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## Implementation of the EU Damages Directive into Member State law

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# Disclosure of documents that lie in the control of the parties

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## ABSTRACT

*Article 5 of the Damages Directive requires Member States to enable courts to order disclosure of evidence under certain qualifying conditions, while protecting the rights of parties and third parties, in particular confidential information. This is an area in which common law jurisdictions and civil law jurisdictions tend to differ substantially. The contributions discuss how the Member States have implemented the provisions in the Damages Directive on disclosure, and to what extent the Damages Directive will result in a harmonisation of the practice in the courts in the Member States.*

*En application de l'article 5 de la Directive 2014/104/UE, les États membres veillent à ce que les juridictions nationales puissent ordonner la production de certains éléments de preuves ou de catégories pertinentes de preuves dans certaines conditions tout en protégeant les droits des parties et des tiers, en particulier des informations confidentielles. Il s'agit d'un domaine dans lequel les États de common law et les États de droit continental adoptent des solutions assez différentes. Les contributions font état de la manière dont les dispositions de la directive ont été transposées dans 5 États membres. Elles s'interrogent également sur le point de savoir s'il peut en résulter une harmonisation de la pratique devant les tribunaux des États membres.*

## I. Introduction\*

1. Commentaries on access to evidence in competition cases generally start by stating that antitrust cases are “fact intensive,” and information relevant to the infringement and its effects on the market will often be distributed asymmetrically, with the infringer usually being in an advantaged position.<sup>1, 2</sup>

2. Legal systems can address this disadvantage in several ways. They can presume the fact in favour of the injured party, either by reversing the burden of proof by establishing rebuttable or irrefutable presumptions, or they can leave the burden of proof formally with the disadvantaged party but require the party in possession of the information to bear a burden of production (e.g., evidential presumptions in the common law, or *abgestufte Darlegungs- und Beweislast* in German law). Or, and this is the topic with which we are concerned here, they can establish an obligation on the duty in possession of the information to disclose it to the other party.

3. Such obligations to disclose can be established as substantive or procedural obligations and are known to a greater or lesser extent in all legal systems.<sup>3</sup> However, the preparatory work for the Damages Directive showed that in particular in the EU's civil law jurisdictions, claimants had difficulties getting access to the information they needed to substantiate their claims. In Europe, a party does not have a right to demand disclosure; it is for the court to order it. Traditionally, in civil law jurisdictions the court could only order disclosure if either the requested party had referred to the piece of evidence or the requesting party had a substantive claim to it.

\* This introduction is largely based on, and reproduces some sections of, F. Wagner-von Papp, *Access to Evidence and Leniency Materials* (February 18, 2016), <https://ssrn.com/abstract=2733973>.

1 Recitals 14 and 15 of the Damages Directive 2014/104/EU; 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”) para. 65–66; A. Bruns, *Private Enforcement of Competition Law: Evidence*, in J. Basedow, J. P. Terhechte and L. Tichý (eds.), *Private Enforcement of Competition Law* (Baden-Baden: Nomos 2011) 127, 130; G. Bauer and K. Kitzberger, *Production of Evidence in Central and Eastern Europe*, in J. Basedow, J. P. Terhechte and L. Tichý (eds.), *op. cit.*, 153, 154; J. A. Samner, *Informationsgewinnung und Schutz von Unternehmensgeheimnissen in der privaten Kartellrechtsdurchsetzung* (Baden-Baden: Nomos 2014) 150, 184–96.

2 I assume in the following 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 – *ORW* para. 72.

3 For a comparative overview, see in particular B. Rodger, *Institutions and Mechanisms to Facilitate Private Enforcement*, in B. Rodger (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU* (Aalphen aan den Rijn: Kluwer Law International 2014) § 2.04, pp 43–59; see also F. Wagner-von Papp, *Access to Evidence and Leniency Materials* (February 18, 2016), <https://ssrn.com/abstract=2733973>, Part III; and of course the contributions below.

While many civil law jurisdictions have relaxed this position to allow the court to order disclosure in a wider range of situations,<sup>4</sup> it remains in the court's discretion whether disclosure is ordered, and in most civil law jurisdictions courts continue to apply a very strict test of proportionality. Most civil law jurisdictions traditionally require a relatively precise specification of an item of evidence before a court will order its disclosure, and many jurisdictions do not allow for ordering the disclosure of entire categories of evidence.

4. A starting point in the drafting of the Directive was the model of discovery under the Federal Rules of Civil Procedure (FRCP) in the United States. At the same time, however, the “excesses” of the US system were to be avoided.<sup>5</sup> These “excesses” result in very high costs of discovery, and can lead to “discovery abuse” and “discovery blackmail.”<sup>6</sup> Since the 1980s, the US has attempted to rein in these excesses in various reforms of the FRCP. Economic analyses usually identify as the main reason for the excessively high costs the “American cost rule”, according to which it is usually the requested party that has to bear the costs, so that these costs are externalities for the requesting party, thus providing an incentive for the requesting party to leave no stone unturned.<sup>7</sup> But, as the English experience shows, even under the European cost rules disclosure may become a costly exercise if all relevant information is to be disclosed (possibly because of cross-party agency costs, partly because of information asymmetries between lawyers and their clients).<sup>8</sup>

5. The resulting compromise is contained in Article 5 of the Damages Directive. Article 5 requires Member States to enable courts to order disclosure under certain conditions. Even if all the conditions of Article 5 are fulfilled—the reasoned justification, relevance of the evidence, the requested party being in control of the evidence, sufficient specification of pieces of evidence and circumscription of categories of evidence, and proportionality—Article 5 of the Directive still does not

compel the Member States to require the court to order disclosure; Member States must merely *enable* courts to order disclosure.<sup>9</sup> In other words, under the Directive there is no express requirement that the claimant must have a *right* to disclosure, although Recital 15 of the Directive still considers it “*appropriate to ensure that claimants are afforded the right [sic] to obtain the disclosure of evidence relevant to their claim.*”

6. As I had already pointed out in relation to the corresponding provision in the 2009 Kroes draft directive,<sup>10</sup> such a provision merely enabling courts to order disclosure is unlikely to change the traditional position in the Member States drastically, because most Member States *already enable* courts to order disclosure. Indeed, for the most part Member States do not have to modify their laws to comply with Article 5 of the Directive. Even though the law in action in Member States such as Germany, France, or Italy differs quite substantially from the law in the United Kingdom, the national provisions in these Member States already complied (fully or largely) with the minimum standard provided for in Article 5 of the Directive. In other words, the “harmonisation” sought by the Directive will not come about solely through the implementation of the provisions of the Directive. One aspect that may require action by some Member States is that they need to clarify that a court must be able not only to disclose specific pieces of evidence, but also entire categories of evidence. To be sure, this is not an insignificant detail; but whether this change will have a practical effect depends on the willingness of national judges to make use of this power.

7. To the extent experience is a guide, there is not much hope that the cultural predisposition of judges will be swayed substantially by modifications to the rules where these rules do not *require* change, but merely seek to “nudge” judges into changing their attitude toward disclosure. In the United States and in the UK, the traditionally broad and costly disclosure has led to numerous reforms of the disclosure rules to suggest more active control and containment of disclosure by the court in order to ensure the proportionality of disclosure requests (various reforms of the FRCP since the 1980s in the US; the Woolf and Jackson Reforms in the UK).<sup>11</sup> It is widely acknowledged that courts in the US and the UK have by and large stuck with their engrained preference toward granting broad disclosure. Conversely, as noted above, civil law jurisdictions have introduced more discretion for judges to order disclosure; but again, courts have by and large not deviated to a significant extent from their traditionally conservative approach to disclosure.

4 E.g., the French legislator reformed the Code of Civil Procedure in the 1970s to introduce Article 11, 138–42 nouveau code de procédure civile (npc); Germany introduced §§ 142, 144 Zivilprozessordnung (ZPO, Civil Procedure Code) in 2001 (Gesetz zur Reform des Zivilprozesses of 27 July 2001 (2001) Bundesgesetzblatt Part I, no 40, 1887).

5 Commission Staff Working Paper, No. 1, para. 93–97.

6 *Bell Atlantic v Twombly*, 550 US 544, 558–559 (2007) (stating that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases [...]”); F.H. Easterbrook, Discovery as Abuse, *Boston University Law Review* 69 (1989) 635–648; see also, from an economics perspective, R.D. Cooter & D.L. Rubinfeld, Reforming the New Discovery Rules, *Georgetown Law Journal* 84 (1995) 61–89; R.D. Cooter & T. Ulen, *Law & Economics*, 6th International edn (Boston: Pearson 2012) 398.

7 B.H. Kobayashi, Law’s Information Revolution as Procedural Reform: Predictive Search as a Solution to the in Terrorem Effect of Externalized Discovery Costs, *University of Illinois Law Review* 2014, 1473, 1476–1477 (with references in fn 15); R.D. Cooter & D.L. Rubinfeld, An Economic Model of Legal Discovery, *Journal of Legal Studies* 23 (1994), 435, 452–454, 455–459; F.H. Easterbrook, Discovery as Abuse, *Boston University Law Review* 69 (1989) 635, 645–648; A.B. Spencer, Rationalizing Cost Allocation in Civil Discovery (January 29, 2015), *Virginia Public Law and Legal Theory Research Paper No 6*, <http://ssrn.com/abstract=2557613>.

8 For more detail see F. Wagner-von Papp, Access to Evidence and Leniency Materials (February 18, 2016), <https://ssrn.com/abstract=2733973>, Part II, and B.H. Kobayashi, Law’s Information Revolution as Procedural Reform: Predictive Search as a Solution to the in Terrorem Effect of Externalized Discovery Costs, *University of Illinois Law Review* 2014, 1473.

9 The wording of the proposal for the Directive suggested otherwise.

10 F. Wagner-von Papp, Der Richtlinienentwurf zu kartellrechtlichen Schadensersatzklagen, *Europäisches Wirtschafts- und Steuerrecht* 2009, 445, 452.

11 For more detail see F. Wagner-von Papp, Access to Evidence and Leniency Materials (February 18, 2016), <https://ssrn.com/abstract=2733973>, Part III.

8. This is not to say that the Damages Directive is incapable of leading to substantial changes with regard to disclosure *inter partes*. First, Member States may take the Damages Directive as an opportunity to go beyond the minimum requirements of the Directive and to gold-plate the implementation provisions (see Article 5(8) of the Directive); indeed, Germany has taken this path.<sup>12</sup> Second, the Court of Justice in *Laboratoires Boiron* held that under the principle of effectiveness “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.”<sup>13</sup> The Damages Directive now ensures that all courts have, as a “procedure[] available to it,” the ability to order disclosure. Even though the obligation under *Laboratoires Boiron* should have been observed even in the absence of such a European provision on disclosure where national provisions previously existed, it has now become more likely that parties will refer to the principle of effectiveness in order to transform the mere power to order disclosure in the hand of the judges to an obligation to order disclosure. This combination of Article 5 of the Directive with the *Laboratoires Boiron* judgment could well lead to a change not only in the law in the books but also the law in action.

9. The interpretation of Article 5 of the Directive raises numerous issues. Is a requested party “in the control” of evidence if the evidence is with a parent or a subsidiary—does the concept of the single economic unit apply? Is the party in control if the evidence is located on its employees’ devices used under a “bring-your-own device” policy? How is the proportionality test to be applied? Many of the practically important questions—such as cost-allocation rules, and to what extent disclosure obligations exist outside the main action for damages—are left to the national implementation.

10. Florian Bien, as the organiser of the event in Würzburg, has assembled an outstanding panel of contributors to report on the national implementation of the Directive. Given the likely departure of the UK from the EU, he understandably did not use the same diligence in picking a reporter for that jurisdiction.

F. W.-v. P.

## II. France

11. There is no procedure of discovery in French law, but the French judge has already the power to order a party to disclose relevant evidence, not only during the litigation<sup>14</sup> but also in a pre-litigation situation<sup>15</sup>. These rules have already been applied in antitrust cases. The most famous cases did not concern cartel cases, but presumed abuses of dominant positions following commitment decisions. The main obstacle was a penal provision<sup>16</sup>, which prevents a party to use a document obtained via proceedings before the French Competition Authority. However, the French Civil Supreme Court<sup>17</sup> accepted production of such documents if it is necessary to preserve the rights of defence<sup>18</sup>.

12. These rather broad powers of the judge in a continental legal system explain that the new French provisions are rather limited. There are included in the Chapter III of the new Title VIII on damages action, which is divided in three sections. The first one on general provisions contains a single article—the new Article L. 483-1 Commercial Code—shorter than Article 5 of the Directive. The second section deals with the specific issue of the protection of business secrets<sup>19</sup>. The third section is devoted to the access of evidence in the file of the Competition Authority<sup>20</sup>. The Decree, of course, follows the same divisions, but it also contains the rules on penalties<sup>21</sup> to be in line with the requirements of Article 8 of the Directive. However, the maximal amount of the fine is rather limited: €10,000. Furthermore, the penal prohibition of using information obtained in previous competition proceedings does not apply anymore in damages action<sup>22</sup>.

This specific part of the reform is applicable to all actions introduced after December 26, 2014.

Two series of remarks can be made: first, on the general system of disclosure, second, on the protection of business secrets, which is the main innovation of the French implementation.

<sup>12</sup> See J. Bernhard’s contribution on Germany below.

<sup>13</sup> Judgment of the Court (Second Chamber) of 7 September 2006 in Case 526/04 (*Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d’allocations familiales (Urssaf) de Lyon*), ECLI:EU:C:2006:528, para. 57.

<sup>14</sup> Art. 138 Civil Procedure Code.

<sup>15</sup> Art. 145 Civil Procedure Code.

<sup>16</sup> Art. L. 463-6 Commercial Code.

<sup>17</sup> Cass. Com., 19 January 2010, *Semavem v. JVC France*, *Concurrences* No. 2-2010, obs. C. L., S. N.

<sup>18</sup> For a general presentation of the former French system, L. Idot and F. Zivy, L’accès au dossier des autorités de concurrence dans le cadre des actions privées : État des lieux deux ans après l’arrêt Pfeleiderer, *Concurrences*, No. 3-2013, pp. 34-53.

<sup>19</sup> Art. L. 482-2 and L. 483-3 Commercial Code.

<sup>20</sup> See *infra*.

<sup>21</sup> Art. R. 483-14 Commercial Code; Art. R. 775-15 Administrative Justice Code.

<sup>22</sup> Art. L. 463-6, para. 2, Commercial Code.



## 1. The general system of disclosure\*

13. The first provision contains a referral to the ordinary rules of procedure, either civil or administrative depending on the judge who has jurisdiction<sup>23</sup>. Accordingly, it can be said that France has opted for procedural disclosure rules. These ordinary procedural rules will apply on most issues since the new special rules introduced in the Commercial Code are rather limited. They concern both the request for disclosure and the powers of the judge.

### 1.1 Request for disclosure

14. As far as the admissibility of the request is concerned, the French requirement seems to be lighter than Directive's Article 5.1: "(...) *the claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of a claim for damages*". In French law, the claimant is only requested to invoke a plausible harm following an anticompetitive practice.

15. To our knowledge, there was no specific debate on some Directive's elements such as "*relevance*" or "*control*", which are useful to delineate the object of the request. Many discussions occurred rather on the implementation of Directive's Article 5.2 and on the meaning of "*relevant categories of evidence*". In practice, the judges may already order to produce categories of evidence, which are rather broadly defined. Though, a new provision has been inserted in the Decree<sup>24</sup>, which could produce some restrictive effects since it is specified that the categories of evidence shall be identified in a precise way through common characteristics (such as nature, object, content of pieces...).

### 1.2 Powers of the judge

16. The general principle of proportionality expressed in Directive's Article 5.3 is transposed in the general provision of Article L. 483-1, paragraph 2. It is only said that the judge shall consider the legitimate interests of both parties and third parties taking into consideration four elements which can be balanced: effectiveness of damages action versus efficiency of public enforcement, usefulness of pieces of evidence versus protection of confidential information.

It is maybe the main point of the French reform. So far, no protection of confidential information was organised before ordinary courts. It is no more the case.

\* Art. L. 483-1, Art. R. 483-1 Commercial Code.

<sup>23</sup> Art. L. 483-1, para. 1, *in fine*, Commercial Code.

<sup>24</sup> Art. R. 483-1 Commercial Code.

\*\* Art. L. 483-2, L. 483-3; R. 483-2 to R. 483-10 Commercial Code; Art. R. 775-4 to 775-11 Administrative Justice Code.

## 2. The protection of business secrets before ordinary courts\*\*

17. Directive's Article 5.4 raised some issues in France due to the lack of protection of confidential information. So far, unlike the proceedings before the Competition Authority, everything is public (hearing, final decision) in proceedings before ordinary courts. Only the Paris Commercial Court began to organise a specific protection, but in a full informal way. In the meantime, the Directive 2016/943/EU of the 8th of June 2016 on the protection of business information was adopted. Article 9 of this text requires a preservation of the confidentiality of trade secrets in the course of legal proceedings. Therefore, the Ministry of Justice considered that it was possible to anticipate the full implementation of this directive in the new provisions.

18. According to the new system, the judge keeps the power to order the production of pieces containing business secrets, but a protection is now laid down. It applies both to parties and to third parties. The definition of what is a business secret is not given, but the French judges will probably follow the EU competition case law.

If the holder of the piece of evidence requires a protection for this piece, the procedure is very close to that organised for the protection of business secrets before the Competition Authority:

- The holder of the piece shall prepare a non-confidential version;
- The judge, who has always a full access to the piece, decides, whether or not, it shall be produced taking into consideration first the content of the piece (does it, or not, contain any business secret?). If it is deemed to be a business secret, the judge has to balance this fact with the usefulness of the document and the rights of defence of the other parties;
- If it is a business secret, to which access (fully or only partially) shall be given, the judge organises the rules for submitting such document (data room; *huis clos*...; limited circle);
- The order of production can be immediately reviewed either by the president of the Paris Court of Appeals (or Administrative Court of Appeals), then, if necessary, an appeal in cassation may be introduced before the Supreme Court.

A non-confidential version of the final decision is established if necessary.

All persons who have access to business secrets are bound by an obligation of confidentiality (Art. L. 483-3 Com. C.). However, the penal prohibition of Article L. 463-6 Commercial Code is no more applicable.

19. These new provisions cannot be considered as the general transposition of Directive 2016/943/EU's Article 9, but the antitrust field will probably be used as a reference in the next texts of transposition.

L. I.

# III. Germany

20. Prior to the adoption of the EU Antitrust Damages Directive, the German legislature had taken a clear stance: “*In accordance with the principle of subsidiarity, there is no need for any fundamental decision, such as the EU-wide introduction of discovery proceedings into continental European civil procedure.*”<sup>25</sup> In view of this, it is all the more surprising that the German legislator then, in Section 33g of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) set forth a separate right to the disclosure of information and surrender of documents for the parties to antitrust damages actions that goes even above and beyond the transposition of the Antitrust Damages Directive. Pursuant to Section 89c (5) GWB, the claim to surrender and disclosure *inter partes* takes precedence over the inspection of files by the antitrust authorities. Thus, the new legislation first and foremost shifts the investigation efforts from the German Federal Cartel Authority (Bundeskartellamt) to the parties to civil law actions and the courts involved in such actions.

## 1. Entitlement to claims

21. Any party that can credibly demonstrate that they have a claim to antitrust damages has a right to the disclosure and surrender of information during and prior to an action for antitrust damages pursuant to Section 33g(1), (10) in conjunction with Section 89b(5) GWB. Following the case law of the German Federal Court in the *ORWT*<sup>26</sup> case and the ECJ in the *Courage*<sup>27</sup> case, this applies equally to those directly and indirectly affected by a cartel. Interpreting the provision in line with EU law, the requirement to provide credible evidence pursuant to Article 5(1), sentence 1, of the Antitrust Damages Directive 2014/104/EU requires merely a reasoned justification of the damage caused by the cartel.<sup>28</sup> Pursuant to Section 294(1) German Code of Civil Procedure (ZPO), an affidavit, for instance concerning the purchase of a product from a company involved in the cartel during the relevant period, is sufficient. According to the principles of prima facie evidence applied by German courts in this context, the purchase of a product covered by the cartel on the relevant product market from a cartel member during the cartel period leads to a rebuttable presumption that the cartel

caused harm to the purchaser.<sup>29</sup> The principles governing prima facie evidence merely require a typical sequence of events, i.e., there must be circumstances which, in line with general life experience, indicate a certain cause or a certain sequence of events as decisive for the occurrence of a specific outcome.<sup>30</sup> In the context of this reduced standard of proof, it is likely that in particular the assertion of antitrust damages based on low-value damages will become more straightforward. So far, it was nearly impossible to enforce such claims, since there typically remains nearly no evidence in the form of till receipts or similar documents for mass everyday transactions involving foodstuffs or consumer goods, even after only a short period. If such means of evidence may be replaced by an affidavit, the reduced evidentiary requirements are likely to encourage at least the bundling of claims with respect to low-value damages by means of assignment to a claimant pursuant to Section 398 of the German Civil Code (Bürgerliches Gesetzbuch, BGB).

22. Conversely, the alleged injuring party also has a right to disclosure and surrender of information, but this right exists only from such time as an action is pending. The reduced standard of proof does not apply in this context. If the injuring party lodges an action for negative declaratory judgment, it is not permitted to deny in this context its involvement in the breach of antitrust law. Otherwise, it would lose its claim to disclosure and surrender of information pursuant to Section 33g(2), sentence 2, GWB.

## 2. Defendant

23. As well as the cartelists, third parties that are in possession of evidence can also be the defendants in a claim to the disclosure and surrender of information. Which facts the claimant must furnish in order to demonstrate that the defendant is “*in possession of evidence*” is not clear from the explanatory memorandum of the German legislator. However, due to the claimant’s lack of opportunity to inspect information as to ownership, the requirements cannot be too stringent here either. The plausible demonstration by the claimant that a typical sequence of events leads to the conclusion that, based on experience, an individual or a legal entity is in possession of certain evidence is likely to be sufficient.<sup>31</sup>

25 Statement of the Federal Ministry for the Economy and Technology, the Federal Ministry of Justice, the Federal Ministry of Food and Agriculture and the Federal Cartel Office on the European Commission’s White Paper, Damages Actions for Breach of the EC Antitrust Rules, of 14 July 2008, p. 7.

26 BGH, judgment of 28 June 2011, File Ref. KZR 75/10 = *Neue Juristische Wochenschrift* 2012, 928 – ORWI.

27 ECJ, judgment of 20 September 2001, Case C-453/99, ECR 2001, I-6297 – *Courage*.

28 A. Rosenfeld and P. Brandt, *Wirtschaft und Wettbewerb*, 2017, 247, 249; A. Bach and C. Wolf, *Neue Zeitschrift für Kartellrecht*, 2017, 285, 288.

29 Higher Regional Court (OLG) Karlsruhe, judgment of 9 November 2016, File Ref. 6 U 204/15 Kart (2) = *Neue Zeitschrift für Kartellrecht*, 2016, 595, 597 – *Grauzement*; OLG Thüringen, judgment of 22 February 2017, File Ref. 2 U 583/15 Kart, margin note 68 and 69 = *Wirtschaft und Wettbewerb* 2017, 203 – *Gleisoberbaumaterialien*.

30 BGH, judgment of 5 February 1987, File Ref. I ZR 210/84 = *Neue Juristische Wochenschrift* 1987, 2876, 2877.

31 To overcome difficulties in the provision of evidence, the Federal Court assumes, for instance, also in the case of the wrongful use of a debit card using the original card that, based on general experience, the cardholder was at the time of the withdrawal himself in possession of the card or had kept it together with the PIN such that a third party could make a withdrawal (BGH, judgment of 29 November 2011, File Ref. XI ZR 370/10 = *Neue Juristische Wochenschrift* 2012, 1277, 1278).

### 3. Identification of evidence

24. Pursuant to Section 33g(1) GWB, the disclosure of the evidence must be “*necessary*” for the assertion of the antitrust damages claim. The criterion of necessity is stricter than the wording of “*relevance*” set forth in Article 5(1) Antitrust Damages Directive. The term is therefore likely to be interpreted in line with the Directive such that the suitability of evidence to substantiate part of the claim to antitrust damages will already be sufficient.

25. In addition, the evidence must be described as precisely as possible, based on the available facts and using reasonable effort. Pursuant to an interpretation in line with the Directive and in light of Article 5(2) of the Antitrust Damages Directive, the description of categories of evidence must suffice for a suitably precise description. Which degree of precision is deemed reasonable is measured first and foremost based on whether the entitled claimant is aware of the existence and content of the evidence or ought to have been aware thereof according to Section 122(2) BGB. If this is the case, a precise description should also be requested. If the potential victims of a cartel are unaware of the existence of or the contents of evidence due to information asymmetry, it is likely to be sufficient for them to comprehensively describe the evidence in terms of categories, for example, with reference to “*all internal e-mails concerning contact with the companies A, B and C that participated in the cartel,*” or to “*all invoices concerning supplies of the product X during the period Y to the company Z.*”<sup>32</sup> What is relevant is solely that it is unequivocally clear for the party required to disclose information precisely which information is required of it.<sup>33</sup>

### 4. Proportionality of the request for disclosure or surrender of information

26. Pursuant to Section 33g(3), (10) GWB, the claim to disclosure and surrender of information can be successfully asserted only if the disclosure of the evidence is proportional. According to the general principles of German civil procedural law, the burden of proof and provision of evidence of disproportionality is borne by the defendant, since it relates to a negative fact that is beneficial to it.<sup>34</sup> Pursuant to Section 33g(3), sentence 2 No. 1 to 6, GWB, when reviewing the proportionality, particular consideration is to be given to the scope of the claim, the costs associated with the disclosure, the relevance of the requested evidence for the antitrust damages proceedings, whether the reference to an item of

evidence is obsolete based on the court being bound by a decision of the cartel authorities, whether the effectiveness of public enforcement of antitrust law would be limited and whether business or trade secrets are affected. In this context, the criterion of the costs of disclosure is to be interpreted restrictively, since the defendant party pursuant to Section 33g(7) GWB is in any case entitled to reimbursement of the costs incurred by it. Ultimately, in addition to the review of necessity pursuant to Section 33g(1) GWB, the courts will be unable to avoid carrying out a proportionality review for each item of evidence pursuant to Section 33g(3) GWB.

### 5. Restriction of the claim to disclosure or surrender of information to court inspection of leniency applications and settlement submissions

27. Section 33g(4), (10) GWB excludes the disclosure of leniency applications and settlement submissions to potential claimants, insofar as the information contained therein is not available in any case irrespective of any cartel authority proceedings. However, if the disclosure between the parties of the leniency application or the settlement submissions is excluded, the claimant can, pursuant to Section 33g(4), sentence 3, GWB, demand the disclosure of the information to the court competent for the antitrust damages claim, without itself having a right to inspection. Based on the principle of party disposition in German civil procedural law, a claimant normally continues to be required to provide evidence and bears the burden of proof with respect to the facts contained in a leniency application and settlement submissions. If, however, it cites the leniency application and settlement submissions as evidence, a court that received these statements directly from the alleged infringer will certainly also include this information in its consideration of the evidence.

### 6. General exclusion of the claim to disclosure or surrender of information with regard to documents provided specifically for cartel proceedings

28. Prior to the conclusion of proceedings by the cartel authorities against all those involved, the disclosure of evidence and the respective surrender of information is generally excluded in Section 33g(5), (10) GWB in so far as it concerns information provided specifically for the cartel proceedings outside the leniency application, notices by the cartel authorities to the parties to the proceedings or withdrawn settlement submissions. After conclusion of the cartel proceedings, i.e., in case of follow-on damages claims, disclosure of those pieces of evidence may, however, be claimed by the parties.

32 R. Podszun and S. Kreifels, *Gesellschafts- und Wirtschaftsrecht*, 2017, 67, 68; B. Krefe, *Wettbewerb in Recht und Praxis*, 2016, 567, 573; A. Bach and C. Wolf, *Neue Zeitschrift für Kartellrecht*, 2017, 285, 289.

33 Draft bill of 1 July 2016, p. 62.

34 U. Foerste, in: H. J. Musielak and W. Voit, *ZPO*, 14th edition 2017, margin note 35.

29. Furthermore, pursuant to Section 33g(6) GWB, the disclosure of evidence held by parties entitled to refuse testimony, such as, in particular, lawyers, is generally excluded. It is unclear whether this exclusion criterion also applies to correspondence relating to the filing of or defence against antitrust damages actions. An interpretation in light of Section 383(1) No. 6 of the German Code of Civil Procedure (Zivilprozessordnung, ZPO) supports the view that all communications with lawyers are excluded from the disclosure obligation.<sup>35</sup> However, in particular in the case of an intentional transfer of evidence to the lawyer, this extensive exclusion appears incompatible with the European law principle of effectiveness.

## 7. Legal consequences

30. If the defendant intentionally or grossly negligently discloses incorrect or incomplete evidence or provides incomplete information, he is liable to pay compensation to the claimant pursuant to Section 33g(8) GWB. In contrast, under German law, the defendant is not liable to payment of a fine. In view of the fact that damage caused by refusal to disclose or surrender information is likely to be very difficult to prove, it is by all means conceivable that a large proportion of the claims to disclosure and provision of information will prove fruitless due to the defendant's refusal to provide information.

31. By contrast, if the defendant discloses or surrenders evidence or information, he is entitled to claim reimbursement of the expenses incurred in the disclosure pursuant to Section 33g(7) GWB. This claim to the reimbursement of expenses applies irrespective of the provisions on the allocation of costs set forth in Section 91 ZPO, pursuant to which the unsuccessful party must bear the costs of the action. It is questionable whether the German legislator thought through the consequences of this provision. It could result in the odd outcome that a court allows an action for the disclosure and provision of information in full and orders the respondent to pay the costs, but the respondent subsequently has a claim to reimbursement of expenses in an amount far higher than the claimant's original claim. However, if the court were to allow the respondent's claim to reimbursement, the claimant could subsequently assert the amount of the claim to reimbursement as another item in the action for antitrust damages, since his obligation to reimburse expenses would not have existed, were it not for the respondent's infringement of antitrust law.

J. B.

<sup>35</sup> Official Bundestag Publication 18/102007, p. 63; A. Bach and C. Wolf, *Neue Zeitschrift für Kartellrecht*, 2017, 285, 290.

## IV. Italy

32. Article 5 of the EU Directive 2014/104 has been fully implemented by the national legislature. Notwithstanding the enthusiasm of some scholars or, on the opposite side, the fears of others, it is well accepted that, like the corresponding provision in the Directive,<sup>36</sup> Article 3 of the Legislative Decree No. 3/17 has nothing to do with the US style pre-trial discovery or even with UK disclosure techniques. Although the Directive allowed national law to preserve or introduce higher standards of disclosure, Article 3 of the Decree simply translates the Directive almost word for word. In addition, even some of the Recitals have been transposed into national law. The outcome is a special and to a certain extent more effective form of the “*esibizione di documenti*” in Article 210 of the Code of Civil Procedure (c.p.c.). Meaningfully, the Decree translates “disclosure” with the Italian “*esibizione*” and the Explanatory Report accompanying the scheme of Legislative Decree (from now on, “the Report”) insists on the need to coordinate the rationale behind the Directive and the common requirements of Article 210 c.p.c. In the following overview, I will point out the major changes to the status quo.

### 1. Disclosure of relevant categories of evidence

33. Pursuant to Article 210 c.p.c.,<sup>37</sup> disclosure can be granted, on application by the parties, if it is “necessary” (i.e., documents, the disclosure thereof is sought, are potentially useful to prove specific and previously asserted facts relevant to the case) and “indispensable” (both in the sense that the applicant cannot get the document by different means and, according to the most stringent case law, also in the sense that the facts, to which the document refers, cannot be proved by different means). Moreover, according to the traditional strict construction of Articles 210 c.p.c. and 94 *regio decreto* No. 1368/1941 (provisions for the implementation of the c.p.c.) only disclosure of precisely identified documents can be granted, provided that the applicant describes the content thereof and offers evidence, when necessary, that the documents exist and lie in the control of the addressee of the order. Finally, disclosure is precluded if it forces the addressee to breach professional secrets or if it causes “*grave danno*” (serious harm) to the addressee. Comparing Article 3 of the Decree and the aforementioned provisions, differences and similarities can be found. In antitrust damages actions, there will be no need that documents of which disclosure is sought are the only means to prove relevant facts; besides, parties will not be requested to prove the existence and describe *ex*

<sup>36</sup> Osti, *Concorrenza e mercato*, 2014, 293; Vincre, *Rivista diritto processuale*, 4-5/2015, 1160; Giussani, *AIDA*, 1/2015, 25. References to the White Book and related debates in: Negri, *Giurisdizione e amministrazione nella tutela della concorrenza. II. La tutela della concorrenza innanzi al giudice civile*, Torino, 2012, 331.

<sup>37</sup> See: Volpino, in *Commentario al c.p.c.*, edited by Chiarloni, Torino, 2014, 185; Dittrich, *Rivista diritto processuale*, 3/2016, 539.



ante the precise content of documents.<sup>38</sup> Indeed, Article 3, fully complying with the Directive, allows disclosure of entire “categories of evidence.” This is undeniably the most appreciable change to the pre-existing rules. The phrase “category of evidence” was previously unknown to Italian procedural law. Article 3 tries to define this concept by making use of the exact words of Recital 16 of the Directive. The result is that Article 3.2 offers only a vague guidance and, inescapably, it leaves room to a substantial degree of judicial discretion in drafting the order.<sup>39</sup> The judge will perform the task by applying the crucial test of proportionality (see *infra*) and by taking care to circumscribe as narrowly as possible the scope of the order in the light of all the circumstances of the case. Above all, the judge can only order the disclosure of “relevant” categories of proofs.

34. It is worth noticing that “relevance” of evidence the disclosure of which is sought under Article 3 plainly corresponds to “necessity” in Article 210 c.p.c. As a consequence, it is well accepted that documents to be disclosed under Article 3 have to bear reference to previously asserted facts. The requirement is precisely meant to prevent “fishing expeditions” in the strictest sense, that is to say, requests for disclosure of documents in order to search for new and previously unknown facts, potentially relevant to the case.<sup>40</sup>

35. Disclosure of entire “categories of evidence” is, of course, a welcome development if compared to current practice, but in my opinion, probably not a revolution. It is true that courts have up to now adopted an overly cautious approach to Article 210 c.p.c. There have been, though, from time to time, episodes in which courts took a more generous stance towards the requirement of the precise identification of relevant documents. Article 3.2 should, therefore, encourage those more generous attitudes.<sup>41</sup>

36. It appears that courts will follow this somewhat more liberal attitude towards disclosure. It is noteworthy to remind that the Corte di cassazione has already shown a remarkably proactive attitude in the field of antitrust private enforcement, by fostering a broad interpretation of the provisions relating to the gathering of evidence

and the burden of proof.<sup>42</sup> The Italian Supreme Court has thus clearly shown itself to be willing and ready to take seriously the new rules on evidence gathering and the Directive’s goal of boosting antitrust private enforcement.

## 2. Plausibility of the claim

37. The party seeking disclosure has to lodge a reasoned request adducing facts and evidence reasonably available to the opposing party or to non-party and sufficient to support the plausibility of the claim (“*fatti e prove ragionevolmente disponibili dalla controparte o dal terzo, sufficienti a sostenere la plausibilità della domanda*”). This is a requirement unknown to Article 210 c.p.c. To some extent, it recalls the similar requirement laid down by Article 6 of the Directive 2004/48/CE and the transposition thereof in Article 121 Legislative Decree No. 30/2005.<sup>43</sup> It has been, therefore, observed that, also with regard to antitrust claims, the threshold of plausibility of the action is the *semi-plena probatio* of the relevant facts.<sup>44</sup> Such a threshold can be easily met in follow-on actions, where at least the existence of the infringement is certain; with regard to stand-alone actions, though, it is far more difficult to establish a *prima facie* case. It is, therefore, perhaps preferable to take the view that the judge shall reject the request for disclosure only when the claim or the defence is manifestly unfounded.<sup>45</sup> At any rate, the claim cannot be said to be “plausible” and the request for disclosure shall be dismissed if the initial description of the particulars of the claim is exceedingly generic. This, of course, leads one to wonder when an antitrust claim, in stand-alone actions, is sufficiently detailed. As already mentioned, Article 3 confirms the usual requirement that documents or categories of documents to be collected through disclosure orders are actually useful to prove facts already asserted by the parties. It follows from this that the plaintiff should be already able to describe the essential features of the infringement in accordance with the fact-pleading standard. It remains nevertheless open to debate if and to what extent the provision allows to slightly relax the current requirements of initial fact-pleading so that previously unknown details of infringements or damages can be detected through disclosure orders. Indeed, Article 3 does not address this crucial topic. The Directive itself is not entirely clear, though Recital 14 hints to such a possibility. Describing the structural “information asymmetry” in competition cases, Recital 14 reads: “(...) *strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the*

38 Caiazza, *Italian Antitrust Review*, 2/2017, 108. Commenting on the Directive: Giussani, 254; De Santis, 1503.

39 See: Villa, *Corriere giuridico*, 4/2017, 444.

40 Giussani, 255; Finocchiaro, *Diritto industriale*, 3/2016, 237; Caiazza, 108.

41 As a consequence, it can be reasonably expected that it will be now possible to obtain disclosure of all the invoices relating to specified business relations, issued in a certain period of time by company X, or the correspondence entertained in a defined time span between company X and a certain category of customers (Vincere, 1160; Haasbeeck, in *L'applicazione del diritto della concorrenza in Italia e in Europa*, Benacchio-Carpagnano (ed.), 2015, Trento, 77). To the contrary, an order to disclose all the addressee’s accounting books and records is presumably still not admissible, outside special provisions such as Art. 2711.1 c.c.

42 Corte di cassazione, civ., 4.6.2015, No. 1156, basing on the rationale behind the Directive, at the time not yet implemented; Corte d’appello, Milano, 7.1.2016 No. 9. Cass. No. 1156/2015 also supported in the reasoning, albeit incidentally, the applicability of the Directive to different remedies, such as nullity. Unfortunately, Art. 3 only mentions damages actions based on European and/or national competition law, including the so-called consumers “class action” under Art. 140 *bis* Legislative Decree No. 20672005.

43 Muscolo, *Italian Antitrust Review*, 2/2015, 57.

44 Muscolo, *ibidem*.

45 Giussani, 254.

*effective exercise of the right to compensation guaranteed by the TFEU.*” Scholars commenting on the Directive suggested that Article 5 should be construed in the light of Recital 14, allowing courts to be less demanding as to the initial fact-pleading standard.<sup>46</sup> It remains quite uncertain whether courts will follow these indications.

### 3. Proportionality test

**38.** Article 3.3 entrusts the judge with the task of limiting the scope of disclosure to what is proportionate to the decision to be adopted. To that purpose, the judge takes into account: the strength of the claim or the defence, the scope and costs of the disclosure (especially as to non-parties), and finally the need to protect confidential information. This is apparently a new requirement, though it is true that civil courts have always acted as “gatekeepers” of disclosure. Unfortunately, Article 3.3 just echoes the wording of the Directive and therefore does not help to overcome perplexities already raised by the latter. Doubts have arisen as to the issue of costs mainly. Pursuant to Article 210 c.p.c., the party making the request has to pay in advance all the costs of complying with the order of disclosure, though the order is not conditional upon payment. The final allocation of costs follows the “loser pays” rule and amounts paid in advance by the winner party are subject to restitution. Being so, it is difficult to understand how the issue of costs can interfere with the proportionality of the disclosure sought.<sup>47</sup> According to Article 3.3, disclosure of confidential documents is not excluded: the judge has the power to limit the scope of the order and give practical directions aimed at reconciling access to proof and protection of confidential data. This kind of practical directions is certainly not unprecedented,<sup>48</sup> though Article 3 states even more clearly that access to proof shall in principle prevail on the right of confidentiality. Besides, Article 3 for the first time provides a non-exhaustive list of judicial orders to protect confidentiality. The list echoes Recital 18, adding the judicial power to impose a “duty of secrecy.” Most of these measures are already well known in the Italian court practice, though mainly in patent infringement litigation.<sup>49</sup> With reference to legal privilege, Article 3.6 confirms the “confidentiality” of communications between lawyers and their clients as currently provided for by national law. As a consequence, only communications between external lawyers and their clients are excluded from disclosure. Not surprisingly, hopes for the extension of the privilege to in-house counsels have been disappointed.<sup>50</sup>

<sup>46</sup> De Cristofaro, *Int'l Lis*, 3–4/2015, 123; *Id.*, *AIDA*, 1/2015, 108, basing also on the aforementioned Supreme Court’s ruling; De Santis, 1503. On divergences and convergences concerning pleading standards between civil and common law, see: Dalla Bontà, *Civil Procedure Review*, Vol. 1, No. 3: 75–94, 2010. On the interplay between evidence gathering and information gathering: Negri, 340; Vincre, 1170.

<sup>47</sup> Giussani, 255; Vincre, 116. Cf.: Finocchiaro, 237.

<sup>48</sup> See Art. 121.3 Lgs. Decree No. 30/2005, Art. 210.2 and 212 c.p.c.; Dittrich, 596.

<sup>49</sup> For references and some critical assessments, see: Vincre, 1162.

<sup>50</sup> Falce, *Diritto industriale*, 6/2016, 511

### 4. Penalties

**39.** I will conclude by drawing attention to one of the most important changes in national disclosure rules. Up to now, parties’ disobedience to disclosure orders simply allowed the judge to draw very weak evidential inference (Art. 116 c.p.c.). As for non-parties’ disobedience, the law was completely silent. As a consequence and following the traditional opinion, there was no remedy at all in case of refusal to comply with the judicial order. This situation has undergone intense criticism for a long time now, unfortunately without succeeding in prompting national legislature to take action. At least with respect to competition damages actions, Article 6 supplies national courts with a wide armoury of penalties, which are fully suitable to make disclosure orders more effective. This development has come as a welcome surprise. According to Article 6, both parties and non-parties who refuse to comply with disclosure orders are now subject to heavy financial fines.<sup>51</sup> It is for the judge to determine the amount of fines within the minimum and maximum limits set out by the law (€15,000–150,000). The amount of fines aligns with that of the fines that the ICA can adopt pursuant to Article 14.5 DPR 287/90 (€25,000–100,000). Notwithstanding the financial level is considerably high, there is the risk that the addressee finds it more profitable to pay and refuse to disclose. Therefore, parties are subject to an additional penalty: the judge can draw adverse evidential inferences from the refusal or failure to comply, meaning that the judge may deem the relevant facts to be proven. When the addressee of the disclosure order is a party to the proceedings, fines and adverse evidential inferences can be both applied at the same time. The unexpected improvements concerning penalties, combined with the already mentioned proactive attitude of the Corte di cassazione, suggests a moderate optimism on the effectiveness of disclosure orders in competition damages actions, at least with reference to follow-on cases.

M. N.

<sup>51</sup> Pursuant to Art. 6.5 fines are issued also to the representatives of companies; presumably this means that the penalties should apply to the representatives on joint and several basis with the represented party (Caiazza, 111).

## V. Netherlands

40. The central provision for disclosure of documents in general—not only for those in the hands of the parties—is Article 843a Code of Civil Procedure, the so-called “exhibition obligation.” This provision was already part of our law before the implementation of the Directive. It is, as such, not restricted to matters of competition law. It is already applied widely. Under Article 843a Code of Civil Procedure, a party may demand inspection or copy at its cost of certain documents pertaining to a legal relationship to which he is a party. He must, however, demonstrate a legitimate interest in taking copies or inspection. He may demand this from the party that has the documents in its possession. This may, therefore, be a third party, in other words, a party that is not involved in the dispute. The demand may be made in proceedings that are already pending, but also in separate proceedings, for example in summary proceedings (*kort geding*).

41. The requirement of a legitimate interest means that just being interested is not sufficient. The petition must concern documents the inspection of which the petitioner has a direct and concrete interest in. The petitioner must present sufficient facts and circumstances that demonstrate this direct and concrete interest. The documents do not need to be decisive for the outcome of the case, but they must be relevant as evidence for the petitioner’s legal position.

42. These requirements should cover the requirement of Article 5, paragraph 1, of the Directive of “a *reasonable justification*,” containing “*reasonably available facts*” and “*evidence sufficient to support the plausibility of its claim for damages*.” The Directive introduced a presumption that a cartel causes harm.<sup>52</sup> So, arguably, no legitimate interest can exist as far as it concerns the existence of damage. Therefore, “*plausibility of claim for damages*” must mean something different, for example documents relevant to causation or the calculation or estimation of damages.

43. The limitation of the petition to certain documents requires the petitioner to identify the documents in his petition. The documents must at least be described in such a fashion that it is sufficiently clear what the petitioner is after and that the court may assess whether he has a legitimate interest. This does not require an exact description of the documents; for example: “*all invoices relating to the sales of product X in the period of the infringement*” will usually be sufficient. This requirement to identify the documents prevents fishing expeditions. “Documents” in the meaning of Article 843a Code of Civil Procedure has a broad meaning, and includes electronic data.

44. These requirements of Article 843a Code of Civil Procedure mirror more or less the restrictions of Article 5, paragraph 2, Directive that the disclosure needs to be limited to “*specified items*” or “*relevant categories of documents circumscribed as precisely and narrowly as possible*.”

<sup>52</sup> Article 17, para. 2, Directive, implemented as article 6:1931 Civil Code.

45. The legal relation to which the documents must pertain includes a wrongful act, which in its turn captures a claim for damages caused by an infringement of competition law. The petitioner must be a party to that relationship, but it is not required that the petitioner be a party to the document or the legal relationship that is captured in the document. A petitioner may, for example, require exhibition of a sales agreement between the infringer and a third party if that is relevant for his claim for damages based on wrongful act (an infringement of competition law).

46. The court will, if necessary determine the fashion in which copies or inspection of the documents must be given.<sup>53</sup>

47. Article 843a, paragraph 3, Code of Civil Procedure provides that no exhibition may be required from anyone who is held to confidentiality due to his profession, if he has possession of the documents only in and because of his professional capacity. This aims to protect rights of privilege of lawyers, but also notaries (and probably less relevant for damages claims), medical doctors and the clergy.

48. The fourth paragraph of Article 843a Code of Civil Procedure makes an exception for “exhibition” if there are weighty reasons or if proper adjudication can reasonably be assumed to be ascertained without provision of the documents.

49. Article 845 Code of Civil Procedure makes an exception to this rule, or rather a restriction. Pursuant to Article 845 Code of Civil Procedure exhibition may only be refused in case of weighty reasons. So, even if it were clear that proper adjudication is also guaranteed without exhibition of the documents, they must still be provided if the requirements of Article 843a Code of Civil Procedure are otherwise met. Apparently wanting to err on the side of caution, just as the Directive, the Explanatory Memorandum makes clear that the wish to prevent damages claims is not a weighty interest.<sup>54</sup> The Netherlands did not implement with so many words the requirement of Article 5, paragraph 3, Directive that the disclosure must be “*proportionate*.” The tests in that regard—in particular (a) the extent to which a claim or defence is supported by available evidence and justify a request for disclosure; and (b) scope and cost—will need to take place in the context of the legitimate interest test.

50. The protection of confidential information, which is part of the proportionality test under Article 5 of the Directive, will,<sup>55</sup> under Dutch law, need to be captured by the weighty reasons test.

<sup>53</sup> Art. 843a, para. 2, Code of Civil Procedure.

<sup>54</sup> Explanatory Memorandum, p. 23, and Art. 5, para. 5, Directive.

<sup>55</sup> Cf. Art. 5, para. 3, sub c, Directive.

51. The defendant to the petition or the party that has possession of the documents in question will need to make plausible that weighty reasons exist. Confidentiality will not quickly be accepted as a weighty reason. The interest that the truth is brought to light will most of the time override this interest. This is so, because the Dutch courts have other ways to protect confidential information. In their determination of the way in which exhibition must be given, they may, for example, appoint a third party that is under an obligation of confidentiality in order to look at the documents first and select what is really relevant.<sup>56</sup> The court may impose obligations of confidentiality on the parties to the proceedings.<sup>57</sup> The court may set a penalty on non-adherence to certain conditions for disclosure.<sup>58</sup>

52. The claim or petition for exhibition must be filed against the party that controls the documents. This ensures that this party will have the opportunity to be heard.<sup>59</sup>

53. Article 13, paragraph 2, Directive requires that disclosure be possible from the claim or from third parties of information that is relevant to proof pass-on. This particular provision was not implemented separately in the Implementation Act. Article 843a Code of Civil Procedure already provides for this possibility. It has indeed already been applied for that purpose.<sup>60</sup>

54. It is worth noting that a claim on the basis of Article 843a Code of Civil Procedure may be supported with the possibility of an attachment, if the petitioner can demonstrate a risk that the documents will be lost otherwise.<sup>61</sup> Such an attachment can be made prior to a claim or petition for exhibition, but the petitioner may, in that case, only inspect the documents that were attached if the court allows exhibition on that claim or petition. Pending the decision on the claim or petition, the documents will be stored with an independent third party.

55. Although they are relevant to claims or petitions for disclosure from the parties also, for systematic reasons, I will discuss Articles 846 (that excludes access to leniency documents) and 847 (other information in relation to an investigation of the competition authorities) in the next topic (“Disclosure of evidence included in the file of a competition authority”).

F. K.

56 Explanatory Memorandum, p. 8.

57 Article 29 Code of Civil Procedure.

58 Article 611 ff Code of Civil Procedure.

59 Art. 5, para. 7, Directive.

60 District Court The Hague, 21 September 2016, ECLI:NL:RBDHA:2016:11305 (*Shell / CDC III*) (I acted for one of the parties).

61 Cf. Dutch Supreme Court (*Hoge Raad*), 13 September 2013, ECLI:NL:HR:2013:BZ9958, NJ 2014/455.

## VI. United Kingdom

### 1. Introduction\*

56. A disclaimer: With a few isolated remarks on Scots law and Northern Irish provisions, I will concentrate on English and Welsh law. This is not due to a lack of respect to Scots law (indeed, for me as a civilian-trained lawyer the mixed legal system that is Scots law has many attractive features) or to Northern Ireland, but for want of familiarity with these jurisdictions.

57. As many commentators had indicated before the national implementation, Article 5 of the Damages Directive did not require any extension of the already broad disclosure rules in England and Wales; on the contrary, they needed to be restricted in relation to the black and grey lists contained in Articles 6 and 7 of the Directive.<sup>62</sup>

58. Accordingly, in order to implement the rules on disclosure in the Damages Directive, the 2017 Regulations<sup>63</sup> merely refer to the relevant disclosure rules (para. 27 of the new Schedule 8A to the Competition Act 1998), introduce the restrictions made necessary by the grey and black lists (para. 28 to 30), and empower the courts in Northern Ireland to order disclosure from third parties (para. 31). English and Welsh courts had already been empowered to order disclosure of third parties in the Woolf Reforms.<sup>64</sup>

59. The following paragraphs will therefore not contain anything new in terms of the implementation of the Damages Directive, but will outline the system of *inter partes* disclosure in England and Wales, first in the Civil Procedure Rules (for actions in the High Court) and then in the Competition Appeals Tribunal (CAT) Rules 2015, and will focus on issues that have arisen under these rules and which may also arise under the provisions of the Directive.

\* This contribution is largely based on, and reproduces some sections of, F. Wagner-von Papp, *Access to Evidence and Leniency Materials* (February 18, 2016), <https://ssrn.com/abstract=2733973>.

62 For England and Wales see, e.g., F. Wagner-von Papp, *Implementation of the Damages Directive in England & Wales, On-Topic Implementation of EU Directive 2014/104/UE, Concurrences* No. 2-2015, reprinted in *Concurrences* 2017 English Edition, 23, para. 9 to 17. In Scotland, the corresponding provisions are to be found in the Administration of Justice (Scotland) Act 1972 (inspection of documents, etc.), 1972 c.59 (as amended).

63 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, Statutory Instrument 2017 No. 385.

64 See Civil Procedure Rules (CPR) 31.17. English law before the Woolf reforms did not allow for disclosure requests addressed to others than the parties to an action. Information from third parties could only be obtained under witness summons, which were only available under more restrictive conditions. This was the difference that had caused friction between the US and the UK, for example, in the *Westinghouse* case. *Rio Tinto v. Westinghouse* [1978] All ER 434, 440–1.



## 2. CPR

60. For proceedings in the High Court in England and Wales, the Civil Procedure Rules (CPR) provide in Part 31 for disclosure.

61. “Standard disclosure” under CPR 31.6 now provides for disclosure 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.”<sup>65</sup>

62. The court may, however, still order disclosure of documents that satisfy the broader *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.<sup>66</sup> Under the menu option, 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.<sup>67</sup> The revised CPR rule 31.5(7) now incorporates this menu of possible disclosure orders.<sup>68</sup>

63. Disclosure usually takes place after fact pleading in the damages action.<sup>69</sup> One question has been how specific the facts have to be pleaded in competition cases before disclosure can be ordered. Article 5 of the Damages Directive requires that the reasoned justification contain “reasonably available facts and evidence sufficient to support the plausibility of its claim.” This raises the question how the court should proceed if no facts that would be sufficient to support the plausibility of the claim are reasonably available to the claimant. English courts have been relatively generous to claimants, at least in cartel cases: “*In a case involving an allegation*

*that a secret cartel has operated (...) 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.”*<sup>70</sup> The court in *Nokia* concluded that “the balance is to be struck by allowing a measure of generosity in favour of a claimant.”<sup>71</sup> However, this generosity is not unbounded. In *Hutchinson 3G Ltd v. O2 (UK)*,<sup>72</sup> the court refused disclosure in a pre-action disclosure setting.<sup>73</sup>

64. With regard to the question if a parent has “control” over evidence that is located at a subsidiary, English courts have 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.<sup>74</sup> The mere possibility to obtain the consent of the subsidiary was held to be insufficient to constitute control. The starting point 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.<sup>75</sup> The CAT Rules 2015 define control in the same way.<sup>76</sup> *Lonrho v. Shell* continues to inform the test 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.”<sup>77</sup> 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

65 CPR 31.6.

66 CPR Rule 31.5(7) (in the post Jackson review version). For the *Peruvian Guano* test see *Compagnie Financière du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55, 63, interpreting the test under the Rules of the Supreme Court (RSC) (1875) Order I rule 12, subsequently RSC (1965) Order 24.

67 On the menu option see R. Jackson, Review of Civil Litigation Costs: Final Report (December 2009) (The Stationery Office 2010) 275–277.

68 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, para. 4.7 and 4.8 (24 November 2011), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>.

69 The exception is pre-action disclosure under CPR 31.16 (introduced by the Woolf Reforms), which is granted only under restrictive conditions (see the *Hutchinson 3G* case cited below).

70 *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].

71 *Nokia Corporation v. AU Optronics Corporation* [2012] EWHC 731 (Ch) [67].

72 *Hutchinson 3G Ltd v. O2 (UK) Ltd and others* [2008] EWHC 55 Comm, [2008] UKCLR 83.

73 The decision was largely based on the argument that pre-action disclosure is the exception and not the norm. However, it is unlikely that, on the facts of *Hutchinson 3G*, the main action could be pleaded with sufficient specificity without pre-action disclosure, even under the relaxed standards used in *Nokia*.

74 *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 M. Brealey and N. Green, *Competition Litigation — UK Practice and Procedure* (Oxford University Press 2010), para 9.25–9.30.

75 CPR 31.8(2).

76 CAT Rules 2015, Rule 60(4).

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

“principal” can be deemed to be in “control.”<sup>78</sup> In *Ardila Investments*, Mr. Justice Males summarised the position as follows: “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.”<sup>79</sup>

65. Another question in relation to “control” that has come up in the United States—though, to my knowledge not yet in the UK—is whether information on employees’ devices used under a “bring-your-own-device” policy is in the control of the undertaking.<sup>80</sup> 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.<sup>81</sup> This view arguably implies that the undertaking has control over these communications (although the same interpretation in the different contexts is not logically necessary). The proportionality analysis in these cases would have to take into account the employee’s privacy and data protection issues, but there are indications that the protection under the ECHR may not be very strong.<sup>82</sup>

66. Eventually, these questions about “control” are probably in most cases not of crucial importance, given that the court (both under English law<sup>83</sup> and under the Directive) may also order disclosure from non-parties. However, it may make a difference in international cartel cases where the subsidiary is not within the court’s

jurisdiction (as was the case in the non-competition case *Schlumberger*). Also, the proportionality analysis may be affected by the question whether the disclosure is *inter partes* or against a non-party.

67. With regards to “proportionality,” the English legal system has attempted to contain the costs for disclosure through the Woolf and Jackson reforms. The Woolf reforms sought to limit disclosure by subjecting it to the “overriding objective” of dealing “with cases justly and at proportionate cost.”<sup>84</sup> 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.<sup>85</sup> While the costs of disclosure will, of course, vary widely depending on the scope of the disclosure 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.<sup>86</sup>

68. The Jackson review found disproportionate disclosure costs in particular in multitrack and other “high stakes” cases,<sup>87</sup> 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, a position that was adopted in CPR 31.5(7). 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.<sup>88</sup>

78 *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].

79 *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* at [12].

80 D. Richter, “Bring Your Own Device” Programs: Employer Control over Employee Devices in the Mobile E-Discovery Age, (2015) 82 *Tennessee Law Review* 443–459.

81 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](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.

82 See, by analogy, *B rbulescu v Romania* App No. 61496/08 (ECHR, 12 January 2016), where, however, the employer did not refer to the content of private messages, but only on the frequency of private use.

83 CPR 31.17.

84 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).

85 *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741, [2007] *Business Law Review* 1753 [36]–[55], especially [44], in which Jacob L. J. 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, P. Matthews and H. M. Malek (*Disclosure* 4th edition (London: Sweet & Maxwell, 2012), 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.* para 1.04, 1.33); M. Brealey and N. Green, *Competition Litigation — UK Practice and Procedure* (Oxford University Press 2010) 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”).

86 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.

87 “High stakes” cases included cases where the amount in controversy was more than £1m.

88 *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).

### 3. CAT Rules 2015

69. Where a claimant brings a stand-alone or follow-on claim under the amended s. 47A of the Competition Act 1998 in the Competition Appeal Tribunal (CAT)—which is increasingly likely after the Consumer Rights Act has done away with many of the issues that prevented or disincentivised claimants from bringing their actions in the CAT—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.*”<sup>89</sup> As the CAT has explained in its Guide to Proceedings<sup>90</sup> this means that disclosure in the CAT 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.<sup>91</sup>

70. 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.*”<sup>92</sup> 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.<sup>93</sup> 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.*”<sup>94</sup> 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.

71. The CAT Rules 2015 provide, again in parallel to the CPR, for disclosure before proceedings start and for non-party disclosure.<sup>95</sup>

72. 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.*”

73. The CAT had already applied a proportionality test to disclosure under the 2003 Rules. 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.*”<sup>96</sup> The CAT Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 2015 of 14 March 2017 (the “PD”) add that the specification of the evidence must be as “precise and narrow as possible on the basis of a reasoned justification”, and that the CAT will limit disclosure or inspection to that which is proportionate, which is to be determined by taking the interests of all parties and third parties concerned and by taking into account the factors listed in Article 5(3) of the Damages Directive (2.2–2.4 of the PD).

89 Rule 60(3) of the CAT Rules 2015.

90 Tribunal’s Guide to Proceedings (2015), para. 5.86. See also Mr. Justice Roth’s Introduction to the CAT Practice Direction Relating to Disclosure and Inspection of Evidence in Claims Made Pursuant to Parts 4 and 5 of the Competition Appeal Tribunal Rules 2015 of 14 March 2017; and compare already the 2003 CAT Rules, SI 1372/2003.

91 *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].

92 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).

93 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.*”

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

95 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).

96 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].



## 4. Confidential Information

74. Common law jurisdictions have no general bar against the disclosure of confidential information,<sup>97</sup> and have developed the corresponding safeguards to protect such information by redaction of documents or containing confidential information in confidentiality rings.<sup>98</sup>

75. One practically 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

76. In the English High Court, Mr Justice Peter Smith had vented his frustration with the Commission's 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.<sup>103</sup> The Court of Appeal set aside the Judge's order on the basis that *Pergan* protection was absolute and not sufficiently safeguarded by confining the disclosure to the confidentiality ring.<sup>104</sup> 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.<sup>105</sup>

## 5. Clarifications

77. 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.*"<sup>106</sup> The second party may object that such a request "*can only be complied with at disproportionate expense,*" and explain why that is the case.<sup>107</sup> Unless the court allocates costs differently in its order, costs lie where they fall.<sup>108</sup>

78. 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.<sup>109</sup> 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.<sup>110</sup> 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.*"<sup>111</sup>

F. W.-v. P. ■

97 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 M. Brealey and N. Green, *Competition Litigation* — UK Practice and Procedure (Oxford University Press 2010) paras 9.47–9.52.

98 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).

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

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

101 Case C-278/13 (P) *Commission v Pilkington* ECLI:EU:C:2013:558.

102 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).

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

104 *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.

105 *Ibid* [84].

106 Practice Direction 18 — Further Information ("PD 18"), para. 1.2.

107 PD 18 para. 4.2(2).

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

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

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

111 CAT Rules 2015, Rule 53(2)(d).