult or impossible to specify the document sufficiently precisely without already knowing the content of the document in question.¹⁹⁴ An additional limitation is that only the disclosure of *individual documents*, not *categories* of documents, is available under § 142 ZPO. Even where facts are pleaded in sufficient detail, the Court has discretion whether or not to order disclosure.¹⁹⁵ Relevant factors are, for example, the added value of the document, proportionality of disclosure and confidentiality considerations.¹⁹⁶ While an appeal court can review whether discretion has been exercised at all, the weighting is largely for the trial court to make.¹⁹⁷ Where disclosure is ordered and a party to the proceedings does not disclose the document, there is no way

¹⁸⁹ Deutscher Bundestag, Beschlussempfehlung des Rechtsausschusses, *Bundestags-Drucksache* no 14/6036 (15 May 2001) 120–1.

¹⁹⁰ Beckhaus, n 9, 94–122; R Willer, ‘Das selbstständige Beweisverfahren und die Grenzen richterlicher Vorlageanordnungen’ (2014) *Neue Juristische Wochenschrift* 22 notes that § 142 ZPO has divided commentators since its inception into two camps, one warning that parties need to be protected against fishing expeditions while the other praises the increased possibility for a search for material truth and the empowerment of the party with less information at its disposal.

¹⁹¹ See, eg, LG Ingolstadt, 22 March 2002, 4 O 1729/01, (2002) *Neue Zeitschrift für Insolvenzrecht* 390 (ordering disclosure of a lever arch file labelled ‘Bürogebäude’), but after the Federal Court of Justice’s decisions (n 192 below), this practice is likely a thing of the past.

¹⁹² The German Federal Court of Justice has denied access to entire files of documents where the request is aimed at ‘fishing for evidence’; access will only be granted where there is a sufficiently substantiated allegation of the content of the document, see BGH, 27 May 2014, XI ZR 264/13, (2014) BeckRS 13725 [28]–[29] (on § 142 ZPO) and [24]–[26] (on the substantive access to evidence claim under § 810 BGB); see also BGH, 14 June 2007, VII ZR 230/06, (2007) *Neue Juristische Wochenschrift – Rechtsprechungsreport* 1393 [10]; N Stackmann, ‘Richterliche Anordnungen versus Parteiherrschaft im Zivilprozess?’ (2007) *Neue Juristische Wochenschrift* 3521, 3525–6; D Leipold, ‘§ 142’, in Stein/Jonas, *Zivilprozessordnung*, 22nd edn (Tübingen: Mohr Siebeck 2005) paras 9–11 with further references.

¹⁹³ C Hommerich, H Prütting, T Ebers, S Lang & L Traut, *Rechtstatsächliche Untersuchungen zu den Auswirkungen der Reform des Zivilprozessrechts auf die gerichtliche Praxis* (Cologne: Bundesanzeiger Verlag, 2006) 112. The disclosure provisions were used even less frequently against third parties; about two thirds of judges had never made use of this power, and the remaining judges (except for 1 to 2%) had rarely made use of it. *Ibid.* See also Stackmann, n 192, 3521 (noting that ‘acceptance of the provision in practice is still low, and the option to order the production of documents is made use of only in rather exceptional circumstances’ (author’s translation)).

¹⁹⁴ Sanner, n 3, 264–5, 266–7. Similar problems are reported from other Civil Law jurisdictions, eg, Sweden (Glader & Alstergren, n 60, 406).

¹⁹⁵ BGH, 17 July 2014, III ZR 514/13 [26].

¹⁹⁶ *Ibid.* DA Jüntgen, ‘Zur Verwertung von Kronzeugenerklärungen in Zivilprozessen’ (2007) *Wirtschaft und Wettbewerb* 128, 133–5, discusses the possibility that German courts could use § 142 ZPO to order disclosure of leniency statements, but given the restrictive use of § 142 ZPO and the weight that German courts have given to confidentiality and considerations of maintaining the effectiveness of leniency programmes post *Pfleiderer* (especially when the competition authorities intervene), this was a relatively low risk even before the Damages Directive.

¹⁹⁷ BGH, 17 July 2014, III ZR 514/13; BGH, 26 June 2007, XI ZR 277/05, BGHZ 173, 23 [20], [21].

to force the party to disclose; however, the Court may draw all inferences from this refusal, such as treating the pleaded facts as proven.¹⁹⁸ Overall, the impact that § 142 ZPO has had on disclosure orders so far is negligible.¹⁹⁹

iii Summary for Germany

Overall, party and non-party disclosure in Germany remains weak. In some cases, the claimant may have a claim for information under § 242 BGB, or may rely on the procedural concept of a secondary burden of persuasion. The wording of the reformed § 142 ZPO could have opened the door for much more extensive procedural disclosure. However, courts have proved resilient to legislative change and interpreted the new provision conservatively in the light of their previous restrictive practice, in particular by continuing to insist on a precise specification of any documents and pleading of the facts to be proven by these documents, and by not allowing for disclosure of broader categories of evidence. In German private enforcement cases, much of the shortfall in terms of access to evidence is made up by shifting the burden or standard of proof, but this substitute may not always apply or prove inadequate, for example, where the denial of disclosure makes it impossible for the claimant to plead even a sufficiently detailed basis for estimated damages.

As will be discussed below, German courts have applied more liberal standards when it comes to giving applicants or courts access to the file of authorities or other courts. In that context, the Federal Court of Justice was willing to relax, first, the requirement of pleading a substantiated claim, allowing access on the basis that the claim was not ‘a priori without merit’, and, second, the requirement of specifying individual documents, allowing access to the entire file because the ‘applicant usually will not know the exact content of the file and therefore will be unable to specify documents.’²⁰⁰ It is an open question whether this decision is an indication that German courts may be willing in the future to apply relaxed standards also under § 142 ZPO at least in competition cases, possibly by invoking the Damages Directive and the principle of effectiveness, or whether different standards will continue to apply depending on whether disclosure under § 142 ZPO is sought or whether access to the file is in question.

D Acquis communautaire: Laboratoires Boiron

We have seen that disclosure rules in the jurisdictions surveyed here give discretion to the court as to the extent of disclosure, but that English (and US) courts have tended to exercise this discretion in favour of disclosure while German and other civilian jurisdictions order disclosure at best occasionally.

Even before the Damages Directive, European Union law has not been completely silent on the exercise of discretion in the context of disclosure where the enforcement of Union rights is concerned. While the principle of procedural autonomy means that ‘it is for the domestic legal system of each Member State to [...] to lay down the detailed procedural rules governing actions for safeguarding

¹⁹⁸ BGH, n 195, citing §§ 286, 427 (second sentence) ZPO. In contrast, *third parties* can be sanctioned.

¹⁹⁹ See, eg, S Jungermann, ‘US-Discovery zur Unterstützung deutscher Kartellschadensersatzklagen’ (2014) *Wirtschaft und Wettbewerb* 4, 5.

²⁰⁰ BGH, 14 July 2015, KVR 55/14, (2015) *Wirtschaft und Wettbewerb* 1237, 1243–4, paras 32–3 — *Trinkwasserpreise*.

rights which individuals derive from the direct effects of [Union] law',²⁰¹ Member States still have to observe the principles of equivalence and effectiveness.

In *Laboratoires Boiron*,²⁰² the CJEU explained the impact of the principle of effectiveness on the exercise of discretion by national courts in the context of disclosure. In an action for a refund of taxes, Boiron had the burden of proving that competing wholesale distributors had not fulfilled the *Altmark Trans* criteria when being exempt from the tax and had therefore received illegal state aid. Boiron argued that unless the national court ordered disclosure, Boiron could not discharge its burden of proof with respect to the fact that the wholesale distributors were overcompensated in the sense of the *Altmark Trans* criteria. Under (French) national law, the national court had the power to order all methods of inquiry, but this power was 'purely discretionary'.²⁰³ The CJEU held that:

if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, *the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.*²⁰⁴

This holding of *Laboratoires Boiron* was subsequently reaffirmed in several cases.²⁰⁵ Accordingly, in actions for damages in cases of competition infringements and other cases of enforcing Union rights, the principle of effectiveness limits the discretion afforded by national rules to national courts with regard to the question whether and to what extent disclosure should be ordered.²⁰⁶ Discretionary disclosure under national law may be transformed into mandatory disclosure where this is required by the principle of effectiveness.

Given that national laws in most jurisdictions already *enable* courts to order disclosure, and further given that the principle of effectiveness is to be applied whenever a right deriving from EU law is involved, especially but not only in damages actions in competition cases, one could suspect that the *Boiron* decision would be widely cited by national courts. A search for German²⁰⁷ decisions citing to *Boiron*, however, appears to falsify this prior belief: While *Boiron* is cited in various German decisions, it is exclusively in the context of tax

²⁰¹ Eg. Case C-526/04 *Laboratoires Boiron v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, ECLI:EU:C:2006:528 para 51.

²⁰² Case C-526/04 *Laboratoires Boiron*, ECLI:EU:C:2006:528.

²⁰³ *Ibid.*, para 53.

²⁰⁴ *Ibid.*, paras 55, 57 (emphasis added).

²⁰⁵ Case C-479/12 *H Gautzsch Großhandel GmbH & Co KG v Münchener Boulevard Möbel Joseph Duna GmbH*, ECLI:EU:C:2014:75, paras 43, 44 (in the context of Community designs; holding that the burden of proof may need to be adjusted or lightened); Case C-264/08 *Belgische Staat v Direct Parcel Distribution Belgium NV*, ECLI:EU:C:2010:43, para 35 (in the context of the Community Customs Code).

²⁰⁶ As noted by the Commission Staff Working Paper, n 3, para 91; *Becker*, n 26, 58–9; *Wagner-von Papp*, n 26, 451 (discussing the 2009 draft directive); *K von Papp*, 'Die Durchsetzung der Gemeinschaftsgrundrechte gegenüber den Mitgliedstaaten' (2009) *EWS* 216, 221–2; *Sanner*, n 3, 370–1.

²⁰⁷ Since English courts already grant extensive disclosure, it is not astonishing that English courts to do not refer to *Boiron Laboratoires* in the disclosure context.

or state aid issues, never with regard to the implications of the principle of effectiveness for ordering disclosure.²⁰⁸

If the German example is representative, then the potentially great impact of *Laboratoires Boiron* on disclosure may simply have been overlooked in the enforcement to date.

E Comparative Conclusions

The brief comparative overview has, first, reconfirmed the trite fact that common law jurisdictions provide for more extensive procedural disclosure rules than civil law jurisdictions. It has been noted by other authors that this represents a ‘curious kind of role reversal, in which the idealist civil lawyer worries about the pragmatic, and the pragmatic common lawyer worries about the ideal’.²⁰⁹ In substantive private law it is the (English) common lawyer who stresses the adversarial nature of dealings between private parties and categorically denies any requirement to disclose information or act in good faith, whereas civilian lawyers are more willing to embrace disclosure and good faith requirements. Likewise, in procedural law the ‘adversarial’ process in common law jurisdictions, where the truth emerges in a battle between the parties, is usually contrasted with the supposedly ‘inquisitorial’ process in civil law jurisdictions in which the judge is tasked with getting at the truth.²¹⁰ But when it comes to the disclosure of unfavourable information, it is suddenly the civilian lawyer who proclaims that a party cannot be held to act against its own interests, and it is the common lawyer who declares that litigation is ‘conducted “cards face up on the table” ’ and that it ‘is not a war or even a game. It is designed to do real justice between opposing parties [...]’.²¹¹

To some extent, the counterintuitive role-reversal can be explained by the complementary nature of procedural and substantive solutions. Civilian jurisdictions may be restrictive when it comes to procedural rules on access to evidence, but may go further in terms of providing for substantive claims for information or shifting the burden or standard of proof which makes access to evidence superfluous or at least reduces its importance.²¹²

A closer look at US and English discovery rules has shown that the black-letter law in these jurisdictions has moved towards ever more judicial control of the proportionality of discovery requests. Despite these legislative changes, we can still observe (possibly, but not necessarily, disproportionately) expensive discovery processes in both these jurisdictions. The courts appear reluctant to

²⁰⁸ A search for ‘Boiron’ in the German database beck-online (restricted to case law) yielded 49 hits (13 January 2016). All but 13 are references to decisions by the CJEU or General Court. The 13 remaining hits refer to only six German decisions. Of these, two are false positives (they refer to literature authored by someone with the name Boiron). The remaining references in German decisions to *Laboratoires Boiron* are all in the context of tax or state aid by courts for administrative and fiscal matters.

²⁰⁹ Matthews & Malek, n 97, para 1.26.

²¹⁰ The characterisation as an ‘inquisitorial’ process is wrong at least for German law. See the discussion in Kötz, n 38, 66–7, and Jackson, *Preliminary Report*, n 100, 555 in n 24, noting that it is for the parties to define what factual issues are controversial and to name the evidence that should be introduced (‘*Beibringungsgrundsatz*’).

²¹¹ *Davies and another v Eli Lilly & Ors* [1987] 1 All ER 801, 804 (Donaldson, MR).

²¹² See text accompanying n 167. Indeed, even substantive competition law may be used to circumvent the need for fact gathering. For example, the controversial ‘economic dependency’ rules in some of the Continental jurisdictions may be partially explicable by facilitating private enforcement against dominant undertakings without requiring the claimant to have access to evidence necessary to establish market definition and a dominant position. See F Wagner-von Papp, ‘Comparative Antitrust Federalism and the Error-Cost Framework’ in N Charbit & E Ramundo (eds) *William E Kovacic – An Antitrust Tribute, Liber Amicorum Vol II* (New York: Institute of Competition Law, 2014) 23, 90.

make use of their powers to limit discovery. This demonstrates two things: first, that an introduction of judicial screening for proportionality does not in itself guarantee that one will avoid the alleged ‘discovery excesses’ in US or, to a lesser extent, English cases, and, second, that courts display considerable inertia when it comes to changing their ingrained habits.

This latter point was also demonstrated, at the opposite end of the spectrum, by the discussion of German law. The revision of § 142 ZPO opened up the opportunity for a sea change in procedural disclosure. Instead, it resulted in little more than a footnote to the previous practice. Not even the *effet utile* obligation set out in *Laboratoires Boiron* was able to shift the German courts’ restrictive practice.

Taken together, the comparative overview demonstrates that courts are unlikely to change their previous practice with regard to ordering disclosure as long as the rules provide for wide discretion. With this in mind, we turn to the access to evidence provisions in the Damages Directive.

IV Disclosure in the Directive

This section examines the Directive’s provisions on party and non-party disclosure in greater detail.

A Article 5: Discretionary Disclosure as the Basic Rule

Article 5 establishes as the basic rule (and generally the minimum standard²¹³) that Member States have to ensure that national courts are *able to order* defendants, claimants, and third parties to disclose relevant evidence upon request of either of the parties. The Directive — in contrast to Article 5(2) of the 2013 Commission Proposal and Article 8(2) of the unofficial 2009 Commission Draft — at no point explicitly provides for a duty of a court to order disclosure, even though recital 15 still speaks of the claimant’s ‘*right to obtain the disclosure of evidence*’. While the provisions of the Directive do not explicitly provide for such a right with a corresponding duty, the principle of effectiveness may indirectly transform the mere enabling function of Article 5 into a duty on the court to order disclosure.

i Reasoned Justification

The first condition for a disclosure order is that the request is accompanied by a reasoned justification.

Where it is the *claimant* who requests disclosure, the reasoned justification has to contain ‘*reasonably available facts and evidence sufficient to support the plausibility of its claim [...]*’. The difficulty with the wording of this test—introduced into the Directive by the European Parliament²¹⁴—is that it contains countervailing forces. If the test required ‘*facts and evidence sufficient to support the plausibility of [the] claim*’, this would be a reasonably well-

²¹³ See Article 5(8).

²¹⁴ European Parliament, *Report* (Rapporteur Andreas Schwab), 4 February 2014, A7-0089/2014, 20, following the Opinion of the Committee on Legal Affairs (Rapporteur Bernhard Rapkay), *ibid*, 42. The same wording had already been used in the Commission Staff Working Paper, n 3, para 96. It is mostly derived from Article 6(1) of the IP Enforcement Directive 2004/48/EC (see text to and following n 218).

defined and fairly strict test. Conversely, a test that required ‘*reasonably available*’ facts and evidence to support the plausibility of [the] claim’ would also be a reasonably well-defined but much more permissive test.²¹⁵ It is not entirely clear from the wording of Article 5(1) what is to happen in the case that very little evidence and very few facts are available to the claimant—a case that is the norm rather than the exception in competition actions.²¹⁶ One English judge has framed the issue as follows:

In a case involving an allegation that a secret cartel has operated in breach of Article 101 [TFEU] there is an inevitable tension in domestic procedural law between the impulse to ensure that claims are fully and clearly pleaded so that a defendant can know with some exactitude what case he has to meet (and also so that disclosure obligations can be fully understood, expert witnesses given clear instructions and so on), on the one hand, and on the other the impulse to ensure that justice is done and a claimant is not prevented by overly strict and demanding rules of pleading from introducing a claim which may prove to be properly made out at trial, but which will be shut out by the law of limitation if the claimant is to be forced to wait until he has full particulars before launching a claim.²¹⁷

Does the composite test in Article 5(1) mean that the standard for the sufficiency to support the plausibility of the claim is to be lowered to take account of the circumstance that other facts and evidence are not reasonably available? Or does it mean that the claimant must, even where such facts and evidence are not reasonably available, at any rate adduce facts and evidence *sufficient* to support the plausibility of the claim? While the recitals are unhelpful in this regard, there is some evidence that the threshold test is not a demanding one.

First, the phrase ‘reasonably available facts and evidence sufficient to support’ copies the wording of Article 6 of the IP Enforcement Directive 2004/48/EC.²¹⁸ In that context, even the generally disclosure-averse German courts have indicated that the test is satisfied where there is evidence that there is ‘a certain degree of probability’ of an infringement (while a ‘mere possibility’ of an infringement would not suffice).²¹⁹ If anything, the threshold under Article 5(1) of the Damages Directive is even lower: while Article 6(1) of the IP Enforcement Directive requires ‘evidence sufficient to support *the claim*’, Article 5(1) of the Damages Directive only requires ‘evidence sufficient to support *the plausibility of the claim*’.²²⁰

²¹⁵ This was essentially the standard the Commission had proposed in Article 5(1) of the Proposal of 11 June 2013.

²¹⁶ See Commission Staff Working Paper, n 3, para 102. For an example, *cf* the English case *Hutchinson 3G*, n 125.

²¹⁷ *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch) [62], cited with approval in *Bord Na Mona Horticultural Ltd & Anr v British Polythene Industries Plc* [2012] EWHC 3346 (Comm) [30], in turn cited with approval in *Emerald Supplies Ltd v British Airways plc & Ors* [2014] EWHC 3514 (Ch) [50].

²¹⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157, corrected version [2004] OJ L195/16. See De Smijter, n 9, para 8.134.

²¹⁹ Federal Court of Justice, 1 August 2006, X ZR 114/03, BGHZ 169, 30 [42]–[43] with further references, interpreting § 142 ZPO in the light of Article 6 of the Enforcement Directive). It is not very helpful that a mere possibility *is* a certain degree of probability (namely a very low one). Wagner, n 183, 715, argues that the lower threshold applied by the Court in this decision should be the generally applicable test under § 142 ZPO.

²²⁰ The evidential requirements for proving an infringement of intellectual property and those for proving an infringement of competition law are very different, which explains the difference (*cf* De Smijter, n 9, para 8.134). This is reflected in the second sentence of Article 6(1) of the IP Enforcement Directive, which provides that ‘Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.’ It would be difficult to devise a similar shortcut for competition law infringements, and the Damages Directive does not even attempt a definition or description of facts that would be sufficient to support the plausibility of a claim. For such a description in the Commission Staff Working Paper, see text following this footnote.

Secondly, the wording that ended up in Article 5(1) was already contained in the Commission Staff Working Paper, which exemplifies the test with the scenario that:

a claimant may produce an infringement decision showing that the defendant participated in a cartel for product X covering territory Y and for period Z. He may also be able to produce purchase receipts for the same product from the defendant on the same territory and covering the period of the cartel. *This makes the claim a plausible one and should be sufficient to allow the claimant to access the evidence necessary to meet the applicable standard of proof required for ultimately winning the case.*²²¹

Whether an example in the Staff Working Paper can be used to interpret the wording of the Directive may be controversial. It can be assumed that the European Parliament was aware of the explanation in the Staff Working Paper. Even if one did not find this reasoning based on the legislative history persuasive, a follow-on *cartel* case such as the one described would usually satisfy the threshold test in Article 5(1): where there is a final infringement decision by the Commission or an NCA, the effect of Article 16 Regulation 1/2003 or Article 9 of the Directive is that the decision irrefutably establishes the infringement or at least provides prima facie evidence for it; and under Article 17(2) of the Directive, it shall be presumed that cartel infringements cause harm. Accordingly, the example mentioned in the Staff Working Paper is arguably not even a borderline case.

The question of the required pleading standard will become especially pertinent in stand-alone damages actions and in actions involving infringements other than cartels. Where the claimant can show some evidence of cartel conduct, it is to be expected that courts will give claimants some latitude. This is certainly the current practice in England, where it has been held repeatedly in the context of summary judgments or applications to strike out that:

[t]he strength (or otherwise) of any such case cannot be assessed (or indeed usefully particularised) until after disclosure of documents because it is in the nature of anti-competitive arrangements that they are shrouded in secrecy.²²²

Similarly, the English judge in *Nokia* held that in resolving the ‘inevitable tension’ between particularised pleading and the impossibility of pleading without disclosure, ‘the balance is to be struck by allowing a measure of generosity in favour of a claimant.’²²³ Even in Germany, courts are willing to relax pleading standards to some extent where there is an information asymmetry.²²⁴

Yet, it is unclear how far this ‘generosity’ goes. Courts will have to grapple with the question what standard of plausibility they apply where, for example, the claimant does little more than assert an agreement between competitors based on evidence of parallel conduct, perhaps enriched with a few ‘plus factors’—a scenario not uncommon in the United States, at least before

²²¹ Commission Staff Working Paper, n 3, para 102 (emphasis added).

²²² *Cooper Tire & Rubber Company Europe Ltd & Ors v DOW Deutschland Inc & Ors* [2010] EWCA Civ 864 [43], cited and applied in *KME Yorkshire Ltd & Ors v Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190 [32], in turn cited and applied in *Emerald Supplies Ltd v British Airways plc & Ors* [2014] EWHC 3514 (Ch) [47]–[49].

²²³ *Nokia*, n 217, [67].

²²⁴ See the discussion in Beckhaus, n 9, 79–86.

Twombly.²²⁵ Does such a combination of parallel conduct and plus factors amount to ‘a certain probability’ of a claim, or is this a ‘mere possibility’?²²⁶ It seems likely that European courts would consider the threshold pleading standard *not* to be fulfilled in cases in which the pleading is mostly based on mere parallel conduct, although this may well depend on the strength of the evidential value of the plus factors such as contacts between the competitors.²²⁷ Given the heterogeneity in sophistication of European civil courts as far as competition law is concerned, there is, however, a danger of uneven application when dealing with the oligopoly problem or intricate theories of harm.

A third argument for being relatively generous when deciding whether the justification is supported by ‘reasonably available facts and evidence sufficient to support the plausibility of its claim’ is that disclosure under the Directive is not automatic on finding that the threshold is passed. Instead, a disclosure order is still subject to a decision by the judicial gatekeeper in particular with regard to proportionality. The proportionality assessment, in turn, takes into account ‘the extent to which the claim or defence is supported by available facts and evidence’.²²⁸

Where it is the *defendant* that seeks disclosure, the second sentence of Article 5(1) appears to require no more than the mere request for disclosure. However, one can deduce from Article 5(2), and from common sense, that this request also has to be supported by a reasoned justification. The necessary content of the defendant’s reasoned justification is largely left unspecified. From Article 5(2), it is however clear that the request has to circumscribe the pieces or relevant categories of evidence whose disclosure is requested as precisely and narrowly as is possible on the basis of reasonably available facts,²²⁹ and, as in the case of the claimant, the defendant’s request will also have to explain why the other requirements for an order are met (such as relevance, control, and proportionality).²³⁰

ii Relevance

²²⁵ See, eg the scenarios in *Twombly*, n 10 (motion to dismiss); see also the *In re Text Messaging* case, where the motion to dismiss was not granted because of parallel conduct and price raises in the face of falling costs and some other plus factors, but summary judgment for defendants was granted after discovery had taken place, because there was no direct evidence of an agreement and the parallel conduct could be due to pure tacit collusion (all that was uncovered was an e-mail by the Vice President of one of the companies stating that the conduct had been ‘colusive’ [sic], a statement that was too ambiguous). *In re Textmessaging Antitrust Litigation*, 782 F3d 867 (7th Cir 2015), cert den sub nomine *Aircraft Check Services et al v Verizon Wireless*, 136 S Ct 524 (16 November 2015).

²²⁶ To use the German court’s terminology (text accompanying n 219).

²²⁷ *Cf Hutchinson 3G*, n 125. Even if the threshold test were considered to be satisfied, it is unlikely that a court would find the disclosure proportionate, Article 5(3), and exercise its discretion in favour of disclosure in cases in which there is not substantially more than parallel conduct.

²²⁸ Article 5(3)(a) of the Directive. For this interplay between a low threshold of mere plausibility and heightened standards for proportionality where the evidence of an infringement is weak, see De Smijter, n 9, para 8.134.

²²⁹ Below text accompanying and following n 253.

²³⁰ On a literal reading of the second sentence of Article 5(1), the defendant could ask even for the disclosure of evidence that is not relevant or not in the control of the claimant or third party, because these conditions are only mentioned explicitly in the first sentence, which is not cross-referenced in the second sentence. Nor is it self-evident that the conditions of the first sentence have to be read into the second sentence; after all, the defendant certainly does not have to adduce ‘evidence and facts sufficient to support the plausibility of [the] claim’, which is the main content of the claimant’s reasoned justification. Nevertheless, relevance and control are, on a purposive interpretation, necessary in any case, and a request for irrelevant evidence or evidence not in the control of the addressee of the disclosure order would usually be disproportionate anyway (Article 5(3)).

In order to be subject to a disclosure order, the evidence has to be *relevant* and *in the control* of the party subject to the disclosure order.²³¹ Neither ‘relevance’ nor ‘control’ are defined in the Directive, although neither term is self-explanatory.

In the context of disclosure, ‘relevance’ can mean one of many things. As a term in an EU Directive, it is, in principle, to be interpreted autonomously. However, in EU law it is only the IP Enforcement Directive 2004/48/EC²³² that contains disclosure requirements, and ‘relevance’ is not used as a limiting criterion for the evidence to be disclosed under Article 6 of that Directive; the term ‘relevant evidence’ does make an appearance in Article 7(1) of that Directive (and ‘relevant information’ is used in Article 9(2) of that Directive), but this is in the context of protective orders and is arguably unhelpful for the interpretation of ‘relevant evidence’ in Article 5 of the Damages Directive.

With regard to the *reference point* for ‘relevance’, the Commission Staff Working Paper had considered that the disclosure needed to be ‘relevant for the case brought by the claimant’, which was said to be the case where ‘the information or evidence to be disclosed is suitable to support the allegations in the initial fact pleading’.²³³ The ‘relevant for the case’ language is reminiscent of the former category of evidence ‘relevant to the subject matter involved in the action’ under US discovery rules—which was discoverable even under the old US FRCP only upon showing of good cause, and which is no longer discoverable under the 2015 amendments to the FRCP. However, the Staff Working Paper’s explanation that this means that the information or evidence must be ‘suitable to support the allegations in the initial fact pleading’ indicates that it should be the claim or a defence that is the reference point for relevance. It seems improbable that the language adopted for Article 5(4) of the Directive (‘relevant to the action for damages’) is meant to be wider than this.

With regard to the *standard* for relevance, the Directive gives no guidance at all. Accordingly, there may be a temptation for national courts to revert to ‘home-grown’ definitions of ‘relevance’ in the context of disclosure, and since disclosure is primarily available in common law jurisdictions, it would be natural to look at their definition of ‘relevance’. Crucially, the traditional *Peruvian Guano* test of relevance used in many Common Law jurisdictions was extremely wide, especially the ‘train of inquiry’ prong.²³⁴ In Lord Woolf’s classification into four categories (parties own documents, adverse documents, relevant documents, and train of inquiry documents), the ‘relevant documents’ category was identified as the category which ‘produces proportionately the greatest number of documents disclosed and to least effect.’²³⁵ Merely ‘relevant documents’ were to be excluded from ‘standard discovery’ and consigned to ‘extra discovery’ under the *Woolf* recommendations.²³⁶ Relevance (to any party’s claim or defence) is also the test employed in the United States,²³⁷ and is interpreted broadly.

²³¹ Article 5(1); for the application of these criteria to disclosure requests of the defendant see n 229.

²³² Above n 218.

²³³ Commission Staff Working Paper, n 3, para 108.

²³⁴ Text accompanying above nn 109–115.

²³⁵ Woolf, *Access to Justice – Interim Report*, n 8, ch 21, para 22.

²³⁶ *Ibid*, para 23.

²³⁷ Text to n 68.

Of course, the autonomous interpretation of ‘relevance’ in Article 5(1) of the Directive does not have to follow the example of England and Wales, or any other common law or civil law²³⁸ jurisdiction within or outside the EU. However, in the absence of any other indication what ‘relevance’ in this context is to mean, there will be substantial uncertainty, at least until a national court makes a preliminary reference to the Court of Justice of the European Union on this point.

One could make the case that even a broad definition of relevance as it was used in the *Peruvian Guano* test or as it is used in the US would not necessarily be problematic under the Directive, because the courts are merely *empowered*, not *obligated* to order disclosure of relevant evidence. However, the more broadly one interprets ‘relevant evidence’, the wider the discretionary leeway for courts becomes; and this, in turn, may lead to a continued divergence between jurisdictions with a liberal approach to disclosure and those with a restrictive approach.

iii Control

Another problem of interpretation arises with regard to the criterion that the evidence has to lie in the ‘control’ of the addressee of the disclosure order. In competition cases, the question may arise, in particular, whether a parent ‘controls’ a subsidiary’s documents, or whether a subsidiary ‘controls’ documents in the hands of the parent or another corporation within the corporate group.

English courts have grappled with these questions for a long time, and settled for the *Lonrho* test that requires a ‘presently enforceable right to possession’, which a parent may or may not have against its subsidiary, depending on the circumstances.²³⁹ The mere possibility to obtain the consent of the subsidiary was held to be insufficient to constitute control. Today, the starting point in England is the definition of ‘control’ in the CPR, which comprises physical possession, a right to possession, or a right to inspect or take copies, in the past or present.²⁴⁰ The CAT Rules 2015 define control in the same way.²⁴¹ The *Lonrho v Shell* position continues to be the starting point under the CPR (and presumably the CAT rules 2015). In *Schlumberger*, a case in which one company already had obtained the consent of other companies in the same corporate group to inspect documents, this pre-existing access was held to be sufficient to constitute ‘control’.²⁴² Similarly, the Court of Appeal held in *North Shore* that where there is an existing arrangement between the party and the person in possession that is in substance akin to agency, the ‘principal’ can be deemed to be in ‘control’.²⁴³ More recently, Mr Justice Males summarised the position as follows:

²³⁸ An example for ‘relevance’ in a civil law jurisdiction is the relevance of a document (or other object) for the litigation under §§ 142, 144 of the German ZPO, see, eg, R Greger, ‘§ 142’ in Zöller, *Zivilprozessordnung*, 30th edn (Cologne: Verlag Dr Otto Schmidt 2014) para 7.

²³⁹ *Lonrho v Shell Petroleum* [1980] 1 WLR 627, 633–7, albeit under RSC Order 24 and in a slightly more complex scenario than usual for parent-subsidiary relationships; see also the discussion in Brealey & Green, n 97, paras 9.25–9.30. CPR 31.8(2).

²⁴⁰ CAT Rules 2015, Rule 60(4).

²⁴¹ *Schlumberger Holdings Ltd v Electromagnetic Geoservices* [2008] EWHC 56 (Pat) [8]–[21].

²⁴³ *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 [26]–[40]. The judgment indicates that the definition of control in CPR 31.8 may not, in fact, be exhaustive, *ibid* [40].

'First, it remains the position that a parent company does not merely by virtue of being a 100 parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances [...] there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. [...] Fourth, however, a party may have sufficient practical control [...] if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access.²⁴⁴

In Germany, the question is similar but not identical, namely whether the addressee of the disclosure order has possession or a right to possession.²⁴⁵

The Directive does not indicate whether the concept of a single economic entity is to be applied for the purpose of defining the scope of 'control'.²⁴⁶ Given the tendency of EU competition law to look more to the substance than to the legal niceties of national corporate law, it seems likely that the autonomous interpretation of 'control' will be wider than the English or German solutions, in particular where the information is available within the 'undertaking' in the meaning of a single economic entity.

A similar problem may arise with regard to an undertaking's 'control' over its employees' communications via their company or private e-mail or social media accounts on company or private devices. The issue of 'Bring Your Own Device' policies, under which employees use their own devices for work related communications, and to what extent the employer has control for purposes of discovery, has already occupied courts in the US.²⁴⁷ In the context of inspections, the Commission controversially claims the right to search such devices under Article 20(4) of Regulation (EC) no 1/2003.²⁴⁸ This view arguably implies that the undertaking has control over these communications.

As it is easily foreseeable that these questions will soon arise, it would have been preferable to define or describe the concept of control in the Directive.

²⁴⁴ *Ardila Investments NV v ENRC NV v Zamin Ferrous Ltd*, [2015] EWHC 3761 (Comm) [13], [14]. The Court pointed out in this case that the formula of 'practical control' used in *Global Energy Horizons Corporation v Gray* [2014] EWHC 2925 (Ch) [50] should be treated with care, because it could imply that *any* practical control was sufficient, whereas the existing precedent made clear that only an existing arrangement that allowed access, rather than the possibility to obtain access in the future, was enough for present 'control'. *Ardila* [12].

²⁴⁵ § 142 of the German ZPO requires Besitz (possession), which is interpreted as comprising both direct possession and so-called 'indirect possession' (mittelbarer Besitz, § 868 of the German Civil Code (Bürgerliches Gesetzbuch, BGB)), see, eg, A Stadler, '§ 142', in H-J Musielak (ed), *Kommentar zur Zivilprozessordnung*, 9th edn (Munich: Verlag Franz Vahlen 2012) para 3. Indirect possession requires a relationship between the indirect and direct possessor pursuant to which the indirect possessor has a claim for the surrender of the object. In contrast to the English definition, it is not enough that (direct or indirect) possession existed in the past, although this seems a marginal difference: while English law lets (a right to) possession, or a right to inspect or take copies, suffice even where possession or the right existed only in the past, this is only for the purpose of disclosure in the narrow sense (CPR 31.2), as opposed to inspection (CPR 31.3(1)(a)). In other words, where the possession or right has ceased to exist, the disclosing party need only state that the document existed (and, in practice, explain when they had the possession or right and why they no longer have it), but they need not produce the document. Where the indirect possessor has a right to possession but this is temporarily not enforceable, an order against the indirect possessor would usually be disproportionate under German law, so that this is not a difference to English law.

²⁴⁶ For a discussion under English law, see Brealey & Green, n 97, para 9.30 (pointing out that in the case of a single economic unit the question becomes academic where parent and subsidiary are sued jointly).

²⁴⁷ D Richter, '“Bring Your Own Device” Programs: Employer Control over Employee Devices in the Mobile E-Discovery Age', (2015) 82 *Tennessee Law Review* 443–59.

²⁴⁸ Explanatory Note on Commission Inspections pursuant to Article 20(4) of Council Regulation No 1/2003 (revised 11 September 2015), point 10, http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf. For a critical assessment see S Kinsella, 'The EU Commission publishes an explanatory note on its powers of investigation, 11 September 2015', *e-Competitions Bulletin* (September 2015), art no 76175.

However, given that courts have the power under the Directive to order disclosure from third parties anyway, a lack of a precise definition of control may in practice be unproblematic in many cases. Where, for example, the parent claims that it does not have control over documents on file with its subsidiary, and the court does not impute control to the parent on the basis that parent and subsidiary are a single economic entity, the court will still have to consider whether the subsidiary should be ordered to disclose the documents as a third party. Although this may make a difference in that the interest balancing in third-party cases has to take into account additional factors, it is unlikely that this distinction would often make a difference to the outcome in parent/subsidiary cases.²⁴⁹ Nevertheless, it can make a difference where the subsidiary is not in the jurisdiction of the court while the parent is.²⁵⁰

In addition, in ‘undertaking v employee’ cases it may very well make a difference to the outcome on the margin whether information on private devices or in employees’ e-mail or social media accounts are considered to be within the ‘control’ of the undertaking, or whether the order has to be addressed to the employees. If the order is against an employee as a third party, privacy and other fundamental rights issues may well play a slightly greater role in the interest balancing and may affect the outcome—even though, to be sure, these interests would need to be taken into account to some extent even where the undertaking is the formal addressee of the order. The outcome is arguably determined by the applicable contractual and data protection rules that allow or prohibit the employer to access the employee’s communications.²⁵¹ The issue is complicated by the fact that ‘technology has blurred the dividing line between work life and private life, and some employers allow the use of company-owned equipment for employees’ personal purposes, others allow employees to use their own equipment for work-related matters and still other employers permit both [...]’.²⁵²

iv Specification of Pieces of Evidence and Circumscription of Categories

Article 5(2) of the Directive mandates the ability of national courts ‘to order the disclosure of specified pieces of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts [...]’.

This wording, while at first glance catering to the restrictive Continental jurisdictions (‘specified’, ‘circumscribed as precisely and narrowly’), actually seeks to remedy two core concerns against the current, largely ineffectual Continental disclosure rules. As the comparative observations have shown,²⁵³ disclosure rules on the Continent tend to have two major limitations: requesting parties can usually only request disclosure of *pieces* of evidence, not of *categories*

²⁴⁹ For non-party disclosure in similar circumstances under English law, see *Global Energy Horizons Corporation v Gray* [2014] EWHC 2925 (Ch).

²⁵⁰ *Cf. Schlumberger Holdings Ltd v Electromagnetic Geoservices* [2008] EWHC 56 (Pat) [8].

²⁵¹ *Cf.*, by analogy, *Bărbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016). It should be noted, however, that that judgment emphasised that the employer had not relied on the *content* of the communications, which had been written on a device owned by the employer and (for the most part, see para 7 of the judgment) from a work-related Yahoo Messenger account, but on the mere fact that a substantial amount of private messages had been sent during working hours (para 58 of the judgment). But see *ibid.*, dissenting opinion by Judge Pinto de Albuquerque paras 19–22.

²⁵² *Ibid.*, dissenting opinion, para 4.

²⁵³ Above text to and following n 194.

of evidence; and these pieces of evidence usually have to be identified fairly precisely. Without already knowing the document in question, it will often be impossible to identify it in sufficient detail. In the area of competition law, this makes most of the Continental disclosure rules ineffectual. The Directive, in contrast, seeks to overcome these constraints by, first, allowing requests for *categories* of evidence, and, second, instead of requiring the categories to be circumscribed ‘precisely and narrowly’, they only have to be circumscribed ‘as precisely and narrowly as possible on the basis of reasonably available facts.’

It is not clear whether only categories of evidence or also pieces of evidence have to be circumscribed ‘as precisely and narrowly as possible’. The syntax of Article 5(2) is ambiguous. The participle construction in lieu of a defining relative clause (‘circumscribed [...]’) could refer either to ‘specified pieces of evidence or relevant categories of evidence’, or only to ‘relevant categories of evidence’. The recitals are not unambiguous, either. In recital 16, it looks as if the circumscription requirement only applies to ‘categories’ rather than to ‘specified pieces’ of evidence. On the other hand, recital 23 talks of the ‘requesting party’s duty to specify pieces of evidence or categories of evidence as precisely and narrowly as possible’. The legislative history offers some support for the interpretation requiring a precise and narrow specification of both pieces and categories.²⁵⁴ However, the original 2009 Kroes Commission Draft had unambiguously talked of the specification of ‘pieces of this evidence or *as precise and narrow categories* of this evidence’.²⁵⁵

The ambiguity in the current wording of the Directive is arguably of little consequence, however. If we think of ‘specified pieces of evidence’ that are as precisely specified as ‘the e-mail sent on 30 April 2014 at 2.43pm from X to Y’, then there would be no need for any further precise and narrow circumscription. This does not answer the question what is to happen in cases of requests for disclosure of pieces of evidence that are not as precisely specified. What should we do if ‘an e-mail between X and Y regarding the pricing of product Z’ or ‘the documents in the file on the XY Contract’ are requested? We could say that these are (1) *sufficiently specified pieces* of evidence, (2) *insufficiently specified pieces* of evidence, or (3) relevant categories of evidence that are circumscribed as precisely and narrowly as possible on the basis of reasonably available facts. Even where option (2) appears more appropriate than option (1), under the Directive it would not be permissible to deny the request on the sole basis that these are insufficiently specified pieces of evidence, as is currently the case in those jurisdictions that provide only for the disclosure of specified pieces of evidence.²⁵⁶ Instead, once a piece of evidence is considered to be insufficiently specified, it becomes necessary to examine whether the disclosure request can be granted as a disclosure of a sufficiently circumscribed category of evidence. In other words, every insufficiently specified ‘piece of evidence’ is always an element of a wider set, namely a ‘category’, so that the question becomes

²⁵⁴ See Opinion of the Committee on the Internal Market and Consumer Protection (Rapporteur Olle Schmidt), 9 January 2014, Justifications for Proposed Amendments 24 (modifying Article 5(2)(a)) and 26 (proposing a new Article 5(2a), which in essence became Article 5(2) of the Directive), in European Parliament, *Report* (Rapporteur Andreas Schwab), 4 February 2014, A7-0089/2014, 56, 73, 74 (both containing the sentence: ‘In order to avoid “fishing expeditions”, pieces of evidence or categories of evidence have to be defined as precisely and narrowly as possible by the claimant.’).

²⁵⁵ Article 8(3)(b) of the 2009 Kroes Commission Draft (for a summary of that draft see Wagner-von Papp, n **Error! Bookmark not defined.**).

²⁵⁶ See above n 194.

whether this category is, or is not, sufficiently precisely and narrowly circumscribed.

Turning to the requirement of the circumscription of categories of evidence, recital 16 provides some insight into the extent of circumscription of categories of evidence: the request ‘should identify [scil: the category] by common features of its constitutive elements such as the nature, object or content of the documents, the time in which they have been drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive.’ This raises further issues.

First, as pointed out above, it is by no means clear when evidence is ‘relevant within the meaning of this directive’.²⁵⁷ Nor is it clear whether the category has to be specified in such a way that *all* documents in the category are (or are likely to be?) ‘relevant’ whatever definition of relevance one applies. Further, if this should be the case, it is unclear whether the English practice should be followed, under which even those documents in a class may be considered relevant that in isolation would not be considered relevant to the issues, but which provide background information against which the other documents in the class can be assessed.²⁵⁸

Secondly, as in the threshold question of sufficient plausibility for claimants’ requests,²⁵⁹ here again there is an unresolved tension, in this case between the need for precise and narrow circumscription of the ‘relevant categories’ of evidence and the relaxation that there has to be an enquiry what facts can reasonably be expected to be available before deciding on the necessary degree of precision in the request.

Again the question is what happens if the claimant, on the one hand, possesses no or hardly any knowledge of facts that would allow a precise and narrow circumscription, but on the other hand it cannot reasonably be expected that the claimant possesses such knowledge, either. Two very different interpretations of the requirements of Article 5(2) are possible.

On the one hand, the request could be rejected as hopelessly ill defined. An argument for such a restrictive interpretation could be the concern against fishing expeditions, defined in recital 23 as ‘non-specific search or overly broad searches of information that is unlikely to be of relevance for the parties to the proceedings’²⁶⁰. The concern regarding fishing expeditions was introduced into the text of the Directive on the recommendation of the European Parliament,²⁶¹ and which is reflected in recital 23 to the Directive as well as in Article 5(3)(b). In the somewhat special context of disclosures of evidence in the file of a competition authority, recital 23 explains that requests referring to ‘the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context

²⁵⁷ Text following n 231.

²⁵⁸ *Three Rivers DC v Bank of England (No. 4)* [2002] EWCA Civ 1182 [38] (under CPR Part 3.17); but see the potentially narrower scope in a request for pre-action disclosure under CPR Part 3.16, in *Hutchinson 3G*, n 125, [43]–[50].

²⁵⁹ Above text following n 214.

²⁶⁰ The definition used by the Draft EP Legislative Resolution (namely, in recital 15: ‘indiscriminate requests for production of information or documents, in the hope of uncovering material that is helpful to building up a case’, European Parliament, *Report*, n 254, 10; similarly, Commission Staff Working Paper, n 3, 23 in fn 39) would have been preferable. Even in a fishing expedition the search is for relevant information.

²⁶¹ The Draft EP Legislative Resolution mentions fishing expeditions in recital 15 and Article 5(3)(b), European Parliament, *Report*, n 254, 10, 21; these amendments were proposed in the Committee on Legal Affairs, 27 January 2014, Amendments 7 and 15. *Ibid.*, 32, 37, 44. For similar concerns voiced in the Committee on the Internal Market, see the quotations in n 254.

of a particular case' would not only be disproportionate, but 'would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible'.²⁶² One can easily imagine cases where no information is reasonably available that would allow a claimant to circumscribe the category more precisely than that. Recital 23 assumes without discussion that despite the claimant's lack of reasonably available information to overcome the information asymmetry, such a circumscription would be insufficiently precise.²⁶³

Alternatively, it could be argued that it would be unreasonable to require more precision from the claimant, and that therefore the request is sufficient even on the basis of no or hardly any precise and narrow circumscription of the requested evidence. In other words, where nothing is reasonably possible, 'as precise and narrow as possible' is not precise and narrow at all. This seems to have been the position of the Staff Working Paper 2008, which states, referring to the specification of categories of evidence:

In the above example of a cartel relating to product X covering territory Y during period Z,^[264] the claimant [...] may well seek disclosure of documents about the price discussions between the cartelists for the clearly described product, period and territory to the extent that they may concern him. Disclosure could also be requested for the specified product, period and territory, of facts to enable the claimant to determine what the pricing structure on the market would have been in the absence of the cartel. In that context, [...] details of price discussions during the life of the cartel may be relevant.²⁶⁵

So, the specification by the content of the document in terms of 'price discussions between the cartelists' is sufficiently precise,²⁶⁶ while the specification 'documents in the file of a competition authority relating to a certain case' is not.²⁶⁷ This is counterintuitive. The little information on how to apply the Directive's disclosure rules that is available indicates that the degree of precision required will vary on a sliding scale. This standard gives ample room for discretionary choices by the national courts — another bad sign for those hoping that the Directive will result in a 'level playing field'. Even after implementation, it is to be expected that arguing that a disclosure request for a category of evidence is sufficiently precisely and narrowly circumscribed will be much more difficult, for example, in Germany (or indeed most Continental jurisdictions) than in the United Kingdom.

v Proportionality

Article 5(3) provides that disclosure has to be limited to that which is proportionate. Whether the filter of proportionality is effective or not depends on how it is applied. Even the US rules on discovery provide for a proportionality

²⁶² See also De Smijter, n 9, para 8.154, who also considers the circumscriptions 'all information that the defendant submitted to the authority' and 'all the defendant's replies to the requests for information' as 'cutting too wide and thus resembling a fishing expedition.' In contrast, he appears to consider 'the documents that demonstrate the mechanism used for the price-setting in a bid-rigging infringement' to be sufficiently focused.

²⁶³ This criticism does not affect the primary reason mentioned in recital 23 for not allowing such requests on the basis of *proportionality* concerns, especially the need to protect public enforcement.

²⁶⁴ Text accompanying n 221.

²⁶⁵ Commission Staff Working Paper 2008, para 106.

²⁶⁶ *Ibid.*

²⁶⁷ Recital 23 to the Directive; see also the examples given by De Smijter, above in n 262.

filter.²⁶⁸ At least up to the December 2015 revision, this filter has been relatively ineffective, however,²⁶⁹ and few would argue that the Damages Directive seeks a proportionality assessment along the lines of US practice.

Similarly, in England the *Woolf* reforms have introduced the filter of proportionality into English disclosure law, or at least, depending on one's reading of the previous case law, raised its salience by making the requirement explicit. Nevertheless, complaints about overly broad disclosure orders resulting in extensive and expensive disclosure persisted even after the reform.²⁷⁰

The US American and English examples show that a proportionality filter as law on the books does not necessarily prevent (excessively?) costly practices. Conversely, legal systems that are traditionally restrictive in ordering disclosure could use the proportionality requirement to reject disclosure orders simply based on a different weighting of the interests involved.

That different assessments are possible under the same standard of proportionality is hardly a new insight or specific to competition law.²⁷¹ Balancing tests are often decried as being 'vacuous'.²⁷² A way to limit the 'vacuousness' of a proportionality test is to define as specifically as possible the primary goal that is pursued, the conflicting goal that is to be weighed against the primary goal, and the weights that are attached to each of these goals, in a way that makes the weights of the conflicting goals commensurable. The more multidimensional a balancing test becomes, the less predictable are the results in any given case.

How does Article 5(3) measure up in this respect? The operative clause is that 'national courts shall consider the legitimate interests of all parties and third parties concerned.' In principle, then, the range of interests to be used is open-ended, which gives ample scope for national courts to apply different standards according to their own traditions and policy assessments, unless and until the European institutions clarify the standards to be applied. The open-endedness of the appraisal is only marginally limited by (i) the guidance provided by the examples in the third sentence of Article 5(3); (ii) the guidance on confidential information in particular;²⁷³ (iii) the need to give full effect to Union *and national* legal professional privilege;²⁷⁴ (iv) the statement in Article 5(5) that the defendant's interest in not having to pay damages is not an interest to be considered; and (v) the requirement to consider the need to safeguard the effectiveness of public enforcement under Article 6, and in particular to heed the absolute and temporary protections under Article 6(5), (6).

²⁶⁸ Text accompanying n 68.

²⁶⁹ But see, for an example of an application of the proportionality filter (formerly contained in FRCP 26(b)(2)(C)(iii)): *In re ATM Fee Antitrust Litigation*, No C 04-02676 CRB (ND Cal, 25 June, 2007), 2007 WL 1827635, 2007-1 *Trade Cases* P 75,760. As discussed above, it is questionable whether moving the proportionality filter from the exceptions to the rule, as happened in the 2015 revision of FRCP 26, will lead to a fundamental reversal in the application.

²⁷⁰ See n 123.

²⁷¹ The balancing between freedom of the press and privacy, for example, takes markedly different forms in the US, the UK, Germany, and France – in the latter three nations despite the fact that the yardstick is supposedly the same under the ECHR.

²⁷² In the constitutional context see generally TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; see also JE Bond, *The Art of Judging* (Piscataway: Social Philosophy and Policy Center and Transaction Publisher 1987/2009) 46 ('multifactor tests are so vacuous that they can justify conflicting public policies'); in the antitrust context (of the oligopoly problem) JE Lopatka, 'Solving the Oligopoly Problem: Turner's Try', (1996) 41 *Antitrust Bulletin* 843, 906 ('balancing tests tend to be vacuous').

²⁷³ Article 5(3), third sentence, lit (c), and Article 5(4).

²⁷⁴ Article 5(6).

Turning to the examples for legitimate interests to be considered ‘in particular’, this non-exhaustive list includes ‘the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence’, the ‘scope and cost of disclosure, especially for any third parties’, and ‘whether the evidence to be disclosed contains confidential information [...] and the arrangements for protecting such confidential information.’²⁷⁵ The ‘value of the claim for damages’, which was the first factor mentioned in the 2009 Kroes Commission Draft,²⁷⁶ is no longer mentioned, although it is likely that this factor will be considered when assessing whether the ‘cost of disclosure’ is proportionate under Article 5(3)(b)—after all, proportionality requires considering a *ratio*, and in the case where the claimant seeks disclosure, this is arguably the ratio between the cost of disclosure and the marginal increase in expected value of the claim where disclosure is granted. While it is not logically necessary that the marginal increase in the expected value of the claim depends on the total value of the claim, the marginal benefit of disclosure will usually be expressed in a percentage increase in the probability of succeeding with the claim—and so the absolute marginal benefit of disclosure is likely to be higher where the total value of the claim is higher.

With regard to the weight to be assigned to the ‘cost of disclosure’, the national rules on the allocation of these costs must be considered in the proportionality analysis. In the United States, the major reason why ‘discovery abuse’ arguably exists is that the discovery costs are generally externalised to the responding party. With such an ‘American rule’, the factor ‘costs’ should play a large role in determining proportionality of a disclosure request, because these costs are an externality for the requesting party and will therefore not be considered.²⁷⁷ Where courts decide on cost-shifting, so that the requesting party shoulders the costs, this factor can be discounted for the proportionality analysis. In Europe, the cost allocation is different. In Germany, the costs would generally be borne by the party losing the action to the extent they were ‘necessary’ for pursuing or defending against the claim;²⁷⁸ it is possible, however, that the costs of individual unsuccessful procedural actions are allocated by court order to the successful party.²⁷⁹ In the English High Court, a similar ‘loser pays’ rule applies generally,²⁸⁰ although the court has considerably more discretion to make an order allocating the costs differently.²⁸¹ The costs of complying with a *pre-litigation* or *non-party* disclosure order are generally borne by the party making the request.²⁸² The CAT has discretion as to the allocation of

²⁷⁵ Article 5(3), third sentence, (a)–(c). This list is slightly different from the one proposed by the Commission (see Article 5(3)(a)–(d) of the Commission Proposal).

²⁷⁶ Article 8(3)(a) of the 2009 Kroes Commission Draft. Also compare the CAT Rules 2015, Rule 4(2)(c)(i), which lists as the first aspect for proportionality ‘the amount of money involved’.

²⁷⁷ See above text to and following n 83.

²⁷⁸ § 91 ZPO.

²⁷⁹ § 96 ZPO. This provision can be applied by analogy to costs incurred in an independent procedure for taking evidence, see BGH, 9 February 2006, VII ZB 59/05, (2006) *Neue Juristische Wochenschrift-Rechtsprechungsreport* 810 para 14.

²⁸⁰ CPR Rule 44.2(2)(a).

²⁸¹ CPR Rule 44.2(2)(b).

²⁸² CPR Rule 46.1(2) (the court has discretion to impose the costs otherwise, Rule 46.1(3)). The *Jackson* review has considered introducing a general rule imposing the costs of disclosure (including standard disclosure) on the party making the request, and found some advantages of such a rule in terms of avoiding excessive costs, but ultimately considered such a rule superfluous in the light of the existing scope for discretion in the cost allocation. Jackson, *Final Report*, n 100, 373–4 paras 3.17–3.19.

the whole or part of the costs, with special consideration being given to the proportionality of incurring the costs and their amount.²⁸³

Where the costs are fully borne by the party making the request, and the costs are accordingly fully internalised by this party, there is little reason to second-guess that party's weighting of the disclosure's costs and benefits. In other words, in cases of fully internalised cost there is no need to give significant weight to the costs of complying with the request when determining if the request is proportionate—this can, as a first approximation, be left to the decision of the party making the request and bearing the costs.²⁸⁴ However, the problem with the 'European rule', which generally applies in both England and continental European jurisdictions, is that it is not known *ex ante* which party will lose and therefore bear the costs. From a stochastic perspective, the disclosure costs in such a situation are partially externalised, which will lead to more disclosure requests than would otherwise be the case, so that there is a need for external (judicial) control.²⁸⁵ This is exacerbated with over-optimistic claimants. In practice more relevant, however, will be two other considerations. First, even where the party requesting disclosure bears the out-of-pocket costs, the addressee of the order will still face the inconvenience and opportunity costs of the disruption caused by the search. Secondly, there is a principal-agent problem between the parties and their legal advisers.²⁸⁶ While the consideration of the disruption caused by disclosure can be taken into account in deciding on the proportionality of the disclosure request under Article 5(3) of the Directive, it is arguably not the function of Article 5(3) to protect parties against their own legal representatives.

vi Confidential Information

With regard to evidence containing confidential information, Article 5(4) of the Directive clarifies that courts must be able to order disclosure of such information if necessary, but that they also must be enabled to protect such information effectively, for example, as recital 18 explains, by measures such as 'redacting sensitive passages [...], conducting hearings in camera, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form.'

Common law jurisdictions have no general bar against the disclosure of confidential information,²⁸⁷ and have developed the corresponding safeguards to

²⁸³ CAT Rules 2015, Rule 104, in particular Rule 104(2) and (4) (cost allocation is subject to special rules where an offer to settle under Rule 45 was rejected or accepted, Rules 104(2), 48, 49).

²⁸⁴ From this perspective, the weight given to the cost considerations in *Hutchinson 3G*, n 125, in an application for pre-litigation disclosure appears unnecessary, given that the applicant would have had to bear the costs in the absence of an (exceptional) court order to the contrary.

²⁸⁵ CR Plott, 'Legal Fees: A Comparison of the American and English Rules', (1987) 3 *Journal of Law, Economics, & Organization* 185–92. The problem may be attenuated by the possibility of imposing the costs on the successful party, especially because in England an order under CPR Rule 44.2(2)(b) is more likely where the court considers the disclosure to have been excessively broad, and in Germany the court may decide under § 91 ZPO that certain costs were not 'necessary'.

²⁸⁶ Above text to and following n 46.

²⁸⁷ See generally Lord Wilberforce's speech in *Nassé v Science Research Council* [1979] UKHL 9, [1980] AC 1028. In the competition law context: *MTV Europe v BMG Records (UK) Ltd* [1998] EWCA Civ 430; for the CAT: *Albion Water Ltd and another v Water Services Regulation Authority* [2008] CAT 3 [61]; *Aberdeen Journals v DGFT* [2003] CAT 14; *Umbro v OFT* [2004] CAT 3. See also Brealey & Green, n 97, paras 9.47–9.52.

protect such information by redaction of documents or containing confidential information in confidentiality rings.²⁸⁸ Civil law jurisdictions have traditionally often denied disclosure or information requests where confidential information was concerned. Accordingly, there was generally little need for protective measures in private actions, and some civil law jurisdictions will face a steep learning curve. However, some civilian courts do have experience in this area. German courts have restricted access to confidential information to expert witnesses, in particular accountants, and specified lawyers, and have enjoined these persons from revealing confidential information thus acquired to the other party, essentially establishing confidentiality rings.²⁸⁹ Germany has been conservative in comparison to several other civilian jurisdictions, such as France.²⁹⁰

Deciding what information deserves protection as confidential often requires an intricate balancing exercise. The General Court in *Evonik Degussa* considered information more than five years old generally to be historic and worthy of protection only in exceptional circumstances.²⁹¹ However, the President of the General Court in *Pilkington* accepted, for purposes of the interim protection of information, the applicant's arguments that contracts in the industry in question were long term and often renewed, and that therefore protection could be necessary far beyond the five-year period; the president pointed out, with reference to *Agrofert*,²⁹² that under the Transparency Regulation information may be protected even beyond a 30-year period.²⁹³ In principle, this is correct: where longer contract periods or production cycles, or a lower degree of innovation and volatility are involved, information can stay competitively sensitive for a very long time. However, one should hold undertakings in one and

²⁸⁸ See CAT Rules 2015, Rule 53(2)(h) (CAT may give directions to create a confidentiality ring). In the High Court, see, eg, *National Grid Electricity Transmission plc v ABB and others* [2012] EWHC 869 (Ch) [58] (lifting the redaction of a 'number of, but by no means all' passages; see also the order of Roth J of 11 July 2011, establishing a confidentiality ring in this case); see also *IPCom GmbH & Co KG v HTC and others* [2013] EWHC 2880 (Ch) [47]–[49], where Roth J imposed a 'particularly tight confidentiality club' (excluding, among others, a German lawyer) on the application of the non-parties Qualcomm and Intel, whose source code was in question, under CPR Rule 40.9. For the practice in the CAT in appeal proceedings, see, eg, *National Grid plc v Gas and Electricity Market Authority*, CAT Order of 23 May 2008 in Case 1099/1/2/08 (the confidentiality ring was varied in several subsequent orders); *Talktalk Telecom Group plc v British Telecommunications plc, Ofcom v Sky UK Ltd* [2015] CAT 13 [9]–[17]; *AC Nielsen Company Ltd v Competition and Markets Authority and Information Resources, Inc* [2014] CAT 13 [14]–[22] (on the treatment of disclosed confidential information after proceedings have come to an end; noting, inter alia, that while 'the CPR does not apply to proceedings in the Tribunal [...] the Tribunal Rules are based on the same general philosophy as the CPR', *ibid* [16]; see also the confidentiality ring order of 15 May 2014 in that case).

²⁸⁹ For an in-depth discussion from a German perspective see Sanner, n 3, 533–796, in particular 594–748 (discussing, inter alia, the 'Wirtschaftsprüfervorbehalt', the 'Düsseldorfer Praxis', and (controversial) in-camera procedures; see also Beckhaus, n 9, 374–84; M Rausch, *Stärkung des Informationsanspruchs durch das arca-nigra-Verfahren* (Peter Lang 2010) 91 *et seq.* The German Federal Constitutional Court has clarified the framework for in camera hearings on confidential information in the context of administrative procedures (Bundesverfassungsgericht (BVerfG), 14 March 2006, 1 BvR 2087/03 and 1 BvR 2111/03, (2006) *Multimedia und Recht* 375, 379–81; BVerfG, 27 October 1999, 1 BvR 385/90, (1999) 101 *Entscheidungen des Bundesverfassungsgerichts* 106), and the Court's consideration that such a limitation of the requesting party's knowledge of the evidence is not impermissible from a constitutional perspective where this furthers the range of available evidence in its favour can arguably be transferred both to the context of civil procedure and to protective measures such as confidentiality rings.

²⁹⁰ References in Sanner, n 3, 618–9.

²⁹¹ Case T-341/12 *Evonik Degussa v Commission* ECLI:EU:T:2015:51, paras 84–6.

²⁹² Case C-477/10 P *Commission v Agrofert* ECLI:EU:C:2012:394, para 67 (setting aside the General Court's decision that had annulled the Commission's decision denying access to information in a merger control case under the Transparency Regulation).

²⁹³ Case T-264/12 R *Pilkington Group v Commission* ECLI:EU:T:2013:119, paras 62–4, 70; upheld in Case C-278/13 p(R) *Commission v Pilkington* ECLI:EU:C:2013:558 (pointing out, at paras 67–9, that for purposes of the interim protection it was sufficient to raise 'the existence of difficult legal issues the solution to which is not immediately obvious [...]').

the same industry to the same standard when it comes to claiming confidentiality vis-à-vis the public and vis-à-vis their competitors. In the context of information exchanges between competitors, the same representatives very often argue that one year old data is in any case historic and that even younger information may well be competitively neutral in the circumstances.²⁹⁴ In both the information exchange and the disclosure context, the Commission's test in the Guidelines on Horizontal Cooperation should be applied: 'Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry. For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations. Moreover, the threshold when data becomes historic also depends on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency).'²⁹⁵

The decision when measures of protection are sufficient to safeguard confidential information, however, is a difficult one. One important question that has already occupied the English courts is to what extent disclosure of confidential versions of the Commission's infringement decision (redacted only for leniency statements and legal professional privilege) can be ordered, provided a confidentiality ring is established.²⁹⁶ It can take the Commission a long time to come up with a non-confidential version of the decision. The Commission is in a difficult situation.²⁹⁷ On the one hand, the Court of Justice's *Pilkington* decision prohibits the publication of a non-confidential version where undertakings have raised claims of confidentiality that are not yet fully resolved.²⁹⁸ On the other hand, the decision in *Schenker* obligates the Commission to publish a meaningful non-confidential version within a reasonable time, where necessary excluding those passages that are still in contention.²⁹⁹

In the English High Court, Mr Justice Peter Smith vented his frustration with the delay in providing a meaningful non-confidential version and eventually ordered disclosure of a minimally redacted confidential version into a confidentiality ring. This order was appealed by parties that were mentioned in the Commission decision, but to whom the Commission decision had not been addressed, so that they were entitled to *Pergan* protection.³⁰⁰ The Court of Appeal set aside the Judge's order on the basis that *Pergan* protection was

²⁹⁴ See, eg, H-J Ziegenhain, 'Marktinformationsverfahren im Deutschen und Europäischen Kartellrecht' (1993) *Europäisches Wirtschafts- und Steuerrecht* 50, 54. The one-year threshold is often traced back to Commission, 17 February 1992, [1992] OJ L68/19, 29 para 50 — *UK Agricultural Tractor Registration Exchange*; see also Commission, 26 November 1997, [1998] OJ L1/10, 19 para 52 — *Wirtschaftsvereinigung Stahl*.

²⁹⁵ Commission *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements* [2011] OJ C11/1 para 90. See already F Wagner-von Papp, *Marktinformationsverfahren: Grenzen der Information im Wettbewerb* (Baden-Baden: Nomos 2004) 234–6.

²⁹⁶ *Air Canada and ors v Emerald Supplies* [2015] EWCA Civ 1024.

²⁹⁷ For a discussion see M Kellerbauer, 'The Recent Case Law on the Disclosure of Information Regarding EU Competition Law Infringements to Private Damages Claimants' (2014) 35 *European Competition Law Review* 56–62.

²⁹⁸ Case C-278/13 p(R) *Commission v Pilkington* ECLI:EU:C:2013:558.

²⁹⁹ Case T-534/11 *Schenker AG v Commission* ECLI:EU:T:2014:854. On the other hand, Case T-345/12 *Akzo Nobel v Commission* gives the Commission latitude in publishing a more detailed non-confidential version of the decision that is helpful to private claimants (here: CDC before the Landgericht Dortmund).

³⁰⁰ See Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* ECLI:EU:T:2007:306 [2007] ECR II-4225.

absolute and not sufficiently safeguarded by confining the disclosure to the confidentiality ring.³⁰¹ In particular, the Court was of the view that other claimants could likewise initiate damages actions, that the claimants' undertakings did not prevent use of the information obtained in order to expand the scope of their claims, and that the members of the confidentiality ring would inevitably be influenced by their knowledge in future actions.³⁰²

A different concern is that care must be taken that disclosure of competitively sensitive information in court proceedings does not become a court-approved channel for collusion.³⁰³ While the parties of the case can take measures to safeguard their interests, it is for the court to recognise when the parties are perhaps a little too willing to disclose information to their competitor and thereby harm the public good. Given that courts dealing with private actions tend to be focused on the interests of the parties before them and may lose sight of the potential externalities of shared information, it would have been expedient to raise awareness by mentioning this aspect in the Directive.

vii Legal Professional Privilege

While the Directive does not specify instances in which disclosure is mandatory, it does *prohibit* disclosure categorically in a few cases. One of the categorical limits to the courts' discretion to order disclosure is Legal Professional Privilege (LPP).³⁰⁴ Under the final version of the Directive, both Union and national law on LPP has to be observed. Other forms of privilege are not included in the categorical exception of Article 5(6).

The extent to which privilege should be respected has varied substantially over the course of the legislative history. The 2009 Kroes Commission Draft was wider in that it provided an exception not only for LPP, but also for 'other rights not to be compelled to disclose evidence', but it was narrower in that it only recognised LPP and other rights 'that exist under the law of the European Union.'³⁰⁵ The 2013 Commission Proposal extended this to 'legal privileges and other rights not to be compelled to disclose evidence' without mentioning

³⁰¹ *Air Canada and ors v Emerald Supplies* [2015] EWCA Civ 1024. The Court also argued, in the alternative, that even if *Pergan* protection were not absolute, it would at any rate not be possible to exercise discretion such that disclosure of the confidential decision could be made even into the confines of the confidentiality ring.

³⁰² *Ibid* [84].

³⁰³ See, by analogy, Joined cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke et al v Commission* ECLI:EU:T:1996:85, [1996] ECR-II 537 para 24: '[T]he Commission is not entitled to oppose disclosure of those documents to the applicants *except where disclosure would in itself constitute an infringement of the competition rules*' (emphasis added). On information sharing between competitors, see Commission *Guidelines on Horizontal Co-operation*, n 295, paras 55–110; F Wagner-von Papp, 'Information Sharing Agreements', in I Lianos & D Geradin (eds), *Research Handbook on European Competition Law: Substantive Aspects* (Cheltenham: Edward Elgar 2013) 130; Wagner-von Papp, n 295. Brealey & Green, n 97, paras 9.47 and 9.48, indicate that English courts are alert to this danger, although their statement that 'the fact that material contains business secrets affords no good reason for refusing to disclose it, even if such information exchanged consensually might breach the competition rules themselves' because '[t]he court's task is to enable a trial to take place that is fair to both parties' raises serious concerns: where European competition rules would be breached by the disclosure, ordering the disclosure without more would be an infringement of the *effet utile*, Article 4(3) Treaty on European Union with Protocol no 27. The right way to proceed in such cases is the use of protective measures (strictly circumscribed confidentiality rings) that remove the competition concerns. More generally on such measures to contain competitively sensitive information in as tight a circle as possible without rendering the legitimate purpose unattainable see Wagner-von Papp, n 295, 306–9, 421–2, 424–50, 473, 477–80, 482–5, 507–12 (discussing Chinese walls, clean teams, and firewalls in various contexts); Wagner-von Papp in Lianos & Geradin, *Research Handbook: Substantive Aspects*, 161–2.

³⁰⁴ Article 5(6). Other restrictions follow, in particular, from the need to safeguard the effectiveness of public enforcement.

³⁰⁵ Article 9(3) of the 2009 Kroes Commission Draft.

whether these rights had to be those conferred by EU law or could be conferred by national law as well.³⁰⁶

The Directive now mandates the full effect of LPP explicitly both under EU and national standards,³⁰⁷ which will, in principle, be a relief to English lawyers after *AKZO v Akcros* failed to raise EU standards of LPP to that of English law especially with regard to in-house lawyers.³⁰⁸ Article 5(6) speaks of ‘applicable’ LPP under (EU or) ‘national law’. But which national law is the applicable law in cases with foreign elements? Is it a matter of procedural law to which the *lex fori* applies? Is it the law applicable to the contract establishing the lawyer-client relationship? Or something else?³⁰⁹ Given the huge differences in the protection of LPP in the different Member States,³¹⁰ and given further the wide possibilities for forum shopping under the Brussels Regulation, this is not a minor issue. For an English lawyer, the EU standard is woefully inadequate;³¹¹ for a German lawyer, the EU standard is a dream.³¹² If the *lex fori* determined the applicable law, then, for example, a German court could compel an English undertaking to disclose its correspondence with its in-house lawyers, even where the correspondence would be protected by legal advice or litigation privilege under English law. In the converse case, however, an English court could not order a German undertaking to disclose such correspondence. The application of the LPP under the law governing the contractual lawyer-client relationship, or a similar substantive link, appears generally preferable. Firstly, this would ensure that the trust in the lawyer-client relationship can be based on the law of the jurisdiction in which lawyer and client interact. An English company interacting with its in-house counsel in England arguably has a legitimate expectation that its communications are protected to the extent provided for under English law. Such a substantive qualification would also ensure identical outcomes regardless of the forum before which the dispute happens to be brought. Such a substantive solution would, however, require the forum court to apply foreign procedural law, and it may open up the opportunity for strategic contractual choices of the applicable law in the retainer. Curiously, the position whether to apply the *lex*

³⁰⁶ Article 5(5) of the 2013 Commission Proposal.

³⁰⁷ Article 5(6) of the Directive.

³⁰⁸ Case C-550/07 P *AKZO and Akcros v Commission* ECLI:EU:C:2010:512 [2010] ECR I-8301; Case 155/79 *AM&S Europe Ltd v Commission* ECLI:EU:C:1982:157 [1982] ECR 1575.

³⁰⁹ See the options discussed in J McComish, ‘Foreign Legal Professional Privilege: A New Problem for Australian Private International Law’ (2006) 28 *Sydney Law Review* 297, 312–42 (lex fori, interest balancing, law of the jurisdiction where the lawyer was admitted to practice, lex causae of the underlying dispute, law about which advice was sought, law of the place of communication, law on which the client relied).

³¹⁰ For brief comparisons of the LPP rules in different Member States see, eg, J Copeman & K Hurford, ‘Practical Considerations in Maintaining Privilege’ (2005) *Journal of International Banking Law and Regulation* 360–9 (England, France and Germany, as well as the United States); T Baudesson and P Rosher, ‘Professional Secrecy v Legal Privilege’ (2006) *International Business Law Journal* 37–66 (France, England, Germany, Belgium and Spain); McComish, n 309, 300–10 (Australia, France, Germany, Italy, Japan, Switzerland, EU, United States); for monographical treatment see R Magnus *Das Anwaltsprivileg und sein zivilprozessualer Schutz* (Tübingen: Mohr 2010) (discussing English, French and German law).

³¹¹ For an exposition of English legal litigation privilege and legal advice privilege, see *Three Rivers District Council v Governer and Company of the Bank of England (no 6)* [2004] UKHL 48, [2004] 3 WLR 1274, [2005] AC 610. For the English reaction to the Court of First Instance decision in *AKZO and Akcros* see G Murphy ‘Is it Time to Rebrand Legal Professional Privilege in EC Competition Law?’ (2009) 30 *European Competition Law Review* 125, 128–9.

³¹² For a description of the very narrow circumstances under which communications between lawyer and client are privileged in Germany see K Krauß, ‘Die aktuelle Rechtsprechung zum Anwalts- und Verteidigungsprivileg im deutschen Kartellbußgeldverfahren’ (2013) *Wirtschaft und Wettbewerb* 24–33; for criticism of the narrowness of German LPP from the defence bar and a positive assessment of European LPP, see T Kapp and M Schröder, ‘Legal Privilege des EG-(Kartell-) Verfahrensrechts’ (2002) *Wirtschaft und Wettbewerb* 555–66; ‘M Buntscheck, ‘Anwaltskorrespondenz — Beitrag zur geordneten Rechtspflege oder “tickende Zeitbombe”’ (2007) *Wirtschaft und Wettbewerb* 229–41.

fori or some link to the substance of the lawyer-client relationship does not seem to be settled in the law of conflicts.³¹³ Despite the uncertainty that multi-factor balancing tests necessarily entail, the most attractive solution appears to be to apply the law to which the most significant relationship exists.³¹⁴ Where the law applicable to the lawyer-client relationship is not chosen arbitrarily, this law is arguably the one on which the client relies and which has the closest relationship. Whatever the preferred rule, however, given the uncertainty in the law of conflicts how to determine the applicable law of LPP, it would have been helpful to state in the Damages Directive how the applicable national law on LPP is to be determined. Without any indications to the contrary, it seems likely that the formalistic *lex fori* solution will be applied in European courts. The harsh results this could potentially create should arguably be attenuated by taking further-reaching foreign LPP into account at least within the proportionality test under Article 5(3). These uncertainties do not arise where the court, instead of ordering disclosure itself, makes use of the Regulation on Taking of Evidence or the Hague Convention: in these cases a right to refuse giving evidence in the law of *either* the requesting court *or* the requested court is enough to refuse giving evidence.³¹⁵

In addition, it is not clear how the functional equivalence between professional secrecy and legal privilege that is widely recognised in the comparative literature on LPP maps onto Article 5(6) of the Directive — do, for example, the French or German rules on professional secrecy, which are a partial functional equivalent to LPP in common law jurisdictions, participate in the special protection under Article 5(6), or are they merely to be taken into account in the proportionality test?³¹⁶

It will be interesting to see whether civilian jurisdictions are going to shore up their rules on LPP to prevent disclosure in private actions, which would narrow the gap.³¹⁷ Interestingly, the Directive appears to give Member States the possibility to expand their LPP rules — and thereby limit the scope for disclosure — without any limitations, contrary to the general rule that Member States should not be allowed to determine the scope of rights afforded by Union law.³¹⁸ It seems likely, however, that an attempt by a Member State to limit disclosure obligations excessively by expanding LPP far beyond the current limits would be struck down as infringing the principle of effectiveness.

In contrast to the 2009 and 2013 draft versions, the Directive does not recognise any ‘other rights not to be compelled’ under either EU or national law. This could become relevant, for example, where compelling disclosure could

³¹³ See McComish, n 309, 312–42; R Garnett, *Substance and Procedure in Private International Law* (Oxford: Oxford University Press 2012) paras 8.20 *et seq.* On the US position, see, eg, McComish, n 309, 324–9; Garnett, *Substance and Procedure*, paras 8.29 *et seq.*; ABA, *Antitrust Discovery Handbook*, n 63, 125–6.

³¹⁴ Cf Garnett, n 313, para 8.28.

³¹⁵ Article 14(1) of Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, [2001] OJ L174/1; Article 11 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970).

³¹⁶ It cannot be argued that it does not make a difference whether protection is under Article 5(3) or Article 5(6); otherwise, the latter provision would be superfluous (which would contravene the maxim *ut res magis valeat quam pereat*).

³¹⁷ See, by analogy, WPJ Wils, ‘Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case-law’ (2006) 29 *World Competition Law and Economics Review* 3, 23 (recalling that it is open to Member States to increase their LPP standards).

³¹⁸ Case 6/64 *Costa v Enel* ECLI:EU:C:1964:66 [1964] ECR 585, 594 (English edition).

infringe the right against self-incrimination.³¹⁹ However, any such rights would be taken into account in the balancing under the proportionality test of Article 5(3).

viii Right to be heard

The Commission Proposal had, in its Article 5(6), made provision for Member States that order disclosure without first hearing the person from whom disclosure is sought. Article 5(7) of the Directive now provides for an unqualified right to be heard for the person from whom disclosure is sought before disclosure is ordered, and Article 5(8) provides that Member States cannot derogate from this requirement.

ix Minimum standard for disclosure

Article 5(8) of the Directive provides that, in principle, Member States remain free to retain or introduce rules that lead to wider disclosure than is envisaged by the Directive. However, such wider disclosure is not permissible where the Directive has made a positive decision to limit disclosure for specific reasons, such as the protection of leniency programmes.

In the compromise version from April 2014, the list of instances in which the Directive provides not only a minimum, but also a maximum standard of disclosure, went awry. Article 5(8) of that version listed ‘paragraphs 4 and 5(a) and [...] Article 6’. The reference to Article 6, the protection of information included in the file of a competition authority, was unproblematic. The reference to paragraphs 4 and 5(a), however, made little sense: Article 5(4) in the April version was the provision that the interest to avoid damages actions is not ‘an interest that warrants protection’. The reference should instead have been to paragraph 5, the provision that confidential information is disclosable but must be protected. This provision had been contained in Article 5(4) of the European Parliament’s draft legislative resolution of February 2014, and Article 5(8) of that version referred to its Article 5(4). It seems that the April version forgot to

³¹⁹ See, eg, Brealey & Green, n 97, paras 10.36–10.43. German law permits non-parties to invoke their right against self-incrimination, §§ 142(2), 144(2) with §§ 383–5 ZPO. The parties themselves cannot invoke this right against self-incrimination, but it would be taken into account in the decision whether to order disclosure. The Court denied the relevance of the privilege against self-incrimination in civil proceedings in *Postbank v Otto*. Case C-60/92 *Postbank v Otto* ECLI:EU:C:1993:876, [1993] ECR I-5683 paras 15–17. However, the corollary to this non-application of the privilege was that ‘it follows from the Orkem judgment that the Commission — or for that matter a national authority — cannot use that information to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties, or as evidence justifying the initiation of an investigation prior to such proceedings.’ *Ibid*, para 20. The problem with this approach is that, first, this is not generally the position in national law. Second, even if it were the position in national law, it is in practice difficult to exclude the possibility that a competition authority uses such knowledge as a starting point for investigations, so that the effectiveness of the privilege is de facto substantially undermined. Thirdly, even in EU case law there are indications that while the information disclosed cannot be used in evidence in a future proceeding, it may be used as a starting point for investigations after all. Case T-112/98 *Mannesmannröhren-Werke v Commission* ECLI:EU:T:2001:61, [2001] ECR II-729 paras 85–8, relying on Case C-67/91 *AEB and Others* [1992] ECR I-4785, which included the passage (para 42): ‘Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure.’

It is a separate issue whether *legal* persons may rely on the privilege at all, and if yes, whether the extent of the privilege is the same as for natural persons in criminal proceedings in the strict sense (see *Affaire A Menarini Diagnostics c Italie* (Requête no [43509/08](#)), para 62: ‘Par ailleurs, la Cour rappelle que la nature d’une procédure administrative peut différer, sous plusieurs aspects, de la nature d’une procédure pénale au sens strict du terme. Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l’article 6, elles peuvent néanmoins influencer les modalités de leur application’).

update the reference when Article 5(4) became Article 5(5); in the final version of the Directive, this has reverted to Article 5(4). Even more puzzling was the reference to 'paragraph 5(a)' in Article 5(8) of the compromise version: there was no paragraph 5(a). While the European Parliament's draft legislative resolution of February 2014 had contained a paragraph '5a.' (providing for the need to be heard before disclosure is ordered), Article 5(8) of the Parliament's version had not referred to paragraph 5a. The reference of Article 5(8) of the compromise version to paragraph '5(a)' was meant to point to Article 5(7).

These errors were corrected with the corrigendum on 21 October 2014. Accordingly, it is now clear that Article 5(8) means that wider disclosure under national law is permissible as long as (1) confidential information that has to be disclosed is adequately protected, (2) the person from whom disclosure is sought has had the opportunity to be heard before disclosure is ordered, and (3) the protections of Article 6 are guaranteed (in particular with regard to the temporary protection in on-going proceedings and the categorical protection for leniency statements and settlement submissions that have not been withdrawn). Moreover, such wider disclosure under national law may not provide for the disclosure of information protected under LPP as protected under Union law. While Article 5(8) does not refer to the pertinent paragraph 6, national law cannot derogate from the Union law on LPP, which is derived from primary EU law.³²⁰

B Articles 6 and 7: Balancing Private and Public Enforcement

Articles 6 and Article 7 seek to strike the balance between the effective right to damages for any individual harmed by a competition law infringement and the protection of effective public enforcement, in particular leniency programmes and settlement procedures. The controversy about how to achieve the right balance between public and private enforcement was easily the most controversial aspect of the Damages Directive. The debate mostly centres on the absolute protection of leniency statements. Accordingly, the discussion below looks at this aspect first. It should not be overlooked, however, that disclosure of settlement submissions may require a different balancing from that in the case of leniency statements.³²¹

i The Tension between Private Enforcement and Leniency Programmes

At one end of the spectrum of the discussion about the relative weighting between the private right to damages (and any resulting deterrent effects) and the effectiveness of public enforcement it is argued, first, that an effective right to damages requires an extensive right to disclosure where this is necessary to overcome the information asymmetry between the parties.³²² Secondly,

³²⁰ While the case law on LPP under Union law has developed as a limit to the Commission's investigatory powers, there is no reason to think that the due process considerations underlying LPP would lead to a different conclusion in the horizontal relationship.

³²¹ See below text to n 359.

³²² For a sustained argument that the compensation function should prevail see L Guttuso, 'Leniency and the Two Faces of Janus: Where Public and Private Enforcement Merge and Converge', in Beaton-Wells and Tran, n 20, 273–97. See also A Kumar Singh, 'Disclosure of Leniency Evidence: Examining the Directive on Damages Action in the aftermath of recent ECJ rulings', (2014) 7 *Global Competition Litigation Review* 200, 201, 207–8, 209; T Makatsch and AS Mir, 'The new EU

proponents of this view argue that leniency applicants are already sufficiently incentivised to make use of leniency programmes through the immunity from or a reduction of their fine, so that it is unnecessary also to privilege them in private enforcement.³²³

At the other end of the spectrum it is argued that the primary goal should be to avoid any reduction in the effectiveness of public enforcement. The argument here is, first, that deterrence and clarification of the law are more important in competition law than compensation, and that the former two functions are better served by public enforcement than by private enforcement.³²⁴ In addition, even the compensatory function through private enforcement is better served if public enforcement remains effective in uncovering cartels, because private enforcement in most cases builds on public enforcement.³²⁵ This is obvious in the case of follow-on actions, but even standalone claims are often triggered by competition authorities' investigations.³²⁶

My own sympathies lie closer to this second view, namely that it is essential that the full effectiveness of leniency programmes be protected. The real question for striking the right balance is not whether we want to protect the full effectiveness of leniency programmes, but to what extent private enforcement *actually* interferes with these programmes.

From a theoretical perspective at least, an obligation of the leniency applicant to compensate victims will *inevitably* lead to a reduction of the attractiveness of leniency programmes. From a game-theoretic viewpoint, leniency programmes do not usually, as is sometimes erroneously assumed,³²⁷ put cartelists who operate a profitable cartel in a prisoners' dilemma situation. If leniency programs created prisoners' dilemmas for all cartelists, the war against cartels would be over quickly: all cartelists would immediately apply for leniency (unless firms plan on playing the game repeatedly, or cartelists do not behave rationally). It is characteristic and essential for a prisoners' dilemma that there is a dominant strategy, that is, a strategy that is advantageous *regardless* of the other player's (or players') actions. In an ongoing cartel, however, the situation is different, even after the introduction of a leniency program.³²⁸

Directive on Cartel Damage Claims from a German Law Perspective' (2015) 8 *Global Competition Litigation Review* 60, 63.

³²³ Guttuso, *Two Faces of Janus*, 279–282; Makatsch and Mir, *The new EU Directive*, 63; Kumar Singh, *Disclosure of Leniency Evidence*, 204, 207.

³²⁴ Wils, n 20; Crane, n 20, 263–71, concluding that '[g]iven the enormous apparent success of the leniency system in achieving deterrence, it would be foolish to weaken the instruments of leniency in order to pursue a compensation objective that is unlikely to be meaningfully met in any event' (ibid, 271).

³²⁵ Cf Recital 26 of the Directive.

³²⁶ GJ Werden, SD Hammond and BA Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' (2011) 56(2) *The Antitrust Bulletin* 207, 231–3.

³²⁷ Eg the following contributions in Beaton-Wells and Tran, n 20: C Beaton-Wells, 'Leniency Policies: Revolution or Religion?', 3; A O'Brien, 'Leadership of Leniency', 17, 20–1; M Williams, 'Leniency Policy with Chinese Characteristics', 33, 34, 45; Crane, n 20, 264; J Murphy, 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels', 315, 320, 321.

³²⁸ M Motta and M Polo, 'Leniency Programs and Cartel Prosecution', (2003) 21 *International Journal of Industrial Organization* 347 (2003); see also M Motta, *Competition Policy – Theory and Practice* (Cambridge University Press 2004) 194–202; LM Marx and C Mezzetti, 'Leniency, Profiling and Reverse Profiling in Multi-Product Markets: Strategic Challenges for Competition Authorities' in Beaton-Wells and Tran, n 20, 107, 112; CJ Ellis and WW Wilson, 'Cartels, Price-Fixing, and Corporate Leniency Policy: What Doesn't Kill Us Makes Us Stronger', 4, https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=339.

To illustrate: If, in a cartel in which two companies participate, one company applies for leniency, it is of course better for the other one to apply for leniency in the same move. This part of the game indeed looks like a prisoners' dilemma game. However, if instead the other cartelist continues to collude, then it would usually be the best response to collude as well and continue to reap the cartel profits. In this case, it would only be advantageous to apply for leniency instead of continuing with the cartel if the expected fine exceeded the expected profits from the continuation from the cartel — if, in other words, fines were optimal. If, however, fines were optimal, then the cartel would not be formed in the first place. For an ex ante profitable cartel, leniency programs do not lead to a prisoners' dilemma situation. Instead they usually lead to a stag-hunt game with a payoff-dominant equilibrium, in which both cartelists continue with the cartel, and a risk-dominant equilibrium, in which both apply for leniency.³²⁹ Only if something has changed in the time between the cartel formation and the application for leniency stages can the game become a prisoners' dilemma — that is, if a cartel that appeared profitable ex ante turned out to be unprofitable when taking the expected fine into account. In that latter case, applying for leniency is indeed a dominant strategy, and the overall game a prisoners' dilemma. The situation under sub-optimal fines, which arguably better reflects reality at least for viable cartels, is to be modelled as a 'stag-hunt game'.

Accordingly, there is a fine balance between the risk-dominant equilibrium of applying for leniency and the pareto-dominant equilibrium of continuing with a profitable cartel. Ceteris paribus, the greater the difference between the positive payoffs in the pareto-dominant equilibrium of continuing with the cartel and the negative payoffs in the risk-dominant equilibrium of applying for leniency is, the more likely it is that some undertakings choose the pareto-dominant equilibrium, that is, continue with the cartel.

		Cartelist 2	
		continues to collude	applies for leniency
Cartelist 1	continues to collude	$(1-P)(\text{cartel profits}) - P(\text{damages} + \text{full fine})$	zero fine [immunity]-damages
	applies for leniency	$-(\text{full fine} + \text{damages})$	$-(\text{reduced fine} + \text{damages})$

Where private damages claims are added to the payoff matrix, the pareto-dominant equilibrium of continuing with the cartel instead of applying for leniency becomes relatively more attractive. The reason is that where one or both undertakings apply for leniency, they are nearly certain to be sued for damages. Where, however, both undertakings continue with the cartel (upper left or 'North West' cell in the payoff matrix), they have to pay damages only with

³²⁹ See references in n 328.

the probability that their cartel is detected by means *other* than leniency applications, such as whistleblowers or investigations following tips from suppliers or customers of the cartel or sector-enquiries (this exogenous probability of detection is denoted “P” in the simplified payoff matrix above). While the payoff in all cells of the payoff matrix in which at least one of the cartelists applies for leniency is reduced approximately by the full value of the damages claims,³³⁰ the payoff in the cell when both cartelists continue to collude is reduced only by the *expected* value, calculated by multiplying the damages claims by the, arguably relatively low, probability P that the cartel is detected by means other than leniency applications.

This means that from a theoretical perspective *any* private enforcement regime that does not privilege leniency applicants with regard to damages claims makes leniency programmes less attractive on the margin — quite apart from the considerations specific to the disclosure of incriminating evidence.

Disclosure obligations could add to this effect. Leniency applicants have to provide substantial self-incriminating evidence to the competition authority to benefit from immunity from or a reduction of the fine. If they were forced to disclose this information to claimants, or had to fear that competition authorities were to make this information available to claimants, they would have to anticipate that leniency applications would supply claimants with a wealth of evidence and admissions, increasing the claimants’ probability of winning the legal action,³³¹ and so further reducing the attractiveness of leniency programmes relative to the continuation of the cartel.

It is less clear to what extent these theoretical considerations translate into *actual effects in practice*. In the United States, leniency programmes did not lead to any reduction in the applicants’ obligation to pay treble damages until 2004. In 2004, the Antitrust Criminal Penalties Enhancement and Reform Act (ACPERA) was enacted.³³² ACPERA detrebles damages for successful leniency applicants,³³³ provided they cooperate with private plaintiffs.³³⁴ The theoretical considerations above would suggest that ACPERA should have resulted in a substantial increase in leniency applications compared to the situation between 1993, when the US leniency system was modernised but leniency applicants were liable for treble damages, and 2004. A review in 2011 found, however, that the total number of leniency applications had not significantly increased in the six years after ACPERA (81, of which 56 were successful) compared to the six years before ACPERA (78, of which 54 were successful).³³⁵ This does not necessarily mean that there is no positive effect of reducing damages liability exposure on leniency applications. One additional finding in the 2011 GAO review was that the number of successful so-called type A applications had

³³⁰ That is, in the lower left (‘South West’), upper right (‘North East’) and lower right (‘South East’) cells of the payoff matrix above.

³³¹ This increases the expected damages that were simplistically called ‘damages’ in the lower left (‘South West’), upper right (‘North East’) and lower right (‘South East’) cells of the payoff matrix above, but not the expected damages in the upper left (‘North West’) cell. The payoff-dominant equilibrium therefore becomes even more attractive.

³³² Pub L No 108-237, Title II, 118 Stat 661 (2004).

³³³ Ibid, § 213(a).

³³⁴ Ibid, § 213(b), (c).

³³⁵ United States Government Accountability Office, *Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection* (July 2011), GAO-11-619, <http://www.gao.gov/assets/330/321794.pdf>, 16.

nearly doubled (from 17 in the six years before ACPERA to 33 in the six years after ACPERA), that is, applications where the authorities had no prior knowledge of the infringement.³³⁶ If this increase was caused by the reduction of damages liability under ACPERA, this would confirm the theoretical intuition. It is difficult to say, however, whether ACPERA was the cause for this increase in Type A applications. Alternative explanations for the increased number of Type A applications include the introduction of leniency programmes in other jurisdictions, thus offering efficiencies of scale for leniency applicants, or increased cartel activity during the financial crisis.³³⁷

One way to ensure that private damages claims have no detrimental effect on leniency applications even from a theoretical perspective would be to exempt successful leniency applicants entirely from the obligation of paying damages; if that were the case, no limits on disclosure would be necessary.³³⁸ In the European discussions leading up to the Damages Directive, however, this was considered undesirable because it would lead to the unjust enrichment of the leniency applicant, who would keep the ill-gotten gains, and could lead to undercompensation for the victim. Undercompensation of the victim could be avoided by introducing residual liability of the leniency applicant if the damages could not be recovered from the other infringers, but the problem of unjust enrichment of the leniency applicant would remain. What is more, the anticipation of keeping the ill-gotten gains could have an undesirable negative effect on deterrence. Unjust enrichment of the leniency applicant could have been avoided by generally awarding overcompensatory damages and reducing this to compensatory damages for successful leniency applicants, comparable to the detrebbling in the United States since ACPERA. Overcompensatory damages, however, were rejected early on in the European discussion as incompatible with the postulated purely compensatory function of private enforcement and as resulting in unjust enrichment of the victims. This hostility to overcompensatory damages is reflected clearly in Article 3(3) of the Directive.

In the end, the drafters of the Damages Directive chose to consider immunity recipients to be fully liable for compensatory damages, but to privilege them in two ways. First, joint and several liability was limited to damages for harm suffered by their own direct and indirect purchasers and to others only as residual obligees.³³⁹ Second, the Directive's provisions seek to shelter immunity recipients from the fear that leniency statements could be disclosed to claimants in private actions. It is this second aspect to which we now turn.

ii Protection of Leniency Statements and Settlement Submissions

The *Pfleiderer* and *Donau Chemie* judgments held that the question whether leniency documents have to be disclosed is to be answered on a case-by-case basis. This led to anxiety on the part of competition authorities, who feared that the possibility that leniency statements in particular could be disclosed to

³³⁶ Ibid, 17.

³³⁷ Ibid, 21.

³³⁸ P Buccirossi, C Marvão and G Spagnolo, 'Leniency and Damages' (June 2015), *CEPR Discussion Paper* No DP10682, <http://ssrn.com/abstract=2624637> (preferring complete immunity from damages claims for the first immunity applicant, but considering this applicant's residual liability as a second-best solution where the claimant cannot obtain full compensation from the other cartel participants).

³³⁹ Article 11(4)–(6) of the Directive. See Chapter ■ in this volume.

claimants in private actions would deter potential leniency applicants.³⁴⁰ The Damages Directive seeks to replace the case-by-case balancing with an absolute protection for leniency statements and settlement submissions. This raises three questions. First, to what extent do the Directive's provisions achieve the stated objective of protecting leniency statements and settlement submissions absolutely? Second, what is the desirable extent of protection from a policy perspective? And third, is the absolute protection intended by the Directive compatible with primary law? The next section will address these three questions in turn.

a Is Protection Absolute Under the Terms of Articles 6, 7?

Turning to the first question of the scope of the protection under the Directive, it is obvious that the Directive's aim is to protect leniency statements and settlement submissions absolutely. Article 6(6) of the Directive provides that no court may 'at any time order a party or third party to disclose [...] leniency statements [or] settlement submissions'. The legal definition of 'leniency statement' in Article 2(16) of the Directive clarifies that it includes written or oral presentations or records thereof that were 'drawn up specifically for submission to the competition authority' for purposes of a leniency application, but excludes 'pre-existing information'.³⁴¹ Article 2(18) of the Directive provides a parallel definition for settlement submissions, although this definition omits the clarification contained in Article 2(16) for leniency statements that the presentation may be 'oral or written'.³⁴² Recital 26 adds that the exemption from disclosure also applies 'to verbatim quotations from leniency statements or settlement submissions included in other documents'. Article 7(1) of the Directive strengthens the protection of leniency statements and settlement submissions by providing for the inadmissibility of evidence where the information was acquired 'by a natural or legal person solely by way of access to the file of a competition authority'. The national court may access leniency statements and settlement submissions, but only for the limited purpose of ensuring that the material falls under the Directive's definitions for leniency statements and settlement submissions.³⁴³

This seemingly watertight protection of leniency statements and settlement submissions may not be as comprehensive as it seems. Arguably the greatest problem is that leniency statements and settlement submissions are defined as the 'presentation' that was prepared. What is protected is, in other words, the *expression* that was used in the leniency application, not the

³⁴⁰ See the discussion in Singh, n 322.

³⁴¹ See the legal definition for 'pre-existing information' in Article 2(17).

³⁴² This is curious because para 38 of the Notice on the Conduct of Settlement Procedures allows for oral settlement submissions. Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases [2008] OJ C167/1, para 38.

³⁴³ Art 6(7) of the Directive. It has been observed that this is 'an odd addition' because competition authorities are usually better placed than courts (with usually less experience in competition law) to make this assessment. I Lianos, P Davis and P Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford: Oxford University Press 2015) para 3.26. The reason for the addition seems to me to be the following. From a rule of law perspective, it must be possible for a claimant to have the competition authority's decision reviewed for legality. If the Damages Directive did not allow the national court seised with the damages action to review the competition authority's qualification, then the claimant would have to challenge the legality of the qualification in separate judicial review proceedings, which would arguably be less efficient than having the court already seised with the private action make the decision (although the review court admittedly usually has more technical experience with competition law).

information contained in it. Nothing in the Directive prevents a claimant from having the court call as witnesses the persons who provided the information for the leniency statement or settlement submission. While the court is not allowed to ask the witnesses for ‘verbatim quotations’ from the statement or submission,³⁴⁴ it appears to be perfectly possible to ask these witnesses what they know about the infringement.³⁴⁵ This, after all, relates to ‘pre-existing information’. This way the *information* contained in the leniency statements can arguably be extracted without ever asking for the presentation in the submission to the competition authority.

Geradin and Grelier have pointed to a different perceived chink in the armour of the Draft Directive (in the version of 17 April 2014).³⁴⁶ Leniency applicants are under a duty of genuine and full cooperation on a continuous basis.³⁴⁷ Geradin and Grelier argue that while the corporate statement may be fully protected, responses to requests for information may not be, so that under the Draft Directive ‘there is a real risk that leniency applicants’ responses may be accessible to potential claimants after the investigation ends.... [L]eniency applicants may be less forthcoming More generally, this could deter prospective applicants ...’.³⁴⁸ This fear arguably is no longer justified under the final version of the Directive. The *Commission Proposal* had indeed used the terminology ‘leniency corporate statement’, which could have meant that only the ‘corporate statement’ in the meaning of paragraph 9(a) of the Leniency Notice would have been protected, not the information transmitted under the duty of continuous cooperation under paragraph 12 of the Leniency Notice. Under the definitions now used in the Directive (and, indeed, already in the Draft of 17 April 2014) for ‘leniency statement’, however, any information that is transmitted under paragraph 12 of the Leniency Notice is arguably also absolutely protected under Article 6(6) of the Directive, because and to the extent it is a ‘presentation voluntarily provided ..., describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines.’ Unless the Commission follows up with a Request for Information by decision under Article 18(3) of Regulation (EC) No 1/2003 (in which case the information would not be ‘voluntarily provided’), continuing cooperation will usually fulfill this definition. As always, pre-existing information is excluded from this exemption, but the mere fact that any admissions were part of the continuing obligation rather than the initial corporate statement will not deprive the admission of the protection of Article 6(6) of the Directive.

Makatsch and Mir consider it problematic that Article 6(6) ‘does not specify whether a “leniency statement” comprises only the application itself or also encompasses appendices.’³⁴⁹ This is arguably a very German view: the

³⁴⁴ Cf. in a slightly different context, Recital 26.

³⁴⁵ It is a different question whether national procedural law (for example, variations on the hearsay or best evidence rules) puts any limits to such interrogations.

³⁴⁶ D Geradin and L-A Grelier ‘Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?’, in N Charbit and E Ramundo (eds) *William E. Kovacic: An Antitrust Tribute – Liber Amicorum Vol II* (Institute of Competition Law 2014) 257, 266–7, 274.

³⁴⁷ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, [2006] OJ C 298/17 para. 12(a).

³⁴⁸ Geradin and Grelier, n 346, 266–7.

³⁴⁹ Makatsch and Mir, n 322, 63.

German Bundeskartellamt, in its leniency notice, promises to resist requests to grant access to the file within the legal limits ‘insofar as the leniency application *and the evidence provided by the applicant* are concerned’.³⁵⁰ In contrast, Article 6(6) seems unambiguous in this regard: the exclusion of ‘pre-existing information’³⁵¹ from the definition of ‘leniency statement’ in Article 2(16) means that any appendices containing pre-existing information do *not* fall under the absolute protection of Article 6(6).³⁵²

b Should Protection be Absolute?

The second issue is to what extent the protection of the leniency applicant from disclosure is desirable as a matter of policy. This is controversial between proponents of a compensation perspective and those emphasising the deterrence function. This issue was largely addressed above.³⁵³ If the Directive had excluded damages liability for the leniency applicants, no protection of the leniency applicant in terms of disclosure would have been required, but this view did not prevail. Given that the leniency applicant remains liable for damages, any disclosure of the information that the leniency applicant has voluntarily submitted in a leniency application can therefore potentially provide ammunition to damages actions against the leniency applicant, and make applying for leniency on the margin less attractive. The question is how likely it is that in practice an infringer would risk a large fine in addition to the obligation to pay damages by not applying for leniency in order to avoid the slightly more certain damages claims when applying for leniency.³⁵⁴ The little empirical evidence available on this question is ambiguous.³⁵⁵ Understandably, proponents of private damages actions and disclosure interpret this ambiguity in their favour and argue that leniency applicants already have sufficient incentives and need no further protection,³⁵⁶ while competition authorities and those who prefer public enforcement over private enforcement take the ambiguity as an argument for proceeding with caution so as not to imperil the effectiveness of leniency programmes.³⁵⁷ The latter view is preferable. Public competition law enforcement in the EU has proven to be very effective in the de facto absence of private enforcement. Game theory suggests that any private liability of the leniency applicant makes leniency applications on the margin less attractive, and the sharp rise in Type A immunity applications in the United States following the introduction of detrebling is at least potentially an indication that the theory may

³⁵⁰ Bundeskartellamt, *Leniency Programme, Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases* (7 March 2006), para 22, <http://tinyurl.com/zdj6f68>.

³⁵¹ Defined in Article 2(17) of the Directive.

³⁵² This is also obliquely referred to in Recital 27: ‘Any content falling outside those definitions [scil: of leniency statements and settlement submissions] should be disclosable under the relevant conditions.’

³⁵³ Text following n 321.

³⁵⁴ *National Grid*, n 159, [37] (‘Although any consideration of what would have been sufficient to deter ABB from informing the Commission of the cartel and thus obtaining immunity is inherently speculative, it is significant that a decision not to go to the Commission would not have given ABB any guarantee of protection from civil liability since if any of the other participants had informed the Commission the cartel would have been exposed. Then ABB would similarly have been liable to civil claims but in addition would have faced a very substantial fine. Of course, any disincentive to seek leniency because of potential disclosure in civil litigation might have dissuaded all the other participants from approaching the Commission, but this would have been a high-risk gamble for ABB to take.’); Schweitzer, n 59, 341.

³⁵⁵ See above text accompanying nn 335, 336 (on the effects of ACPERA).

³⁵⁶ References in n 322.

³⁵⁷ References in nn 20, 324.

indeed have practical implications.³⁵⁸ Private enforcement depends in large part on previous detection through public enforcement, so that anything that affects negatively the effectiveness of public enforcement indirectly harms private enforcement as well. From a *policy* perspective, the Directive's attempt to protect leniency applicants is therefore to be commended.

Heike Schweitzer has rightly pointed out, however, that it is much less clear that the same balance should also be struck for the settlement procedure.³⁵⁹ Similar reasons for which disclosure makes leniency applications, at least on the margin, less attractive could also make settlement submissions less attractive if they were disclosable in private proceedings. However, first, the forgone benefit of settlement submissions is arguably smaller than the forgone benefit of leniency applications. Settlements only concern detected cartels, and save only the competition authority's resources potentially spent on appeals.³⁶⁰ In contrast, making leniency applications less attractive may result in continued secret cartelisation and no compensation for victims at all. Secondly, unlike potential leniency applicants, who may hope that the cartel goes entirely undetected, settling cartelists are already likely to face damages actions. Therefore, both the effect on the potentially settling parties' incentives, and the benefit derived from the voluntary cooperation that could be affected if disclosure were possible, appear much smaller than in the case of leniency applications. The argument against disclosure of settlement submissions is therefore much weaker than against the disclosure of leniency applications.

c Is the Directive's Absolute Protection Compatible with Primary Law?

The third question is whether or not the (nearly) absolute protection in Articles 6(6) and 7 of the Directive is compatible with primary EU law.

Pfleiderer and *Donau Chemie* established the requirement to balance in each individual case the claim of any individual harmed by the infringement of competition law derived from Article 101(1) TFEU on the one hand,³⁶¹ and the interest in effective public enforcement of Articles 101 and 102 TFEU on the other hand, before reaching a decision whether or not to exclude leniency documents.³⁶² In *Donau Chemie*, the Court held that:

'It is clear [...] that although those considerations [on the need to protect leniency programmes] may justify a refusal to grant access to certain documents contained in the file of national competition proceedings, they do not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case [...].'³⁶³

³⁵⁸ Above n 336.

³⁵⁹ Schweitzer, n 59, 343.

³⁶⁰ *Ibid.*

³⁶¹ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, ECLI:EU:C:2001:465, paras 22–7; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, ECLI:EU:C:2006:461, paras 39, 60–1.

³⁶² Case C-360/09 *Pfleiderer v Bundeskartellamt*, [2011] ECR I-5161, ECLI:EU:C:2011:389 [30]–[32]; Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG* ECLI:EU:C:2013:366 [29]–[49]. For a careful balancing by Roth, J, following *Pfleiderer* see, famously, *National Grid Electricity Transmission plc v ABB et al* [2012] EWHC 869 (Ch).

³⁶³ *Donau Chemie*, n 362, para 43; see also *Pfleiderer*, n 362, paras 30, 31.

Articles 6(6) and 7(1) of the Directive seek to replace the case-by-case balancing with a blanket ban on disclosure.

Pfleiderer and *Donau Chemie* derived the necessity of case-by-case balancing from primary law. Some commentators have emphasised that *Donau Chemie* concerned a *national* rule that made disclosure de facto impossible, and that the Court made the proviso in both *Donau Chemie* and *Pfleiderer* that there was no binding Union law on the issue.³⁶⁴ The Directive now introduces the binding Union law on the issue that was previously missing, and, so the argument goes, binding Union law is free to resolve the issue any way it pleases.³⁶⁵ However, the proviso only explained why it was in principle Member States' law that governed the issue of disclosure under the principle of procedural autonomy, so that Union law was relevant only in so far as the principles of equivalence or effectiveness limited that procedural autonomy.³⁶⁶ *Pfleiderer* indicates³⁶⁷ and *Donau Chemie* makes abundantly clear³⁶⁸ that the damages claim—and the derivative right to access information that is required not to render the enforcement of this damages claim excessively difficult—derives from primary EU law. The Court clearly held that these rights exist under EU law, and since they did not arise under secondary law, the rights and the balancing requirement *must* derive from primary law. Hence, the case-by-case balancing requirement derives from the need to balance two interests that are both protected by primary EU law. The Court held that they must be brought into what Germans would call 'practical concordance' meaning that neither right trumps the other in the abstract. Therefore the rights have to be balanced on a case-by-case basis. The Directive cannot remove this requirement.

The authors of the Directive were, of course, well aware of this controversy when drafting the Directive. They felt reassured, however, by the *EnBW* judgment of the Court, which was handed down in the final phase of the drafting process.³⁶⁹ In that judgment, the Court of Justice was willing to accept that

'for the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific, individual examination of each of the documents in a file relating to a proceeding under Article [101 TFEU], that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings involved [...] and the protection of the purpose of the investigations relating to the proceeding.'³⁷⁰

³⁶⁴ *Pfleiderer*, n 362, 20–2; *Donau Chemie*, n 362, paras 25, 26.

³⁶⁵ I Vandenborre, T Goetz and A Kafetzopoulos, 'Access to File under European Competition Law' (2015) 6 *Journal of European Competition Law & Practice* 747, 748 in n 2; CF Weidt, 'The Directive on Actions for Antitrust Damages After Passing the European Parliament', (2014) 35 *ECLR* 438, 439–40; also cf R Gamble, 'The European Embrace of Private Enforcement: This Time with Feeling', (2014) 35 *European Competition Law Review* 469, 478–9.

³⁶⁶ *Pfleiderer*, n 362, para 24; *Donau Chemie*, n 362, para 27.

³⁶⁷ The *Pfleiderer* judgment makes the argument only indirectly, namely by referring to *Courage v Crehan* and *Manfredi*. *Pfleiderer*, n 362, paras 28–30.

³⁶⁸ *Donau Chemie*, n 362, paras 20–4 (eg, *ibid* para 21: 'Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for the individuals [...]').

³⁶⁹ Case C-365/12 P *Commission v EnBW* ECLI:EU:C:2014:112 (handed down 27 February 2014; in April 2014, the European Parliament voted on the Draft Directive).

³⁷⁰ *Ibid* para 93.

This includes statements that were submitted voluntarily, such as leniency statements.³⁷¹ The reasoning underpinning *EnBW* undoubtedly makes it easier for the Commission, and arguably by implication also for national competition authorities, to deny access to the file. By analogy, it may also allow leniency applicants to argue that there should be a similar presumption against ordering disclosure of such documents in private enforcement actions between claimants and the leniency applicant. However, even *EnBW* emphasised that:

‘the general presumption referred to above does not rule out the possibility of demonstrating that a specific document disclosure which has been requested is not covered by that presumption, or that there is an overriding public interest in disclosure of the document by virtue of Article 4(2) of Regulation No 1049/2001.’³⁷²

In the party disclosure scenario the ‘overriding public interest’ would not derive from Article 4(2) of the Transparency Directive, but *Pfleiderer* and *Donau Chemie* have made clear that the right to claim damages for harm inflicted by a competition law infringement derived from Article 101 TFEU must not be rendered impossible or excessively difficult. *EnBW* reiterates this point,³⁷³ and *AXA* goes into more detail under what circumstances the presumption may be rebutted.³⁷⁴ There may be cases in which enforcement of the damages claim would be rendered excessively difficult if disclosure of a leniency statement or settlement submission were absolutely prohibited. This is, however, precisely what Articles 6(6) of the Damages Directive seeks to do. Under the Court’s case law, it must remain possible for the claimant to ‘establish that it is necessary for that person to be granted access to documents in the Commission’s file, in order to enable the latter to weigh up, on a case-by-case basis, the respective interests [...]’.³⁷⁵ It is true that it will be difficult for the claimant to demonstrate that access to a particular document is necessary where the document is not known — essentially, the problems that claimants have hitherto faced under civil law disclosure rules that demand substantiation of the content of the document to be disclosed may be replicated by this requirement for substantiated rebutting the presumption.³⁷⁶ However, Articles 6(6) of the Damages Directive does not even give the claimant the theoretical opportunity of arguing this point. This has led many commentators to the conclusion that Articles 6(6) is incompatible with the case-by-case balancing requirement grounded in primary EU law.³⁷⁷

³⁷¹ Ibid para 97.

³⁷² Ibid para100. In the context of Regulation No 1049/2001, the General Court held in *Schenker* that the general public interest in cartel enforcement is sufficiently satisfied by the publication of a non-confidential version. Case T-534/11 *Schenker v Commission* ECLI:EU:T:2014:854 paras 78–89. It also held that the non-confidential version need not be drafted in the strict time limits of the Transparency Regulation, because of the need to ensure confidentiality and business secrets (citing Article 339 TFEU), but that it must be drafted within a reasonable period of time. Ibid, paras 110–42, in particular 127–30. However, those parts that are uncontested must be made available even before any contested confidentiality claims are settled. Ibid, paras 137–41.

³⁷³ *EnBW*, n 369, para 104; see also *Schenker*, n 372, paras 90–8.

³⁷⁴ T-677/13 *AXA Versicherung v Commission* ECLI:EU:T:2015:473, paras 59–78, 162–6.

³⁷⁵ *EnBW*, n 369, para 107.

³⁷⁶ This was not, however, the case in *AXA Versicherung*, because the applicants had received a (redacted) table of documents, so that more specific pleading could have been expected, see *AXA Versicherung*, n 374, para 75. In that case, the applicants also succeeded in getting a less redacted table of contents; specifically, references to leniency documents could not globally be redacted (but the identity of natural persons, third-party undertakings and commercially sensitive information could be).

³⁷⁷ This is the conclusion reached, eg, by C Kersting, ‘Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants’ (2014) 5 *Journal of Competition Law & Practice* 2, 3–4; Makatsch and Mir, n 322, 63; Kumar Singh, n 322, 208–9 (with some equivocation regarding the positive law); R Hempel, ‘An der schönen blauen Donau – Akteneinsicht in Kronzeugenanträge im Fluss’, [2014] *Zeitschrift für Wettbewerbsrecht*

However, in the exceptional case that the claimant can make the case that the right to damages would be rendered excessively difficult if no access were granted, the claimant retains the right under the Transparency Regulation to access the information. If Article 7(1) of the Damages Directive applied to materials obtained under the Transparency Regulation, this would help the claimant only to a very limited extent, because then the materials would be inadmissible in the damages action. However, the wording of Article 7(1) specifically refers to evidence obtained ‘solely through access to the file’. ‘Access to the file’ is generally used as a technical term denoting a party’s or complainant’s access to the file for purposes of exercising one’s rights of defence, which is distinct from ‘public access to documents’ under the Transparency Regulation.³⁷⁸ The Damages Directive does not explicitly define ‘access to the file’ more broadly, and explicitly states in Article 6(2) that Article 6 is ‘without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001’, which indicates that the legislator was aware of the distinction between access to the file and public access to documents.³⁷⁹ Accordingly, a claimant who manages to rebut the *EnBW* presumption (which admittedly is no mean feat) by showing that access to a leniency statement or settlement submission is essential to proceeding with the claim, would *not* be prevented by Article 7(1) from introducing these documents into the damages action.

Even though the Directive forces potential claimants to apply via the Transparency Regulation to get to the material from the Commission, this remaining possibility to go the route via the Transparency Regulation could save the compatibility of Article 6(6) of the Damages Directive with primary law in so far as leniency statements and settlement submissions made to the European Commission are concerned. However, there is no guarantee that national competition authorities are subject to freedom of information acts that require the same balancing process as is required under *EnBW*. To that extent, claimants may have no opportunity to access protected materials at all, and excluding any possibility of getting access to them, as Article 6(6) of the Directive purports to do, is contrary to primary law.

iii The Temporary Restriction in Articles 6(5) and 7(2)

203, 214–7; Schweitzer, n 59, 341–3; Sanner, n 3, 501–4 (with further references in n 1878); possibly also Lianos, Davis and Nebbia, n 343, para 7.167 (essentially agreeing with the line of argument that considers the rules in the Directive as incompatible with the Court’s interpretation of primary law, and that secondary law ‘should be compatible with primary EU law’, but noting that ‘it is not clear if the CJEU would have arrived at a different conclusion, had there been EU rules on the matter’ — which is true but cannot detract from the fact that the CJEU did make its ruling based on primary law). A German appeals court raised ‘grave doubts whether the Directive, if formally adopted, would be upheld [*scil*: with regard to the absolute protection of leniency statements].’ OLG Hamm, n 433, paras 99–101. The Rapporteur in the European Parliament had also argued against absolute protection, see A Schwab, ‘Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims’ (2014) 5 *Journal of European Competition Law & Practice* 65, 66. *Contra* those mentioned in n 365.

³⁷⁸ See paras 1, 2 of the Access to the File Notice, Commission Notice on the Rules for Access to the Commission File in Cases Pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, as amended in 2015, n 1.

³⁷⁹ This distinction is also apparent in other language versions, eg, German: ‘Einsicht in die Akten’ (Art 7(1)) v ‘Zugang der Öffentlichkeit zu Dokumenten’ (Art 6(2)), or French: ‘uniquement grâce à l’accès au dossier’ (Art 7(1)) v ‘règles et pratiques régissant l’accès du public aux documents’ (Art 6(2)). See also De Smijter, n 9, paras 8.156–8.157, who clearly only refers to access to file in this sense in the discussion of Article 7 of the Directive.

By comparison to the absolute restriction on disclosure under Articles 6(6) and 7(1) of the Directive, the merely temporary restriction in Articles 6(5) and 7(2) seems harmless. This temporary restriction applies to withdrawn settlement submissions,³⁸⁰ information prepared by a person for the proceedings, such as ‘replies to requests for information’ or ‘witness statements’,³⁸¹ and information prepared by the competition authority in the course of the proceedings, in particular the Statement of Objections.³⁸² Disclosure becomes possible once the competition authority has closed its proceedings, ‘for instance by adopting a decision under Article 5 or under Chapter III of Regulation (EC) No 1/2003, with the exception of [interim measures].’³⁸³ The provision’s purpose is to keep interference with ongoing investigations at a minimum.³⁸⁴

Even though the 2015 amendment to Regulation (EC) No 773/2003 by Regulation (EU) No 1348/2010 was meant to harmonise the access to the file rules with the Damages Directive, it adds a potentially important qualification. The new Article 16a(3) Regulation (EC) No 773/2003 provides that documents drawn up for or in the course of proceedings obtained through access to the file ‘shall not be used in proceedings before national courts until the Commission has closed its proceedings *against all parties under investigation*’.³⁸⁵ Article 6(5) of the Directive does not make it explicit that proceedings must have been closed against all parties under investigation, and it seems a stretch to read this qualification into the text. Therefore, under Article 6(5) of the Directive, the information or withdrawn settlement submission is generally disclosable as soon as the proceeding against the party in question has been closed, unless the information was obtained by access to the file under Regulation (EC) 773/2004. However, the possibility that disclosure of, for example, the Statement of Objections against one cartel member could interfere with the investigation into other cartel members’ conduct will still have to be considered in the proportionality assessment under Article 5(3).

C Article 8

Article 8 provides that ‘Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives’ where they fail or refuse with a disclosure order, destroy relevant evidence, fail or refuse to comply with a confidentiality order, or use the evidence outside the permitted limits.³⁸⁶ These penalties have to be ‘effective, proportionate and dissuasive.’ Article 8(2) provides that the available penalties shall include, with regard to the parties, the ‘possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs’. Interestingly, the Directive does not require Member States to

³⁸⁰ See the definition in Art 2(18) of the Directive.

³⁸¹ Recital 25.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Emphasis supplied.

³⁸⁶ For the limits to which disclosed information can be put under English law, see CPR 31.22 and *Infederation Ltd v Google, Inc and ors*, [2015] EWHC 3705 (Ch) (discussing CPR 31.22 and the common-law collateral purpose rule where Foundem asked permission to make available to the European Commission an analysis of documents disclosed by Google).

introduce other penalties in the case of non-compliance. This is astonishing in so far as the failure of some civil law regimes to provide for penalties *other* than adverse inferences where a party fails to disclose³⁸⁷ was one of the issues that had been highlighted in the discussions preceding the Directive.³⁸⁸ In most cases the prospect of an adverse inference may indeed be a dissuasive penalty to a party. However, where the document whose disclosure is requested is, for example, absolutely essential for the claimant to establish a sufficient basis for damages to be estimated, an adverse inference or the imposition of costs on the defendant may not help the claimant to the same extent as actual disclosure would.³⁸⁹ In this regard, an obligation on Member States to provide for penalties such as periodic penalty payments or committing the refusing party to prison would arguably be more effective.³⁹⁰

Another issue that may present problems is the question when ‘relevant evidence’ is destroyed. The antecedent question is what the relevant duties for preserving information are: does the obligation to preserve documents and other evidence arise only from the moment proceedings are commenced, or is there a duty to preserve relevant documents that precedes the action? In some jurisdictions, the parties’ ‘duties’ (or at least ‘duties against themselves’) to preserve potential evidence may arise even before proceedings are commenced, at least where the proceedings are reasonably foreseeable.³⁹¹ In other jurisdictions, such as England, there is at least generally no duty to preserve prior to the commencement of proceedings.³⁹² These issues of document retention take on particular importance in the context of Electronically Stored Information (‘ESI’),³⁹³ and with regard to these, the English CPR Practice Direction 31B requires retention from the moment litigation is contemplated as well.³⁹⁴ Considering the discussion in the United States about discovery and spoliation issues concerning ESI,³⁹⁵ it would have been helpful if the Directive had provided a little more detail.

V Access to Evidence Beyond Disclosure

A Using Transparency Rules and Access to the File Rules

³⁸⁷ For German law, see, eg, §§ 427, 444 ZPO.

³⁸⁸ See *Ashurst Comparative Report*, n 8, 1-65.

³⁸⁹ Although courts will go a long way to help a claimant in such circumstances, see (though not in the context of a damages action based on competition law) BGH, 27 September 2001, IX ZR 281/00, (2002) *Neue Juristische Wochenschrift* 825-7.

³⁹⁰ Cf Staff Working Paper, n 3, para 139 ([C]ourts may find the imposition of financial (e.g. fines and/or periodic penalty payments) or personal sanctions available under national law to be the most effective sanction in certain cases [...]).

³⁹¹ See, eg, for an interpretation of the German § 444 ZPO: BGH, 23 November 2005, VIII ZR 43/05, (2006) *Neue Juristische Wochenschrift* 434, 436 para 23; for the US American spoliation doctrine, see, eg, *West v Goodyear Tire & Rubber Co*, 167 F3d 776, 779 (2d Cir 1999); see also ND Wright, ‘Note’ 38 *Hofstra Law Review* 793, 796-8; ABA *Antitrust Discovery Handbook*, n 63, 114-7. In a different context the Leniency Notice, n 347, para 12, requires that ‘when contemplating making its application ... the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel ...’.

³⁹² See the discussion in *Timothy Duncan Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile) [28]-[30], and in Hibbert, n 97, 1-14-1-29 (including discussion of a number of statutory duties to preserve information).

³⁹³ For an introduction to the issues raised by ESI under English law, see, eg, Hibbert, n 97, ch 4 and CPR PD 31B; for ESI issues in US American antitrust discovery, see ABA, *Antitrust Discovery Handbook*, n 63, 87-124.

³⁹⁴ CPR PD 31B para 7: ‘As soon as litigation is contemplated, the parties’ legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.’

³⁹⁵ SM O’Brien, ‘Analog Solutions: E-Discovery Spoliation Sanctions and the Proposed Amendments to FRCP 37(E)’ (2015) 65 *Duke Law Journal* 151.

An alternative to asking the Court to order the other party or a non-party to disclose information in the damages action is to use freedom of information rules to get the information directly from the competition authority or another public body. Depending on who is in possession of the information, and who is asking for the information, provisions such those of the Transparency Regulation (EC) 1049/2001 (with Article 15(3) TFEU), national Freedom of Information Acts, or rules on Access to the File may apply. The question in these cases is how to reconcile the paradigm of transparency and openness that underlies these rules, at least in principle, with the protection of information in ongoing investigations, leniency statements and settlement submissions sought by Articles 6 and 7 of the Directive.

It was in the context of a request under the Transparency Regulation that the CJEU held in *EnBW* that the Commission may rely on a presumption that documents in the file of an Article 101 TFEU investigation generally fulfill the conditions of Article 4(2) of the Transparency Regulation (EC) 1049/2001, unless applicants can demonstrate that they require access to enforce their claim effectively, in which case the Court must engage in a case-by-case balancing.³⁹⁶

Article 6(2) of the Damages Directive provides explicitly that Article 6 is 'without prejudice' to the rules and practices under the Transparency Regulation. This prevents a direct clash between the absolute protection under Articles 6(6) and the more flexible standard espoused in *EnBW* for the Transparency Regulation. In other words, the possibility for the applicant to argue that there is an overriding public interest, or that a denial of access to the file would render the right to damages ineffective, remains open even after the entry into force of the Damages Directive. To the extent that the Transparency Regulation applies, namely where leniency statements and settlement submissions in the control of the Commission are concerned, this possibility arguably saves the compatibility of Article 6(6) with primary law.³⁹⁷

Another way for parties to whom the Commission addressed a Statement of Objections, and to a lesser extent for complainants, to access evidence could be to use the rules on access to the file.³⁹⁸ The European Commission has, however, with effect from 6 August 2015, modified its access to the file rules.³⁹⁹ Information obtained under these rules cannot be used for purposes other than for the rights of defence in proceedings before the EU courts reviewing Commission decisions, or national courts where they review a decision by an NCA or decide on the allocation of a fine imposed by the Commission on cartel participants jointly and severally. The wording of the new Article 16a Regulation (EC) No 773/2004 limits use of the information where this is necessary for the

³⁹⁶ See above text to and following n 369.

³⁹⁷ Text before and after n 361.

³⁹⁸ Commission Notice on the Rules for Access to the Commission File in Cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, [2005] OJ C325/7, as amended by Amendments to the Commission Notice on the Rules for Access to the Commission File in Cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2015] OJ C256/3.

³⁹⁹ See in particular the new art 16a Regulation (EC) 773/2004, introduced by Commission Regulation (EU) 2015/1348 of 3 August 2015, amending Regulation (EC) No 773/2004, [2015] OJ L208/3 relating to the Conduct of Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; Amendments to the Commission Notice, n 398, here in particular point 8, replacing the previous para 48 of the Notice on the Rules for Access to the Commission File. See also the description in the Commission Opinion in the case *Sainsbury's Supermarkets v Mastercard Inc*, n 23.

‘rights of defence’. Where parties, or non-parties, have obtained documents by making use of their right to access to the file, an order of disclosure against them can now only be made under the restrictions of Article 6 of the Directive. In particular, leniency statements and settlement submissions are entirely out of bounds, and other materials prepared for the proceedings can only be used once proceedings against *all* parties under investigation are closed.⁴⁰⁰

In the Member States, similar rules to the European Transparency Regulation or Notice on Access to the File may exist under national law.⁴⁰¹

In Germany, parties and interveners may have a right to access to the file under §§ 13, 29 VerwVfG (either in the federal or state version). However, a right to information only exists to the extent that the applicant has a *legal interest*, which is interpreted as being restricted to rights of defence or affirmative rights *in the administrative procedure*.

Where a person enumerated in § 67 of the German Act against Restraints of Competition (ARC) seeks judicial review against a competition authority’s decision, this person may have access to the file under § 72 ARC. Under these provisions, parties and the competition authorities have a right to access, while interveners *may* be granted access to the file.

Where the competition authority is investigating in the fines procedure, or where a public prosecutor has opened a criminal investigation, for example for bid rigging, access to the file may be sought under § 406e of the Criminal Procedure Code (StPO).⁴⁰² The intention of seeking damages is accepted as constituting the ‘legitimate interest’ required by § 406e StPO.⁴⁰³ However, applications based on § 406e StPO have usually not been successful with regard to the more sensitive parts of the file, due to a balancing of the applicant’s interests with the interests of the (legal or natural) persons under investigation or third parties.⁴⁰⁴ As will be discussed below, success chances may be higher for

⁴⁰⁰ Indirect access to documents was used in *National Grid* to obtain disclosure of documents concerning Areva and Alstom from ABB and Siemens. The French companies Areva and Alstom claimed to be prevented from disclosing the documents by the French blocking statute. ABB and Siemens had received the documents in question through access to the Commission’s file. Mr Justice Roth ordered ABB and Siemens to disclose these documents within a confidentiality ring. *National Grid v ABB & ors* [2011] EWHC 1717 (Ch). This disclosure would now have to observe the limits of Article 6 of the Directive.

⁴⁰¹ De Smijter, n 9, para 8.145 states that because Article 6(2) does not exempt national public access rules, they ‘only apply to the extent that they are compatible with the provisions of the [Damages Directive].’ It is unclear, however, where they would conceivably conflict: Article 6 deals with disclosure before the courts (which will not be relevant when public access rules apply, because these rules are not ordered in a damages action), and Article 7 only applies to ‘access to the file’ (which is distinct from the public access to documents, above n 379).

⁴⁰² In the case of the public prosecutor, § 406e StPO is directly applicable, in the case of a competition authority, it is applicable by reference via § 81 ARC, § 46(1) Act on Administrative Offences (OWiG). For a discussion of § 406e StPO in the context of competition damages actions, see, eg, J Wessing and M Hiéramente, ‘Akteneinsicht im Kartellrecht—Der Aspekt des Vertrauens- und Geheimnisschutzes’, (2015) *Wirtschaft und Wettbewerb* 220–33.

⁴⁰³ OLG Düsseldorf, 22 August 2012, V-4 Kart 5 und 6/11 (OWi) — *Kaffee Röster*, (2012) *Wirtschaft und Wettbewerb* 962, 966–7.

⁴⁰⁴ § 406e(2) StPO establishes the interest balancing requirement. For a partial granting and partial rejection of an application under § 406e StPO, see OLG Düsseldorf in *Kaffee Röster*, n 403, 966–71, where the court granted the application with regard to redacted fining decisions (including the parts based on leniency statements, and including those decisions that had not yet become final) and an index of the evidence, but not with regard to business secrets, personal data, the leniency statements, or documents voluntarily submitted. The Court weighted the interest in the confidentiality of leniency statements and the interest in the protection of the leniency programme higher than the interest of the applicants in claiming damages. However, the Court allowed access to the fining decision despite recognising that it was predominantly based on information contained in the leniency programme (ibid, 968–969). The appeals against this decision by both parties (seeking more protection and more access to the file, respectively) was held to be inadmissible, BGH, 18 February 2014, KRB 12/13, because appeals against decisions on access to the file are only admissible to the extent that they may impair the rights of defence in the proceedings to which the file relates.

claimants if they manage to persuade the court seized with the damages action to request the file from the prosecutor or competition authority.⁴⁰⁵

Others may have a right to access information under the applicable Freedom of Information Acts.⁴⁰⁶ However, the federal IFG, which applies to the *Bundeskartellamt*, specifies that a right to access information is excluded where public knowledge of the information ‘may have a detrimental impact on [...] the exercise of the regulatory or supervisory functions of [...] competition authorities’.⁴⁰⁷

Even in the absence of a right to access under any of these provisions, the Federal Court of Justice has affirmed that an authority (such as a competition authority in the administrative procedure or sector-specific regulator) has a duty to exercise its discretion in deciding whether to grant access to the file (or parts thereof), provided the applicant has a legitimate interest in access to the information.⁴⁰⁸ The Court considered an interest in pursuing a damages claim to constitute such a legitimate interest.⁴⁰⁹ Interestingly, the Court did *not* apply the strict criteria of substantiation of the claim or the requirement of specification of the documents that it applies in the context of § 142 ZPO⁴¹⁰ to the right of having the authority exercise its discretion.⁴¹¹ It should be noted that the Court merely criticised that the administrative body had not exercised its discretion at all. The Court pointed out that the need for exercising discretion did not prevent the authority from ‘taking duly into account’ legitimate interests such as the protection of business secrets or voluntary submissions in leniency or commitment procedures.⁴¹² It is to be expected that in the future competition authorities will raise the possibility of discretionary access to the file, and quickly determine that the interest in the protection of ongoing investigations and the leniency and settlement programmes outweighs the private interest of the applicant.⁴¹³ It is much more difficult to challenge an administrative decision that exercises discretion but reaches an outcome that is perceived to be wrong than to challenge a decision that failed completely to exercise discretion.

⁴⁰⁵ Below text accompanying n 430.

⁴⁰⁶ See, in particular, the federal Freedom of Information Act, *Gesetz über den Zugang zu Informationen des Bundes*, of 5 September 2005, BGBl 2005 I 2722 (also called *Informationsfreiheitsgesetz, IFG*), amended by Art 2(6) of the Act of 7 August 2013, BGBl 2013 I 3154. Some, but not all, of the *Länder* have their own versions of Freedom of Information Acts.

⁴⁰⁷ § 3(1)(d) IFG.

⁴⁰⁸ BGH, 14 July 2015, KVR 55/14, (2015) *Wirtschaft und Wettbewerb* 1237–45 = WuW/E DE-R 4883 — *Trinkwasserpreise*, affirming OLG Frankfurt, 4 September 2014, 11 W 3/14 (Kart), (2015) *Wirtschaft und Wettbewerb* 171, 173–4 = WuW/E DE-R 4505, 4507–8 paras 35–38 — *Akteneinsichtsrecht*. The case concerned a potential private claimant who sought access to the file of a *Länder* competition authority after it had made commitments binding on a utility in an investigation of allegedly excessive water prices.

⁴⁰⁹ See BGH, n 408, paras 30, 31. The Court did not consider such access to the file unnecessary because of the possibility that the court seized with the private damages claim could request the file under § 273 of the German Civil Procedure Code (ZPO), see below n 430. The Court pointed out that a potential claimant would have to risk initiating an action, based on the mere hope that the court seized with the action would request the file, without knowing whether the content of the file was helpful or not.

⁴¹⁰ Above n 192.

⁴¹¹ BGH, n 408, para 32, 33, arguing that it was sufficient that the applicant’s claim was not one that was ‘a priori without merit’, and that the applicant ‘could’ have a claim if the allegations of excessive prices turned out to be justified, and that the applicant ‘usually will not know the content of the file and therefore will be unable to specify individual documents’. All true, but hardly different from the situation of §§ 142, 144 ZPO, in which German courts continue to apply these strict standards. It is unclear whether this could be an indication that at least in competition cases the Court is willing to relax the standards under §§ 142, 144 ZPO as well, or whether the access to the file issue is simply treated as a separate category based on different applicable rules.

⁴¹² BGH, n 408, para 23.

⁴¹³ The Court did see this possibility and clarified that these considerations do not allow a *general* denial of access to the file; instead, the exercise of discretion also has to consider partial access to the file (*ibid*, para 24).

In the United Kingdom, the Office of Fair Trading (OFT) has published guidance on when leniency information may be accessed, and the Competition and Markets Authority (CMA) has adopted this guidance by reference.⁴¹⁴ More generally, Part 9 of the Enterprise Act 2002 (EA 2002) defines the limits within which public authorities may disclose ‘specified information’ as defined in s238(1) EA 2002. Generally, specified information may not be disclosed unless one of the exceptions applies. Where disclosure of specified information is exceptionally permitted in principle, the factors in s244 EA 2002 have to be considered, namely the public interest, the confidentiality of commercial or private information, and the necessity to disclose information in the light of the purpose for which disclosure is allowed. However, these restrictions do not apply to the CAT.⁴¹⁵

The Freedom of Information Act 2000 (FOIA 2000)⁴¹⁶ is applicable to the CMA in principle, but — as is true for the FOIA in Germany and the Transparency Regulation — is of very limited usefulness for the acquisition of information that could be used in a damages action because of the absolute and qualified exemptions in the FOIA 2000.⁴¹⁷

B Exchange of Information Rules

There may also be rules that allow the Court seized with the damages action to acquire information or consult files from other courts or authorities. Depending on the applicable national civil procedure rules, parties in a damages action may be able to request that the court make use of these rules, and may be able to introduce the information acquired into evidence.⁴¹⁸

Under Article 15 of Regulation (EC) No 1/2003, national courts ‘may ask the Commission to transmit to them information in its possession’. The 2015 amendments to the Notice on Cooperation between the Commission and Courts extend the absolute and temporary restrictions of Articles 6 of the Damages Directive to the transfer of information from the Commission to national courts.⁴¹⁹

In the *National Grid* case, the Court initially did not order the French Areva and Alstom to disclose documents in their control because of the French blocking statute. To the extent these documents could not be obtained through disclosure from other parties,⁴²⁰ in particular with regard to the responses to the Commission’s Statement of Objections, Mr Justice Roth sought to obtain the documents from the Commission under Article 15 Regulation (EC) No 1/2003. The Commission indicated that it was willing to accede to this request, noting that issues of professional secrecy were sufficiently addressed by the

⁴¹⁴ See, eg, Office of Fair Trading, *Applications for Leniency and No-Action in Cartel Cases*, OFT1495 (July 2013) 66–75.

⁴¹⁵ See Brealey and Green, n 97, para 9.41.

⁴¹⁶ Freedom of Information Act 2000 ch 36, 30 November 2000, as amended.

⁴¹⁷ See Brealey and Green, n 97, paras 9.66–9.69.

⁴¹⁸ Most of these avenues were explored at one point or another by Mr Justice Roth in the *National Grid* case, which will serve to illustrate the provisions below: beside party disclosure orders, he explored in particular accessing evidence via the Taking of Evidence Regulation (EC) No 1206/2001 and a request under Article 15 of Regulation (EC) No 1/2003.

⁴¹⁹ Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC [2015] OJ C 256/5, replacing para 26 and inserting paras 26a, 26b.

⁴²⁰ Some documents concerning Areva and Alstom had been obtained by ABB and Siemens through access to the file in the course of their defence, and to that extent ABB and Siemens had to disclose them. Above n 400.

confidentiality order, that the request excluded leniency materials, that the Commission had already adopted the decision in the *Gas Insulated Switchgear* case, and that the documents could not be directly obtained from Areva and Alstom because of the French blocking statute.⁴²¹ Alstom sought and obtained an interim order from the General Court, suspending the transmission of the confidential version of the reply to the Statement of Objections until the Court had decided on the main action.⁴²² The High Court eventually decided that Alstom and Areva could not rely on the French blocking statute to resist disclosure after all, because a prosecution was considered so unlikely as to be purely hypothetical,⁴²³ and withdrew its request to the Commission for cooperation because the claimants in the English action could obtain disclosure directly from the parties; the Commission therefore withdrew its decision to transmit the documents to the High Court.⁴²⁴

Courts may make use Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters.⁴²⁵ The Damages Directive reaffirms this possibility in Article 5(1) *in fine* and recital 17.

In *National Grid*, the High Court sought to make use of the direct procedure, and when this failed, considered making use of the court-to-court procedure before deciding that disclosure should be made directly by the party despite the French blocking statute after all.⁴²⁶ The Court emphasised that the Taking of Evidence Regulation was meant to facilitate the taking of evidence in cross-border cases, not to preclude existing avenues such as disclosure orders under national law, and therefore the use of disclosure orders under national law were not subsidiary to making use of the Taking of Evidence Regulation.⁴²⁷

Article 12 of Regulation (EC) No 1/2003 allows the exchange of information between the Commission and national competition authorities, including confidential information. This potentially multiplies the possibilities for accessing the information by way of national access to the file or FOIA rules. However, Article 339 TFEU and Article 28 of Regulation (EC) No 1/2003 provide that information so exchanged shall not be disclosed to the extent it is covered

⁴²¹ See the description in *National Grid v ABB & ors* [2012] EWHC 869 (Ch) [11]–[14].

⁴²² Case T-164/12 R *Alstom v Commission* ECLI:EU:T:2012:637 (Order of the President of the General Court, 29 November 2012, noting that the Commission was free to adopt a new decision to transmit a *non-confidential* version to the High Court, *ibid* [44]). Areva lodged a separate appeal before the General Court, but discontinued proceedings when the Commission accepted that some leniency materials would have been disclosed. Case T-173/12 *Areva v Commission* ECLI:EU:T:2012:349 (Order of the President, 6 July 2012).

⁴²³ *National Grid v ABB & ors* [2013] EWHC 822 (Ch), [2013] UKCLR 177 [18]–[48] (discussing the low probability of prosecution); see also *The Secretary of State for Health and Others v Servier Laboratories Limited, Servier Research and Development Limited, Les Laboratoires Servier SAS, Servier SAS*, [2012] EWHC 2761 (Ch), 2012 WL 6933798 [64] (ordering Part 18 requests for further information to be answered despite the French blocking statute, because prosecution was unlikely); appeals against these two orders were dismissed, *Secretary of State for Health and others v Servier Laboratories Ltd and others, National Grid Electricity Transmission plc v ABB Ltd and others*, [2013] EWCA Civ 1234, [2014] 1 WLR 4383 (with a note that the Supreme Court refused permission to appeal).

⁴²⁴ See Case T-164/12 *Alstom v Commission* ECLI:EU:T:2014:1089.

⁴²⁵ [2001] OJ L174/1.

⁴²⁶ *National Grid v ABB & ors* [2013] EWHC 822 (Ch), [2013] UKCLR 177 [11]–[13] (describing the French court's rejection of the direct procedure, because the request had designated the defendant's solicitor to take the evidence), [49]–[57] (holding that the possibility of the court-to-court procedure did not displace the possibility of directly ordering disclosure), [18]–[48] (discussing the low probability of prosecution); appeals against these two orders were dismissed, n 423.

⁴²⁷ *National Grid v ABB* [2013] EWHC 822 (Ch), [2013] UKCLR 177 [49]–[57].

by the obligation professional secrecy.⁴²⁸ Information voluntarily submitted by a leniency applicant will usually not be exchanged without the leniency applicant's consent.⁴²⁹

Rules on the exchange of information between courts and authorities also exist on the national level. In Germany, civil courts may request documents or information from public authorities for the preparation of the trial.⁴³⁰ The Regional Court in Berlin, seised with a damages action in the *Elevator* cartel, requested, on the claimants' application, the public prosecutor's file concerning the criminal investigation against one of the individuals for bid rigging under § 273 ZPO.⁴³¹ This file included the confidential version of the European Commission's infringement decision and the leniency application. The public prosecutor transmitted the file, based on § 474 of the Criminal Procedure Code (StPO), under which files and information shall be transmitted to other prosecutors and courts, arguing that it would be for the receiving Regional Court to balance the interests of the parties before granting any access to the transmitted information.⁴³² The defendants in the civil actions sought to prevent transmission of the file, first by seeking a judicial decision by the Higher Regional Court,⁴³³ and ultimately by filing a constitutional complaint before the Federal Constitutional Court. The Constitutional Court considered it sufficient protection for the defendants that the requesting court would have to balance the interests before allowing any access to the information and that any decision could only be based on information to which both parties had access; accordingly, the Court dismissed the complaint.⁴³⁴

C Access to Evidence in the International Context

Where evidence outside the EU has to be collected, the Hague Convention may apply,⁴³⁵ much in the same way as the Taking of Evidence Regulation (EC) 1206/2001 applies within the EU. In the practically particularly important case that European claimants seek evidence in the United States,⁴³⁶ however, recourse to the Hague Convention may not be necessary or even possible. Just as *National Grid* considered it possible to rely on English disclosure before exhausting the possibilities under the Taking of Evidence Regulation,⁴³⁷ it has

⁴²⁸ See also Commission Notice on cooperation within the network of competition authorities [2004] OJ C101/43 ('Network Notice'), para 28; Commission Opinion in *Sainsbury's Supermarkets v Mastercard Inc*, n 23, points 18–23.

⁴²⁹ Commission, Network Notice, n 428, para 40, with exceptions in para 41.

⁴³⁰ § 273(2) no 2 ZPO.

⁴³¹ LG Berlin, 21 December 2012, 96 O 200/10 Kart.

⁴³² StA Düsseldorf, 13 June 2013, 130 Js 14/07 A. The exchange follows the so-called 'double door model', according to which both the requesting authority or court needs to be empowered to request (here: the civil court relied on § 273(2) no 2 ZPO) and the transmitting authority needs to be empowered to transmit (here: the prosecutor relied on § 474 StPO).

⁴³³ OLG Hamm, 26 November 2013 (and 29 January 2014), II-1 VAs 116/13 — 120/13 and 122/13. OLG Hamm, 26 November 2013, 1 VAs 116/13 – 120/13 and 122/13, WuW/E DE-R 4101 — *Einsicht in Strafakten*, with case note by A Yomere and J Kresken, 'Die Entscheidung des OLG Hamm zum Akteneinsichtsrecht von Zivilgerichten in Bonusanträge und vertrauliche Kommissionsentscheidungen', (2014) *Wirtschaft und Wettbewerb* 481–9.

⁴³⁴ BVerfG, 6 March 2014, 1 BvR 3541/13, (2014) WuW 609 = WuW/E DE-R 4213 — *Akteneinsicht durch Zivilgerichte* (extracts; full text at WUW0662405).

⁴³⁵ Above n 315. For a discussion of the Hague Convention see T Abdollahi, 'The Hague Convention: A Medium for International Discovery' (2015) 40 *North Carolina Journal of International Law* 771.

⁴³⁶ There is no need here to discuss the frequent problems that come up when US claimants seek far-reaching discovery abroad under the Hague Convention; it suffices to say here that most contracting states have made declarations under Article 23 of the Convention exempting them from executing letters of request for pre-trial discovery.

⁴³⁷ Above text accompanying nn 426, 427.

been held that recourse to the Hague Convention is unnecessary where, for example, the discovery rules of the FRCP apply; the Hague Convention is said to be a 'permissive supplement' to these rules.⁴³⁸ If possible, it may therefore be easier to proceed directly under the FRCP's discovery rules or 28 USC § 1782.

The US Supreme Court decision in *Intel v AMD*,⁴³⁹ has alerted European litigants to the route to accessing evidence located in the United States under 28 USC § 1782,⁴⁴⁰ which provides (in § 1782(a)):

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal [...]. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. [...] The order may prescribe the practice and procedure [...]. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

In *Intel v AMD*,⁴⁴¹ the US Supreme Court held that there was no reciprocity requirement. A district court may order discovery even where the same order could not be made under the foreign procedure. Europeans, in other words, can potentially use § 1782 to make discovery requests that would not be possible under the more restrictive disclosure regimes at home. Since 1964, the foreign proceedings do not yet have to be pending. This means that § 1782 opens a rare opportunity for Europeans to conduct discovery before proceedings have started, which may help them to substantiate their pleadings once proceedings start. Theoretically this could even be a way to get access to leniency statements. However, the district courts' exercise of discretion will often be influenced by amicus curiae interventions from the European Commission or governments of Member States.⁴⁴²

D Settlements with Other Cartelists

From a practical perspective, victims often make access to relevant information a condition in early settlements.⁴⁴³ This information then can be used in litigation against the remaining defendants. In the US, such cooperation by leniency applicants is famously incentivised by ACPERA. Despite a lack of such additional incentives in Europe, the first undertakings to settle may be glad to trade off giving access to information for a lower damages bill.

E Admissibility after the Damages Directive

⁴³⁸ *Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa*, 482 US 522, 533–40 (1987); *In re Automotive Refinishing Paint Antitrust Litigation* 358 F3d 288, 299–305 (3rd Cir 2004); *Schindler Elevator v Otis Elevator*, 657 F Supp2d 525, 528; *Yowie North America v Candy Treasure*, 2013 WL 6061945 (SD Cal 2013).

⁴³⁹ *Intel Corporation v Advanced Micro Devices Inc*, 542 US 241.

⁴⁴⁰ See the discussion and references in Jungermann, n 199; Abdollahi, n 435, 798–802.

⁴⁴¹ *Ibid.*

⁴⁴² See the discussion and references in Ashton and Henry, n 25, paras 4.061–4.070.

⁴⁴³ Makatsch and Mir, n 322, 63.

In contrast to the ostensible aim of strengthening damages actions, the overall effect of the Damages Directive may instead be to limit access to evidence. The discussion above highlighted various ways in which European claimants (or, less frequently, defendants) may have access to evidence even without relying on party disclosure. It has already been noted that in the United Kingdom, the existing disclosure rules are relatively far-reaching, and that the main effect of the Damages Directive will be to limit disclosure under Articles 6 and 7. In Germany, the party disclosure rules have been restrictive, and are broadened only marginally by Article 5 of the Directive. German courts have, however, begun to give potential or current claimants instruments to access relevant information through other means, in particular discretionary access to the file where the authority was or is investigating in an administrative procedure,⁴⁴⁴ access by the claimant through § 406e StPO in the fine or criminal procedure,⁴⁴⁵ and access to the files of other courts or authorities by the court seised with the damages action under § 273 ZPO (with § 474 StPO in cases of a criminal or fines procedure).⁴⁴⁶ It is true that in all these cases access was limited by the case-by-case interest balancing à la *Pfleiderer*, *Donau Chemie* and *National Grid*, but claimants had a chance of, and sometimes succeeded in, obtaining evidence. This favouring of access to evidence over disclosure rules has even a benefit for claimants: they allow evidence collection even before damages claim is initiated.⁴⁴⁷ Sensitive information can also be obtained from parties that settle private disputes early.⁴⁴⁸

In all these cases, it will now have to be assessed whether the information was ‘obtained by a natural or legal person solely through access to the file of a competition authority’.⁴⁴⁹ This will arguably lead to some arbitrary outcomes.

If, for example, a US court were to order a leniency applicant to disclose its leniency application under 28 USC § 1782, this leniency application would clearly not be obtained through ‘access to the file’ — the evidence remains admissible. Likewise, information obtained through voluntary disclosure by settling co-conspirators is certainly not obtained ‘solely through access to the file’, unless it is information this co-conspirator gleaned through access to the file.

In contrast, where access to a competition authority’s file is granted in Germany under §§ 406e, 475 StPO (in combination with §§ 81 ARC, 46 OWiG), § 72 ARC, § 29 VwVfG, or the discretionary access to the file outside § 29 VwVfG, this is very clearly obtained through ‘access to the file of a competition authority’, and any information falling under Article 6(6) of the Directive would be inadmissible under Article 7(1).

Where, on the other hand, the file accessed under §§ 406e, 475 StPO is one by the *public prosecutor*, in particular in cases investigated under the bid-

⁴⁴⁴ Above text to and following n 408.

⁴⁴⁵ Above text to and following n 402.

⁴⁴⁶ Above text to and following n 430.

⁴⁴⁷ See in contrast T De Meese, ‘Private Enforcement: Private Practitioner’s Perspective’ in F Wijckmans and F Tuytschaever (eds) *Horizontal Agreements and Cartels in EU Competition Law* (Oxford: Oxford University Press 2015) paras 8.68–8.69, noting the development on the EU level, where the Court appears more permissive when it comes to disclosure (*Pfleiderer*, *Donau Chemie*) compared to public access to documents (*EnBW*), as well as the disadvantage this has in terms of timing.

⁴⁴⁸ Above text to and following n 443.

⁴⁴⁹ Article 7(1) of the Damages Directive.

rigging offence, this is not access to the file ‘of a competition authority’. The same is true where a German court requests transmission of the file under § 273 ZPO, and is granted access to the prosecutor’s file under § 474 StPO — the information remains admissible. If the same court requests transmission of the file from the competition authority under § 273 ZPO, one could ask whether this information is obtained ‘by a legal or natural person’, but arguably the judge is a natural person, and the public entity employing the judge would be a legal person, so that *that* information would be inadmissible under Article 7(1) of the Directive.

The limited admissibility in turn could have an effect on the extent to which authorities and courts continue to allow access to the file in these cases: where the evidence acquired through access to the file could not be admitted in the damages action, the applicant’s ‘legitimate interest’ is at least much reduced.

Whenever the evidence is obtained solely through access to the file of a competition authority and falls in the categories in Article 6(6), it would now be deemed inadmissible under Article 7(1) — *if* this provision is considered compatible with primary law. To the extent that national laws do not provide for a ‘safety valve’ (such as the one required by *EnBW* and provided for leniency statements and settlement submissions in the Commission’s control by the Transparency Regulation) this exclusion in Article 7(1) is arguably incompatible with the case-by-case balancing requirement required by primary law as interpreted in *Pfleiderer*, *Donau Chemie* and *EnBW*. In contrast, the temporary restrictions under Article 7(2) for evidence that falls into one of the categories in Article 6(5) is arguably compatible with this case law, because it would be a rare case that waiting for proceedings to be closed would make pursuit of the right impossible or excessively difficult.

Even if the restrictions in Article 6(6) and Article 7(1) were to be considered entirely compatible with primary EU law, these other routes to access evidence will not become completely irrelevant for claimants.

First, as discussed above,⁴⁵⁰ a number of avenues remain open because they do not constitute ‘access to the file of a competition authority’.

Secondly, information obtained through any of these routes, even if deemed inadmissible under Article 7 in the damages action, still allows claimants to substantiate their pleadings and identify relevant pieces or categories of evidence with specificity. As noted earlier, the specification and circumscription requirements in many current regimes, and possibly even under the Directive (depending on the interpretation of the specification requirement of Article 5),⁴⁵¹ often make it impossible for claimants to make effective use of disclosure rules. Knowledge obtained through other sources, such as 28 USC § 1782 or access to the file rules can remedy this problem.⁴⁵²

⁴⁵⁰ Text following n 449.

⁴⁵¹ See above and Makatsch and Mir, n 322, 63 (‘With regard to art.5(1), it is questionable how the damages claim for the disclosure request can be justified sufficiently plausibly without already knowing the very information that the disclosure is supposed to provide.’)

⁴⁵² Arguably with the exception of knowledge about leniency statements and settlement submissions obtained by accessing the Commission file, because Article 16a of the amended Regulation (EC) 773/2004 prohibits use of the ‘information’, not only documents, for any purpose other than the exercise of the rights of defence. It may, however, be difficult to ‘unknow’ some of the information acquired through access to the file.

VI What Does the Future of Disclosure in the EU Look Like?

How, then, will disclosure, and access to evidence more broadly, develop in EU Member States after the implementation of the Directive? The answer, as always when you ask a lawyer, is: it depends.

First, it depends on the reference point. In a disclosure-friendly jurisdiction like England, the Directive's disclosure-enabling rules of Article 5 do not bring any advantages to requesting parties beyond the status quo. In these jurisdictions, the effect of the Directive is clearly to limit disclosure and the availability of evidence due to the constraints of Articles 6 and 7.⁴⁵³ In contrast, in a traditionally disclosure-averse jurisdiction like Germany and most other continental European legal systems, the disclosure-enabling rules of Article 5 may seem to be more important at first glance. For example, Article 5 now empowers continental jurisdictions like Germany for the first time to order disclosure of relevant *categories* of evidence, not only individually specified documents,⁴⁵⁴ and the definition of leniency statements that explicitly excludes pre-existing information may induce courts to treat the annexes to leniency applications as less sacrosanct than previously.

Second, it depends on how the Member State legislatures and courts implement, interpret and apply the 'jurisdictional' preconditions before disclosure may be ordered, in particular the proportionality criterion. This chapter made the argument that jurisdictions with very different disclosure regimes, such as the United States, England, and Germany, already operate under a proportionality condition. It is not the law in the books, but the *application* of this criterion in practice that leads to completely divergent outcomes. Indeed, there is evidence that *the very same rule* on disclosure under the IBA guidelines is interpreted differently by arbitrators from different jurisdictions:

'One point that users of the IBA guidelines note is that the rules can be applied very differently depending upon the constitution of the tribunal. Tribunals comprised of members of the English judiciary and Bar or from North America tend to be fairly receptive to requests for additional documents. However, their European counterparts are very resistant to such requests, requiring very good evidence that the documents requested are material to the issues.'⁴⁵⁵

The introduction of an abstract proportionality test without more, such as the one contained in Article 5(3) of the Directive, does not necessitate any change in the law or practice in either the liberal or the conservative disclosure regimes. Without more, the abstract test is therefore very unlikely to further the aim of a level playing field.⁴⁵⁶ If Member States take the position that they will only make

⁴⁵³ Above n 23.

⁴⁵⁴ This expansion from pieces to categories of evidence is considered '[t]he main transformation' by De Smijter, n 9, para 8.135.

⁴⁵⁵ Jackson, *Preliminary Report Vol II*, n 100, 396.

⁴⁵⁶ Similarly R Gamble, 'The Parliament, the Commission and the Court — Three Institutions and Their Effect on Private Enforcement of Anti-Competitive Conduct in the EU' (2015) 36 *European Competition Law Review* 501, 512 ('it is uncertain how national courts will apply the proportionality principle in the context of disclosure requests'); A Howard, 'Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive' (2015) 6 *Journal of Competition Law & Practice* 256, 259, concluding:

'In some Member States, judges will be culturally reluctant to permit disclosure and may pay close scrutiny to the proportionality of requests. In others, the balance may go the other way if insufficient regard is paid to the position of

the changes that are strictly required by the Directive, then it is probable that not much will change in continental Europe with regard to disclosure and access to evidence, except for the additional limitations that Articles 6 and 7 introduce. There are some indications that Member States such as the Netherlands⁴⁵⁷ or Germany⁴⁵⁸ will take such a minimum approach to disclosure issues, despite calls for gold plating.⁴⁵⁹

Third, even where similar standards for the preliminary preconditions for disclosure are applied, the question remains how Member States courts will exercise their discretion whether or not to grant disclosure requests. The intransigence of courts when confronted with attempts by legislatures in the past to change their approach to disclosure makes it unlikely that disclosure-averse regimes like Germany and most other European jurisdictions will spontaneously turn into bastions of liberal disclosure.

Nevertheless, there are signs that the disclosure-friendly decisions in *Pfleiderer*, *Donau Chemie* and (to a much more limited extent) *EnBW* had some effect on German courts' willingness to be more permissive, at least when it comes to access to file issues. It remains to be seen whether the Damages Directive will have a similar effect on disclosure in damages actions. It seems, however, that these tentative developments towards allowing potential or actual claimants more access to evidence will be nipped in the bud by the restrictive provisions of Article 6 and 7 of the Directive.

This leads to the fourth point. The net impact of the Directive depends on whether the restrictive provisions of Article 6 and 7 will be considered compatible with EU primary law as interpreted by the CJEU in *Pfleiderer* and *Donau Chemie*, and how broadly these provisions will be interpreted. If they are considered compatible and interpreted broadly, then much of any disclosure-enhancing effects Article 5 might have will likely be outweighed by the restrictions that Articles 6 and 7 impose on requesting parties. Not only do these provisions prevent party disclosure; this would at most have a negligible negative impact compared to the status quo in most continental European jurisdictions. Much more significantly, they also prevent evidence acquired in other ways from being introduced into evidence — in particular, evidence procured through access to the file of a competition authority, which currently seem a more promising functional equivalent to disclosure for continental European claimants.

third parties that are implicated but not indicted by the decision. Cue forum shopping and further preliminary references to the CJEU.'

⁴⁵⁷ See the Draft Bill with explanatory memorandum (*Concept wetsvoorstel Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht* (8 October 2015) https://www.internetconsultatie.nl/implementatiewet_richtlijn_privaaterechtelijke_handhaving_mededingingsrecht) introducing Articles 844–50 into the Dutch Code of Civil Procedure (DCCP), which nearly exclusively implement the limitations to the disclosure rule in Article 843a DCCP derived from Articles 6 and 7 of the Directive.

⁴⁵⁸ While the Ministry for Economic Affairs has not yet published a draft, presentations by an official of that Ministry seem to indicate as much. A Jungbluth 'Akteneinsichtsrecht v Kronzeugenschutz', 44. Brüsseler Informationstagung Neuere Entwicklungen des europäischen Wettbewerbsrechts, Brussels (12 November 2015); idem 'Umsetzung der Kartellschadensersatz-Richtlinie in das deutsche Recht', Presentation at the Forum Unternehmensrecht der Institute für Kartellrecht und für Unternehmensrecht Düsseldorf (9 March 2015).

⁴⁵⁹ Eg. A Weitbrecht, 'Die Umsetzung der EU-Schadensersatzrichtlinie: Eine Chance für den Rechtsstandort Deutschland' (2015) *Wirtschaft und Wettbewerb* 959, 962–4 (proposing a unitary procedure for disclosure and access to the file that preplaces the patchwork of the various rules discussed above, which should be available even before proceedings have started); similarly Tilman Makatsch (Deutsche Bahn), 'Umsetzung der Kartellschadensersatzrichtlinie in das deutsche Recht', Institut für Kartellrecht, Forum Unternehmensrecht (9 March 2015). See also the proposal for a more extensive section on access to evidence in Spanish law available at <http://tinyurl.com/zu8tpu9>.

Fifth, it depends on how closely the European institutions are going to monitor how Member States implement the Directive's obligations in practice, in particular in the light of the principle of effectiveness. Article 5 of the Directive in combination with the principle of effectiveness as applied in *Laboratoires Boiron* could impose an obligation on Member State courts to order disclosure. The obligation from *Laboratoires Boiron* to order disclosure now applies in all cases where claimants' rights to damages for harm caused by an infringement of competition law would otherwise become impossible or excessively difficult to enforce, because Article 5 now gives *all* courts in EU Member States this discretionary power, provided only disclosure is proportionate. This greater scope for application of the *Boiron* principle could become an avenue for EU institutions to enforce the principle more widely. It is not clear that this is going to be an easy task, however. First, not many national courts appear to have considered the already existing *Boiron* obligation up to now, despite the prevalence of discretionary powers to order the production of documents under existing national laws. Second, even after Article 5 of the Directive is implemented, the decision whether or not to order disclosure in any given case will be very fact-specific, and some of the factors to be considered continue to depend on national law. For example, proportionality of disclosure in any particular case depends on how easy national law makes it for the requesting party to acquire the information another way; to what extent national law relieves the requesting party from proving certain factors by establishing rebuttable or irrefutable presumptions; and how national law allocates the costs for disclosure to the parties. Third, the Commission rarely initiates actions against Member States, so that it depends largely on how willing national courts are to make preliminary references to the CJEU, or to request the Commission's opinion under Article 15(3) of Regulation (EC) No 1/2003.

Accordingly there are reasons to be skeptical whether the Damages Directive will make much difference to the existing practice of disclosure in the EU. And yet — *Pfleiderer* and *Donau Chemie* have shown that just two decisions following preliminary references can have a large impact. These judgments have influenced not only disclosure decisions such as *National Grid* in England, but also access to evidence decisions in continental Europe. It is possible that the very fact of the Damages Directive will draw the attention of national legislators and courts to disclosure issues. Judgments following preliminary references seeking answers to the interpretation of the Damages Directive could similarly provide an impetus for continental European courts to reconsider their restrictive approach to disclosure.

In regimes with weak disclosure rules, the trend towards more permissive access to evidence rules beside disclosure may also lead to a gradual development toward more effective party and non-party disclosure. Even if Article 7 should foreclose the introduction into evidence of much of this material obtained from other sources, knowledge of the information contained in this material may allow claimants to make substantiated pleadings and more specific requests for party or non-party disclosure. Combined with the application of the principle of effectiveness from *Laboratoires Boiron*, there is still hope for the future of disclosure in damages actions in the EU.

What is a hope for claimants, however, is a threat to potential defendants, innocent and guilty alike. Common law jurisdictions have had a long time to find

an equilibrium between disclosure rules and the protection of privileged or confidential information. The same is not true to the same extent for continental European jurisdictions. Where there is very little danger of disclosure, there is no need for robust defence or containment mechanisms. One challenge for the legislators and courts in such jurisdictions will be to develop not only increased disclosure rights, but also the corresponding defence mechanisms.

The ostensible aim of having an ‘effective disclosure regime’ that ‘avoids the US American excesses’ was unachievable from the outset. *Either* the disclosure regime will be extensive and effective for claimants, in which case costs for disclosure will likely approach the sums typical in the US and England; *or* it will avoid these costs, by being similarly restricted to very targeted requests, in which case there is a danger that it will remain similarly ineffective as the current continental rules. It is impossible to get the best of both worlds. The best one can hope for is that Europe edges towards a healthy compromise.

How all this will play out in practice is, at this stage, largely crystal-gazing. It is said that ‘prediction is very difficult, especially about the future’.⁴⁶⁰ It is, however, very unlikely that all national legislators and courts will spontaneously interpret the many vague and undefined terms in the Directive identically, handle the open-ended interest-balancing test that determines the proportionality of the disclosure (Article 5(3)) in the same way, and exercise their seemingly unfettered discretion to grant or deny proportionate disclosure requests without regard to their previous practice under national procedural law. It is therefore likely that with regard to *facilitating* access to evidence the Directive in itself will not achieve much of the level playing field that it seeks to attain.⁴⁶¹ Politically it was arguably impossible to achieve more in the Directive, and perhaps the national legislators and courts will respond more enthusiastically to their new powers than my calculated pessimism suggests.⁴⁶² It seems likely, however, that any harmonising effects would have to come from the CJEU’s jurisprudence that could transform the merely enabling character of the Directive’s rules into a system of mandatory disclosure by using the principle of effectiveness as a fulcrum.

⁴⁶⁰ The only thing that is even more difficult is to attribute this quotation to the right person. Contenders for variations on the sentiment are Niels Bohr, Yogi Berra, Sam Goldwyn, Mark Twain, Robert Storm Petersen, and Piet Hein. See ‘Books and Arts: The Perils of Prediction — The Black Swan: The Impact of the Highly Improbably by Nassim Nicholas Taleb is reviewed’, (2007) 383 *The Economist* Issue 8531 (2 June 2007) 96, and the letters to the editor this book review induced: http://www.economist.com/blogs/theinbox/2007/07/the_perils_of_prediction_june.

⁴⁶¹ Recitals 7–9.

⁴⁶² Others have much greater hopes: S Grassani, ‘The EU Directive for Antitrust Actions for Damages and its Side-Effects on Civil Procedure in the European Union’, *CPI Antitrust Chronicle* January 2015(1), concluding that ‘[i]t is [...] easy to predict that the Directive will have a dramatic impact on civil proceedings throughout Europe, making discovery a common feature of civil litigation, whether or not related to antitrust litigation.’