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

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# Disclosure of evidence included in the file of a competition authority

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## ABSTRACT

*The disclosure provisions of the EU Damages Directive allow national courts to order competition authorities to disclose certain documents and information in damages proceedings. In addition, private parties can also be ordered to disclose certain evidence that they have obtained through access to the files of a competition authority. Leniency applications as well as settlement submissions and certain other documents are, however, excluded from disclosure. While the disclosure provisions at first glance seem to be rather clear in this respect, both the Damages Directive as well as the national provisions implementing the Directive raise a number of questions. This article explores the issues raised by the new provisions under the laws of France, Germany, Italy, the Netherlands, and the United Kingdom.*

Les règles de divulgation dans la nouvelle directive UE concernant les dommages et intérêts pour les ententes illicites permettent aux juridictions nationales d'ordonner la remise de certains documents et informations à l'encontre de l'autorité de concurrence dans le cadre d'actions civiles en dommages et intérêts. De plus, les parties privées peuvent se voir obliger de divulguer certaines preuves grâce à l'accès aux dossiers d'une autorité de concurrence. Les déclarations effectuées en vue d'obtenir la clémence et les propositions de transaction aussi bien que certains autres documents sont exclus de la divulgation. Bien que les règles de divulgation, à première vue, semblent être très évident à cet égard, tant la directive concernant dommages et intérêts pour les ententes illicites, que les règles nationales qui transposent la directive soulèvent une série de questions. Cet article examine les questions posées par les nouvelles règles en ce qui concerne le droit de la France, de l'Allemagne, de l'Italie, des Pays-Bas et du Royaume-Uni.

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## I. Introduction

1. The disclosure provisions in Articles 5 to 8 of the Damages Directive do not only oblige the Member States to ensure that national courts can order individuals and companies to disclose certain evidence, but also to order the disclosure of evidence by competition authorities.

### 1. Power of national courts to order disclosure by public authorities

2. This provision, of course, raises several interesting and difficult questions. Are national courts able to order the European Commission or the authorities in other Member States to disclose certain evidence? And how will the European Commission and the national competition authorities respond to such disclosure orders?

3. The Damages Directive itself is ambiguous as to the actual power of the national courts. Recital 15 of the Damages Directive states that “[n]ational courts should also be able to order that evidence be disclosed by third parties, including public authorities,” but then goes on to add that “[w]here a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information apply.” In addition, Article 6(10) Damages Directive provides that “Member States shall ensure that national courts request the disclosure from a competition authority.”

4. The first part of Recital 15 thus seems to point in the direction of the authorities having to obey any court order, whereas the second part and Article 6(10) could be understood as suggesting that the court and the authorities have to find a balance between their interests (which in fact would allow the authorities to resist a court order for disclosure). It is to be expected that it will not

be too long before the Court of Justice is called upon to decide on this question.

## 2. Proportionality of requests to order disclosure from a competition authority

5. A higher standard of proportionality applies in case of requests to order disclosure of information in the files of a competition authority than is the case normally. Article 6(4) Damages Directive provides that in assessing the proportionality a court also has to consider:

- Whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the files (as opposed to a non-specific application concerning documents submitted to a competition authority);
- Whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
- The need to safeguard the effectiveness of public enforcement of competition law.

6. The first criterion is intended to avoid mere fishing expeditions. While it may thus be difficult to request the disclosure, e.g., of all emails submitted to a competition authority, this provision does not stand in the way of requesting the disclosure of, e.g., all emails referring to the setting of prices in a certain territory and that were submitted to the European Commission.

7. In addition, to assist the national courts in assessing the proportionality of disclosure requests, Article 6(11) Damages Directive allows the competition authorities to submit observations to the courts.

## 3. Information in the files of a competition authority protected from disclosure

8. Certain information contained in the files of a competition authority is protected from disclosure.

9. Leniency statements and settlement submissions cannot be disclosed at any time (Article 6(6) Damages Directive).

10. In contrast, disclosure of the following categories of evidence can only be ordered after a competition authority has closed its proceedings (Article 6(5) Damages Directive):

- Information prepared by a natural or legal person specifically for the proceedings of a competition authority;

- Information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and
- Settlement submissions that have been withdrawn.

11. Article 7 Damages Directive establishes limits on the use of evidence obtained solely through access to the file of a competition authority.

12. The categories of evidence mentioned above and listed in Article 6(5) and (6) are—if they have been obtained through access to the file—inadmissible or otherwise protected in actions for damages. However, what exactly this means remains unclear—the wording of Article 7 would seem to suggest that such evidence cannot be used as evidence, but does not prevent a party having obtained such evidence through access to file to cite from such documents in the court submissions (making it hard or almost impossible under the procedural laws of certain countries such as Germany and the Netherlands for the defendants to refute these factual statements).

13. In addition, evidence obtained solely through access to the file of a competition authority can be used in an action for damages only by that person and its legal successors (Article 7(3) Damages Directive).

A. P.

# II. France

## 1. General observations

14. To understand the new rules<sup>1</sup>, it is necessary to know the previous situation. Before 2011, a file of the French Competition Authority (FCA) may be submitted in two different ways. The general rules of civil procedure were the main one. Article 138 Civil Procedure Code (CPC) entitled the judge to order to any person, including the French Competition Authority, to produce some pieces of evidence. Furthermore, it was also possible to rely on the general law of 1978 on access to administrative documents, the French equivalent of the EU Regulation No. 1049/2001.

Following some discussed cases, which did not concern cartels with leniency applications, two laws were adopted. The first one—in May 2011—definitively closed the second door. The second law—in November 2012—introduced a provision in the Commercial Code<sup>2</sup>, which created a new way to obtain some documents, less strict than the order of Article 138 CPC<sup>3</sup>.

1 Art. L. 483-4 to Art. L. 483-11; Art. R. 483-11 to R. 483-13 Commercial Code; Art. R. 775-12 to R. 775-14 Administrative Justice Code.

2 Art. L. 462-3, para. 2 Commercial Code.

3 For a detailed examination of these rules, see 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.

15. The new system of access to the file of the Competition Authority is as follows:

- It is not applicable if a party already holds the pieces;
- The Authority has the choice to give or to deny the access to its file; it is a faculty unlike the order of Article 138 CPC;
- Some documents cannot be submitted. The exception is very broad since it covers “*all pieces created or received*” in a leniency procedure.

16. Since March 2017 and the entry into force of the ordinance, this “new” way of access based upon Article L. 462-3, paragraph 2, Commercial Code is no more applicable for damages actions. However, it always exists for contractual actions. Therefore, in private actions before French ordinary courts, there are two series of rules with a different scope of application according to the nature of the action:

For contractual actions: the “new way” of Article L. 462-3, paragraph 2, Commercial Code and the ordinary rules of civil procedure, mainly Article 138 CPC.

For damages actions: new provisions have been introduced to implement the Directive’s Articles 6 and 7—namely, Articles L. 483-4 to L. 483-11 Commerce Code.

There is no provision on the relation between this new system and the ordinary rules. Therefore, the issue is to determine whether, or not, general rules of civil procedure remain applicable to damages actions. From our perspective, ordinary rules of civil procedure are no more applicable, since there are special rules, which cover the possibility for a judge to order to a competition authority (CA) to give access to its file. Article L. 483-1, paragraph 1, Commercial Code follows, *in fine*, the usual rule according to which special rules prevail on general ones.

## 2. New special rules for damages actions

17. Unlike some other national texts, there are no distinct provisions for the implementation of Directive’s Articles 6 and 7. The new rules are conceived as a “block”, which covers mainly two points: the powers of the judge to make an order to a competition authority, and the procedural mechanism to implement the exceptions to the production.

## 2.1 Powers of the judge to make an order

18. First, as far as the “personal” scope of the order is concerned, it should be noted that the word “competition authority” has been given a broad meaning. It covers not only the French Competition Authority (l’Autorité de la Concurrence) but also the Ministry of Economy, which has kept some jurisdiction in antitrust on local anticompetitive practices, and the European Commission. However, the text does not deal with the issue of an order to the NCA of another Member State<sup>4</sup>.

19. Second, such an order to a competition authority shall remain subsidiary. The judge may order a CA to produce a piece only if the requested piece cannot be reasonably submitted by a party or a third party. That is the first rule asserted in Article L. 483-4 Commercial code, which implements Directive’s Article 6.10. The solution is identical to the new rules introduced in 2012 for accessing the Competition Authority’s file. *Inter partes* access to documents shall prevail. The aim is clearly to avoid an overloaded work for the FCA, which has limited resources. It is true that if the claimant appeared already before the FCA, it will have in its hands many documents, since in French law the proceedings are fully contradictory. The situation will be different in cartel cases.

20. Third, of course, the order cannot concern documents that are covered by the black and/or the grey lists.

The black one, listed in Article L. 483-5 Commercial Code, is in line with Directive’s Article 6.6. It covers leniency statements and settlement submissions. The French text is more detailed since it mentions both written and oral statements and any literal citations of these declarations. Furthermore, as there are many differences between settlements in EU and national laws, it tries to cover all simplified or accelerated proceedings.

The grey one, listed in Article L. 483-8 Commercial Code, applicable when the proceedings before the competition authority have not yet been closed, is in line with Directive’s Article 6.5.

21. In both situations, the exceptions are not applicable to documents which exist regardless of the procedure before the competition authority<sup>5</sup>. In other words, pre-existing information is outside the scope of the rules. Furthermore, for the application of the black list, Directive’s Article 6.8, dealing with documents only partially covered by the exception, is implemented by Article L. 483-7 Commercial Code.

4 On the international aspects of this issue, see L. Idot, Access to Evidence and Files of Competition Authorities, in *International Antitrust Litigation. Conflicts of laws and Coordination*, J. Basedow, S. Francq and L. Idot (eds.), Hart Publishing, 2012, chap. 12, pp. 259–287.

5 Art. L. 483-9 Commercial Code.

## 2.2 Procedural mechanism to ensure the protection of the black and grey lists

22. Various rules have been introduced in French law to ensure the effectiveness of the black and grey lists.

First, if a party invokes the benefit of the black list, a new procedure has been introduced following Directive's Article 6.7. It is up to the judges to decide whether the document is covered or not by the exception. The holder of the piece shall communicate the latter to the judge, who will take a decision<sup>6</sup>. Some limits to the adversarial principle (*principe du contradictoire*) are introduced to be sure that the exception, if applicable, will remain effective.

Second, if a procedure is still pending before a competition authority, the parties have the duty to inform the competition authority of all requests relating to the production of pieces, which are in its file<sup>7</sup>, which enables the authority to intervene. The aim is to be sure that the judge will not order the production of a document covered by the grey list.

23. To strengthen the effectiveness of the mechanisms, this collaboration between the judge and the competition authority has been extended, as it is required by Directive's Article 6.11. The judge may ask for the opinion of the competition authority<sup>8</sup> but the competition authority may also give its opinion of its own initiative<sup>9</sup>.

24. Eventually, if, in spite of these mechanisms, a document covered by the black or grey lists has been transmitted or produced, according to Articles L. 483.5, paragraph 3, and L. 483.8, paragraph 2, Commercial Code, it shall be withdrawn<sup>10</sup>. These two provisions implement Directive's Article 7.1 and 7.2.

25. Last point, Directive's Article 7.3 is implemented in Article L. 483-10 Commercial Code. Documents that are not protected, but have been obtained via the access to the file of the competition authority, could be only used in a damage action brought by the person who has made the request, or its "ayant droit".

L. I.

6 Art. L. 483-6 Commercial Code.

7 Art. R. 483-11 Commercial Code.

8 Art. R. 483-13 Commercial Code.

9 Art. R. 483-12 Commercial Code.

10 Art. L. 483.5, para. 3, Art. L. 483.8, para. 2, Commercial Code.

## III. Italy

26. Let us point out to certain inconsistencies between the EU Directive and the Italian law, not all of them insignificant:

– While Article 6.5(a) of the Directive, regarding information which can be delayed up to after the closing of the agency case, mentions such information as was "*prepared (...) for the proceedings*" of an NCA, the corresponding Article 4.4(a) of the Italian law mentions information which was "*rendered (...) in the context of a proceedings*" of an NCA, which seems to at least potentially much broaden the scope of such temporary delay; the Law also introduces, under Article 4.8, the possibility for the court to suspend the case up to the closing of the proceedings before the agency, which, while of course perfectly reasonable, makes the comfort zone of the NCA even wider;

– Article 7 of the Directive evidences the scope of the protection afforded to the evidence obtained from an NCA file (i.e., either inadmissibility, or delay, or limits on the range of persons who can bring it into court); such provisions are always framed by referring to evidence which has been obtained "*solely through access to the file*" of an NCA. The relevant provision of the Italian law (Article 5.1) refers, however, such limits to evidence "*however obtained by the parties also by access to the file*" of the NCA. Now, this clearly gives such protection umbrella a much wider and more discretionary scope than the Directive ever intended to. An area where the contrast becomes palpable is the one of "*pre-existing information*." The Directive, in fact, both includes a definition of the concept of "*pre-existing information*," and defines leniency applications (which can never be given out as evidence) as "*not including pre-existing information*" and, finally, in its whereas clause (28), considers that courts should always be able to "*order (...) the disclosure of (...) pre-existing information*." The practical significance of this cannot be lost on the practising lawyer. The Italian law, however, has no such clause and, while reiterating the above-mentioned definition of leniency, includes, as just considered, such a broad language in the scope of the Article 7 protection, as to possibly becoming de facto incompatible with the literal meaning of the Directive—which is something Italian courts shall have to take into due account when interpreting the Law;

– Finally, while the Directive (Article 6.3) expressly preserves the "*rules and practices*" of EU and national law in the area of document protection, the corresponding Article 4.9 of the Law changes it into EU "*rules and practices*" and "*specific national rules*" only. As matter of fact, making it necessary for a court to gather information with

regards to national (or the EU, for that matter) “practices” and, therefore, making them legally relevant, is not exactly an ideal interpretation of the concept of rule of law.

**27. A closing remark.** In its (recent) *Donau Chemie* decision, the European Court of Justice stated, apparently very clearly (§§ 46 et seq.), the following: “(...) *as regards the public interest of having effective leniency programmes (...) given the importance of actions for damages brought before national courts in ensuring the maintenance of effective competition in the European Union (...) the argument that [giving access to the file] may undermine the effectiveness of a leniency programme (...) cannot justify a refusal to grant access to that evidence. By contrast, the fact that such a refusal is liable to prevent those actions from being brought (...), by giving the undertakings concerned, who may have already benefited from immunity (...) from pecuniary penalties, an opportunity also to circumvent their obligation to compensate for the harm resulting from the infringement (...) to the detriment of the injured parties, requires that refusal to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused.*”

**28.** Upon reading such rather blunt statements (which, in passing, conforms more than the Directive does to the US practice, where no unqualified pass is given to the leniency applicant), one wonders whether the framework created by the Directive may really be in line with the letter and more importantly the essential *ratio* of the Court’s decision.

C. O.

## IV. Netherlands

**29.** Systematically, disclosure of documents in the file of the Dutch competition authority is treated as a claim for exhibition from a third party. As such, Article 843a Code of Civil Procedure applies and all requirements under that provision must be met.<sup>11</sup> That seems slightly at odds with Article 5, paragraph 1, Directive that provides that disclosure must be possible “in proceedings” relating to an action for damages. The competition authority will not be a party to those proceedings. That means that the party seeking disclosure will need to start separate proceedings against the competition authority.

**30.** Starting such proceedings against the *Autoriteit Consument en Markt* (“ACM” for short, the Dutch National Competition Authority) does not seem to present an issue. Article 843a Code of Civil Procedure co-exists with administrative rules on access to file, such as the Public Information Act.<sup>12</sup>

<sup>11</sup> Explanatory Memorandum, p. 25.

<sup>12</sup> Cf. Dutch Supreme Court, 20 December 2002, *NJ 2004/4 (Lightning Casino / Nederlandse Antillen)*.

**31.** Protocol 7 to the TFEU gives the European Commission and its officials a rather broadly scoped immunity. Article 1, Protocol 7, provides that the premises and buildings of the European Union shall be inviolable. They shall *inter alia* be exempt from search, requisition and confiscation. The archives of the European Union shall also be inviolable.<sup>13</sup> Officials and other servants of the European Union shall be immune from legal proceedings.<sup>14</sup> However, that does not mean that the European Commission cannot be ordered to produce certain documents or permit its officials to be examined by the national courts. This is on the basis of the European Commission’s duty of sincere cooperation with the judicial authorities of the Member States, which are responsible for ensuring that European Union law is applied and respected in the national legal systems.<sup>15</sup> It seems to me, therefore, that the immunity provisions of Protocol 7 stand in the way of a direct claim from a petitioner against the European Union. The Dutch courts should probably resolve this issue by making a request to the European Commission or the European courts that mirrors the petition, to the extent that the court finds it admissible. The petition itself will than lack interest and does not need a substantive decision. The European Commission may refuse the request on legitimate grounds.<sup>16</sup> This raises the question whether, at least in practice, the proportionality test of Article 5, paragraph 3, Directive, for example, is laid in the hands of the European Commission and the European courts rather than the national courts. It is, however, beyond the scope of this contribution to investigate this issue further.

**32.** Pursuant to Article 846, paragraph 1, Code of Civil Procedure, no exhibition may be ordered of so-called “black list documents,” i.e., leniency statements and settlement submissions. Other than the Directive,<sup>17</sup> the Implementation Act itself does not define “leniency statement,” nor “settlement submission.” However, the Explanatory Memorandum makes clear that these must be understood to mean the same as the Directive’s definitions (in the Dutch language version).<sup>18</sup> As such, they capture both written and oral statements and the recording of oral statements. That raises a point that the Implementation Act and its Explanatory Memorandum do not shed a light on. An oral statement can hardly be considered a document, not even in the broad definition of Article 843a Code of Civil Procedure. I do, therefore, not see that this could be disclosed under Article 843a Code of Civil Procedure. However, there are other ways to expose it. A (prospective) party to the proceedings may file a petition for a so-called “preliminary hearing of witnesses” (*voorlopig getuigenverhoor*).<sup>19</sup> That may

<sup>13</sup> Art. 2 Protocol 7 TFEU.

<sup>14</sup> Art. 11 Protocol 7 TFEU.

<sup>15</sup> ECJ 13 July 1990, C-2/88, *Zwartveld* and others.

<sup>16</sup> Cf. ECJ 13 July 1990, C-2/88, *Zwartveld* and others.

<sup>17</sup> Art. 2, sub 15 and 18 respectively.

<sup>18</sup> Explanatory Memorandum, p. 23.

<sup>19</sup> Art. 186 ff Code of Civil Procedure.

result in a hearing of witnesses prior to or in parallel of the proceedings with respect to the damages action for an infringement of competition law. Officers of the competition authority may be heard as witnesses. Arguably, they can absolve themselves from giving evidence,<sup>20</sup> but their right to do so is not absolute. The question would, therefore, be whether they may refuse to testify in relation to the contents of an oral leniency statement or settlement submission (and whether it was made?), for example on the basis of Article 846, paragraph 1, Code of Civil Procedure. The provision does not seem to capture this situation, because it applies only to “inspection,” “copy” or “extract” of the said information. However, it would clearly be against the purpose and *ratio* of Article 846, paragraph 1, Code of Civil Procedure if officers of the competition authority could be compelled to provide evidence on oral leniency statements and settlement submissions in the context of a hearing of witnesses. Therefore, I think that Article 846, paragraph 1, Code of Civil Procedure would stand in the way of this circumvention or the officers of the competition authority should be able to absolve themselves from giving responses on the contents of oral submissions. This seems in line with Article 6, paragraph 6, Directive that prevents disclosure of these categories of evidence, regardless of the fashion in which it is given.

**33.** The “black list documents” do not concern information that exists separately from the proceedings before the competition authority, regardless of whether that information sits in the file of the competition authority or not.<sup>21</sup>

**34.** The court may, or rather must, still assess whether the request for disclosure regards leniency statements or settlement submissions. According to the Explanatory Memorandum, Article 843a, paragraph 2, Code of Civil Procedure—that provides that the court determines the fashion in which exhibition is given—enables the court to seek the assistance of the ACM.<sup>22</sup> In my view, this is a rather stretched interpretation of paragraph 2 of Article 843a Code of Civil Procedure. The determination whether documents are leniency statements or settlement submissions has nothing to do with a determination as to the fashion of exhibition. The court will seek the assistance of the ACM to determine whether documents are leniency statements or settlement submissions. If they are, disclosure is excluded altogether. Therefore, the assistance of the ACM is not sought in the context of the fashion of disclosure, but rather to decide whether disclosure is permitted in the first place. If it is not, there is no need to determine the fashion in which it must be given.

20 Cf. Dutch Supreme Court, 21 February 1997, *NJ* 1997/305; see ECJ 13 July 1990, C-2/88, *Zwarveld* and others, which does not give an absolute right of refusal to the European Commission and its officers, but protection of the leniency program seems a legitimate ground.

21 Explanatory Memorandum, p. 23.

22 Explanatory Memorandum, p. 24. For that reason, The Netherlands did not separately implement Art. 6, para. 7, second sentence, Directive.

**35.** Article 847, paragraph 1, Code of Civil Procedure implements Article 6, paragraph 5, Directive and provides that the exhibition of so-called “grey list documents”<sup>23</sup> may only be allowed to be exhibited after the competition authority took a decision or otherwise closed its investigation. This is regardless of the person from whom exhibition is claimed.<sup>24</sup> Article 847, paragraph 2, Code of Civil Procedure provides that these documents do not constitute evidence prior to the closure of the investigation of the competition authority. In other words, they may only be admitted into evidence after closure of the investigation. The investigation may be considered closed if the competition authority took a decision or otherwise closed the investigation. However, a closure of the investigation otherwise may be less evident. Unfortunately, the Explanatory Memorandum does not shed any further light on what must be understood as a closure of the investigation otherwise, nor how this should be established. What if the competition authorities fail to take any steps in an investigation for a considerable time, but do not formally close it?

**36.** Documents from the NCA’s file may only constitute evidence for a claim for damages for an infringement of competition law for the benefit of the person that obtained their disclosure and its legal successors (Article 848 Code of Civil Procedure).<sup>25</sup> These legal successors include parties that obtained the damage claims, for example through assignment.<sup>26</sup> If a legal entity obtained the documents, legal entities that belong to the same undertaking may also use them.<sup>27</sup> What Article 848 Code of Civil Procedure (and Article 7, paragraph 3, Directive) aims to do is prevent the trade in information that was obtained from the files of the competition authority.<sup>28</sup> This provision does, therefore, not exclude third parties from using Article 843a Code of Civil Procedure to get disclosure from the party that obtained the documents in question.<sup>29</sup>

**37.** The competition authority is only required to provide disclosure if there is no other party that may reasonably provide exhibition of the documents.<sup>30</sup> Disclosure from the competition authority, therefore, is “a last resort.”<sup>31</sup> As a consequence, the claimant or petitioner for exhibition of the competition authority under Article 843a Code of Civil Procedure will need to state in its claim or petition that disclosure cannot reasonably be obtained otherwise, and will need to prove this if disputed.<sup>32</sup>

23 Cf. Art. 6, para. 5, sub (a)–(c), Directive.

24 Explanatory Memorandum, p. 24.

25 This implements Art. 7, para. 2, Directive.

26 Explanatory Memorandum, p. 25; Art. 7, para. 3, Directive, see also Recital 31 Directive.

27 Explanatory Memorandum, p. 25; cf. Recital 31 Directive.

28 Cf. Recital 32, last sentence, Directive.

29 Explanatory Memorandum, p. 25

30 Art. 849 Code of Civil Procedure; implementation of Art. 6, para. 10, Directive.

31 Explanatory Memorandum, p. 25.

32 Art. 149 and 150 Code of Civil Procedure.

38. The court must, at all times, take into account whether the interest of public enforcement of competition law is sufficiently safeguarded when it decides on a claim or petition to obtain disclosure from the competition authority.<sup>33</sup> Since the courts must, under Article 843a Code of Civil Procedure, already assess whether there is a legitimate interest and whether the exhibition request has regard to certain documents concerning a legal relationship to which the petitioner is a party, the Dutch legislator considered that Article 6, paragraph 4, sub (a) and (b), Directive do not require implementation.<sup>34</sup>

39. Finally, it seems unlikely the court will allow the seizure of evidence that sits with the ACM, because the ACM will typically not be seen as a party that presents a risk of destruction of the evidence.

F. K.

## V. United Kingdom and Germany

### 1. United Kingdom

40. The Office of Fair Trading (OFT, since replaced by the Competition and Markets Authority—CMA) summarised the position on access to evidence in the file of a competition authority in a 2007 Discussion Paper.<sup>35</sup> It stated that there were “several gateways” to information in the competition authority’s file, and that one of them was third party disclosure under the Civil Procedure Rules (CPR), noting that third parties in the meaning of these general disclosure rules “include[] the Crown.”<sup>36</sup> The OFT emphasised, however, that access to its file would only be subsidiary to *inter partes* disclosure, so that third-party disclosure from the competition authority would be the exception rather than the rule.<sup>37</sup> It also noted that it would take all possible steps to protect leniency documents.<sup>38</sup> The most important gateway is therefore third-party disclosure under CPR 31.17 and Rule 63 of the CAT Rules 2015, elaborated on in 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.

33 Art. 850 Code of Civil Procedure; implementation of Art. 6, para. 4, sub (c) Directive.

34 Explanatory Memorandum, p. 25.

35 OFT, Private actions in competition law: effective redress for consumers and business, OFT916 (April 2007); the CMA has chosen to make its website as inaccessible as possible, but the relevant extract is quoted in M. Brealey and N. Green, *Competition Litigation — UK Practice and Procedure* (Oxford University Press 2010) para. 9.61.

36 M. Brealey and N. Green, n. 11, para. 9.61, reproducing section 6.8 of the OFT Discussion Paper.

37 *Ibid.* (quoting section 6.9 of the OFT Discussion Paper).

38 *Ibid.* (quoting section 6.10 of the OFT Discussion Paper).

41. Regulation 30(1) of the new Schedule 8A to the Competition Act 1998, introduced by the 2017 Regulations<sup>39</sup> implementing the Damages Directive, appears at first glance to change this position drastically: “[A] court or the Tribunal must not make a disclosure order addressed to a competition authority in respect of documents or information included in a competition authority’s file.” However, Regulation 30(2) makes clear that this is just an expression of British humour and that “sub-paragraph (1) does not apply where the court or the Tribunal making the order is satisfied that no-one else is reasonably able to provide the documents or information.”

42. The 2017 Regulations<sup>40</sup> implement the black list in Article 6(6) of the Damages Directive by prohibiting a disclosure order in respect of settlement submissions that have not been withdrawn and cartel leniency statements in paragraph 28 of the new Schedule 8A to the Competition Act 1998.<sup>41</sup> Paragraph 29 implements the grey list (Article 6(5) of the Damages Directive) by prohibiting temporarily disclosure orders in respect of “investigation materials” as defined in paragraph 3(3) of Schedule 8A. 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 provide, *inter alia*, that in the case of applications for disclosure orders against a competition authority “the application must be supported by evidence that no other person is reasonably able to provide that evidence” (3.1) and that the investigation has been closed (3.2), and that the Tribunal will take into account, in addition to the general provisions on disclosure, the factors mentioned in Article 6(4) of the Damages Directive as well as observations made by the competition authority (5.2).

43. In contrast to the relatively broad disclosure available under the third-party disclosure rules, accessing information through the Freedom of Information Act 2000 is much less likely to yield interesting information from the CMA because of the absolute and qualified exemptions in the Act.<sup>42</sup>

44. Access to documents from the Commission and foreign NCAs can be more problematic. In *National Grid*, Mr. Justice Roth essentially made use of nearly all of the available gateways. The claimants sought access to certain documents relating to the French parties Areva and Alstom. While these documents were in Areva’s and Alstom’s possession and could therefore have been subject to *inter partes* disclosure, Mr. Justice Roth at first considered this to be not possible because of the French

39 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.

40 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.

41 Settlement submissions are defined in paragraph 5 of Schedule 8A; leniency statements in paragraph 4(4), (5) and (6) of Schedule 8A.

42 M. Brealey and N. Green, n. 11, para. 9.66 to 9.69.



blocking statute. ABB and Siemens had obtained some of the documents relating to Areva and Alstom through access to the file, and to that extent, they were ordered to disclose these documents (after the implementation of the Damages Directive, these documents would now be prevented from being used under paragraph 34 of the new Schedule 8A of the Competition Act 1998).<sup>43</sup> With regard to materials not in ABB's or Siemens's possession, Mr. Justice Roth requested the documents from the Commission under Article 15 of Regulation 1/2003. While the Commission was willing to oblige, the General Court blocked the transmission in an interim order.<sup>44</sup> At that point, Mr. Justice Roth ruled that the French blocking statute did not prevent an order for disclosure after all because enforcement would be highly unlikely.<sup>45</sup>

45. Courts may make use of Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters,<sup>46</sup> a procedure that had also been tried (unsuccessfully) in the *National Grid* case.<sup>47</sup>

46. Article 12 of Regulation 1/2003 allows for information exchange. However, Article 339 TFEU and Article 28 of Regulation 1/2003 prevent disclosure to the extent the information so exchanged is covered by professional secrecy.<sup>48</sup>

## 2. Germany

### 2.1 Before the implementation

47. As is well known across Europe since the *Pfleiderer* case, the German Bundeskartellamt is not particularly forthcoming with information in support of private claimants (I would add: for good reason).

48. In Germany, parties and interveners may have a right to access to the file under §§ 13, 29 VerwVfG (either in the federal or state version, depending on the authority in question). However, a right to information only exists

to the extent that the applicant has a legal interest, which is interpreted as being restricted to rights of defence or affirmative rights in the administrative procedure.

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

50. Where the competition authority is investigating in the fines procedure, or where a public prosecutor has opened a criminal investigation, for example for bid rigging, access to the file may be sought under § 406e of the Criminal Procedure Code (StPO).<sup>49</sup> The intention of seeking damages is accepted as constituting the "legitimate interest" required by § 406e StPO.<sup>50</sup> However, applications based on § 406e StPO have usually not been successful with regard to the more sensitive parts of the file, due to a balancing of the applicant's interests with the interests of the (legal or natural) persons under investigation or third parties.<sup>51</sup> As will be discussed below, success chances may be slightly higher for claimants if they manage to persuade the court seised with the damages action to request the file from the prosecutor or competition authority.

51. Others may have a right to access information under the applicable Freedom of Information Acts.<sup>52</sup> However, the federal IFG, which applies to the Bundeskartellamt, specifies that a right to access information is excluded where public knowledge of the information "may have a detrimental impact on (...) the exercise of the regulatory or supervisory functions of (...) competition authorities."<sup>53</sup> The IFG is therefore unlikely to be of substantial help to claimants.

<sup>43</sup> *National Grid v. ABB & ors* [2011] EWHC 1717 (Ch).

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

<sup>45</sup> *National Grid v. ABB & ors* [2013] EWHC 822 (Ch), [2013] UKCLR 177 [18]–[48].

<sup>46</sup> [2001] OJ L174/1.

<sup>47</sup> *National Grid v. ABB & ors* [2013] EWHC 822 (Ch), [2013] UKCLR 177 [11]–[13], [49]–[57].

<sup>48</sup> See Commission Notice on cooperation within the network of competition authorities [2004] OJ C101/43 ("Network Notice"), para. 28; Commission Opinion in *Sainsbury's Supermarkets v. Mastercard Inc.*, Opinion of the European Commission in application of Article 15(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty – CT.00928 – Interchange Fee Litigation before the High Court of Justice, Chancery Division: *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others* (Claim No. HC 2012-000063), C(2015) 7682 final, points 18–23.

<sup>49</sup> In the case of the public prosecutor, § 406e StPO is directly applicable; in the case of a competition authority, it is applicable by reference via § 81 ARC, § 46(1) Act on Administrative Offences (OWiG). For a discussion of § 406e StPO in the context of competition damages actions, see, e.g., J. Wessing and M. Hieramente, *Akteneinsicht im Kartellrecht – Der Aspekt des Vertrauens- und Geheimnissschutzes*, (2015) *Wirtschaft und Wettbewerb* 220–33.

<sup>50</sup> OLG Düsseldorf, 22 August 2012, V-4 Kart 5 und 6/11 (OWi) – *Kaffeehäuser*, (2012) *Wirtschaft und Wettbewerb* 962, 966–7.

<sup>51</sup> § 406e(2) StPO establishes the interest balancing requirement. For a partial granting and partial rejection of an application under § 406e StPO, see OLG Düsseldorf in *Kaffeehäuser*, previous footnote, 966–71, where the court granted the application with regard to redacted fining decisions (including the parts based on leniency statements, and including those decisions that had not yet become final) and an index of the evidence, but not with regard to business secrets, personal data, leniency statements, or documents voluntarily submitted. The court weighted the interest in the confidentiality of leniency statements and the interest in the protection of the leniency programme higher than the interest of the applicants in claiming damages. However, the court allowed access to the fining decision despite recognising that it was predominantly based on information contained in the leniency programme (*ibid.*, 968–969). The appeals against this decision by both parties (seeking more protection and more access to the file, respectively) was held to be inadmissible, BGH, 18 February 2014, KRB 12/13, because appeals against decisions on access to the file are only admissible to the extent that they may impair the rights of defence in the proceedings to which the file relates.

<sup>52</sup> See, in particular, the federal Freedom of Information Act, *Gesetz über den Zugang zu Informationen des Bundes*, of 5 September 2005, BGBl 2005 I 2722 (also called *Informationsfreiheitsgesetz, IFG*), amended by Art 2(6) of the Act of 7 August 2013, BGBl 2013 I 3154. Some, but not all, of the *Länder* have their own versions of Freedom of Information Acts.

<sup>53</sup> § 3(1)(d) IFG.

**52.** Even in the absence of a right to access under any of these provisions, the Federal Court of Justice has affirmed that an authority (such as a competition authority in the administrative procedure or sector-specific regulator) has a duty to exercise its discretion in deciding whether to grant access to the file (or parts thereof), provided the applicant has a legitimate interest in access to the information.<sup>54</sup> The court considered an interest in pursuing a damages claim to constitute such a legitimate interest.<sup>55</sup> Interestingly, the court did not apply the strict criteria of substantiation of the claim or the requirement of specification of the documents that it applies in the context of § 142 ZPO to the right of having the authority exercise its discretion.<sup>56</sup> It should be noted that the court merely criticised that the administrative body had not exercised its discretion at all. The court pointed out that the need for exercising discretion did not prevent the authority from “*taking duly into account*” legitimate interests such as the protection of business secrets or voluntary submissions in leniency or commitment procedures.<sup>57</sup> It is to be expected that in the future competition authorities will raise the possibility of discretionary access to the file, and quickly determine that the interest in the protection of ongoing investigations and the leniency and settlement programmes outweighs the private interest of the applicant.<sup>58</sup> It is much more difficult to challenge an administrative decision that exercises discretion but reaches an outcome that is perceived to be wrong than to challenge a decision that failed completely to exercise discretion.

**53.** In Germany, competition authorities would not simply be treated as third parties as any other third party (as is essentially the case in the UK). However, civil courts may request documents or information from public authorities for the preparation of the trial.<sup>59</sup> The Regional Court in Berlin, seised with a damages action in the *Elevator* cartel, requested, on the claimants’ application, the public prosecutor’s file concerning the

criminal investigation against one of the individuals for bid rigging under § 273 ZPO.<sup>60</sup> This file included the confidential version of the European Commission’s infringement decision and the leniency application. The public prosecutor transmitted the file, based on § 474 StPO, under which files and information shall be transmitted to other prosecutors and courts, arguing that it would be for the receiving Regional Court to balance the interests of the parties before granting any access to the transmitted information.<sup>61</sup> The defendants in the civil actions sought to prevent transmission of the file, first by seeking a judicial decision by the Higher Regional Court,<sup>62</sup> and ultimately by filing a constitutional complaint before the Federal Constitutional Court. The Constitutional Court considered it sufficient protection for the defendants that the requesting court would have to balance the interests before allowing any access to the information and that any decision could only be based on information to which both parties had access; accordingly, the court dismissed the complaint.<sup>63</sup>

**54.** Overall, chances of acquiring access to information held by the competition authority in Germany are not as good as in the UK. The Bundeskartellamt in particular will usually argue that the non-confidential version of the decision will contain all the necessary information.

**55.** The Damages Directive affected the German position to a much greater extent than in the UK, because in the UK the main gateway to information has always been through disclosure, not access to the file. In contrast, in Germany, access to information from the competition authority used to rely on access to the file: under §§ 406e, 475 StPO (in combination with §§ 81 ARC, 46 OWiG), § 72 ARC, § 29 VwVfG, or the discretionary access to the file outside § 29 VwVfG. The implementation of the Damages Directive therefore had to change the approach.

## 2.2 The 9th Act Amending the ARC

**56.** The 9th Act Amending the ARC<sup>64</sup> has introduced § 89c ARC 2017, which provides that a court may, on application by one of the parties, order disclosure of documents or objects from the competition authority’s file, provided the applicant has made plausible that it has a claim against another party, and the information “*suspected to be in the file*” cannot be obtained through

<sup>54</sup> BGH, 14 July 2015, KVR 55/14, (2015) *Wirtschaft und Wettbewerb* 1237–45 = WuW/E DE-R 4883 – *Trinkwasserpreise*, affirming OLG Frankfurt, 4 September 2014, 11 W 3/14 (Kart), (2015) *Wirtschaft und Wettbewerb* 171, 173–4 = WuW/E DE-R 4505, 4507–8 para. 35–38 – *Akteneinsichtsrecht*. The case concerned a potential private claimant who sought access to the file of a *Länder* competition authority after it had made commitments binding on a utility in an investigation of allegedly excessive water prices.

<sup>55</sup> See BGH, n. 30, para. 30, 31. The court did not consider such access to the file unnecessary because of the possibility that the court seised with the private damages claim could request the file under § 273 of the German Civil Procedure Code (ZPO), see below. The court pointed out that a potential claimant would have to risk initiating an action, based on the mere hope that the court seised with the action would request the file, without knowing whether the content of the file was helpful or not.

<sup>56</sup> BGH, n. 30, para. 32, 33, arguing that it was sufficient that the applicant’s claim was not one that was “*a priori without merit*,” and that the applicant “*could*” have a claim if the allegations of excessive prices turned out to be justified, and that the applicant “*usually will not know the content of the file and therefore will be unable to specify individual documents*.” All true, but hardly different from the situation of §§ 142, 144 ZPO, in which German courts continue to apply these strict standards. It is unclear whether this could be an indication that at least in competition cases the court is willing to relax the standards under §§ 142, 144 ZPO as well, or whether the access to the file issue is simply treated as a separate category based on different applicable rules.

<sup>57</sup> BGH, n. 30, para. 23.

<sup>58</sup> The court did see this possibility and clarified that these considerations do not allow a general denial of access to the file; instead, the exercise of discretion also has to consider partial access to the file (*ibid.*, para. 24).

<sup>59</sup> § 273(2) No. 2 ZPO.

<sup>60</sup> LG Berlin, 21 December 2012, 96 O 200/10 Kart.

<sup>61</sup> StA Düsseldorf, 13 June 2013, 130 Js 14/07 A. The exchange follows the so-called “double-door model,” according to which both the requesting authority or court needs to be empowered to request (here: the civil court relied on § 273(2) No. 2 ZPO) and the transmitting authority needs to be empowered to transmit (here: the prosecutor relied on § 474 StPO).

<sup>62</sup> OLG Hamm, 26 November 2013 (and 29 January 2014), II-1 VAs 116/13–120/13 and 122/13. OLG Hamm, 26 November 2013, 1 VAs 116/13–120/13 and 122/13, WuW/E DE-R 4101 – *Einsicht in Strafakten*, with case note by A. Yomere and J. Kresken, *Die Entscheidung des OLG Hamm zum Akteneinsichtsrecht von Zivilgerichten in Bonusanträge und vertrauliche Kommissionsentscheidungen*, *Wirtschaft und Wettbewerb* 2014, 481–9.

<sup>63</sup> BVerfG, 6 March 2014, 1 BvR 3541/13, (2014) WuW 609 = WuW/E DE-R 4213 – *Akteneinsicht durch Zivilgerichte* (extracts; full text at WUW0662405).

<sup>64</sup> Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 1 June 2017, *Bundesgesetzblatt* [Official Journal] 2017 Part 1 1416.

reasonable efforts from another party or a third party. The application may be made in the course of the main action for damages (pursuant to § 33a ARC 2017), or in an action for disclosure (under § 33g ARC 2017). The court may make the documents and objects available to the applicant, or may notify the applicant of information contained in them, to the extent this was requested in the application, provided the facts or pieces of evidence are necessary to pursue or defend against a claim, and granting access or giving the information is not disproportionate. Parties affected by the disclosure and the competition authority have a right to be heard, and confidential material may be excluded from the disclosure. The application is to be rejected in so far as disclosure would be disproportionate. The court will take into account in particular the precision with which the material whose disclosure is sought is identified, whether or not a court is already seised with a claim for damages, and what the effect on the effectiveness of public enforcement would be, in particular on pending investigations, leniency programmes and the settlement procedure. The competition authority may refuse disclosure of documents and objects to the extent that they include leniency statements, settlement submissions that have not been withdrawn, the authority's internal

notes, or communications between competition authorities amongst themselves or between competition authorities and the public prosecutor in the district of the Higher Regional Court with jurisdiction over the competition authority's decision and the Federal Public Prosecutor.

**57.** In contrast to the position before the implementation of the Damages Directive (see above 2.1), § 89c(5) ARC 2017 excludes the application of §§ 406e and 475 StPO where damages claims are pursued. In contrast to the position in the UK, the new general rules on disclosure claims (§ 33g(1), (2) ARC 2017) are not applicable to competition authorities, § 89c(5) *finis*.

**58.** These rules are applicable *mutatis mutandis* to courts and authorities other than competition authorities that have files of competition authorities, or extracts or copies from such files in their own files; in such a case, the competition authority is to be heard as well before the court rules on the application for disclosure (§ 89c(6) ARC 2017).

F. W.-v. P. ■