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

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# Implementation of the EU Damages Directive into Member State law

5 May 2017, Würzburg

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# Implementation of the EU Damages Directive into Member State law (Würzburg, May 5, 2017)

## Introductory remarks

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1. As of June 2017, the majority of the EU Member States have implemented the EU Directive on Private Damages Actions (2014/104/EU).<sup>1</sup> In doing so, the national legislators bring the sustained efforts of the Commission, namely to foster the private enforcement of EU competition law to a provisional conclusion. Preparatory works of the Directive date back to the year 1999, when the Commission (under Mario Monti) published its White Paper on Modernisation of the Rules Implementing Articles 85 and 86,<sup>2</sup> leading ultimately to the decentralisation of the application of EU competition law and requiring undertakings to carry out a self-assessment of agreements. Further important stages include the judgment of the ECJ in the ruling *Courage v. Crehan*<sup>3</sup> in 2001, the Ashurst Study<sup>4</sup> in 2004, the Commission's Green and White Paper in 2005<sup>5</sup> and 2008<sup>6</sup>, and a first draft of a Damages Directive in May 2009<sup>7</sup>. In the meantime, the European Commission was overtaken not only by many national legisla-

### ABSTRACT

On May 5, 2017, a conference organised at Würzburg University (Germany) brought together scholars, lawyers and representatives of national competition authorities from five leading European jurisdictions, i.e., France, Germany, Italy, the Netherlands and the United Kingdom, in order to present and discuss the implementation of important provisions of the EU Damages Directive into their respective national law.

Le 5 Mai 2017, un colloque organisé à l'université de Würzburg (Allemagne) réunit des chercheurs, avocats et représentants d'autorités de la concurrence nationales issus de cinq juridictions européennes majeures, à savoir l'Allemagne, la France, l'Italie, les Pays-Bas et le Royaume-Uni. Leurs présentations permirent de comparer et de discuter la transposition dans les droits nationaux respectifs de certaines règles importantes de la Directive européenne sur les actions privées.

1 See the list provided by DG Competition on its website ([http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)).

2 European Commission, White Paper on Modernisation of the rules implementing articles 85 and 86 of the EC treaty, Commission Programme No. 99/027, available at: [http://europa.eu/documents/comm/white\\_papers/pdf/com99\\_101\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com99_101_en.pdf).

3 Judgment of the Court of 20 September 2001, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465.

4 Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules – Analysis of economic models for the calculation of damages, available at: [http://ec.europa.eu/competition/antitrust/actionsdamages/economic\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf).

5 European Commission, Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0672>.

6 European Commission, White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0165>.

7 The Commission never officially published the text, but the draft nevertheless circulated among the members of the European competition law family.

tors having changed their national law in order to facilitate private action, but also by an ever-increasing number of private damages actions, particularly in the United Kingdom, the Netherlands, and in Germany, and also, to a lesser extent, in France and in Italy. At least in these jurisdictions, the Directive's initial objective—i.e., to remove practical obstacles in the way of compensation for all victims of infringements of EU anti-trust law—became less important. In turn, another aim pursued by the Commission, gained in significance—namely, the fine-tuning of the interplay between private damages actions and public enforcement of the EU anti-trust rules by the Commission and national competition authorities. The objective of refining the interplay between public and private enforcement encompasses two opposite aspects. On the one hand, the Directive facilitates so-called “follow-on actions” brought by private plaintiffs. Thus, *inter alia*, the Directive states that final infringement decisions of a national competition authority constitute proof before civil courts in the same Member State (Art. 9).<sup>8</sup> The Directive also orders that the limitation period be suspended or interrupted if a competition authority starts infringement proceedings, thus allowing victims to wait with their private action until the public proceedings are over (Art. 10).<sup>9</sup> On the other hand, the European legislator emphasises the importance of the public enforcement of Union competition law and takes into account the risk

that potential leniency applicants might be deterred from cooperating with competition authorities, where leniency programmes and settlement procedures require self-incriminating statements were to be disclosed. In order to ensure that infringers will continue to cooperate with competition authorities, the Directive exempts leniency statements as well as settlement submissions from the disclosure of evidence, both *inter partes* and in relation to the competition authorities (Art. 5–8).<sup>10</sup> Finally, by providing a regime governing the effects of consensual settlements (Art. 19)<sup>11</sup> the Directive encourages the parties to make use of alternative methods of dispute resolution such as out-of-court settlements, mediation or other means of conciliation.

2. On May 5, 2017, a conference organised by the Studienkreis Wettbewerb und Innovation (Study Circle on Competition and Innovation) at Würzburg University (Bavaria, Germany) brought together scholars, lawyers and representatives of national competition authorities from five leading European jurisdictions, i.e., France, Germany, Italy, the Netherlands and the United Kingdom. Their presentations of the implementation of important provisions of the Directive into their respective national law allowed the experts attending the event to compare and discuss the possible evolution of private damages actions and their impact on the enforcement of competition law in Europe. ■

<sup>8</sup> See Topic 4.

<sup>9</sup> See Topic 3.

<sup>10</sup> See Topics 1 and 2.

<sup>11</sup> See Topic 5.

# Private damages actions before and after the Implementation of the Directive

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## ABSTRACT

*The majority of Member States have implemented the European Directive on Private Damages Actions for Breach of Competition Law, into their respective law, albeit with some delay. In particular, England, Germany, and the Netherlands, but also France and Italy have faced a certain number of private damages actions well before the implementation of the new regime. Partly the national rules and legal innovations have inspired the European legislator.*

La majorité des États-membres de l'Union européenne a transposé la Directive européenne sur les actions en dommages et intérêts du fait de pratiques anticoncurrentielles, quoiqu'avec quelques mois de retard, dans leurs droits respectifs. Ce sont notamment l'Allemagne, l'Angleterre et les Pays-Bas, mais aussi la France et l'Italie, qui ont connu un certain nombre d'actions privées bien avant la transposition du nouveau régime. Ce sont en partie les règles et innovations juridiques nationales qui ont inspiré le législateur européen.

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## Overview

### I. France

1. In France, the work for the transposition of the Directive began in the first term of 2016. Due to constitutional reasons, some parts of the Directive should be transposed through a law, but the government decided not to go before the Parliament and to adopt an ordinance. The process was achieved on March 9, 2017, with the adoption of the Ordinance No. 2017-303, which has been completed by a decree. The new texts entered into force on March 10, 2017, without retroactive application, except for the provisions dealing with access to evidence.

2. Several remarks can be made on the drafting process.

- First, in France, texts in competition matters are usually under the responsibility of the Ministry

of Economy, but here the leading ministry was the Ministry of Justice. This is easy to understand since most of the new rules are modifying civil procedure rules and rules on liability.

- Second, and it is rather unusual for this kind of text, the ministry of Justice organised some informal consultations with the stakeholders (mainly with associations of specialised lawyers, academics) before writing a first draft. A short public consultation of two weeks was organised afterwards in September 2016 on this first draft. Pursuant to the comments received, some changes were introduced, mainly on technical points. Furthermore, the Ministry of Justice took the opportunity of partially implementing another directive, the Directive 2016/943/EU on business secrets.

- Third, the amended draft written by the Ministry of Justice was, as usual, reviewed by

the Conseil d'État. Before issuing the official review, the counsellor in charge of the matter also organised informal meetings with judges and academics to receive comments. New changes were again introduced. Most of them are justified by constitutional reasons, to be in line with the respective fields of law and decree, or are technical improvements.

3. On the final result, short comments can be made since the political line was clear. The Ministry of Justice has been required to work on a “a minima” implementation. The consequences are twofold:

– First, there is no change in the Civil Code or in the Civil Procedure Code. The new texts have been inserted in the book IV of the Commercial Code (hereafter “Com. C.”) dealing with competition law. This book now contains a new title VIII: “*Des actions en dommages et intérêts du fait des pratiques anticoncurrentielles*” (Damages actions for anticompetitive practices). These are deemed to be “special rules”. Therefore, general rules on liability and procedure remain in force for all issues not covered in the new title. In most cases, rules of the Civil Procedure Code will be applicable, but, if an administrative judge has jurisdiction to deal with the case, rules of the Administrative Justice Code will be applicable.

– Second, it explains that the new provisions are strictly limited to damages actions. They do not cover other types of private actions such as actions for breaches of contracts, nullity... That is the main issue raised by this text, since there are in France many contractual actions, mainly in the field of distribution.

However, there is an exception to the principle of a limited implementation. The new rules apply to every infringement of antitrust rules, both European and French ones. In French law, it covers not only the equivalent of Articles 101 TFEU and 102 TFEU, like violations of Articles L. 420-1 and L. 420-2 Com. C., but also specific French anticompetitive practices, like the prohibition of too low prices and new specific prohibitions of Articles L. 420-2-1 and L. 420-2-2 Com. C.

4. To conclude, the new texts seem to be in line with the Directive, even if the government did not take the opportunity to deal with all issues raised by the private enforcement in the French context. However, the courts will probably have to deal with many difficult issues, like for instance the identification of the persons who are liable. The French texts refer to the legal person, either individual or natural person, and not to the undertaking, which exists neither in civil law nor in civil procedure rules. However, in Article L. 481-2 Com. C., which deals with the binding effect of CA's decisions, there is an indirect reference to the parent company to which infringement has been attributed. It will be the choice of the victim to also sue the parent company.

L. I.

## II. Germany

5. On June 9, 2017, the Ninth Amendment of the Gesetz gegen Wettbewerbsbeschränkungen (“German Act against Restraints of Competition—ARC”) entered into effect, introducing important changes to German competition law. Whilst the implementation of the EU Damages Directive<sup>1</sup> remains the main reason and subject matter of the reform, the German legislator also used the amendment as an opportunity to adapt German competition law to the challenges of the digital economy, through a broad range of additional modifications. On March 9 and 30 2017, the German Parliament (Bundestag and Bundesrat) adopted the final text of the Ninth Amendment. The text is based on two different proposals. Its main basis is the Regierungsentwurf (Draft Law)<sup>2</sup> issued by the Federal Government on September 28, 2016. The Economic Committee of the Bundestag proposed further modifications,<sup>3</sup> which the Parliament subsequently adopted as the definitive new law. The German legislator decided to forego the possibility of transferring the changes required by the Directive to other branches of German tort law. In some cases, rather the opposite is accurate for Germany—e.g., the limitation period of damage claims starts in accordance with the commencement of the standard limitation period<sup>4</sup>, i.e., only at the end of the year in which the damage arose (§ 33h para. 2 ACR 2017).<sup>5</sup>

### 1. Coming into force and scope *ratione temporis*

6. The majority of the new provisions come into force with retrospective effect as of December 27, 2016 (§ 186 para. 3 ARC). Yet, the new substantive law on damages only applies to claims for damages arisen or arising after December 26, 2016. There are extra rules with regard to the provisions on limitation and suspension of the limitation period. These provisions are applicable even to pre-existing claims, provided they have not already been time-barred at the time of the coming into force of the new provisions. Thus, the legislator tries to preclude, all disputes relating to the scope *ratione temporis* of these provisions, which have been crucial in many cases German courts have to and had to deal with in the past.

### 2. First wave of reforms by the Seventh Amendment in 2005

7. The Seventh Amendment of the German Act against Restraints of Competition renewed the legal framework

1 Directive 2014/104/EU.

2 Bundestagsdrucksache (Bundestag Document) No. 18/10207.

3 Bundestagsdrucksache No. 18/11446.

4 See the general rule in § 199 para. 1 Bürgerliches Gesetzbuch (German Civil Code).

5 See *infra* Topic 4: Limitation periods – Germany.

of private damages actions in the case of violation of competition law for the first time in Germany in 2005. At that time, German law had already featured many of the Commission's proposals as published in its Green Book dating from 2005. The legislator, *inter alia*, significantly broadened the circle of potential claimants by abandoning the quite narrow "Schutzgesetzfordernis," "Protective Law Requirement," as established by different German courts. As the meaning of this criterion was not very clear, and some authors and lower courts argued that even direct purchasers had no standing to sue the members of a cartel, as the conspiring parties did not specifically direct their cartel against their commercial partners, but rather, only aimed at raising prices.<sup>6</sup> Other important changes and innovations in the field of private antitrust actions that were present in the German law of 2005 are as follows:

- A provision on the "passing-on-defence," at once restricting, but not excluding the possibility for defendants to invoke it (§ 33 para. 3 sent. 2 ARC 2005);
- The granting of prejudgment interest in favour of victims of a violation as of the moment in which the damage occurred (§ 33 para. 3 sent. 4 and 5 ACR 2005);
- The binding effect (and not only prima facie evidence) of decisions issued by competition authorities—even including those arising other Member States, and thus going beyond the requirements of Article 9, paragraph 2, of the Directive;<sup>7</sup>
- The suspension of the period of limitation during administrative procedures (§ 33 para. 5 ARC 2005);<sup>8</sup>
- The possibility for the judge to reduce unilaterally the value in dispute (and thus reducing the legal costs for the claimant) in order to reduce the financial risk of instituting legal proceedings for claimants (§ 89a ARC 2005);
- The right of associations to claim the absorption of the infringing party's profit (*Vorteilsabschöpfung*). However, one must mention that this instrument has never been used in practice, as the association in question has to deliver the profit to the Federal Budget (§ 34a ARC 2005).

6 For more details, see W. Wurmnest, A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition, 6 *German Law Journal* 1174 (2005), online available at [https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b8f51a2eeb817f29ab4316/1454961947041/GLJ\\_Vol\\_06\\_No\\_08\\_Wurmnest.pdf](https://static1.squarespace.com/static/56330ad3e4b0733dccc0c8495/t/56b8f51a2eeb817f29ab4316/1454961947041/GLJ_Vol_06_No_08_Wurmnest.pdf).

7 See *infra* Topic 3: Binding effect of decisions of national authorities – Introduction with remarks on Germany.

8 See *infra* Topic 4: Limitation periods – Germany.

### 3. Case law

8. The quite famous *ORWI* judgement of the Bundesgerichtshof (German Federal Court of Justice) in 2011<sup>9</sup> led to further clarifications including the so-called pass-on defence, the standing of indirect purchasers, joint and several liability of co-infringers and the price effects in the time after a cartel agreement had come to an end. Other court judgments contributed to clarifying important issues and to building up a quite exhaustive body of case law. For instance, it is settled case law in Germany that there is prima facie evidence that at least long-lasting cartels lead to inflated prices, and thus to damages sustained by those purchasing the cartelised product.<sup>10</sup> Later, the Directive required from the legislators of the Member States the adoption of a corresponding provision (Art. 17 para. 2 Directive), which was codified by the German legislator in § 33a para. 2 ARC 2017. The study of the huge number of decisions<sup>11</sup> concerning the scope of the binding effect of administrative decisions (§ 33b ACR 2017)<sup>12</sup> might help to understand possible problems of the new provision, and might provide some suggestions as to how to deal with them. In fact, even before the implementation of the Directive, virtually all decisions imposing a fine for competition law infringements are followed by one or more private damages actions by alleged victims of the infringement seeking redress.

### 4. Measures the German legislator had to implement

9. Despite a yet quite elaborated legal framework, the German legislator needed not only to modify some already existing provisions, but also was required to implement several completely new provisions of the Directive. Amongst these new provisions, the most important change for Germany were the provisions on *inter partes* document disclosure.<sup>13</sup> It must be emphasised that the German legislator even went as far as to create a substantive right to disclosure, which can be claimed both, in the context of a pending damages action as well as in a separate proceeding—e.g., in order to facilitate out-of-court settlements.

The amendment also aligns the German liability regime to that of the EU. As is well-known, under EU competition law, the existing "single economic entity

9 For more details, see Bien, *Concurrences*, No. 1-2012, Art. No. 42396, pp. 231–233.

10 Landgericht (Regional Court) Mannheim, Judgment of 4 May 2012, 7 O 436/11 Kart – *Feuerwehrfahrzeuge* (Wirtschaft und Wettbewerb DE-R, p. 3584, 3588.)

11 E.g., Bundesgerichtshof (Federal Court of Justice), Judgment of 12 July 2016 - KZR 25/14 – *Lottoblock II*, *Neue Juristische Wochenschrift* 2017, p. 1714; Landgericht (Regional Court of) Köln, Judgment of 17 January 2013 - 88 O 1/11 – *Deutsche Telekom*, Beck Rechtsatz 2013, No. 08412; Oberlandesgericht (Higher Regional Court of) Düsseldorf, Judgment of 29 January 2014 – VI-U (Kart) 7/13, Beck Rechtsatz 2014, No. 1737, *Wirtschaft und Wettbewerb*, DE-R, p. 4477 seq.

12 For more details *infra* Topic 3: Binding effect of decisions of national authorities – United Kingdom with remarks on Germany.

13 See *infra* Topic 1: Disclosure of documents that lie in the control of the parties – Germany.

*doctrine*<sup>14</sup> allows the Commission to impose a fine not only against the subsidiary having performed the infringement, but also against the parent company even in cases in which the parent company had no knowledge of its subsidiary's actions. The Commission considers that the “undertaking” that committed the infringement is not necessarily the same as the legal entity within a group of companies whose representatives actually took part—e.g., in cartel meetings. Already in the Eighth Amendment of 2013, the German legislator tried to close possible enforcement gaps, by introducing the possibility for the Bundeskartellamt (Federal Cartel Office) to impose fines on a legal entity that is the legal successor of an entity having committed the infringement. In its most recent Ninth Amendment of the ARC, the German legislator takes a further step by introducing new rules on the liability of parent companies and of legal successors in § 81 para. 3a–3e ARC 2017, thus bringing German liability law largely in line with the European model. Interestingly, the German legislator, in defiance of the requests made by many scholars, has not carried out the changes necessary to apply the same concept in civil law cases. Practice has to wait for clarification of the meaning of the term “undertaking,” as used in Article 1, paragraph 1, Directive by the ECJ.

F. B.

### III. Italy

10. The Damages Directive is an exercise in frustration and a glaring example of how EU competition policy may lose its legitimacy in the eyes of the European citizen. The Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, prepared for the Commission in 2004, which is really in many ways the first formal step undertaken by the Commission on the way to the Directive, opened by stating that “*the picture*” emerging from the study was “*one of astonishing diversity and total underdevelopment.*”

11. Commissioner Kroes referred to such statement in her speech at the Harvard Club in 2005—pre-dating the adoption of the Green Paper, the first official act properly by the Commission, stating: “*(...) my spontaneous feeling is that private enforcement is by nature complementary to and even strengthens the enforcement actions taken by competition authorities.*” In short the Commission had noticed that private enforcement was in a lamentable state and that the only way to get it on its feet was going to be giving some kind of boost to private, stand-alone private enforcement. This would, in addition, so Ms. Kroes again, have the benefit of allowing competition agencies to focus more on their enforcement priorities.

12. Now, you could be for or against a US-type of enforcement, but clearly the US experience gives us a huge range of devices which any European Union or Member State body may choose from in order to make antitrust private enforcement effective: jury trials, pre-trial discovery, opt-out class actions (references to collective actions abound in the earlier Commission's documents but they tend to disappear from the scene later on), punitive damages (which the Directive now even effectively bans, rather incongruously given its EU status and hardly an incentive to more effective enforcement), third-party funding, contingency fees, etc. By merely reading the Directive now, some twelve years down the line, you have the clear impression that the system may have gone awry: the whole Directive hinges clearly on the assumption that most enforcement will be follow-on (a sobering result, given the premisses, as said), and only enhances very timidly (and, in so far as particular jurisdictions may already have an efficient system, does not enhance at all) the efficiency of the private enforcement national systems, first of all in the more sensitive areas, i.e., evidence gathering and collective actions.

13. That said, the Italian law enforcing the Directive is most notable for the rather unusual rapidity which characterised its adoption. It is mainly a diligent and technically savvy (except for a few quirks here and there, as we shall see) transposition of the text of the Directive, with a limited amount of independent thinking.

C. O.

### IV. Netherlands

14. Although the Directive allows, at least with regard to some issues, that the Member States implement wider measures than the Directive provides for,<sup>15</sup> the Netherlands has chosen to do no more than the Directive requires. This is in accordance with the Dutch so-called “Directions for law making.”<sup>16</sup> Therefore, the Dutch implementation legislation applies only to cross-border infringements of competition law and to the so-called parallel application of competition law (in case an infringement of national competition law has an effect on the trade between the Member States).<sup>17</sup> The government intends to make the provisions of the Implementation Act applicable to strictly national cases, but will do so in a separate act. That act must still be put before parliament.

15. The Dutch implementation legislation consists of the Implementation Act Directive Private Enforcement of Competition Law (*Implementatiewet richtlijn*

14 See in particular ECJ, Judgment of 10 September 2009, Case C-97/08 – *Akzo Nobel NV and Others v. Commission*.

15 For example, with regard to disclosure: see Art. 5, para. 8, Directive.

16 Aanwijzing 331 of the Aanwijzingen voor de regelgeving.

17 Explanatory Memorandum (*Memorie van Toelichting*), Tweede Kamer 2015 – 2016, 34 490, No. 3.

*privaatrechtelijke handhaving mededingingsrecht*).<sup>18</sup> A draft of the implementation legislation was published in October 2015. It was subject to an Internet consultation from 8 October 2015 until 22 November 2015. This led to twelve reactions. Some of the reactions gave rise to amendments, mainly on technical points. The amended draft act was put before parliament on 12 February 2016. The Act was published in the State Gazette (*Staatsblad*) on 9 February 2017. It entered into force on the subsequent day, i.e., 10 February 2017.<sup>19</sup>

**16.** The Implementation Act provides for additions to the Civil Code (*Burgerlijk Wetboek*; Book 6; Articles 6:193k through 6:193t were added)<sup>20</sup> and the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*; Articles 161a and 844 through 850 were added).<sup>21</sup> In addition, Article 44a of the Code of Civil Procedure was amended<sup>22</sup> in order to enable the court to resort to the National Competition Authority (*Autoriteit Consument en Markt* or “ACM”) for help with the determination of the quantum of damages.<sup>23</sup>

**17.** Article III provides for the temporal application of these new or amended provisions, but only in part. Taken literally, it provides that Article 6:193s Civil Code and the pertinent provisions of the Code of Civil Procedure will not apply to cases of which the court was seized prior to 26 December 2014. This is the implementation of Article 22 of the Directive. Article 22, paragraph 1, Directive provides that its substantive provisions must not apply retroactively. Article 22, paragraph 2, Directive then says that all other provisions (the non-substantive provisions) shall not apply to actions for damages of which the court was seized prior to 26 December 2014. National law determines when the court is seized of an action.<sup>24</sup> Pursuant to Article 125, paragraph 1, Code of Civil Procedure, a court is seized of an action as soon as a writ of summons (*dagvaarding*) has been served on the defendant. At this stage, the court is not necessarily aware of the action. The writ of summons must set a date for the defendant to appear before the court (this is an administrative appearance for the record only). No later than one day before this date, the claimant must file the writ of summons with the court.<sup>25</sup> If he or she fails to do so, and does not repair this failure within fourteen days, the court is no longer deemed to be seized of the action.<sup>26</sup> In theory, it is therefore possible that claimants, who served a writ of summons before 26 December 2014 but set a date of appearance after this day, did not file their writ of summons with the court. Rather, they may have

started a new action in order to be able to make use of the procedural provisions of the Implementation Act.<sup>27</sup>

**18.** Article 22, paragraph 1, Directive did not need separate implementation. In principle, the material provisions apply from the day on which the Implementation Act came into force.<sup>28</sup>

**19.** Article III Implementation Act erroneously refers to Article 6:193s Civil Code. This is a provision on the statute of limitation. That is a substantive provision.<sup>29</sup> This happened, because the draft Implementation Act that was put up for consultation contained an Article 6:193m that provided that the infringer commits a wrongful act towards a party that suffers damages as a result of the infringement.<sup>30</sup> This was considered superfluous. Therefore, the original Article 6:193m was deleted and the other provisions were renumbered. As a result, the original Article 6:193s, which was a non-substantive provision,<sup>31</sup> became Article 6:193r and Article 6:193t became Article 6:193s.

**20.** The Netherlands has already seen quite significant activity in the area of private enforcement of competition laws. Damages claims have been filed in The Netherlands in relation to the airfreight cartel, the sodium chlorate cartel, the elevator cartel, the paraffin wax cartel, the CRT cartel and the gas insulated switchgear cartel to name but a few. As a result, a body of law already developed prior to the introduction of the Directive and the Implementation Act, often building on provisions in our Civil Code or Code of Civil Procedure that existed already. As a consequence, the legislator found that a number of provisions of the Directive did not need implementation. This, *inter alia*, applies to:

- Article 3, paragraph 2, Directive that the party that suffered harm is entitled to full compensation and that this must include actual loss and loss of profit, plus the payment of interest. It was considered that these principles are already part of Dutch law. That is true. However, an issue may arise if interest in the meaning of the Directive means the actual interest that could have been obtained on a savings account for example. In The Netherlands, claimants will need to rely on statutory interest,<sup>32</sup> absent a separate implementation of Article 3, paragraph 2,

<sup>18</sup> *Stb.* 2017/28.

<sup>19</sup> Art. IV Implementation Act.

<sup>20</sup> Art. I Implementation Act.

<sup>21</sup> Art. II under B and under C Implementation Act.

<sup>22</sup> Art. II under A Implementation Act.

<sup>23</sup> As per Art. 17, para. 3, of the Directive

<sup>24</sup> Explanatory Memorandum, p. 26.

<sup>25</sup> Art. 125, para. 2, Code of Civil Procedure.

<sup>26</sup> Art. 125, para. 3, Code of Civil Procedure.

<sup>27</sup> This may, of course, have implications for the satisfaction of statutes of limitation. Under Dutch law, the original writ of summons would interrupt the statute of limitations (cf. Art. 3:316, para. 1, and Art. 3:317, para. 2, Civil Code).

<sup>28</sup> Cf. Art. 68a, para. 1, Transition Act Civil Code; “old” law may remain applicable if the damage arose or came to light after the entry into force of the new law, but arises from the same event that caused damage the liability for which is governed by the “old” law; cf. Art. 173, para. 1, Civil Code.

<sup>29</sup> Cf. Art. 15, sub h, Rome II.

<sup>30</sup> [https://www.internetconsultatie.nl/implementatiewet\\_richtlijn\\_privaatrechtelijke\\_handhaving\\_mededingingsrecht](https://www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht).

<sup>31</sup> It provides that the court may stay the proceedings for up to two years in case of extrajudicial dispute resolution (cf. Art. 18, para. 2, Directive).

<sup>32</sup> Art. 6:119 Civil Code.

Directive. This statutory interest is fixed by the government from time to time and may be less or more than the actual interest on a savings account from time to time.

– Article 3, paragraph 3, Directive which says that full compensation shall not lead to overcompensation.

F. K.

## V. United Kingdom

**23.** First, a disclaimer: I have been asked to report on the United Kingdom. However, I will largely restrict my remarks to the law of England and Wales. This is not because I have inside information about a future break-up of the United Kingdom after Brexit. Nor is it because of any presumption of English superiority over the Scots. The reason is primarily that I know too little about the separate legal system that is Scots law to say anything meaningful about it, at least not without talking nonsense. The Northern Irish system is not as distinct from the English legal system as Scots law, but especially in the institutional rules there are differences as well. In my contributions to this *Concurrences* issue, I will endeavour to mention divergences from English law in Scotland and Northern Ireland where they are of relevance to the implementation of the Directive. Concentrating on the law of England and Wales is perhaps justifiable in so far as the majority of competition law actions are, and at least until Brexit will continue to be, brought in London.

### 1. Brexit

**24.** Before turning to the implementation of the Damages Directive in the UK, it is necessary to address the elephant in the room. It is unclear what the effects of Brexit on private damages actions in the UK will be, largely because no-one knows what shape Brexit will take. A quick recap for those just awaking from a coma: In the autumn of 2015, the Conservative party under David Cameron's leadership received an unexpected absolute majority in an election fought on a manifesto that promised to keep the UK in the Single Market but to hold an In/Out referendum about the UK's membership in the EU. On 23 June 2016, the voters decided by 51.9% to 48.1% to leave the European Union. David Cameron stepped down, and none of the previous Leave campaigners stepped up. Theresa May became Prime Minister without election in the party after the challengers withdrew. Having campaigned (very half-heartedly) for Remain, the new Prime Minister sought to brandish her Leave credentials and stepped up the anti-EU rhetoric at the Conservative party conference in October 2016<sup>33</sup> and her Lancaster

House speech in January 2017.<sup>34</sup> Freedom of movement of workers and oversight by the Court of Justice of the European Union were defined as being red lines for Her Majesty's Government, and leaving both the Single Market and the Customs Union was determined to be a necessary consequence. It emerged that the EU did not particularly fancy giving the UK an EU à la carte, so that it looked as if things were tumbling inexorably towards an increasingly hard Brexit, at a minimum leaving the Single Market and the Customs Union, perhaps even without an exit deal. After having ruled out holding a snap election several times, Theresa May changed her mind in light of the 20% poll lead of the Conservatives over Labour in spring 2017 in order to form a “*strong and stable government*.” The result of the general election held in June 2017 was that the Conservatives lost their absolute majority in Parliament, with a surprisingly strong showing of Labour under the socialist leader Jeremy Corbyn, resulting in a hung parliament and a government (propped up by an understanding with the Northern Irish party DUP) that was described as “weak and wobbly” rather than “strong and stable.” Talk of a softer Brexit, with overtures towards Single Market/EEA membership (the “Norway solution”), or even remaining in the EU, has begun to gain a little traction, but freedom of movement of workers and Court of Justice oversight are still considered red lines by the current Prime Minister Theresa May. Something would have to give for the EEA solution — or even remaining in the EU — to become viable. Doubts have been raised about PM Theresa May remaining in office, having lost even the support of the right-wing press, and being described as a “*dead woman walking*” by the former Chancellor George Osborne.<sup>35</sup>

**25.** Given the twists and turns over the last year, which would have made William Shakespeare envious, I will refrain from making any predictions about the future of Brexit. Perhaps this is what “*Brexit means Brexit*” stands for. Especially if a harder form of Brexit materialised, this would arguably make private enforcement in the UK less attractive. Recognition and enforcement of the judgment would not benefit from the Brussels I (Recast) Regulation any more.<sup>36</sup> Even before the informally so-called “Great Repeal Bill” (technically: the “European Union (Withdrawal) Bill”) was introduced on 13 July 2017, it was considered likely that the current

<sup>33</sup> See the transcript in Theresa May's keynote speech at Tory conference in full, *The Independent*, 5 October 2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html> (or watch at <https://youtu.be/08JN73K1JDC>).

<sup>34</sup> See the transcript in Theresa May's Brexit speech in full, *The Telegraph*, 17 January 2017, <http://www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/> (or watch at <http://www.bbc.co.uk/news/av/uk-politics-38687842/theresa-may-s-brexit-speech-in-full>).

<sup>35</sup> Samuel Osborne, George Osborne says Theresa May is a « dead woman walking - it's just how long she's going to remain on death row », *The Independent*, 11 June 2017, <http://www.independent.co.uk/news/uk/politics/george-osborne-theresa-may-dead-woman-walking-death-row-andrew-marr-show-a7784181.html>.

<sup>36</sup> Specifically for competition law: Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 9–10; F. Wagner-von Papp, Competition Law in EU Free Trade and Cooperation Agreements (And What the UK Can Expect after Brexit) (March 1, 2017), forthcoming in *European Yearbook of International Economic Law* 2017 (*EYIEL* 2017), working paper at <https://ssrn.com/abstract=2961721>, section 5.2. Generally, see A. Dickinson, Back to the future: the UK's EU exit and the conflict of laws, *Journal of Private International Law* 2016, Vol. 12(2), 195–210; M. Lehmann and D. Zetzsch (2016) Brexit and the consequences for commercial and financial relations between the EU and the UK, *European Business Law Review* 2016, Vol. 27(7): 999–1027.

binding effect of Commission decisions would be abolished.<sup>37</sup> The Bill now confirms this fear. It provides that a court or tribunal “is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court” and “need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so”.<sup>38</sup> The Competition and Markets Authority can, after exit day, only apply the Competition Act 1998 (not Articles 101 and 102 TFEU), will lose access to the European Competition Network, and may therefore also become a less important source of infringement decisions on which domestic follow-on actions could rely. Accordingly, most commentators see the attractiveness of the UK as a forum for damages actions as waning, at least for follow-on actions based on Commission decisions issued after exit day.<sup>39</sup> Others are more optimistic and have pointed out that some of the very attractive features of the UK system would still draw claimants to courts in the UK regardless of Brexit.<sup>40</sup> Perhaps. Not being able to rely on Commission decisions for follow-on actions is clearly a serious drawback, as are the complications in the laws of conflicts. Be that as it may, we will turn to the, *for now*, attractive features of the UK private enforcement regime.

## 2. Private enforcement before and after implementation

**26.** The UK has long been one of the most attractive jurisdictions for private enforcement. Especially the well-established disclosure regime favourable to claimants, which is described in more detail in the separate contribution on *inter partes* disclosure, gives the UK an advantage over its “competitors” in other EU Member States. Even before the Damages Directive was implemented, the legislator had introduced further features that strengthen the attractiveness of the UK system: the Consumer Rights Act 2015 gave in s 81 effect to Schedule 8 of that Act, which changed the Competition Act 1998 by introducing various collective

proceedings including opt-out proceedings,<sup>41</sup> allowed stand-alone claims (as well as follow-on claims) to be brought in the Competition Appeal Tribunal (CAT), and harmonised the limitation periods in the High Court and the CAT to six years.<sup>42</sup>

**27.** Most of the UK private enforcement regime had already complied with the requirements of the Damages Directive. The remaining implementing changes were made by “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,<sup>43</sup> which, under its very helpful Regulation 1(1), may be cited as “The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017”—a very catchy short title. I will rebel and simply call them the “2017 Regulations.” They were made on 8 March 2017, and in accordance with regulation 1(2) came into force on 9 March 2017.

**28.** The 2017 Regulations primarily modify the Competition Act 1998 by its regulation 2, which gives effect to Schedule 1 of the 2017 Regulations. In particular, Schedule 1 of the 2017 Regulations inserts the new Schedule 8A into the Competition Act 1998.

**29.** Part 1 of this new Schedule 8A to the Competition Act 1998 (para. 1 to 7) contains definitions, implementing, with modifications, Article 2 of the Damages Directive. Part 2 of Schedule 8A (para. 8 to 11) contains rules on pass on, implementing Chapter IV of the Damages Directive. Part 3 (para. 12) implements the SME protection contained in Article 11(2), (3) of the Damages Directive. Part 4 deals with cartels (as defined in para. 4), establishes the presumption of harm (para. 13 implementing Art. 17(2) of the Damages Directive), and deals with the liability of immunity recipients and the corresponding contribution issues (para. 14 to 16). Part 5 of Schedule 8A (para. 17 to 26) covers the limitation and prescriptive periods. Here, the differences between the legal systems in England and Wales, Northern Ireland and particularly Scotland do play a role. The limitation period in England & Wales and Northern Ireland is six years, the prescriptive period in Scotland is five years,<sup>44</sup> but provision is made for the beginning of these periods in paragraph 19, and for the suspension and extension of these periods in paragraphs 20 to 25, in particular suspension during the investigation by the competition authority (para. 21), during consensual dispute resolution (para. 22), and during collective proceedings (para. 23). Part 6 deals with disclosure. As will be explained below, the disclosure

<sup>37</sup> Sir Peter Roth, a judge at the High Court and the president of the Competition Appeal Tribunal (CAT), has even called this conclusion “inescapable.” P. Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 9 (but noting that in a stand-alone action, such a decision would be taken into account).

<sup>38</sup> Clause 6 of the European Union (Withdrawal) Bill. The Bill and its progress can be accessed at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

<sup>39</sup> See, for example, Richard Whish, Brexit and EU competition policy, *Journal of European Competition Law and Practice* 7(5) (2016), 297–298, and the interview An Antitrust Conversation with Richard Whish QC, December 2016, <http://www.nortonrosefulbright.com/knowledge/videos/144930/private-enforcement-of-competition-law-in-the-eu>; Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 10; John Ratcliffe & Cormac O’Daley, Brexit and Competition Law: What to expect, *WilmerHale briefing*, 15 September 2016, <http://www.jdsupra.com/legalnews/brexit-and-competition-law-what-to-72034/>.

<sup>40</sup> Jenny Rayner, Interview with Edward Coulson & Julia Joseph: What does Brexit mean for public and private enforcement of competition law in England and Wales?, *LexisPSL*, 26 July 2016, [http://www.blpaw.com/media/download/What\\_does\\_Brexit\\_mean\\_for\\_public\\_and\\_private\\_enforcement\\_of\\_competition\\_...pdf](http://www.blpaw.com/media/download/What_does_Brexit_mean_for_public_and_private_enforcement_of_competition_...pdf) (the ‘positive’ effect that they identify, namely that after Brexit claimants would not have to wait for final judgments by the Court of Justice, is illusory: after Brexit, such actions would have to be stand-alone actions, and such actions can be brought in parallel already today).

<sup>41</sup> The first application for a collective proceedings order (CPO) under the new rules was made in *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9 ([http://www.catribunal.org.uk/files/1257\\_Dorothy\\_Gibson\\_Judgment\\_CPO\\_CAT\\_9\\_310317.pdf](http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Judgment_CPO_CAT_9_310317.pdf)).

<sup>42</sup> Consumer Rights Act 2015, c. 15, <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>, in Schedule 8.

<sup>43</sup> [http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi\\_20170385\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi_20170385_en.pdf).

<sup>44</sup> In Scotland, both “limitation” and “prescription” exists, but the former is applicable only to personal injury claims. Prescription, unlike limitation, extinguishes the obligation completely.

rules in the UK had already exceeded the standard of the Damages Directive, and so the main modifications are the restrictions of disclosure in the cases of the grey and black lists of Articles 6 and 7 of the Damages Directive for investigation materials, and in particular settlement submissions and leniency statements (para. 28, as defined in para. 4(4), (5), (6) and para. 5), investigation materials (para. 29, as defined in para. 3(3)). The only *extension* of the disclosure regime that was necessary to implement the Damages Directive was to enable courts in Northern Ireland to order disclosure in paragraph 31 (a power that had already existed in England and Wales and Scotland). Part 7 implements in paragraphs 32 to 34 the limitations of admissibility of evidence contained in Article 7 of the Damages Directive. Paragraph 35 implements Article 9 by qualifying decisions by other Member States' competition authorities or review courts as *prima facie* evidence. Part 8, consisting only of paragraph 36, prohibits the award of exemplary damages in competition proceedings.<sup>45</sup> Part 9 covers consensual settlements and the effects on contribution, implementing Article 19 of the Damages Directive and changing the previous default rule for who bears the shortfall in the case of a consensual settlement that underrepresents the share of the settling infringer. This will be explored in more detail below in the section on the effect of consensual settlements.

**30.** If it were not for Brexit, the established practice on disclosure, the undoubted expertise in particular of the Competition Appeal Tribunal, and the new possibility of opt-out proceedings would seem to make the UK a Mecca for damages claimants. Competing jurisdictions vying for these damages actions may still hope for British self-mutilation through a hard Brexit.

F. W.-v. P. ■

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<sup>45</sup> For the narrow circumstances in which exemplary damages were available, see the summary in F. Wagner-von Papp, *Implementation of the damages directive in England and Wales, On-Topic Implementation of EU Directive 2014/104/UE, Concurrences* No. 2-2015, reprinted in *Concurrences* 2017 English Edition, 23, para. 6 and 7.

# 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.

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

<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>

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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).

# 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. Hiéramente, *Akteneinsicht im Kartellrecht – Der Aspekt des Vertrauens- und Geheimnisschutzes*, (2015) *Wirtschaft und Wettbewerb* 220–33.

<sup>50</sup> OLG Düsseldorf, 22 August 2012, V-4 Kart 5 und 6/11 (OWi) – *Kaffeeröster*, (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 *Kaffeeröster*, 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. ■

# Binding effect of decisions of national authorities

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## ABSTRACT

*Article 9 of the Damages Directive requires Member States to ensure that an infringement of competition law found by a final decision of a national competition authority is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts. While some Member States considered decisions by a national competition authority as binding already before the Directive, there were a number of countries where these decisions established only a rebuttable presumption of an infringement. Referring to the application of article 9 of the Damages Directive, the Member States try to determine the binding effect within the Member State of the national authority, the binding effect in another Member State and the binding effect of EU Commission's decisions.*

*En application de l'article 9 de la Directive 2014/104/UE, les Etats membres veillent à ce qu'une infraction au droit de la concurrence constatée par une décision définitive d'une autorité nationale de concurrence soit considérée comme établie de manière irréfutable aux fins d'une action en dommages et intérêts introduite devant leurs juridictions nationales. Bien que certains Etats membres aient considéré des décisions d'une autorité de concurrence nationale comme contraignantes déjà avant la Directive 2014/104/UE, il y a eu certains dans lesquels ces décisions n'ont établi qu'une présomption réfutable d'une infraction. Concernant l'application de l'article 9 de la Directive, les Etats membres essaient de déterminer l'effet contraignant dans l'Etat membre de l'autorité de concurrence nationale en question, l'effet contraignant dans un autre Etat membre et l'effet contraignant des décisions de la Commission européenne.*

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## I. Introduction with some comparative remarks from a German perspective

1. Article 9 of the Directive confers binding force on decisions of national competition authorities. For the purposes of an action for damages brought before a national court, an infringement of competition law found by a final decision of a national competition authority or by a review court is irrefutably established. This principle—laid down in the first paragraph of Article 9 of the Directive—is somewhat watered down by the second paragraph that concerns decisions taken in Member States other than the one where the court is seised. In this regard, the Directive requires that decisions

can be presented as at least “prima facie evidence.”

2. In its initial proposal, the European Commission had suggested a binding cross-border effect.<sup>1</sup> This proposition was in particular inspired by Section 33(4) of the German Competition Act 2005, which reads as follows: “*Where damages are claimed for an infringement of a provision of this Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final and non-appealable decision by the competition authority, the European Commission, or the competition authority—or*

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<sup>1</sup> See Article 9 of the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, p. 36 (“*Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement.*”).

*court acting as such—in another Member State of the European Union. The same applies to such findings in final and non-appealable judgments on appeals against decisions pursuant to sentence 1.*<sup>2</sup>

3. In the course of the implementation of the Directive, it is now Section 33b of the German Competition Act 2017 which contains an essentially identical provision with only negligible modifications to the wording. On the EU level, however, it appears that the idea of a cross-border binding effect did not prevail due to doubts as to whether the administrative and court procedures in effect within all of the Member States sufficiently guarantee the fundamental rights of the defendants, as safeguarded, in particular, by Article 47 of the Charter of Fundamental Rights of the EU.<sup>3</sup>

4. The binding effect as stipulated in Article 9 of the Directive covers both infringements of Articles 101 and 102 TFEU and of national competition law, i.e., of “provisions (...) that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003.”<sup>4</sup> This latter aspect is not reflected in the text of Section 33b of the German Competition Act 2017 according to which the cross-border binding effect applies only to a finding of an infringement of Articles 101 and 102 TFEU. A glance at the legislative materials reveals that the German legislator has recognised that the finding of an infringement of national competition law by a competition authority of another Member State must be considered prima facie evidence of the existence of such an infringement. Nevertheless, the legislator assumed that no legislative amendment was necessary in this regard.<sup>5</sup> On the one hand, it is true that the concept of prima facie evidence as such is well-established under German law, and thus the courts should indeed have less of a problem to construe German law in compliance with Article 9 of the Directive. However, on the other hand, the ECJ has consistently held that while a proper implementation of a directive does not necessarily require legislative action, the Member States have to ensure that “the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights.”<sup>6</sup>

2 The translation is taken from: [http://www.gesetze-im-internet.de/englisch\\_gwb/index.html](http://www.gesetze-im-internet.de/englisch_gwb/index.html) (last visited 11 June 2017).

3 See Report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)), Committee on Economic and Monetary Affairs, Rapporteur: Andreas Schwab, p. 79, where the following amendment to the Commission’s initial draft had been proposed: “This obligation is without prejudice (...) to the right to an effective remedy and a fair trial, and the right of defence, pursuant to Articles 47 and 48 of the Charter, and to the right to a fair hearing pursuant to Article 6 of the ECHR. Accordingly, decisions of national competition authorities and competition courts shall be binding provided that there were no manifest errors in the investigation and provided that the rights of the defence were complied with.”

4 See Article 2(1) and (3) of the Directive.

5 Deutscher Bundestag, Drucksache 18/10207, 07.11.2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 56.

6 Case C-144/99, *Commission v. Netherlands*, ECLI:EU:C:2001:257, para. 17.

It is though not beyond doubt that the conditions of the doctrine of prima facie evidence as conventionally understood under German law are met with regard to the findings of competition authorities of another Member State. Thus, while the German courts have sufficient leeway to implement the Directive properly, it is in particular the Court’s last-mentioned condition that is not fulfilled under the law as it currently stands in Germany.

5. In accordance with the general objective of the Directive “to regulate the coordination of [private and public] enforcement in a coherent manner,”<sup>7</sup> the rationale of the binding effect pursuant to Article 9 is essentially twofold: consistency in the application of Articles 101 and 102 TFEU and facilitating follow-on actions for damages.<sup>8</sup> First, it should be avoided that the civil courts render judgments which run counter to (final) decisions of a national competition authority. Second, plaintiffs that bring a follow-on action for damages should be relieved of the difficulties to show an infringement of competition law. Thus, private plaintiffs will benefit from the investigatory powers of public authorities.

6. The concept of facilitating follow-on damages claims by way of a binding effect of prior decisions on an infringement of competition law originates basically in US Federal Law and the ECJ’s case law. In the US, Section 5(a) of the Clayton Act provides that a “final judgment (...) rendered in any civil or criminal proceeding brought by (...) the United States (...) to the effect that a defendant has violated [the antitrust laws] shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant.” The ECJ held in *Masterfoods* that the national courts must refrain from rendering a judgment that conflicts either with a prior decision or with a decision contemplated by the European Commission.<sup>9</sup> This rule has subsequently been codified in Article 16(1) of Regulation No. 1/2003. In *Otis* the ECJ confirmed that the rule applied “when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU.”<sup>10</sup> By establishing such a primacy of the Commission’s decisions over national courts, the ECJ first and foremost sought to guarantee a consistent application of EU competition law. But at the same time the court effectively released plaintiffs from the burden of demonstrating before a national court an infringement which the Commission has already found.

7. Most Member States have considered decisions by a national competition authority as binding already before the Directive. However, there were a number of countries where these decisions established only a rebuttable

7 Recital (6) of the Directive.

8 See Recital (34) of the Directive.

9 Case C-344/98, *Masterfoods and HB*, EU:C:2000:689, para. 51 et seq.

10 Case C-199/11, *Otis and Others*, EU:C:2012:684, para. 51.

presumption of an infringement or where they were regarded only as an element that judges could take into consideration.<sup>11</sup> This reluctance to confer a binding effect on courts was for the most part motivated by concerns for the independence of judges and the protection of the due process rights. It is for that reason that also the extensive binding effect of Section 33(4) of the German Competition Act 2005 (now Section 33b of the Competition Act 2017) has not been without its critics. These concerns have been acknowledged in the literature in so far as the binding effect is widely considered to be limited in two respects: First, the person against whom the binding effect is invoked must have been involved in the competition authority's proceedings. Bornkamm gives the example of a competition authority's decision against a manufacturer practising a selective distribution system: if a later damages claim is pursued against a distributor, the binding effect cannot be invoked if this distributor was not involved in the competition authority's administrative proceedings.<sup>12</sup> Second, it has been argued that the person against whom the binding effect is invoked must have the opportunity to show that the in the earlier proceedings leading up to the decision whose binding effect is in question that person's due process rights were not adequately protected.<sup>13</sup>

**8.** Recital 34 of the Directive provides some guidance on the scope of the binding effect stipulating that it “*cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority (...) in the exercise of its jurisdiction.*” This statement seems to be consistent with the gist of the current practice in Germany though there are still some aspects that need clarifying. It was only recently that the Bundesgerichtshof (the German Federal Court of Justice) held that the binding effect relates to all findings in law and fact on which an authority's decision that an infringement has occurred is based.<sup>14</sup> As the establishment of an infringement as such does not require findings on a causal relationship between the infringement and harm done to others or on the amount of damage caused, the binding effect is—at least as a matter of principle—not relevant to these aspects, which are, however, essential for a successful follow-on action.<sup>15</sup> In particular, where a cartel authority includes findings on the inflicted harm in order to justify the amount of a fine imposed on a cartel, these considerations are not

binding in a follow-on action.<sup>16</sup> Yet, where a decision contains, for example, findings on the appropriate market definition, these findings are binding on a civil court, where a plaintiff relies thereon to establish that certain categories of products or customers, etc. were affected by an infringement.<sup>17</sup> There is, however, a diverging judgment by the Oberlandesgericht (Higher Regional Court) in Munich, which did not consider itself bound by the market definition adopted by the Bundeskartellamt (Federal Cartel Office) in a decision to fine a firm because of vertical restraint of competition.<sup>18</sup> The court adopted a different market definition, and thus denied standing to a firm that alleged to have sustained damage due to market foreclosure even though according to the Bundeskartellamt's market definition the firm should have been regarded as an actor on the foreclosed market.

**9.** Since the binding effect is limited to the establishment of an infringement of competition law, it does not include the establishment of fault in a fining decision. Therefore, the binding effect does not concern the establishment of fault as required for a damages claim pursuant to Section 33a(1) of the German Competition Act. Nevertheless, the Oberlandesgericht (Higher Regional Court) in Karlsruhe has indeed assumed a binding effect in this regard.<sup>19</sup>

**10.** Ultimately, it will be for the ECJ to clarify remaining uncertainties as to the scope of the binding effect and what exactly the legal effect is which is described in Article 9(2) of the Directive as “*prima facie evidence,*” a notion that appears to be novel to a considerable number of Member States, but which in any case has to be fleshed out as an EU law concept. The Member States enjoy a certain discretion to expand the binding effect beyond what is required in Article 9 of the Directive. First of all, they may—like the German legislator—attribute a binding effect to decisions of “foreign” competition authorities. Moreover, decisions of competition authorities might be considered as binding also with regard to other elements of a damages claim such as, for example, fault<sup>20</sup> or the establishment of harm and the calculation of damages, but also for actions not covered by the Directive such as actions for collective redress or actions for an injunction. While the text of Article 33b of the German Competition Act only refers to damages claims, it has been argued that it equally covers actions for an injunction if the requirements of a damages action are met.<sup>21</sup>

11 See P. Buccrossi and M. Carpagano, Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)? *Journal of European Competition Law & Practice* 4 (2013), 3, 5, who refer, for the former alternative, to Cyprus, Denmark, Italy, Latvia, and for the latter alternative to Austria, Estonia, Finland, France, Lithuania, Portugal, and Spain. Germany and Sweden are listed as the only Member States that recognise a cross-border binding effect.

12 J. Bornkamm, in Langen and Bunte (eds.), *Kartellrecht Kommentar Bd 1 – Deutsches Recht* (Neuwied: Luchterhand, 12th ed. 2014) § 33 para. 171.

13 Ibid.

14 BGH, 12.7.2016, KZR 25/14 – *Lottoblock II*, juris, para. 18 et seq.

15 See Deutscher Bundestag, Drucksache 15/3640, 12.8.2004, Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 54 (“*Die Tatbestandswirkung bezieht sich allein auf die Feststellung eines Kartellrechtsverstößes. Alle weiteren Fragen, insbesondere zur Schadenskausalität und zur Schadensbefreiung, unterliegen der freien Beweiswürdigung des Gerichts.*”).

16 OLG München, 21.2.2013, U 5006/11 Kart – *Fernsehvermarktung*, juris, para. 90.

17 See Deutscher Bundestag, Drucksache 18/10207, 07.11.2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 56 (“*Von der Bindungswirkung erfasst sind die Feststellungen zu sämtlichen Tatbestandsmerkmalen, deren Verwirklichung den Verstoß begründet und zu denen die Behörde oder das Gericht in seiner Entscheidung Feststellungen getroffen hat. Dazu gehören insbesondere auch die räumliche und sachliche Marktabgrenzung sowie das zeitliche Ausmaß des Verstoßes, soweit die Entscheidung hierzu Feststellungen enthält*”) (references omitted).

18 OLG München, 21.2.2013, U 5006/11 Kart – *Fernsehvermarktung*, juris, para. 101.

19 OLG Karlsruhe, 31.7.2013, 6 U 51/12 (Kart) – *Feuerwehrfahrzeuge*, juris, para. 46.

20 See Recital (11) of the Directive.

21 See M. Kling and S. Thomas, *Kartellrecht* (München: Franz Vahlen, 2nd ed., 2016), pp. 853 et seq.

11. At the end of the day, the *effet utile* of the binding effect with regard to follow-on damages claims will, to a considerable extent, depend on the way national competition authorities substantiate and publish their decisions.<sup>22</sup> A challenge in this regard seems to be the increasing number of settlement decisions. From the perspective of cartel victims it is crucial whether the decisions of national competition authorities are useful to demonstrate which products have been negatively affected<sup>23</sup> or whether they reveal facts that are helpful to calculate damages.<sup>24</sup> Certainly, the binding effect is restricted to the finding of an infringement and there is a considerable difference between the facts an authority needs in order to show an infringement and the facts a cartel victim needs in order to substantiate a damage claim. However, an authority may, to a greater or lesser extent, be ambitious in supporting potential plaintiffs by putting in a decision as precise and detailed information as possible about the affected sales, customers or the timeframe of the cartel infringement.

J.-U. F.

## II. France

12. Article 9 of Directive 2014/104/EU of 29 November 2014 relating to “Binding Effect of Competition Authorities’ Decisions” has been implemented into French law by Article L. 481-2 of the French Commercial Code (FCC) in the new title specifically created to gather most of the rules governing antitrust damages actions. The binding effect of competition authorities means that victims bring follow-on actions. It is a key provision in order to foster actions of damages in a field where it is highly difficult to prove the fault as a constitutive element of civil liability: access to evidence and cost clearly represent daunting challenges for victims. Recital 34 explains the rationale of Article 9: avoiding inconsistency in the application of Articles 101 and 102 TFEU and increasing effectiveness and procedural efficiency of actions of damages. The high risks of a contradiction between decisions and judgments would undermine the credibility of this branch of law. Moreover, it would be a waste of public funding for a proper administration of justice. Binding effects are consequently regarded as a lesser evil. These arguments have been essential in France. They were sufficiently convincing to overcome a traditional obstacle: the independence of judges. The result is that we may consider that the provisions of Article L. 481-1 of the French Commercial Code faithfully transpose the Directive. First, we need to clarify the notion of “final decision.” Second, the three kinds of requirements for binding effects are to be scrutinised.

22 Pursuant to Section 53(5) of the German Competition Act, the Bundeskartellamt as a rule has to inform the public about a fining decision on its website. This notification should contain *inter alia* information on the facts of the case, the type and timeframe of the infringement, the firms that participated in the infringement, the goods and services concerned.

23 Cf. Article 17(2) of the Directive.

24 See Article 17(1) of the Directive.

## 1. Clarification about the notion of “final decision”

13. Article 9 of the EU Directive states “an infringement of competition law found by a final decision.” The terms “infringement found” leads to exclude commitment decisions. According to Article 9 of Council Regulation (EC) No. 1/2003, “such a decision (...) shall conclude that there are no longer grounds for action by the Commission.” An infringement is not at all established. Commitment decisions cannot have a binding effect. Article L. 481-2 of the Commercial Code is even clearer than Article 9 of the EU Directive. It specifies that the binding effect is subordinate to finding of existence, and the attribution to, a natural or legal person. A French court seems, however, to have gone beyond the EU Directive by admitting a fault whereas the practice had only been subject to a commitment decision. This isolated case has been widely noticed and commented upon.<sup>25</sup> As a matter of fact, a victim bringing an individual action is not prevented from proving a fault without relying on a full recognition by a competition authority. It is different from a collective action, which must be a follow-on action according to Article 623-24 of the Consumer Code.<sup>26</sup> Consequently, a court may be more easily convinced of the existence of a fault if competition concerns are mentioned by a competition authority in a commitment decision. In this way, we can approve this isolated case. But it is not a binding effect *in stricto sensu*. By contrast, settlement decisions are involved in the binding effect of Article 9 of the EU Directive, because the uncontested finding of the infringement is the condition of the downward adjustment.

14. As for the term “final” which determines the “decision,” the French government distinguishes different points which are not mentioned in the directive. Bruno Lasserre, as former president of the French Competition Authority, was convinced that it was inappropriate to wait for a final decision when an appeal has been directed against the amount of fines and he raised that most appeals are exclusively against the setting of the fines. This line of reasoning had been already put forward during the debates relating to the collective action introduced into French law in 2014 by Act No. 2014-344

25 A. Wachsmann and N. Zacharie, Engagements : Le Tribunal de commerce de Paris reconnaît, au terme d’une motivation succincte, l’existence d’une faute à l’encontre de deux sociétés ayant bénéficié de la procédure d’engagements devant l’Autorité de la concurrence, et en déduit un préjudice pour le demandeur qu’il convient de réparer (*DKT/Eco-Emballages et Valorplast*), 30 March 2015, *Concurrences* No. 3-2015, Art. No. 75009, pp. 79-81 ; Ch. Lemaire, Dommages et intérêts : Le Tribunal de commerce de Paris condamne des entreprises à payer des dommages et intérêts du fait de pratiques ayant donné lieu à une procédure d’engagements (*DKT International/Eco-Emballages, Valorplast*), 30 March 2015, *Concurrences* No. 3-2015, Art. No. 75116, pp. 154-156.

26 S. Pietrini and L. Nicolas Vuillermé, Regards critiques sur l’action de groupe en droit de la concurrence, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, M. Béhar-Touchais, D. Bosco et C. Prieto (eds.), IRJS Editions, 2016, No. 38.

on Consumer Affairs<sup>27</sup>. Finally, it was the basis for Article L. 623-24 of the Consumer Code. Transposing the Directive 2014/104/EU, the French government thought that it was appropriate to align Article L. 481-2 of the Commercial Code with Article 623-24 of the Consumer Code and to give the same treatment to parties injured by anticompetitive practices.<sup>28</sup> However the wording of Article L. 481-2 of the Commercial Code is more accurate than Article L. 623-24, which only refers to “*infringement*.” According to Article L. 481-2 of the Commercial Code, the existence of an anticompetitive practice is to be presumed, as well as the attribution to a natural or legal person.

15. The only real problem with the term “final” comes from the reference to “*ordinary appeals*” which is introduced by Article L. 481-2 of the Commercial Code whereas Article 623-24 of the Consumer Code simply refers to “*appeal*.” Thus, the French government distinguishes between ordinary and extraordinary appeals. In our context a final decision is a decision which is no longer subject to ordinary forms of review. It is difficult to understand that decisions subject to an appeal before the French Cour de cassation (French Supreme Court for judicial matters), i.e., an extraordinary appeal, will be considered as having a binding effect on French courts dealing with damages actions. We must emphasise that the participation in the infringement may be discussed as a point of law and therefore appeal may be brought before the Cour de cassation. The French Supreme Court may reverse a decision on this particular point as has been demonstrated in the case of the cartel between German and French millers. Consequently, it seems inappropriate to have used the term “ordinary.”

16. Aside from this regret, the French transposition should be approved because it goes beyond the Directive in a way that could facilitate injured parties’ proof and accelerate their actions for damages.

## 2. Requirements for binding effect

17. The French government refers to three kinds of binding effects: the binding effect within the Member State of the national authority; the binding effect in another Member State; the binding effect of EU Commission’s decisions.

<sup>27</sup> Article L. 623-24, Code de la consommation : “*Lorsque les manquements reprochés au professionnel portent sur le respect des règles définies au titre II du livre IV du code de commerce ou des articles 101 et 102 du traité sur le fonctionnement de l’Union européenne, la responsabilité du professionnel ne peut être prononcée dans le cadre de l’action mentionnée à l’article L. 623-1 que sur le fondement d’une décision prononcée à l’encontre du professionnel par les autorités ou juridictions nationales ou de l’Union européenne compétentes, qui constate les manquements et qui n’est plus susceptible de recours pour la partie relative à l’établissement des manquements.*”

<sup>28</sup> Rapport au Président de la République relatif à l’ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, Légifrance.

### 2.1 The binding effect within the Member State

18. According to some opinions, it would be necessary to discuss the scope of authority of the French Competition Authority’s decision when compared to the force of *res judicata*. It has been argued that only the operative part of a judgment of the court possesses the force of *res judicata*. This analysis has not been retained for two reasons. First, it was depriving the binding effect of the possibility of obtaining useful information for the proof of harm and causality. Second, Recital 34 should not be misinterpreted: its limitation was in fact an enlargement. It provides “*the effect of finding should cover only the nature of the infringement and its material, personal, temporal and territorial scope.*” The scope of the binding effect is consequently large. No further discussion was pursued on the issue. We can admit that the notion of binding effect according to Article 9 of the Directive should not refer to *res judicata* according to national law, but is an autonomous notion of EU law.<sup>29</sup> We can also emphasise that a similar binding effect has been already introduced in Article L. 623-24 by Act No. 2014-344 on Consumer Affairs, because collective actions can only be follow-on actions. The Act, called “Loi Hamon” (Hamon Act), set a precedent for binding effect. Transposition of Article 9 of the EU Directive into French law has been thus facilitated by Article L. 623-24 of the French Consumer Code. Article L. 481-2 refers to an infringement “*deemed to be irrefutably established*” in the same words as Article 9 of the EU Directive.

### 2.2 The binding effects on actions for damages in other Member States

19. Article 9, paragraph 2, of the EU Directive provides that a final decision taken in another Member State may be presented before national courts as “*at least prima facie evidence.*” Opposition must have been very strong against an irrebuttable presumption of fault. Some views about disparities in procedure guarantees still prevail in certain Member States and they are not willing to give substantial weight to infringement decisions in a sort of mutual recognition.<sup>30</sup>

20. However, the phrase “at least” indicates a potentiality. The French government could have chosen to treat all national competition authorities on an equal footing before French courts. It has already chosen such a solution for collective actions in Article L. 623-24 of the Consumer Code. In the preparatory work for the Hamon Act, German solution was put forward as a

<sup>29</sup> R. Amaro and M. J. Azar-Baud, L’effet des décisions des autorités de concurrence devant les juridictions nationales, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, supra n. 24, at 95.

<sup>30</sup> F. Wagner-von Papp, La transposition de la directive 2014/104/UE relative aux actions en dommages et intérêts pour violation du droit des pratiques anticoncurrentielles, May 2015, *Concurrences* No. 2-2015, Art. No. 72302, p. 11.

model for EU integration.<sup>31</sup> The equal treatment of all competition authorities is consistent with the proper functioning of the European Competition Network. However, this Article L. 623-24 has been changed. From now on it just mentions “*national competition authorities and courts*.” It reveals a backward step in order to align this Article with a new rule in Article L. 481-2 of the Commercial Code. The French government finally chose the minimalist solution proposed by Article 9 of the EU Directive instead of clinging to its forward-thinking and integrationist solution by which the decisions from any competition authority in European Union could benefit from the binding effect on French courts. We can only regret that the initial approach sustaining Article L. 623-24 of the Consumer Code was finally not adopted for the Article L. 481-2 of the Commercial Code.

21. As for the phrase “*prima facie*,” some hesitated between a beginning of proof and even a rebuttable evidence. Finally, the Latin phrase is transposed into a plain wording: “*a means of proof*.” Recital 35 inspired this solution: “(...) *the finding can be assessed as appropriate, along with any other evidence adduced by the parties*.”

22. We can conclude that Article L. 481 is in accordance with Article 9, which introduces a special rule for competition authorities’ decisions from other Member States.

### 2.3 Binding effect of the EU Commission’s decisions

23. The French government felt it necessary to devote a third paragraph to the value of the EU Commission’s decision. It is a source of astonishment because the point is already clearly stated. Article 16 of Regulation (EC) No. 1/2003 provides that national courts cannot take decisions running counter to the decision adopted by Commission when they rule on agreements or practices under Articles 101 and 102 TFUE.<sup>32</sup> Article L. 481-2 of the Commercial Code just repeat the wording of Article 16 of the Regulation. The only advantage of this repetition is to set out within one legal text all the rules about the value of evidence for decisions coming from all competition authorities.

C. P.

## III. Italy

24. Before the implementation of the Directive 2014/104, infringement decisions issued by the Italian Competition Authority (ICA) were not binding on civil courts. Nevertheless, civil courts have always considered those decisions as highly reliable evidence, i.e., in the words of a landmark judgment of the Corte di cassazione, “*prova privilegiata*.”<sup>33</sup> This is, strictly speaking, a notion unknown to the Italian Code of Civil Procedure, but it is clear that it means something more than merely admissible evidence subject to judicial free appreciation and at the same time something less than conclusive evidence, owing to the fact that the defendant could theoretically adduce evidence in rebuttal.<sup>34</sup> It could be said that in the current state of the case law the evidentiary value of ICA’s findings comes close to a rebuttable presumption of the existence of the infringement. Actually, civil courts have never departed from ICA’s findings; furthermore, over time, courts have severely restricted the defendant’s power to adduce evidence in rebuttal. Following settled case law, the defendant can try to persuade the court that the findings in the ICA’s decision are not reliable, provided that the defendant brings fresh evidence or new arguments on points of law. In other words, legal arguments and evidence adduced by the defendant cannot be identical to those, which have been already dismissed as immaterial or unfounded in the administrative proceedings before the ICA.<sup>35</sup> With regard to the scope of the very high probative value of ICA’s decision, courts have developed a twofold standard. On the one hand, in actions relating to the “Car Insurance cartel,”<sup>36</sup> courts have followed a broader approach, and they have also attributed to ICA’s assessments, made in the grounds of the decisions, high evidential value with regard to the issues of causation and of the existence and calculation of damages suffered by individual consumers. As a result, the insured asking for compensation satisfies the burden of proof, both with regard to the existence of the infringement and with regard to the existence of damages, simply by adducing the ICA’s decision and the insurance contract.<sup>37</sup> On the other hand, when dealing with cases of abuse of dominance, courts have followed a far more restrictive approach, maintaining that ICA’s decisions enjoy high evidential value only with regard to the finding of infringement. Courts have thus drawn a distinction between price-fixing cartels and abusive exploitation of dominance. In the latter cases, they have constantly held that the special value of the ICA’s

31 B. Becker, L’effet contraignant des décisions des autorités de concurrence pour les actions privées en droit allemand et européen, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, supra n. 24, at 129.

32 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, Article 16 – Uniform application of Community competition law: “1. *When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty*.”

33 Corte di cassazione, civ., 13.2.2009, No. 3640.

34 Corte di cassazione, civ., 28.5.2014, No. 11904.

35 Corte di cassazione, civ., 23.4.2014, No. 9116; Tribunale Milano, 25.6.2016, No. 6666

36 Follow-on damages actions based on ICA’s decision n. 8546/2000. In the grounds of the decision, ICA stated, i.a., that the unlawful conduct actually had an impact on prices.

37 Courts also require that rebuttal evidence, as to causation, has to do with exceptional circumstances relating to the defendant undertaking and not to the general conditions of the market: Cass., 6.5.2015, No. 9131.

decision is limited to findings pertaining to the dominant position of the defendant company on the market and to the qualification of its conduct as abusive.<sup>38</sup>

25. Article 7.1 of the Decree fully implements Article 9 of the Directive, though it does so with some slightly restrictive clarifications inspired by the Directive's Recitals. In damages actions, ICA's final decisions are now formally binding on civil judges and no rebuttal evidence is admitted. In full compliance with the Directive, only final decisions or final judgments finding an infringement are binding. Article 7.1 of the Decree dispels any doubt and clarifies that ICA's decision is binding both when it becomes final due to confirmation by the review court and when it becomes final because appeal was not lodged in due time.<sup>39</sup> With regard to the nature of this binding effect, little help comes from the wording of Article 7, which echoes Article 9 of the Directive. The Report is not unambiguous on the point, though it seemingly inclines towards the characterisation as conclusive evidence.<sup>40</sup> Anyway, the most interesting question is whether the claimant, in the civil proceedings, is prevented from adducing evidence that the anticompetitive agreement had a longer duration or that there are also other accomplices. It has to be borne in mind that the binding effect of national decisions is limited to decisions finding an infringement so that it only operates in favour of the victim. This is all the more convincing if one considers that the victim of the infringements, as a rule, does not take part in the proceedings before the ICA and therefore shall not be subject to adverse effects deriving from the administrative decision.<sup>41</sup>

Article 7 only mentions claims for compensation, also pursuant to Article 140 *bis* Legislative Decree No. 206/2005, i.e., the so-called consumers' "class action." The question of whether the decision is binding even with regard to different actions, such as claims for declaratory relief, injunction or nullity, has been left to the assessment of the courts. An affirmative answer is likely if one takes the view that the rationale behind the binding effect is mainly the easing of the injured party's burden of proof, besides achieving proper coordination between public and private enforcement. In any event, it is likely that courts, when dealing with different claims, will attribute to ICA's decisions at least a very high evidentiary value, as they used to do in the past.

26. Commenting on the Directive and the White Book, many scholars have raised serious doubts about the consistency of the binding effect of national CA's

decision with Article 24.2 and Article 101.2 of the Italian Constitution, Article 6 ECHR and Article 47 European Charter of Fundamental Rights.<sup>42</sup> The issue has given rise in the past to a heated debate.<sup>43</sup> In the end, the prevailing, though not undisputed, opinion is that binding effect can only be tolerated, provided that the decision can be challenged before a court which enjoys "full jurisdiction."<sup>44</sup>

In order to overcome perplexities, that are still alive after the ECtHR *Menarini* judgment<sup>45</sup> and that are principally due to the uneven court practice and high case-by-case variability in the intensity of the scrutiny,<sup>46</sup> the Decree has tried to restate the standard of judicial review of ICA's decision. It has done so by adding to Article 7.1 a long sentence stating that the administrative courts fully review the facts upon which the challenged decision is grounded and that they can also control technical assessments which are not characterised by a substantial margin of appreciation (*oggettivo margine di opinabilità*). The Report tries to reassure the sceptics that "effective judicial review is guaranteed by Art. 7.1, second sentence." Unfortunately, the wording of the provision is far from adequate for the objective, and it is rather likely that it will rekindle the eternal debate on the adequacy of the judicial review of ICA's decisions. Article 7.1, second sentence, seemingly suggests that complex economic assessments, which are at the core of competition law enforcement, are not subject to full review or even to direct control.<sup>47</sup> To dispel doubts that it violates the right to effective judicial review, Article 7.1 is therefore to be construed in a way consistent with the standard of full jurisdiction established in the *Menarini* judgment.<sup>48</sup>

When ICA's decision is final because it has not been challenged, doubts about consistency of the binding effect with judicial independence and the standard of fair trial are all the more strong, though in practice the case is merely hypothetical since prohibition decision are almost always challenged. In the Report, it is suggested that, to avoid inconsistency with Article 101.2 of the Italian Constitution, Article 7.1 should be construed in the sense that civil courts can "refuse to apply" the ICA's decision in exceptional cases and precisely when they find that the decision is "manifestly illegal." The suggestion has not been codified into law and the actual practicability thereof is entirely left to the evaluation of the courts.<sup>49</sup>

38 Tribunale Milano, 9.11.2015, No. 12519; Tribunale Milano, 4.3.2014, No. 3054; Cass., 10.9.2013, No. 20605.

39 Albeit the law is silent on the issue, it is arguable that CA's decisions finding an infringement are also binding when the appeal is only directed against the amount of fines (Siragusa, *Concorrenza e mercato*, 2014/2, 311).

40 The nature of the "binding effect" is discussed, i.a., by: Vinere, *Rivista diritto processuale*, 4-5/2015, 1160; De Santis, *Rivista diritto processuale*, 6/2015, 1510; De Cristofaro, *AIDA*, 1/2015, 118; Negri, *Int'l Lis*, 2009, 136. Some practical effects of the alternative reference to the notion of *res judicata* are outlined by: Tavassi, in *L'impatto della nuova direttiva 104/2014 sul Private Antitrust Enforcement*, Munari (ed.), Roma, 2016, 64.

41 See Chieppa, *Diritto industriale*, 4/2016, 318.

42 Giussani, *AIDA*, 1/2015, 253; De Santis, 1510.

43 Cf. Fabbio, *Concorrenza e mercato*, 2013, 193; Negri, *Int'l Lis*, 2/2014, 72.

44 *Ex multis*: Villa, 445; Pasquarelli, *Diritto industriale*, 3/2016, 252; Panzani, *Italian Antitrust Review*, 2/2015, 102.

45 ECtHR, 27.12.2011, No. 43509/08, *Menarini Diagnostics v. Italia*. Italian courts recently reaffirmed the adequacy of the current standard of judicial review: Cassazione civ., Sezioni Unite, 20.1.2014, No. 1013; Consiglio di Stato, 6.5.2014, No. 2302.

46 See *Judicial Review of Antitrust Decisions: Q&A*, *Italian Antitrust Review*, 1/2015, 144, reporting opinions of several experts; Muscolo, in *L'applicazione del diritto della concorrenza in Italia e in Europa*, Benacchio-Carpagnano (ed.), 2015, Trento, 14; Torchia, *Mercato Concorrenza e Regole*, 2014, 501; Siragusa-Rizza, *Giurisprudenza commerciale*, 2/2013, 408.

47 Villa, *Corriere Giuridico*, 4/2017, 446.

48 See Caiazza, *Italian Antitrust Review*, 2/2017, 112.

49 Caiazza, 114. See also Fabbio, 213.

27. Article 7.1 of the Decree specifies that ICA's decision finding an infringement is only binding on the infringer, i.e., on the addressee named in the operative part of the prohibition decision. It is undisputed that the injured party can always take advantage of the binding effect of the decision, immaterial whether it had or had not participated in the administrative proceedings. As to the material scope, Article 7 codifies into law the words of Recital 34 of the Directive. Accordingly, only the operative part of the decision, where the finding of infringement is stated, is binding in subsequent damages actions; mere findings of facts in the grounds of the decision are not binding unless they are integral and directly relevant to the finding of infringement. It follows that, as a rule, the issues of causation and the existence and amount of damages are not covered. If, as it usually happens, considerations on effects and damages have been inserted into the grounds of the decision merely to draw attention to the possibility of claiming compensation, it is undisputed that they fall outside the scope of the binding effect. If, instead, the ICA's decision has deemed the conduct to be illegal not by object but only "by effect," then it is arguable that "*the determination of effect made by the NCA is part of the constitutive elements of the infringement, and therefore could be deemed within the scope of the binding effect.*"<sup>50</sup> The restrictive approach followed by the Decree helps to overcome the concerns about the compression of judicial independence, and it is basically in line with previous case law, except for cartels. As a matter of fact, previous case law on damages claims based on cartels went perhaps too far, relying on CA's decision as "*prova privilegiata*" not only with regard to the existence of the infringement but also with regard to the effects on the market and, indirectly, the existence and calculation of individual damages. The binding effect has a narrower scope. As for cartels, the practical outcome will not be excessively different, by virtue of the rebuttable presumption of the existence of damages under Article 14. 2 of the Decree. Of course, outside the scope of the binding effect, ICA's decision can still enjoy evidentiary value. It remains to be seen whether this evidentiary value will be as strong as it used to be (see above). In any event, limiting the admissible rebuttal evidence is now out of the question; so the point is whether national decisions are *prima facie* evidence as to the issues of causation and of damages.

Judging from the wording of Article 7.1, it is clear that only decisions finding an infringement are binding; no other ways of closing of the file are considered. It follows also that administrative courts' judgments which set aside the decision are not binding on civil courts. With regard to commitment decisions (Art. 14 *ter* L. No. 287/90), courts had already reached the conclusion that commitment decisions were not "*prova privilegiata*." Such decisions, though, can be considered at least circumstantial evidence and be assessed along with other

50 Siragusa, 306. With regard to culpability, see Siragusa, *JAR*, 2/2015, 105. The A. suggests that findings of intention or negligence made by the CA usually fall outside the scope of the binding effect. In any event, in the field of unfair competition, Art. 2600 Civil Code sets up a rebuttable presumption of fault; it is generally accepted that the provision can be applied by analogy.

evidence, especially the statement of the objections and infringement decision against undertakings that did not submit commitments.<sup>51</sup>

28. Concerning cross-border effects of decisions issued abroad, the Italian transposition has followed a restrictive approach. Albeit the Directive allowed Member States to recognise the full-binding effect also of final decisions of the CAs of other Member States, not surprisingly Italy has not made use of that option. The Italian lawmaker has not even used the phrase "*prima facie* evidence," with which the Directive tries to describe the cross-border probative value. Presumably, the reason is that the notion has no real correspondence in the Italian law of evidence; hence the different opinions of scholars commenting on the Directive.<sup>52</sup> The Decree appears to follow the more restrictive opinions, since Article 7.2 reads: "*(...) evidence to be assessed along with other evidence.*" At first sight, the expression refers to evidence subject to judicial free appreciation under Article 116.1 Code of Civil Procedure. At the same time, pursuant to Article 7.2 the evidentiary value of foreign NCA's decisions has the same personal and material limits as the binding effect of Italian CA's decisions. These boundaries are perfectly understandable if the foreign decision gives rise to a rebuttable presumption. If this is not the case, Article 7.2 inevitably leads one to wonder what kind of probative value, if any, foreign NCA's decisions enjoy outside those personal and material boundaries. In my opinion, if Article 7.2 is construed in a way that leaves the judge completely free to appreciate the probative value of the foreign decision, then it can be argued that it is not entirely consistent with the Directive's objective. It is true that Article 7.2 partly echoes Recital 35<sup>53</sup>; yet, the belated compromise reached in the final text of the Directive clearly aimed at allowing national judges to attach at least a very high evidential value to foreign decisions.<sup>54</sup> Accordingly, Article 7.2 should be construed as referring to evidence *per se* sufficient to prove the infringement, unless proven otherwise. Of course, in the light of the rationale behind Article 9.2 of the Directive, courts would not be allowed to limit the admissible evidence in rebuttal, as they used to do under the so-called "*prova privilegiata*" doctrine.

M. N.

51 Tribunale Milano, 28.7.2015, *BT Italia*.

52 Rebuttable presumption according to: Pasquarelli, 263; simple means of proof according to: Chiappa, 318.

53 In Recital 35 the finding of infringement in NCA's decisions is considered at least *prima facie* evidence and at the same time as evidence that "*can be assessed as appropriate, along with any other evidence adduced by the parties.*" Actually, the latter phrase simply clarifies that the judge has to take into account rebuttal evidence.

54 Haasbeek, in *L'applicazione del diritto della concorrenza in Italia e in Europa*, Benacchio-Carpagnano (ed.), 2015, Trento, 79; Nazzini, *Italian Antitrust Review*, 2/2015, 91.

## IV. Netherlands

### 1. Decision of the Dutch NCA

29. Under Article 161a Code of Civil Procedure, an unassailable decision of the ACM, the Dutch NCA, is irrefutable proof of the infringement that the ACM established in proceedings for the compensation of damages as a result of an infringement of competition law. An “infringement of competition law” is, in this context also, an infringement of European competition law or national competition law that is applied in parallel to the application of Articles 101 and 102 TFEU.<sup>55</sup> “Compensation of damages” must be interpreted broadly. The compensation may also be in the form of set off, for example, if the defendant has a claim against the claimant.<sup>56</sup> This provision implements Article 9, paragraph 1, Directive.

### 2. Decisions of other NCAs

30. Article 9, paragraph 2, Directive has not been implemented, at least not with a new provision. The Netherlands has what is called a “free evidence doctrine” (*vrije bewijsleer*). Article 152, paragraph 1, Code of Civil Procedure provides that evidence may be given with “*all means*.” It is left to the court to determine the evidentiary value of the evidence.<sup>57</sup> Therefore, the courts already have the possibility to accept a final decision of an NCA of another Member State as *prima facie* evidence of the infringement.<sup>58</sup> That is congruent with Article 9, paragraph 2, Directive that requires no more than that the decision of an NCA of another Member State may be presented as *prima facie* evidence.

F. K.

## V. United Kingdom

31. Prior to the Damages Directive, courts in the UK, of course, had to give effect to Article 16 of Regulation (EC) No. 1/2003 where decisions by the European Commission were concerned. In addition, OFT/CMA decisions (and court decisions upholding such infringement decisions) have two separate effects.

32. First, infringement decisions may be used as a basis for follow-on actions. Sections 47A and 58A(2) of the Competition Act 1998 (in the form given to it under the Consumer Rights Act 2015) make final infringement decisions binding on the court and the tribunal.

<sup>55</sup> Art. 6:193k, sub a, Civil Code.

<sup>56</sup> Explanatory Memorandum, p. 22.

<sup>57</sup> Art. 152, para. 2, Code of Civil Procedure.

<sup>58</sup> See also Explanatory Memorandum, p. 8.

Infringement decisions in this provision are, pursuant to section 47A(6) of the Competition Act 1998, decisions by the CMA on the Chapter I and Chapter II prohibitions or Articles 101, 102 TFEU, tribunal decisions that uphold such decisions on appeal, and Commission decisions on Articles 101 and 102 TFEU.

33. Second, section 58 of the Competition Act 1998 provides that findings of fact by the CMA are binding on the court or tribunal, unless the court or tribunal directs otherwise. This goes beyond the binding effect in follow-on actions, and in one sense even beyond the German provision in § 33(4) ARC 2005/§ 33b ARC 2017, as it does not only relate to the finding of an infringement, but *any* finding of fact. The question under what conditions a finding of fact is binding and when the court or tribunal should direct otherwise is not yet completely settled. In *Enron*, the court of appeal stated that “*the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance. Findings in the former category should be regarded as binding, because to challenge them would be tantamount to challenging the finding of infringement. However, if the finding is peripheral or incidental, on the one hand, to question it may not involve subverting the infringement finding and on the other it may be fair and sensible because the undertaking may not have been concerned, for the purposes of the regulatory proceedings, to contest such a point, whereas if the finding is relied on in proceedings for damages it may have a much greater importance.*”<sup>59</sup> In *Gibson v. Pride Mobility*, the OFT had in its infringement decision made a finding that the agreements and concerted practices in question had a “*not-insignificant*” impact on competition for mobility scooters. Defendants argued that this was not a finding of fact, and if it were, it would be one which was only “*peripheral or incidental*,” and that the CAT should direct otherwise. The CAT did not, at this stage, rule on whether or not to direct otherwise, but noted that “*whether or not binding, it is nonetheless very relevant that the OFT reached the view, after a lengthy investigation, that the infringement had such an effect.*”<sup>60</sup>

34. Prior to the implementation of the Damages Directive in the 2017 Regulations, foreign NCA decisions (or decisions of courts acting as competition authorities or as appeals courts) had no binding effect on UK courts.

35. Implementing Article 9(2) of the Damages Directive, paragraph 35(1) of the new Schedule 8A to the Competition Act 1998 now provides that “[f]or purposes of competition proceedings, a final decision of a member State competition authority or review court that there has been an infringement of Article 101(1) or Article 102 by an undertaking is *prima facie* evidence of the infringement.” Just as under Article 9(2) of the Damages Directive, it is not entirely clear what evidence would be necessary and/or sufficient to rebut the evidence.

<sup>59</sup> *Enron Coal Services Ltd v. English, Welsh & Scottish Railway* [2011] EWCA Civ 2 [50], quoted in *Dorothy Gibson v. Pride Mobility Products Ltd* [2017] CAT 9 [117], sub a.

<sup>60</sup> *Dorothy Gibson v. Pride Mobility Products Ltd* [2017] CAT 9 [117] sub b.

36. The informally so-called “Great Repeal Bill” (that is, the European Union (Withdrawal) Bill, introduced on 13 July 2017<sup>61</sup>) will demote the mandatory effect of Article 16 of Regulation (EC) NO. 1/2003, and the prima facie effect from Article 9(2) of the Damages Directive, to a mere option for courts to have regard to Commission and Court decisions. According to its clause 6, a court or tribunal “*is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court*” and “*need not have regard to anything done on or*

*after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so*”.<sup>62</sup> Therefore, while follow-on actions based on decisions rendered before exit day would appear to continue for an interim period, follow-on actions in the UK will eventually become markedly less attractive, as they can only be based on CMA decisions, which will generally be confined to establishing harm within the UK.<sup>63</sup>

F. W.-v. P. ■

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61 The text of the Bill can be accessed and the progress of the Bill can be tracked at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

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62 Clause 6 of the European Union (Withdrawal) Bill. The Bill and its progress can be accessed at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

63 Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 10.

# Limitation periods

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## ABSTRACT

*Limitation periods could imperil the enforcement of competition damage claims and in the footsteps of the Manfredi case of the ECJ artt. 10, 11 and 18 of the Damages Directive therefore give complex rules on this issue. France, Germany, Italy, the Netherlands and the United Kingdom have adapted their relevant legislations. The five years minimum limitation period is extended in Germany (five years plus rest of the year) and England (six years) and in some Member States there is discussion or case law on when in practice the period really starts to run, especially with a view to the question of publication of decisions of competition authorities. Absolute limitation periods, which are mentioned in Recital 36, is provided for in a number of Member States. Member State choices for suspension or interruption diverge. Sometimes, there are specific rules for limitation periods for claims for contribution against co-infringers. One may wonder whether some of these divergencies may lead to law and forum shopping.*

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Les délais de prescription pourraient compromettre la mise en œuvre des demandes d'indemnisation du fait des pratiques anticoncurrentielles. Par conséquent, les articles 10, 11 et 18 de la directive sur les actions en dommages et intérêts donnent, dans la lignée de l'arrêt Manfredi de la CJUE, des règles complexes sur cette question. La France, l'Allemagne, l'Italie, les Pays-Bas et le Royaume-Uni ont adapté leur législation pertinente. Le délai de prescription de cinq ans au minimum est allongé en Allemagne (cinq ans plus la fin de l'année) et en Angleterre (six ans). Dans d'autres États membres, il y a un débat ou de la jurisprudence sur le point de savoir quand en pratique le délai de prescription commence réellement à courir, en particulier au regard de la question de la publication des décisions des autorités de concurrence. Les délais de prescription absolus mentionnés au considérant 36 sont prévus dans plusieurs États membres. Les choix des États membres divergent entre la suspension et l'interruption. Il y a parfois des règles spécifiques pour les délais de prescription concernant les demandes en contribution à l'encontre des coauteurs de l'infraction. On peut se demander si certaines de ces divergences peuvent mener à un forum shopping ou à un law shopping.

## I. Introduction

1. Limitation periods—or prescription—are a classic issue of private law, but may sometimes have been regarded as a quite dull subject,<sup>1</sup> as a kind of Cinderella of the law. On closer inspection, it appears that such a view would be mistaken and would produce a false impression. In the law of limitation periods, diametrically opposed interests of the parties involved must be taken account of and weighted. On the one hand, there is, in the words of the great pandectist Bernhard Windscheid taken up to the *Motive* (the *travaux préparatoires* or legislative materials) to the German Civil Code (Bürgerliches Gesetzbuch, BGB), the “obfuscating power of time” (*verdunkelnde Macht der Zeit*).<sup>2</sup> If a long period of time has passed, it gets more and more difficult to establish and prove the facts. Legal peace (*Rechtsfriede*) must, someday, be

established.<sup>3</sup> On the other hand, a creditor should have a realistic chance to enforce his claim. In case his claim would be time-barred by the statute of limitations even before he became aware of his claim and had a realistic chance to pursue it, his claim would be deprived of substance and value and practically be taken away from him.<sup>4</sup> In this field full of tension, legal rules on limitation periods mostly have to strike some compromise. In matters of competition law, also the public interest may be involved.<sup>5</sup> And in practice, limitation has sometimes been invoked as a defence successfully in competition damages actions.<sup>6</sup> Interestingly enough, a number of European legislators have, in relatively recent years, thoroughly reformed their laws on limitation periods, e.g., France in

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1 In the same sense, R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, 2002, 65.

2 B. Windscheid, *Lehrbuch des Pandektenrechts*, Band I, 9th edition by v. Kipp, 1906, § 105; *Motive* I 291.

3 H. Prütting, G. Wegen and G. Weinreich (eds.) (*-Deppenkemper*), *BGB*, 12th edition 2017, § 194 no. 3; H. Brox and W.-D. Walker, *Allgemeiner Teil des BGB*, 39th edition 2015, no. 668.

4 *Begr. des RegE*, BT-Drs. 14/6040 S. 95, 96; vgl. dazu BGH, Urteil vom 20-04-1993 – X ZR 67/92.

5 See A. Piekenbrock, *Befristung, Verjährung, Verschweigung und Verwirkung*, 2006, p. 317ff.

6 A specific problem is the intertemporal application of the rule on suspension after a competition authority has taken action, see A. Rinne and K. Kolb, *Die Verjährung kartellschadensersatzrechtlicher “Altansprüche” – Ein Überblick*, *Neue Zeitschrift für Kartellrecht*, 2017, 217-223.

2008<sup>7</sup> and already in 2002 Germany.<sup>8</sup> These reforms have also been in harmony with some academic proposals for uniform European or international rules on limitation periods.<sup>9</sup> But above all, in the present context, there is the *Manfredi*-ruling of the ECJ. There, the ECJ found that national limitation periods for actions for damages because of infringements of the European competition rules have to observe the principles of equivalence and of effectiveness and may not render it practically impossible or excessively difficult to exercise the right to seek compensation for the harm suffered.<sup>10</sup> It thus seems logical that the Directive 2014/104<sup>11</sup> expressly addresses the issue of limitation periods. This is done in Article 10 Directive, which has got four paragraphs, and also in Article 11(4) (joint and several liability of immunity recipient) and Article 18 (consensual dispute resolution). Recital 36 gives explanations to Article 10 and Recital 49 to Article 18. This already shows considerable complexity of the issue. To give at least an introductory overview, one might try to draw up a non-exhaustive, and yet too long list of issues which merit discussion when one does analyse the different implementing rules of the Member States. At the outset, it should be recalled that Article 10(1) Directive mandates the Member States to “lay down rules applicable to limitation periods for bringing actions for damages” ((1) sentence 1) and these shall “determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended” ((1) sentence 2).

## 1. Five years or more under the subjective system?

2. For the limitation period to begin to run, Article 10(2) Directive requires that the infringement have ceased and that the claimant have or ought to have knowledge. This is a subjective system, but Article 10(3) only prescribes a limitation period of “at least five years.” This is a minimum rule and Member States may adopt—and sometimes indeed adopt—longer limitation periods, e.g., in Germany (five years plus rest of year)<sup>12</sup> or England (six years).<sup>13</sup> Will this cause law and forum shopping?<sup>14</sup>

7 Loi n° 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile. See, e.g., P. Ancel, *Carakter, System und Fristen der Verjährung in Frankreich nach der Reform*, in: O. Remien (ed.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform*, Würzburger Tagung vom 8. und 9.5.2009, 2011, 29-44; for reports on many aspects of this reform and on reform proposals in other European countries, see the conference volume edited by O. Remien, just cited in this note.

8 Gesetz zur Modernisierung des Schuldrechts, Vom 26. November 2001 (BGBl. I Seite 3138).

9 Above all Principles of European Contract Law and UNIDROIT Principles of International Commercial Contracts.

10 ECJ, judgment of 13. 7. 2006 – C-295/04 (*Manfredi*), No. 82, ECLI:EU:C:2006:461.

11 Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

12 See § 33h GWB.

13 See s. 18.

14 See W. Wurmnest, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie*, *Neue Zeitschrift für Kartellrecht*, 2017, 2.

## 2. Absolute period?

3. Recital 36, sentence 5, allows Member States “to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.” This is a faculty left to the Member States; the Directive does not prescribe having such an absolute period. Germany, e.g., has such a rule, or even two of them. Does this mean that German law will be disadvantageous for the claimant?

## 3. Effects of lapse of limitation period

4. The Directive gives rules on limitation periods, but does not say anything on their effects. Concepts, however, may differ. The effects of the lapse of the limitation period therefore also may be an issue, although arguably a more dogmatic than practical one.

## 4. Effects of action of competition authority

5. In practice, follow-on actions are important and they are preceded by action having been taken by a competition authority. Article 10(4), sentence 1, Directive prescribes that if a competition authority takes action, the limitation period is suspended or interrupted. The choice between suspension and interruption is expressly left to national law. The two concepts are not defined, but their existence is presupposed—suspension only stopping for some time the limitation period from running, whereas interruption takes away the part of the limitation period which already has lapsed and later leads to a new start of a fresh five years (or longer) limitation period to run. What are the choices which have been made by the national implementing legislators in this respect? At any rate, Article 10(4), sentence 2, adds that the “suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated.”

## 5. Limitation period for recovery of contribution by co-infringer (joint and several liability)

6. Article 11 Directive regulates joint and several liability and Article 11(5) Directive foresees that an infringer may recover a contribution from any other infringer. But what about the limitation period applicable to this claim for contribution of one infringer against his co-infringers? The solution is not necessarily evident, at least the German implementing legislator considered a specific rule to be necessary.<sup>15</sup>

15 § 33 h VII GWB n.F.; see further infra the German report.

## 6. Immunity recipients

7. As far as joint and several liability is concerned, immunity recipients under Article 11(4) Directive enjoy some privilege—they are jointly and severally liable only to their direct or indirect purchasers or providers (lit. a) or “*where full compensation*” cannot be obtained (lit. b); subparagraph 2 of Article 11(4) says that any limitation period applicable shall be “reasonable and efficient, to allow injured parties to bring such actions.” How is this implemented?

## 7. Consensual dispute resolution

8. A consensual dispute resolution process according to Article 18(1) Directive suspends the limitation period. Here, interruption is not given as an alternative option to the Member States. One may ask whether a specific implementing rule is necessary or whether the general rules in periods of limitation can be applied and suffice.

## 8. Collective proceedings

9. Directive 2014/104<sup>16</sup> does not contain specific rules on collective proceedings. Nevertheless, when legislating on competition damages, Member States may wish to legislate on the effect of collective proceedings on the limitation period.

10. The above list gives a number of issues on periods of limitation which possibly could even be extended. To analyse them in the light of the diverging implementing legislations of important Member States promises to be the most interesting and rewarding.

O. R.

# II. France

11. Limitation periods must not be overlooked because they can be an obstacle to an increase in actions for compensation. Follow-on actions should not be impeded by a too large notion of the limitation period. That is the reason why Recital 36 invites Member States to ensure that limitations do not render practically impossible or excessively difficult the exercise of the right to full compensation. Limitations periods are referred to in two Articles of the EU Directive: mainly Article 10 and on a secondary basis Article 18. The provisions of these Articles needed some changes in French law, which have been implemented without difficulties. They did not really trigger much debates.

<sup>16</sup> Above note 11.

## 1. General provisions about limitation periods

12. Article 10 of the EU Directive deals with three specific aspects of limitation periods: the duration; the beginning of these periods; and the circumstances under which they are interrupted or suspended.

### 1.1 The duration of the limitation period

13. Article 10 invites Member States to ensure that the limitation period for bringing actions for damages is at least five years. According to the existing Article 2224 of the Civil Code, action suits shall lapse after a period of five years. The French government could have extended this period, but it clung to the period of five years fixed by Article 2224 of the Civil Code. It was not considered necessary to go beyond five years. Changes to facilitate claims for damages were finally concentrated on the beginning of the limitation period.

### 1.2 The beginning of the limitation period

14. According to Article 2224 of the Civil Code, action suits shall lapse from the day on which the holder of the right became aware or should have been aware of the facts necessary to enable him or her to fully exercise the right. This approach is realistic.

15. Article 10 of the EU Directive outlines the scope further in order to be even more pragmatic. The limitation period should not begin if the claimant does not know or cannot reasonably be expected to know cumulative elements. Two main elements are mentioned: cessation of the anticompetitive practice; knowledge of some accurate information. Those pieces of information are: (a) the behaviour and the fact that constitute an infringement, (b) the facts that the infringement has caused harm to be suffered by the holder of the right, (c) the identity of the infringer. Article L. 482-1 of the Commercial Code faithfully reproduces the list of criteria laid down by Article 10 of the EU Directive. It even added a requirement: the victim must know acts and facts “*imputed to a natural or legal person.*”

16. This would mean in practice that national competition authorities and the Commission publish their decision or a press release containing all these details. The French Competition Authority has aligned its press releases with those of the EU Commission. Its practice is even better in that the French Authority publishes press releases and the decisions they referred to on the same day, whereas the EU Commission publishes its decision long after its press releases. By contrast, the Bundeskartellamt did not

publish most of its decisions<sup>17</sup>. Bruno Lasserre, former president of the French Competition Authority, often regretted this lack of information regarding respect of the rule of law. We hope it will be quite different in the future thanks to the transposition of this Directive.

17. Moreover, Article L. 482-1 implements a subparagraph of Article 11(4) on joint and several liability: “*Member States shall ensure that any limitation period applicable to cases under this paragraph is reasonable and sufficient to allow injured parties to bring such actions.*” It is explained in the final report to the President of the Republic relative to the ordinance of 9 March 2017 transposing the EU Directive<sup>18</sup>. According to the French government, Article L. 482-1 must be applied in relation with Article L. 481-11 implementing Article 11 of the EU Directive on joint and several liability. The five-year period does not begin to run if the injured party, who did not obtain compensation from jointly and severally liable debtors, brings an action against an immunity recipient. The French government chose to deal with all aspects of the beginning of limitation periods in the same Article L. 482-1.

### 1.3 Interruption or suspension of the limitation period

18. Article 10(4) of the EU Directive requires that “*Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.*” It added that “*the suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.*”

19. Article L. 462-7 is modified in the 4th subparagraph: any action taken by the Competition Authority, the EU Commission or another national competition authority to investigate, to find or to sanction an infringement interrupts the period of prescription. The French government further provides: effects of interruption shall go on until a decision is no longer subject to an ordinary review. The effect of an interruption offers more protection than a suspension. According to Article 2231 of the Code of Civil Procedure, “*interruption erases the delay that has elapsed and causes a new period of the same duration as the former period to run.*” In contrast, suspension of the prescription only stops without erasing the delay that has already run, according to Article 2230. The French government chose interruption, which is the most convenient solution for the injured parties.

We can conclude that Article 10, paragraph 4, of the EU Directive has been faithfully implemented into French law.

## 2. Particular provisions about the suspensive effects of a consensual dispute resolution

20. According to Recital 49, the objective is obviously not to discourage injured parties and infringers from choosing consensual dispute resolution. Recital 49 explains that limitation periods for bringing actions for damages could prevent them from having sufficient time to come to an agreement on the compensation to be paid. That is why suspension seems to be necessary.

21. Article 18, paragraph 1, deals with these suspensive effects: “*Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process.*” It adds: “*The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.*”

22. The French government considered this provision was already implemented thanks to Article 2238 of the Civil Code, which provides: “*Prescription is suspended from the day when, after a dispute arises, the parties agree to proceed to mediation or conciliation, or, if there is no written agreement, from the day of the first meeting of the mediation or conciliation.*” The beginning of the suspension is clearly mentioned. The end of the suspension is as clear. Article 2238 of Code civil further specifies: “*The prescriptive period begins to run again, for a duration that cannot be inferior to six months, from the date on which either one of the parties or both, or the mediator or the conciliator, declares that the mediation or conciliation has ended.*” Suspension for the whole duration of a consensual process is ensured.

We can conclude that existing law in France was already complying with the requirements of the EU Directive.

C. P.

17 T. Weck and P. Rummel, Allemagne : Le Gouvernement allemand adopte le Projet de loi relative à la modernisation de la Loi contre les restrictions à la concurrence (Projet de neuvième amendement de la Loi contre les restrictions à la concurrence), 28 September 2016, *Concurrences* No. 1-2017, Article No. 83364, pp. 222-223.

18 Report to the President of the Republic relative to ordinance No. 2017-303 of 9 March 2017 on actions for damages for anticompetitive practices.

# III. Germany

23. The German GWB (Gesetz gegen Wettbewerbsbeschränkungen—Act against restraints of competition) in the new version enacted with the 9th reform act to it (9. GWB-Novelle) of June 1st, 2017 now has one quite long special provision on “*Verjährung*,” i.e., limitation of actions or prescription. It is § 33h GWB.<sup>19</sup> This provision has no less than eight paragraphs. Article 10 Directive has got four paragraphs and even if one adds Articles 11(4) and 18(1) Directive the German law has the tendency of being quite elaborate. A closer look may show the details.

## 1. Five years?

24. The five years rule of Article 10(3) Directive is followed in § 33h I. The German legislator sticks to the five-year minimum rule and has not opted for a higher number of years. As the ordinary prescription period in the BGB is three years only,<sup>20</sup> this is probably not surprising. However, the number of years alone is not decisive!

## 2. Subjective system and end of the year: Five years plus rest of year!

25. Really great importance must be attached to the question when the limitation period begins to run. Generally speaking, there are objective limitation periods and subjective limitation periods: Objective periods start with some kind of real event; subjective periods start only when the creditor has or ought to have knowledge of the event and/or of his claim.<sup>21</sup> Article 10(2) Directive is quite clear in requiring that for the limitation period to begin to run the infringement must have ceased and the creditor must know or be expected to know of behaviour, infringement (lit. a first and second alternative), harm (lit. b) and identity (lit. c). This is a subjective system. And it is in conformity with current general German law of limitation periods.<sup>22</sup> § 33h II does not closely follow the wording of Article 10(2) Directive, but rather reverses the order of the different elements; however, this does not seem to be a deviation in substance.

26. Though, in one respect there is an important German speciality in § 33h II: The limitation period according to § 33h only starts to run “*mit dem Schluss des Jahres*” (with the end of the year) in which all the requirements have been met. Thus, if today on May 5th, 2017 all requirements are met, the limitation period nevertheless only starts to run with the end of the current year, i.e. December 31, 2017! This is the classic German system of end-of-the-year-, Sylvester or ultimo-prescription! It is nowadays the ordinary prescription system in Germany.<sup>23</sup> In a general comparative perspective, this is interesting, but often not followed in other countries.<sup>24</sup> The effect is that the limitation period is not really five years, but a bit longer: five years plus rest of the current year! Only in case all prerequisites are met on December 31st, the period will be just clear five years. If everything gets known to your client on January 1st, it is five years plus 364 days! This is in conformity with Article 10(3) Directive: “*at least five years*.” Interestingly enough, the reasons for the draft bill do not refer to the general German system of end-of-the-year prescription, but say that in practice it will be hardly possible to exactly determine in time when the preconditions for the start of the running of the limitation period under § 33h II, respectively Article 11(2) Directive, have been met.<sup>25</sup> Whether before or after the beginning of New Year’s Day in the eyes of the German legislator is easier to determine and less often relevant. When, e.g., a claim is started on some July 1st it does not matter whether it has been late in June or early in July of five years ago that the claimant got knowledge, it suffices that it has not been earlier than before the start of that year five years ago. In practice, German law thus should be more creditor-friendly than many other European Member State laws: not five years sharp, but five years plus rest of year! Welcome to German law to those who are just a bit late? But please, not too much. And: England and Wales have six years (but not Scotland...)<sup>26</sup>

## 3. Objective period of limitation: Ten years

27. Subjective systems of periods of limitation mostly have a relatively short subjective period of limitation going together with a long objective period,<sup>27</sup> although the “long-stop” is for specific cases sometimes deliberately left out.<sup>28</sup> Article 10 Directive does not contain such a

19 Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 1. Juni 2017 (BGBl. I S. 1416); before see the draft bill in: BT-Drs. 18/10207 (Gesetzentwurf der Bundesregierung Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen), modified by BT-Drs. 18/11446 (8.3.2017) and see Bundesrat Drucksache 207/17 (10.3.2017).

20 Cf. § 195 BGB.

21 D. Looschelders, *Verjährungsbeginn und -frist im subjektiv-objektiven System sowie die Wirkung von Treu und Glauben*, in: O. Remien (ed.) *Verjährungsrecht in Europa – zwischen Bewahrung und Reform*, Würzburger Tagung vom 8. und 9.5.2001, 181–198, 181. See also R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription*, 2002, 96ff.

22 A. Fritzsche, C. Klöppner and M. Schmidt, *Die Praxis der privaten Kartellrechtsdurchsetzung in Deutschland*, *Neue Zeitschrift für Kartellrecht*, 2016, 501, 501–502.

23 D. Looschelders, *Ibid.* 189f.; BeckOK BGB/Henrich/Spindler, 42. Ed. 1.2.2017, BGB § 199 no. 3. See also O. Remien, *Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung*, in: O. Remien (ed.), *Verjährungsrecht in Europa zwischen Bewahrung und Reform*, Würzburger Tagung vom 8. und 9.5.2009, 2011, 337–402, 393.

24 O. Remien, *Schlusswort: Übereinstimmungen und Unterschiede in den Kernfragen der Verjährung in der europäischen Privatrechtsentwicklung*, in: O. Remien (ed.), *Verjährungsrecht in Europa* (above note 23) 377, 393.

25 BT-Drs. 18/10207 S. 66 zu Abs. 2.

26 See s. 18.

27 R. Zimmermann (above note 21) 99ff.; O. Remien (above note 23) 385f.

28 See O. Remien, *ibid.* 391f. on personal injury cases in France and the Netherlands as well as in a British draft and, discussing the problem of cases of sexual abuse.

rule, but Recital 36, sentence 5, permits application of “absolute limitation,” provided it does not make it impossible or excessively difficult to exercise the right to full compensation.<sup>29</sup> The German long-stop period starts to run when the claim has accrued (§ 33h III No. 1) and the infringement has ceased (§ 33h III No. 2). In case the infringement continues and the ten-year-limit of § 33h III applies, German law may be quite unfavourable to somebody who acquires knowledge only very late, say after nine years: only one year is left for taking action. Other EU Member States laws seem to be more favourable: Plaintiff, beware of German law?

28. Where the victim learns of the infringement only after more than ten years, one might wonder whether the complete cut-off by § 33h III is really compatible with Recital 36 and the ruling in *Manfredi*.<sup>30</sup> If these latter are taken literally, probably not... But this is doubtful. If such a case should arise in practice, a preliminary reference to the ECJ may be appropriate.

## 4. Further objective long-stop: Thirty years

29. A further objective long-stop is provided for in § 33h IV: Thirty years after the infringement. This runs independent of harm and ceasing of the infringement. Probably, it will be rather exceptional that this rule will be invoked and it may be more by precaution that the German legislator provided for this contingency. The thirty-year period conforms to the general rule in § 199 III 1 No. 2 BGB.

## 5. Prescription taking effect

30. Not much novelty is contained in § 33h V: Prescription takes effect when the five, ten or thirty-year period of limitation of paragraphs 1, 3 or 4 of § 33h have lapsed. This may be rather evident, save exceptions in paragraph 8. What is meant by prescription here is presupposed and is regulated in the general provisions of the BGB: no extinction of the obligation, but a right to refuse to perform if the defence of limitation is invoked.

## 6. Effect of taking action of competition authority

31. Article 10(4), sentence 1, Directive provides that if a competition authority takes action the period of limitation shall be suspended or interrupted. In a quite similar vein, as of July 1, 2005, in Germany the then newly introduced § 33 V GWB had provided for suspension and it continues to give rise to disputes about

<sup>29</sup> Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Recital 36.

<sup>30</sup> ECJ, judgment of 13. 7. 2006 – C-295/04 (*Manfredi*).

its intertemporal applicability.<sup>31</sup> § 33 V GWB of 2005 provided for suspension when the competition authority “initiates a procedure” and thus was somewhat narrower than Article 10(4), sentence 1, Directive; whereas the bill for the 9th GWB-Novelle stuck to the old wording, in the course of the legislative procedure now the broader formulation of the Directive has been followed.<sup>32</sup> But as already in 2005 also now, § 33h VI chooses suspension, not interruption. The British rule (s. 21) seems to be similar. Sentence 2 of § 33h VI takes up Article 10(4) 4. By choosing interruption, i.e., a new start of a five-year period, French law is even more generous to the plaintiff. But is this really necessary if the competition authority has already decided?

## 7. Joint and several liability, and recovery of contribution from co-infringer

32. Article 11 Directive provides for joint and several liability and Article 11(5) speaks of the recovery of a contribution from co-infringer(s). But what about the period of limitation applicable to the paying infringer’s claim for contribution against the co-infringer? In case the infringer pays at the end of the five-year period, will his claim for contribution against the other infringers be time-barred after a couple of days already? § 33 h VII GWB expressly provides that the period of limitation for the claim for contribution only starts to run at the time of payment of damages to the victim. Here, German law protects the joint cartel tortfeasor’s claim for contribution. This is remarkable, because it is a deviation from general German civil law on limitation periods and joint and several liability.<sup>33</sup>

33. The Bundesgerichtshof (the Federal Court of Justice) has, a number of years ago, held that the claim for contribution accrues already when the joint and several liability arises, thus, in principle, with the infringements or their effects. This leads to harmonisation of the limitation period for the original claim for damages for the victim, which by way of *cessio legis* or subrogation has passed to the infringer who has paid damages (§ 426 II BGB), and the independent claim for contribution which is a consequence of the joint and several liability

<sup>31</sup> Cf. *inter alia* OLG Jena 22.2.2017 – 2 U 583/15, BeckRS 2017, 103209; OLG Düsseldorf 29.1.2014 – VU-U (Kart) 7/13 BeckRS 2014, 17537; 14.2.2015 – VI-U (Kart) 3/14, NJW 2015, 2129; LG Berlin 16.2.2014 – 16 O 384/13 Kart, BeckRS 205, 08972; *contra*: OLG Karlsruhe 9.11.2016 – 6 U 204/15 Kart; LG Mannheim 24.1.2017 – 2 O 195/15, *Neue Zeitschrift für Kartellrecht* 2017/137; *see also* F. Bien and J. D. Harke, *Neues Recht für alte Fälle? Der intertemporale Anwendungsbereich der Verjährungshemmung gemäß § 33 Abs. 5 GWB 2005*, *Zeitschrift für Wettbewerbsrecht*, 2013, 312, 344. For a recent survey *see* A. Rinne and K. Kolb, *Die Verjährung kartellschadensersatzrechtlicher “Altansprüche” – Ein Überblick*, *Neue Zeitschrift für Kartellrecht*, 2017, 217; J. Scherzinger, *Hat der Gesetzgeber aus den Fehlern bei der 7. GWB-Novelle gelernt? – Zu den Übergangsvorschriften im Regierungsentwurf für eine 9. GWB-Novelle*, *Neue Zeitschrift für Kartellrecht*, 2016, 513, especially 515f.

<sup>32</sup> *See* BT-Drs. 18/11446 p. 7 (sub bb)) and the explanation p. 29, which also refers to the differences in the procedures in the particular legal systems of the EU. The explanation calls this a “clarification” (“*wird klargestellt*”).

<sup>33</sup> BGH 18. 6. 2009 – VII ZR 167/08, BGHZ 181, 310; slightly critical P. Bydliński, *Münchener Kommentar zum BGB*, 7th edition 2016, § 426 Rn. 25.

(§ 426 I BGB). But it is disadvantageous for the jointly and severally liable person who has paid, here the paying co-infringer. § 33h VII GWB departs from this general rule or, at least, the view of the BGH.<sup>34</sup> This shall protect the jointly and severally liable co-infringer who has paid damages.<sup>35</sup>

## 8. Immunity recipients and SMEs

34. Immunity recipients and SMEs under the Directive enjoy certain privileges, provided the injured party could obtain complete redress from the other tortfeasors. That this proves to be the case may become clear only after years. Article 11(4), subparagraph 2, therefore calls for reasonable limitation periods for the claim against the immunity recipient. In Germany, § 33h VIII GWB provides that for the claim against the immunity recipient or SME the period of limitation starts to run only as from the end of the year in which the injured party could not obtain complete redress from the immunity recipient respectively the SME. This then brings another five years plus. One may wonder whether this is really necessary or whether a suspension as in the case of action of a competition authority would have been sufficient.

## 9. Consensual dispute resolution

35. Article 12 Directive specifically mentions suspension during consensual dispute resolution. The GWB-Novelle does not take this up. Indeed, the BGB in § 204 No. 4 BGB already has a general norm on suspension if the case is submitted to a dispute resolution body and § 203 BGB even provides for suspension during negotiations between debtor and creditor.<sup>36</sup> Therefore, a specific cartel damages rule such as s. 22 of the British statutory instrument in Germany for this issue is not needed.

## 10. Collective proceedings

36. As German law is rather reluctant towards collective proceedings for damages and also the GWB does not bring specific rules in this respect, the question of the effect of collective proceedings on damages claims does not really arise. Something like s. 23 British statutory instrument therefore will be looked for in vain in the reformed GWB.

37. To sum up, one might say on the German implementing legislation:

- Five years plus rest of the year seem to be quite friendly to the claimant;
- But the ten and thirty years objective absolute periods put clear limits in order to restore legal peace (*Rechtsfriede*);
- Suspension is preferred over interruption;
- The claim for recovery of contribution is specifically protected by German law. According to the mandate of the Directive, the same applies in case of immunity recipients and SMEs.

O. R.

## IV. Italy

38. Article 10 of the Directive aims to prevent that the statute of limitations could possibly unduly hamper the bringing of actions for damages.<sup>37</sup> It can be said that, all in all, Article 8 of the Legislative Decree No. 3/2017 faithfully transposes the Directive. The task has not been a hard one for the lawmaker, since Article 10 of the Directive does not imply major changes in the national system, except for the suspension of the limitation periods pending the administrative proceedings. In order to shed some light on the effects of the implementation, I will in the first instance shortly describe the current situation. In the absence of statutory provision specifically dealing with the issue, according to dominant case law, the period of limitation for bringing damages actions for breach of competition law is governed by Article 2947 of the Civil Code (c.c.), relating to tort liability, and it amounts therefore to five years. With regard to the question of when the period of limitation starts to run, the Italian Corte di cassazione has ruled that, since harm caused by competition law infringement is not immediately apparent (so-called “hidden damages”), Article 2947 c.c. has to be construed in the light of the general principle of law, according to which the period starts to run only “*from the day on which the right can be enforced*” (Article 2935 c.c.). As a consequence, the limitation period only starts to run when the victim has or ought to have had knowledge of all the essential elements of the tort; courts shall determine the starting point of the limitation period case by case, taking into consideration all the circumstances of the case.<sup>38</sup> This principle of law applies both to follow-on and to stand-alone actions. In follow-on actions, courts tend to find that the starting point for limitation is the publication of CA’s infringement decision, regardless of its finality.<sup>39</sup> Yet, this is not an uncompromising rule. The publication of the decision simply gives rise to a rebuttable presumption of awareness, on the part of the potential claimant, of the essential elements of the tort. The claimant can bring evidence of delayed knowledge, not attributable to his

34 BGH, 18. 6. 2009 – VII ZR 167/08 BGB, previous footnote; *contra* F. Peters, *Neue Zeitschrift für Baurecht und Vergaberecht*, 2007, 337 (341).

35 See the explanation in BT-Drs. 18/10207 p. 67.

36 Cf. H. Prütting, G. Wegen and G. Weinreich (*-Deppenkemper*), BGB, 12th edition 2017, § 204 no. 11.

37 ECJ, Case C-295/04, *Manfredi*.

38 Leading case: Cassazione civ., 2.2.2007, No. 2305.

39 Cassazione civ., 6.12.2011, No. 26188.

or her negligence; the defendant, who has the burden of proof with regard to limitation, can bring evidence of prior knowledge. As a matter of fact, in the series of cases relating to the so-called “Car Insurance cartel,”<sup>40</sup> where consumers acted as claimants, courts have up to now invariably applied the presumption that the injured party becomes aware of tort and damages not before the publication of the CA’s infringement decision.<sup>41</sup> Instead, in cases concerning abuse of dominant position, when the plaintiff claiming damages is an undertaking active in the same market, where the defendant is active, or in close connected markets, district courts usually take into account the claimant’s special experience and knowledge of the market. As a result, in such cases, the limitation period can start earlier than the publication of the ICA’s infringement decision: depending on the circumstances of the case, from ICA’s formal decision to commence proceedings or even earlier.<sup>42</sup> Unfortunately, case law gives no guidance at all for stand-alone actions.

**39.** Article 10.3 of the Directive requires Member States to ensure/guarantee that the time limit for bringing actions for damages is at least five years. Although there is nothing in the Directive to prevent Member States from keeping or introducing more generous national provisions, Article 8.1 of the Decree provides that the limitation period for bringing actions for damages is precisely five years. The provision is, to that extent, basically consistent with current case law. It is noteworthy, though, that Article 8.1 bears an impact on the dispute, which is still alive not only among scholars, as to whether the infringement of competition laws gives rise to damages in tort or in contract.<sup>43</sup> According to the Report, Article 8.1 clarifies once and for all the tortious nature of antitrust damages, thus confirming the prevailing opinion.<sup>44</sup> From a different perspective, though, the dispute on characterisation now appears to be immaterial, at least with regard to limitation periods. In this light, Article 8.1 seemingly implies that every attempt to argue the applicability of the more generous standard deriving from Article 2946 c.c. (general limitation period of ten years) is now destined to fail.<sup>45</sup>

With regard to the starting point of limitation, Article 8.2 copies out Article 10.1 of the Directive.<sup>46</sup> The case-by-

case assessment of the starting point of limitation period based on subjective standards is nothing new, since national case law already requires that the victim of the tort has knowledge of all the elements necessary to file the claim (behaviour, illegality thereof, harm, causal link, identity of the infringer).<sup>47</sup> Being so, it is likely that previous case law will be confirmed. The rule, in follow-on litigation, will continue to be the same as now: the publication of the infringement decision gives rise to a rebuttable presumption of knowledge of the essential elements of the tort.

**40.** Italian law provides for both interruption and suspension of limitation periods (Articles 2943, 2941 c.c.). Moreover, when the claimant starts judicial proceedings in order to enforce a civil right, the limitation period is both interrupted and “suspended” in the broad sense (Article 2945 c.c.), meaning that the time does not run until the judgment becomes final. Nothing similar used to apply to administrative proceedings before the Competition Authority. This discrimination was not perceived as problematic, due to the fact that, according to the prevailing case law, the starting point of the limitation period was the publication of the ICA’s infringement decision and, even when the limitation period had already started to run before, Article 2943 c.c. allowed the creditor to interrupt it by filing a written request for payment. Fully complying with the Directive, Article 8.2 provides for a new case of suspension: even when the period of limitation had already begun to run before, it is suspended pending the administrative proceedings before the CA and until twelve months after the administrative decision has become final or the proceedings are otherwise terminated, i.e., without finding an infringement.<sup>48</sup> This is a radical change in the national system. When the CA takes action, it is therefore less important to establish when exactly the victim had or ought to have had knowledge of the tort: in any event, the victim has a time limit of at least twelve months after the CA’s decision has become final. Furthermore, while it was previously undisputed that the limitation period continues to run pending an ongoing appeal against the CA’s decision, things are now different. Pursuant to Article 8.2, the period of limitation is suspended not only pending the CA’s investigation, but also pending judicial review proceedings.<sup>49</sup> Since ICA’s decisions are almost always challenged and judicial proceedings before administrative courts are not always fast, the system is likely to lead to extremely long limitation periods.<sup>50</sup>

**41.** The new regime is consistent with the increased value of ICA’s decisions and it appears to align with the overall objective of the Directive, i.e., the enhancement of

40 Follow-on damages actions based on ICA’s decision No. 8546/2000, finding that a number of insurance companies conspired, by means of exchanging confidential information, to inflate insurance prices in the compulsory motor-vehicle liability insurance market.

41 Cassazione civ., 28.11.2013, No. 26685.

42 Tribunale Roma, 23.11.2016, *Fastweb-Wind*; Tribunale Milano, 26.5.2016, *CISMAT-SEA*.

43 Cassazione civile, 3.3.2013, No. 8110, casting doubts on the dominant characterisation as liability in tort.

44 See also: Caiazzo, *Italian Antitrust Review*, 2/2016, 114; Mingione, *Corriere Giuridico*, 3/2017, 384.

45 At a closer look, the question arises of whether Article 8 still allows the claimant to act “at the same time or alternatively under a contract,” when there is a contractual relationship between the parties (see: Caiazzo, 114).

46 Accordingly, limitation period begins only after the conduct has ceased. This is basically consistent with previous case law (Mingione, 385), though it has been noticed that it could indirectly interfere with settled case law relating to the calculation of the period of limitation in case of continuing or repeated infringements (see: Tavassi, 2016, 71; Scoccini, *Giurisprudenza italiana*, 12/2015, 2603).

47 The usual standard of “knowledge by using ordinary diligence” can be deemed to be equivalent to the “reasonable presumption of knowledge” in Article 10 of the Directive. Cf. Granieri, *AIDA*, 1/2015, 90, commenting on the Directive.

48 On the question of whether suspension starts only with the formal commencement of investigation, published in the ICA’s Bulletin, or even with the prior “informal investigation,” see: Granieri, 94.

49 Granieri, 96; Scoccini, 2604.

50 Caiazzo, 115; cf. Mingione, 386.

private enforcement. Nevertheless, scholars commenting on the Directive have criticised the suspension of limitation, on account of its inconsistency with the—up to now undisputed—basic autonomy of civil proceedings and administrative proceedings.<sup>51</sup> It has to be borne in mind, though, that Article 8.2 does not imply that the existence of a prior CA's decision finding an infringement is now a condition precedent to bringing an action for damages. Article 8.2 simply attaches importance to factual difficulties that the claimants usually face in gathering information necessary to substantiate the claim. Theoretically, nothing prevents the victim from bringing a civil action before the CA issues a decision. As a matter of fact, though, everything now encourages the victim to wait. Taken together, the new provisions on the binding effect and on the statute of limitations have the practical effect of preventing parallel proceedings before civil courts and before the CAs. The Decree clearly aims to give precedence to administrative proceedings. This can also be inferred from Article 4.8 of the Decree. Indeed, the latter goes beyond the Directive and allows the staying of civil proceedings pending investigations, with reference to the same infringement, before the CA.<sup>52</sup>

**42.** The Directive contains two other provisions concerning the statute of limitations: Article 11.4, dealing with joint and several liability of co-infringers; Article 18.1, relating to ADR proceedings. Article 11.4 of the Directive aims to harmonise the right to claim full compensation with the special position granted to immunity recipients and SMEs. Accordingly, Article 9.4 of the Decree sets out that, when the injured party seeks compensation from the immunity recipient on a joint and several basis, since full compensation cannot be obtained from the other undertakings, the period of limitation for bringing such actions starts to run only “*when it is established*” (*risulta accertato*) that the condition precedent for bringing such actions has come to existence. The national provision applies the rationale behind Article 2935 c.c., but it is not clear how and when precisely the impossibility of recovering compensation from other co-infringers can be deemed to be “established.”<sup>53</sup>

**43.** With regard to ADR proceedings, Article 18.1 of the Directive mandates that the limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. Article 15.1 of the Decree simply makes reference to pre-existing national provisions governing the effect on the limitation period of the commencement of some ADR proceedings. All of these provisions set out a rule according to which the commencement of ADR proceedings both interrupts the period and “suspends” it for the entire duration of the

proceedings.<sup>54</sup> Article 15.1 does not mention the ordinary out-of-court negotiations. If none of the aforementioned provisions could apply by analogy, general rules will apply: under Article 2943 c.c., the service of a written request for payment interrupts the limitation period that starts afresh. This would not presumably be fully in line with the Directive, though the practical outcome is perhaps even more favourable to the injured party.

M. N.

## V. Netherlands

**44.** Article 6:193s Civil Code introduces two limitation periods for claims for the compensation of damages as a result of an infringement of competition law: one shorter period of five years (also called a “relative” or subjective period)<sup>55</sup> and a longer period of twenty years (also called an “absolute or objective period”).<sup>56</sup> The short period of five years starts to run on the day subsequent to the day on which the infringement ceased and the harmed party knows or reasonably should know of the infringement, the damage suffered as a result and the identity of the person that is liable for the damage. This part of Article 6:193s Civil Code implements Article 10, paragraph 2, Directive. The drafting of it may give rise to a misunderstanding. Article 10, paragraph 2, Directive requires knowledge of the “*behaviour*” and the “*fact that it constitutes an infringement of competition law.*” The Directive, therefore, seems to make a distinction between the factual behaviour (the acts of the infringer) and its legal qualification as an infringement of competition law. It requires that the harmed party have knowledge of both for the statute of limitations to start to run. That is alien to the Dutch rules on statutes of limitation. Knowledge or awareness of the legal qualification of the facts that gave rise to the damage is not required for a subjective statute of limitations to run.<sup>57</sup> Against this backdrop, one might read “infringement” in Article 6:193s Civil Code as to mean that the harmed party should have knowledge only of the facts that constitute the infringement (or are sufficient to constitute an infringement of competition law). However, Article 6:193s Civil Code purports to implement the Directive loyally.<sup>58</sup> “*Infringement*,” therefore, captures both the “*behaviour*” and “*the fact that it constitutes an infringement of competition law.*” In practice, this will, of course, usually go hand in hand,

<sup>51</sup> Tavassi, 71. See Cass. civ. No. 2305/2007, reaffirming the autonomy of judicial proceedings from the pre-existence of a CA's decision.

<sup>52</sup> The question of whether civil courts had or not the power to stay, pending the national CA's investigation or the appeal against the decision, has been up to now highly controversial, outside the limited scope of Article 140 *bis* D. lgs. No. 205/2005 (which allows courts to stay the proceedings at the stage of the decision on the admissibility of the consumers’ class action”) and of Article 16 EU Regulation 1/2003 (see Negri, 2012, 427).

<sup>53</sup> Caiazza, 116.

<sup>54</sup> Articles 2943.4 and 2945.4 c.c., concerning arbitration; Article 5.6 D. lgs. No. 28/2010, concerning mediation; Article 2 and Article 8 d.l. No. 132/2014, concerning negotiation proceedings, when the lawyers have entered into a so-called “negotiation convention”; Article 141-*quinquies* D. lgs. No. 206/2005, concerning ADR proceedings for consumers. It is arguable that Article 2945 c.c. and the “suspension” of limitations do not apply to the “*arbitrato irrituale*” (so-called “contractual arbitration,” Article 808 *ter* Code of Civil Procedure).

<sup>55</sup> Explanatory Memorandum, p. 19.

<sup>56</sup> Explanatory Memorandum, p. 19.

<sup>57</sup> Cf. Dutch Supreme Court, 26 November 2004, NJ 2006/115 (*Bosman / Mr. G.*) and Dutch Supreme Court; 5 January 2007, NJ 2007/320 (*De Bijenkorf / X.*).

<sup>58</sup> Cf. Explanatory Memorandum, p. 19.

especially in follow-on litigation. However, this is not necessarily the case. One can think, for example, of a complaint filed by the harmed party with the competition authorities. In that case, the harmed party may be aware of the behaviour, but may not know yet whether it constitutes an infringement of competition law. The District Court in Rotterdam found that, prior to the introduction of Article 6:193s Civil Code, the filing of a complaint and knowledge of damage was sufficient to start the subjective statute of limitations of Article 3:310, paragraph 1, Civil Code (pursuant to which the statute of limitations of five years starts on the day subsequent to the day on which the harmed party gets subjective knowledge of the damage and the person liable for it).<sup>59</sup> A problem with the approach of the Directive may be that it introduces a differentiation for the starting point of the statute of limitations, based on the legal knowledge of the harmed party. Given a certain behaviour on the market, a multinational with a large competition law department may have the knowledge that the behaviour constitutes an infringement of competition law sooner than an SME without a legal department. This is even more true where Article 6:193s Civil Code (and Article 10, paragraph 2, Directive) introduces a certain objectivation of knowledge (“*should have known*”).

**45.** In addition to the subjective term of five years, Article 6:193s Civil Code also provides for an objective term of twenty years. This term starts to run on the day following the day the infringement ceases. The Directive allows the introduction of absolute limitation periods, “*provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.*”<sup>60</sup> The Dutch twenty-year term seems compliant with that provision, in particular because it only starts to run once the infringement has ceased.

**46.** Dutch law makes a distinction between interruption and extension of limitation periods. A bit counter-intuitively, interruption has the effect that a new statute of limitations starts to run. Interruption requires an act of one of the parties, such as the sending of a demand letter. Extensions work *de lege*. Dutch law does not have the concept of suspension of limitation periods.<sup>61</sup> Extension has, however, the same effect as suspension, because the extension extends or lengthens the limitation period with the duration of the period during which there were grounds for extension (or suspension). So, the clock is not stopped during the period in which that ground arises, but is allowed to run for a longer period. The net effect is the same. In order to be consistent with our laws, the legislator has opted to use extension in all instances where the Directive applies suspension.<sup>62</sup>

**47.** Article 6:193t, paragraph 1, Civil Code provides for

<sup>59</sup> District Court Rotterdam, 7 March 2007, ECLI:NL:RBROT:2007:BA0926.

<sup>60</sup> Recital 36 Directive.

<sup>61</sup> Cf. Art.10, para. 4, and 18, para. 1, Directive.

<sup>62</sup> Explanatory Memorandum, p. 20.

an extension during extrajudicial dispute resolution.<sup>63</sup> This provision applies to all forms of ADR, not only mediation, including arbitration.<sup>64</sup> It seems, however, doubtful that arbitration is captured by this provision (and by Article 18, paragraph 1, Directive for that matter). The Directive requires a suspension in case of consensual dispute resolution.<sup>65</sup> The reason for this suspension is to afford the parties a “*genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts.*”<sup>66</sup> This does not suggest that arbitration is meant to be included here. This is reinforced by the link that is made between “*consensual settlements*” and “*consensual dispute resolution.*”<sup>67</sup> Also, at least under Dutch law, there is no need for an extension in case of arbitration. Article 3:316 Civil Code already interrupts the statute of limitations in case of arbitration.

**48.** What possibly militates against this line of reasoning is that Article 18, paragraph 2, Directive provides that the court may suspend the proceedings for up to two years to make way for consensual dispute resolution, “[w]ithout prejudice to provisions in national law in matters of arbitration.”

**49.** However, an arbitration agreement, if invoked before the court, generally leads to a lack of jurisdiction of the courts, at least if done before any other defences were raised.<sup>68</sup> In that case, a suspension of the proceedings makes no sense. So, at least under Dutch law, a suspension of the proceedings to make way for arbitration would only occur if the parties agree to arbitration pending litigation before the courts. That is slightly at odds with the notion that limitation periods must be suspended (or extended) for the duration of the consensual dispute resolution process to offer them a genuine opportunity to engage in it before they bring the matter to court.<sup>69</sup> When considering the possibility of an extension of the proceedings, the courts must take into account the advantages of an expeditious procedure.<sup>70</sup> It can hardly be maintained that opting for arbitration pending litigation will usually result in an expeditious procedure. Therefore, on balance, I do not think that arbitration should lead to an extension of the statute of limitations (other than the interruption under Article 3:316 Civil Code, which makes the extension superfluous in any case).

**50.** Article 6:139t, paragraph 1, Civil Code also determines the end of a mediation. A mediation is ended if one of the parties or the mediator advises the other party that the mediation ends (if the mediator does it, presumably both parties should be advised).

<sup>63</sup> It implements Art. 18, para. 1, Directive.

<sup>64</sup> Explanatory Memorandum, p. 20.

<sup>65</sup> Art. 18, para. 1, Directive.

<sup>66</sup> Recital 49 Directive

<sup>67</sup> Recital 51 Directive.

<sup>68</sup> Art. 1022 and 1074 Code of Civil Procedure; Art. II, para. 3, New York Convention 1958.

<sup>69</sup> Recital 49 Directive.

<sup>70</sup> Recital 50 Directive.

51. Article 6:193t, paragraph 2, Civil Code provides that an act of a competition authority in the context of an investigation is grounds for extension. The extension starts to run the day after the completion of the statute of limitations. The duration of the extension is the time that was needed to make a final infringement decision or the determination of the end of the investigation otherwise plus one year.<sup>71</sup>

52. The starting point of the limitation period for contribution claims is not covered by the Directive. Under Dutch law the starting point is the payment by one of the jointly and severally liable infringers of more than his share (as determined on the basis of Article 6:10, paragraph 1, and 6:102, paragraph 1, Civil Code).<sup>72</sup> In this respect, it is, however, worth noting that contribution claims are governed by the law of the original damages claim. The statute of the latter will, therefore, also govern the issue of the statute of limitations of the contribution claims.

F. K.

## VI. United Kingdom

53. Limitation periods have in the past created some problems in the private enforcement of damages claims in the United Kingdom. In the past, stand-alone and follow-on actions could be initiated in the High Court, while only follow-on actions could be brought before the Competition Appeal Tribunal (CAT). In the High Court for England & Wales, the standard six-year limitation period of the Limitation Act 1980 applied to both stand-alone and follow-on actions,<sup>73</sup> while in the CAT, where only follow-on actions could be brought, the claim had to be made within a period of two years “beginning with the relevant date,” the relevant date being—*cum grano salis*—when the infringement decision became final.<sup>74</sup>

54. This had the effect in *Deutsche Bahn AG v. Morgan Advanced Materials plc* that the claimants’ action against one of the addressees of a Commission infringement decision was struck out. The Commission decision, issued on 3 December 2003, had been addressed to seven defendants, including Morgan Crucible. All addressees except for Morgan Crucible (the immunity recipient) appealed to the General Court, and the General Court dismissed their appeals on 8 October 2008. Deutsche Bahn brought a follow-on action in the

CAT by claim form dated 15 December 2010 against six of the addressees (including Morgan Crucible, later renamed Morgan Advanced Materials). Morgan Crucible applied for the claim against it to be struck out. The CAT struck out the claim as being brought out of time, because the infringement decision *against Morgan Crucible* had become final once the time for appeal against the Commission decision had lapsed without an appeal being brought. Deutsche Bahn appealed, and the Court of Appeal allowed the appeal, arguing that the Commission’s infringement decision had not become final until the time for the further appeal against the General Court’s decision had lapsed; the Court of Appeal considered the Commission decision against all the various addressees as one unit, and this decision (addressed to various addressees) had not become final. The UK Supreme Court allowed the appeal against the Court of Appeal’s judgment.<sup>75</sup> The “decision” in the meaning of s. 47A of the Competition Act 1998 was the decision *addressed to Morgan*, and since Morgan had not appealed the Commission decision, the decision against Morgan had become final on 13 February 2004, so that the two-year period under Rule 31 ended in February 2006.

55. Even before the implementation of the Damages Directive, the limitation periods in the High Court and the CAT were harmonised in the new s. 47E of the Competition Act 1998, inserted through paragraph 8(1) of Schedule 8 to the Consumer Rights Act 2015, which provides in s. 47E(2) that in England & Wales the Limitation Act 1980 will apply to the claim brought in follow-on actions in the CAT as well; in Scotland, s. 6 of the Prescription and Limitation (Scotland) Act 1973 applies; and in Northern Ireland, the Limitation (Northern Ireland) Order 1989 applies.

56. In implementing the Damages Directive, the new Schedule 8A of the Competition Act 1998, inserted by the 2017 Regulations,<sup>76</sup> provides in paragraph 17 that a competition claim may not be brought in England & Wales or Northern Ireland after the end of the six-year limitation period provided for in paragraph 18(1), and that in Scotland, proceedings may not be brought after the end of the prescription period (and the obligation in respect of the loss or damage is extinguished), this prescription period being five years under paragraph 18(2).

57. Paragraph 19 of the new Schedule 8A to the Competition Act 1998 provides for the beginning of the limitation or prescription period, which is the later date of the day on which the infringement ceases or the “claimant’s day of knowledge,” defined in paragraph 19(2) as “the day on which the claimant first knows or could reasonably be expected to know (a) of the infringer’s behaviour, (b) that the behaviour constitutes

71 Cf. Art.10, para. 4, Directive.

72 Cf. Dutch Supreme Court, 6 April 2012, *NJ 2016/196, ASR / Achmea*

73 Limitation Act 1980, c. 58, whose s. 9(1) provides: “An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.” Even if the nature of the damages claim were to be seen in tort and not as a breach of a statutory duty (as *Garden Cottage Foods v. Milk Marketing Board* [1984] AC 141 held), and even if a contract claim were brought, a six-year limitation period would apply (ss. 2, 5 Limitation Act 1980). At any rate, as will be discussed below, now paragraph 18(1) of the new Schedule 8A to the Competition Act 1998 clarifies that the limitation period is six years.

74 Then: CAT Rules 2003, Rule 31.

75 *Deutsche Bahn AG v. Morgan Advanced Materials plc* [2014] UKSC 24, [2014] Bus. L.R. 377.

76 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, [http://www.legislation.gov.uk/uksi/2017/385/pdfs/ukxi\\_20170385\\_en.pdf](http://www.legislation.gov.uk/uksi/2017/385/pdfs/ukxi_20170385_en.pdf).

*an infringement of competition law, (c) that the claimant has suffered loss or damage arising from that infringement, and (d) the identity of the infringer.*” According to paragraph 19(6), references to “*a person knowing something*” are to a “*person having sufficient knowledge of it to bring competition proceedings.*” Given that the beginning of the limitation period is delayed until the claimant’s day of knowledge, there is now likely little need for the provision in s. 32(1)(b) of the Limitation Act 1980, under which the beginning of the limitation period was delayed until concealment ended.

**58.** Paragraphs 21, 22 and 23 provide, respectively, that the periods of investigations by a competition authority, of a consensual dispute resolution process, and of collective proceedings are not to be counted when calculating the expiry of the limitation or prescription period. Paragraphs 20 and 24 provide for legal disabilities.

**59.** The limitation period for claims for contribution in England & Wales is provided for in s. 10 of the Limitation Act 1980, and is set at two years, beginning from the date of the judgment, arbitral award, or the earlier of (1) the earliest date for which payment is agreed, or (2) on which payment is made.

F. W.-v. P. ■

# Effect of consensual settlements on subsequent damages actions

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## ABSTRACT

*Hand in hand with an ever-growing amount of cartel damage litigation all across Europe, settlements have become an increasingly important tool for resolving private competition law disputes. However, while the majority of disputes concern infringements committed jointly by more than one party, many settlements are concluded bilaterally between only one injured party and one of the co-infringers, leading to the difficult question of what effects the settlement would have on joint and several liabilities. In the past, these complexities have been amplified by the fact that different Member States gave different answers to this question, making it difficult to draft settlements in cases concerning multistate infringements. In this respect, Article 19 of the EU Damages Directive took a stab at harmonizing the rules across the EU. A conference held at the University of Würzburg, Germany, on May 5, 2017, took a closer look at the way the Directive has been implemented into the laws of five Member States (France, Germany, Italy, the Netherlands, and the UK), and discussed the likely impact on settlements as a dispute resolution mechanism.*

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## I. Introduction with remarks on Germany

1. While other parts of the EU Damages Directive<sup>1</sup> have been widely heralded as genuine game changers for private enforcement in Europe (most notably, the rules on disclosure of evidence), Article 19, which deals with consensual settlements and their effects on subsequent actions for damages, has received far less attention—and perhaps undeservedly so. Even in the three European jurisdictions that are considered to be leaders in private enforcement (the UK, the Netherlands, and Germany), the courts still face tremendous difficulties in assessing and

De pair avec un plus d'un nombre constamment croissant de litiges en matière de dommages et intérêts dus aux cartels dans toute l'Europe, les règlements sont devenus un outil de plus en plus important pour résoudre les conflits privés en droit de la concurrence. Cependant, bien que la majorité des litiges concernent des infractions commises conjointement par plus d'une partie, de nombreux règlements sont conclus bilatéralement entre une seule partie lésée et l'un des co-contrevenants, ce qui mène à la question difficile de savoir quels effets le règlement aurait sur les responsabilités conjointes et diverses. Dans le passé, ces complexités ont été amplifiées par le fait que différents États membres ont donné des réponses différentes à cette question, ce qui rend difficile la rédaction de règlements lorsqu'une infraction concerne plusieurs États. À cet égard, l'article 19 de la Directive 2014/104/UE a essayé d'harmoniser les règles dans l'ensemble de l'UE. Une conférence tenue à l'Université de Würzburg, en Allemagne, le 5 mai 2017, a examiné de plus près la manière dont la Directive a été mise en œuvre dans les lois de cinq États membres (France, Allemagne, Italie, Pays-Bas et Royaume-Uni) et a discuté de l'impact probable sur les règlements en tant que mécanisme de règlement des différends.

quantifying damages, often leading to protracted multi-year litigation and battles between economic experts. By contrast, settlements sometimes offer an efficient and expedient way for resolving competition law claims, at least in B2B settings. This is in line with experience in the US where, according to some estimates,<sup>2</sup> over 90% of all treble-damages cases are eventually resolved through settlements, often even before the discovery process is initiated. Of course, the US achieves this impressive result with the help of a very specific set of rules and incentives, first and foremost the no-contribution rule,<sup>3</sup> but this only reinforces the idea that the rules governing the effects of settlements matter greatly. In other words, Article 19 of

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1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

2 See J. M. Connor, Forensic Economics: An Introduction with Special Emphasis on Price Fixing, *Journal of Competition Law & Economics* 4 (2008), pp. 31 et seq.

3 The US Supreme Court in a landmark decision in 1981 held that there is no basis, either in the federal antitrust laws or in federal common law, for allowing federal courts to create a right of contribution among antitrust defendants (*Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). This has generated significant incentives for defendants to settle early.

the Directive and its transposition into Member State laws deserve a closer look.

2. At the outset, it is important to note that Article 19 only deals with settlements which do not include all co-infringers as parties. Practical experience confirms that this is by far the most relevant setting—competition law disputes are usually settled bilaterally (on a confidential basis) between the injured party and one of the co-infringers, and they invariably relate only to the individual harm caused by the settling co-infringer. This raises a number of potentially problematic issues for both sides:

(1) For the settling co-infringer, the natural question is whether he can now close the books over the case, which depends partly on (a) potential residual liability towards the injured party, and partly on (b) potential liability in contribution claims towards the other co-infringers.

(2) The injured party, in turn, will ask whether he can still recover additional amounts from the other co-infringers.

3. Article 19 answers question (1) with a qualified “yes,” stating that a settling co-infringer may still need to compensate the injured party if the other co-infringers are unable to do so, but allowing this residual liability to be expressly excluded under the terms of the settlement. Question (2), too, is answered in the affirmative, but the injured party will need to deduct from its claim against the other co-infringers “*the settling co-infringer’s share of the harm.*”

4. In giving these answers, the Directive follows the general concept of “proportionate share reduction” that can be traced back to the French 18th-century jurist Pothier<sup>4</sup> and is quite familiar in many jurisdictions, including the Netherlands<sup>5</sup> and Germany,<sup>6</sup> but not the UK,<sup>7</sup> and has already been embraced in real-world settlements of competition law disputes. However, it seems that the Directive skips the hardest questions entailed by this concept in competition law settings and also adds an unnecessary layer of complexity.

5. As for the hardest questions, many competition law practitioners dealing with settlement agreements have scratched their heads over what it means to reduce claims brought against non-settling co-infringers by “*the settling co-infringer’s share of the harm.*” Obviously, the share of the harm is a rather elusive concept, as Article 11(5) of the Directive makes abundantly clear when stating that this share “*shall be determined in the light of [the*

co-infringer’s] *relative responsibility for the harm caused by the infringement of competition law.*” In practice, therefore, settlements often do not require the injured party to reduce its claim by the “*share of the harm,*” but by a more tangible and concrete amount, for example any damages stemming from products sourced from the settling co-infringer, and perhaps a defined share of any umbrella damages. Of course, a settlement that is framed in this manner cannot be fully reconciled with the rules on “*proportionate share reduction*”—it will inevitably leave the door open for potential contribution claims from other co-infringers against the settling co-infringer. This, indeed, was one of the reasons why the German legislator, in implementing Article 19 into German law with the recently published 9th Reform Act to the Act against Restraints of Competition (GWB), treated the concept of “proportionate share reduction” as the default rule, but explicitly left it to the parties to agree on other mechanisms.<sup>8</sup>

6. As for the unnecessary layer of complexity, Article 19(3) 2nd subparagraph seems to require a tick-the-box exercise to exclude residual liability of the settling co-infringer in case other co-infringers are unable to pay (“*may be expressly excluded*”). While it is certainly useful if the parties devote attention to this question by making it the subject of an express clause in the contract, many real-world settlements are concluded without expert lawyers at the table, for example in connection with annual renegotiations of delivery terms. Those settlements are often strongly worded (“All damage claims by A against B relating to the widgets cartel are hereby comprehensively settled following a payment of EUR X”), but will—in the future—inevitably lead to discussions whether the wording was “express” enough to exclude residual liability. Again, the German legislator tried to give the parties more wiggle room by omitting the qualifier “expressly” in its transposition into German law (Section 33f(2) GWB), but this will not prevent disputes about whether this Section needs to be interpreted in conformity with European law.

7. Of course, in the grand scheme of things, the two points mentioned hardly limit the achievement of the Directive in an area that is just as important for effective private enforcement as an effective court system. Following the implementation in Member State law, it is now possible in cross-border cases to take advantage of a theoretically sound mechanism (“proportionate share reduction”) and rely on its universal recognition throughout all Member States. This is indeed a significant step forward.

T. P.

4 See J. Kortmann and R. Wesseling, Two Concerns Regarding the European Draft Directive on Antitrust Damage Actions, *CPI Antitrust Chronicle*, August 2013(1), at pp. 7–8.

5 Article 6:14 of the Dutch *Burgerlijk Wetboek*.

6 See, e.g., Federal Court of Justice, judgment dated 21 March 2000 – Case IX ZR 39/99, and judgment dated 22 December 2011 – Case VII ZR 7/11.

7 Under English law prior to the Directive’s implementation, a “*covenant not to sue*” was the only tried method of agreeing on a bilateral settlement while keeping claims against other co-infringers intact, see H. Beale, *Chitty on Contracts*, Vol. 1: General Principles, 31st ed. 2012, at para. 17-017.

8 See Section 33f(1) GWB (“*Unless otherwise agreed*”).

## II. France

8. Article 19 of the EU Directive aims at promoting consensual settlements. For this purpose, it introduces provisions in favour of the settling infringer. Recital 51 states that the settling infringer should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. However, it pays attention to the non-settling co-infringers because the risk of imbalance could turn against the settling infringer. The provisions of this Article did not raise a great deal of interest in France because of the lack of culture of mass settlement. They have been implemented into French law by two articles in the Commercial Code: Articles L. 481-13 and L. 481-14. The word “transaction” is used. It may be considered as a broad term, like an umbrella term. Two kinds of relationships may be distinguished: the relationship between co-infringers and the settling injured party; and the relationship between co-infringers and the non-settling parties.

### 1. Impact of a settlement on the relation between co-infringers and the settling injured party: Article L. 481-13

9. According to Recital 51, non-settling infringers should not be unduly affected by settlements to which they are not parties. The injured party has to reduce the settling infringer’s share to the harm cause to him. The French government transposed Article 19, paragraph 1, by Article L. 481-13, paragraph 1, in this way: “*The injured party who made a transaction with one of the joint and several co-debtors can only claim against the other co-debtors, who are non-parties to the transaction, the amount of his damage reduced by the part of the damage attributable to the transaction party co-debtor.*”

10. Article 19, paragraph 2, as it is explained by Recital 51, supports a non-contribution rule which is essential to the protection of the settling infringer: he should in principle not contribute to the non-settling co-infringers. Article 19, paragraph 1, is implemented by paragraph 2 of Article L. 481-13: “*(...) co-debtors, who are non-parties to the transaction, cannot claim from the settling party co-debtor a contribution for the sum they paid to the injured party.*”

11. Then, Recital 51 intends to ensure the right to full compensation. That is the ground of Article 19, paragraph 3. This is implemented by Article L. 481-13, paragraph 2: “*Unless otherwise stated, the injured party can claim from the transaction party co-debtor payment of the remaining sum attributable to co-debtors, who are non-parties to the transaction, after unsuccessful prosecution.*” We may question the effectiveness of this provision dictated by Article 19. Because of the phrase “*unless otherwise stated,*” the settling infringers will certainly use a style clause in order to block this possibility.

### 2. The impact of a settlement on the relation between co-infringers and non-settling injured parties: Article L. 481-14

12. Recital 52 explains the intention of the EU Directive drafters as far as Article 19, paragraph 4, is concerned. We might consider that the relationship of this provision with paragraph 2 is not clear. Recital 52 seems to shed light on the accurate object: contribution for damages paid to non-settling injured parties, and not contribution for damages paid to settling injured parties as before. It is so specified: “*(...) when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages paid under a consensual settlement.*”

13. Article 19, paragraph 4, is not so clear. It does not mention “*damages paid to non-settling injured parties.*” Article L. 481-14 follows its wording: “*In order to fix the amount that a co-debtor can claim for contribution from the other joint and several co-debtors, the court takes into account all compensation amounts already paid by co-debtors by execution of a transaction made with the injured parties.*”

14. **In conclusion**, we may regret the wording of the whole of Article 19, which could have been written in a clearer and more effective way. The French government did not manage to implement the potentialities of these provisions in a better way.

C. P.

## III. Italy

15. The Italian law, first of all, provides to the useful function of listing all the situations in the Italian legal system where the concept of “consensual settlement” under the Directive may apply. The same provision (Article 15) also makes specific reference to the rules which, within such different legal situations, already provide for the statute of limitations being interrupted: in such regard, it is important to note that, while Article 18 of the Directive provides for a “suspensive effect” of the settlement procedure, the internal Italian rules mentioned by the implementing law, actually contemplate an “interruption” of the running period. Where, needless to say, the difference is that the statute of limitations will not just start running again from where it was left, but will have to start all over again from the very beginning.

16. The Italian rule also reminds the reader that in case of proper arbitration, the natural conclusion cannot be limited only to the interruption of the statute of limitations, as the arbitral panel, under Italian law at

least, has the specific duty to pronounce a decision and thereby define the dispute. Also, having Italian law provided for possible compensations against the state in case of unduly lengthy court proceedings (as an effect of rather punitive ECHR case law concerning the malfunctioning of the Italian judicial system), Article 15 expressly considers that the relevant interruption will not be accounted for such purpose.

17. The rule adopted by the Directive concerning allocation of damages in case of settlements (which, it should be mentioned, corresponds anyhow to the case law of the Italian courts, even though this predictably has not been shaped by antitrust cases) allows for the carve-out of the settled amount and the relevant immunity for the settling defendants, establishing that this shall be *pro quota* (and not *pro tanto*). This, as provided by the Directive, will shield the settling party both from the injured party's and from its non-settling joint tortfeasors' potential claims. It will also benefit the other defendants in so far as the settling party's share of liability will be carved out from the aggregate amount of recoverable damages.

18. The intended effect of this rule is, as stated under Clause 51 of the Preamble, to “encourage settlements.” Now, on the one hand, one may question the sagacity of “encouraging settlements” (it is unclear why the EU legal system should take a critical position vis-à-vis judicial deliberation); and, on the other hand, one may wonder whether such system really has the effect of encouraging settlements. It is a well-known fact that in the US legal system the “contribution” system is expressly rejected, precisely for the purpose of putting the potentially settling parties in a competitive relationship against one another and, therefore, making them run to the plaintiff for reaching a settlement as soon as possible.

19. Also, it goes without saying that determining the share of the settling defendant's liability will not in any event always be without its fair share of complications. While this complexity is not unique to antitrust, the very complicated factual issues that already arise in allocating fines among tortfeasors in the European Commission's and NCAs' practice, give us a hint of the predictable future intricacies of judging in this area.

20. Finally, it should be reminded that in the US system litigating cartel damages has given rise to the widespread use of the so-called “judgment-sharing agreements” (JSAs). In such covenants, defendants agree in advance on their relative responsibility for any antitrust damages awarded at trial against any of them. In fact, in the US system JSAs are mostly used to apportion liability (so, in a sense the Directive would make them irrelevant). In such regard it is perhaps interesting to remind that the Court of Justice, in its *Siemens Österreich* decision opined: “(...) where there is no contractual agreement as to the shares to be paid by those held jointly and severally liable for payment of the fine, it is for the national courts to determine those shares, in a manner consistent with EU law” (§ 62) which, in a way, could be read as an implicit recognition of the validity of JSAs (though

admittedly in a different factual situation)—and, in a rather contradictory fashion, establishing *ex cathedra* the validity of such arrangements, while ostensibly leaving it to the national court to determine how to apportion liability in their absence.

21. The most notable content of a JSA would normally be to (i) apportion contribution among defendants and (ii) regulate any settlement by, e.g., establishing that a settling defendant shall extract from the contentious claim the whole amount attributable to it (such stipulation leading to an obligation for the settling defendant to include the relevant clause in the settling agreement).

22. In this regard, it is perhaps interesting to ask oneself whether, in such JSAs, parties may possibly derogate to the discipline provided for by the Directive and, therefore, by the different national systems, including with regards to the pro-quota allocation of the settlement outcome.

C. O.

## IV. Netherlands

23. The Netherlands already had a system to deal with settlements in the context of joint and several liability before the implementation of the Directive. The system of the Directive is not unsimilar, but has one important difference. Under the existing system a settlement worked in favour of the other debtors, but had no impact on the remaining claim.<sup>9</sup> Suppose the total amount of claim is 100. There are three debtors A, B and C, who are jointly and severally liable and whose respective shares are 40, 30 and 30. If debtor A settles with the claimant for 20 as a full and final settlement, the claimant could seek recourse for 80 against B and C. Now suppose that B and C both pay 40 each. This means that they “overcontributed” 10 each. They can then still turn round to A and claim their “overcontribution” from him. A then ends up paying 40 after all.<sup>10</sup>

24. The claimant and A can avoid this by an additional juristic act. The claimant and A may agree that the claimant undertakes to reduce his claim against B and C with the amount of the total debt that concerned A and could have been claimed from him as a contribution.<sup>11</sup> This means that the claimant can claim no more than 60 from B and C jointly and severally. In their internal relationship, B and C each must contribute 60, which equals the claimants remaining claim. A is cut out entirely by his settlement with the claimant.

25. Whereas our existing laws obtained this effect by way of an agreement with the creditor and settling debtor, Article 19, paragraph 1, Directive requires that this be made mandatory. This is now provided for in Article 6:193o, paragraph 1, Directive.

9 Cf. Art. 6:14 Civil Code.

10 Art. 6:10, para. 2, Civil Code.

11 Art. 6:14 Civil Code.

26. As a result, the settling injured party can subsequently only claim from non-settling infringers.<sup>12</sup> It is specifically made clear that the claim of the settling injured party is thereby decreased with the share of the settling defendant, not just with the amount of the settlement, even if the amount that should have been contributed is higher than the settlement amount.<sup>13</sup> The non-settling infringers cannot claim contribution from settling infringers.<sup>14</sup>

27. Only if a non-settling infringer is “not capable” of compensating the remaining damages, in accordance with the reduced claim, is the liability of the settling infringer for the damages reinstated.<sup>15</sup> This reinstatement, however, may be contracted away.<sup>16</sup>

F. K.

## V. United Kingdom

28. Where an injured party settles with one (or more) of a number of jointly and severally liable co-infringers, there is always the possibility that the amount for which the injured party and the settling infringer(s) settle falls short of the settling infringer’s (or infringers’) share of the loss or damage caused.

29. In such a situation, the residual loss must be borne either by (i) the injured party, or (ii) the settling co-infringer(s), or (iii) the non-settling co-infringers.

30. The United States has opted for alternative (iii) in *Texas Industries v. Radcliff Materials*. The injured party may pursue the claim against the non-settling co-infringer(s), and only has to subtract any payments actually made by the settling infringer(s). However, there is no right to contribution under federal law.<sup>17</sup> The effect is that plaintiffs can “pick off” defendants one after the other: early settling co-infringers may get favourable terms (often in exchange for inside information about the cartel; and the money is often used to finance the action against the others). The more parties settle, the greater the bill for the remaining defendants becomes. There is a ratchet effect, an expensive version of musical chairs: defendants seek to settle as early and cheaply as possible. As a countermeasure, defendants often enter into judgment-sharing agreements—an agreement that seeks to make up for the lack of statutory contribution rights by creating contractual contribution rights (but is itself not unproblematic from a competition law perspective).<sup>18</sup>

31. English law has traditionally opted for alternative (ii) and allocated the residual burden to the settling co-infringer(s): While the settlement prevents the injured party from seeking further damages from the settling co-infringer(s), the injured party may seek full compensation from the non-settling co-infringers (minus the settling amount<sup>19</sup>), and the non-settling co-infringers may seek contribution from the settling co-infringers under the Civil Liability (Contribution) Act 1978.<sup>20</sup>

32. However, again the parties may vary the effects by contractual agreement. First, it is possible, though usually not intended by the settling parties, to release all co-infringers, so that the injured party bears the residual loss (resulting in an extreme version of alternative (i) instead, in which the injured party foregoes all further claims). Secondly, it is possible to negotiate a “sales carve-out,” in which the injured party will no longer claim damages for the settling infringer’s direct and indirect sales; as Hollway et al. point out, “[t]his lessens, but does not remove, the risk of a contribution claim by a non-settling defendant against a settling defendant,”<sup>21</sup> for example because it may still be the case that the share of some co-infringers is not recoverable. Thirdly, the settling co-infringer may negotiate for an indemnity from the injured party “against any liability to which [the settling co-infringer] may become subject relating to the subject matter of the compromise.”<sup>22</sup> Such an indemnity achieves, indirectly, alternative (i): The injured party may pursue the full claim against non-settling infringers; the non-settling co-infringers may pursue a contribution claim against the settling co-infringer(s); and the settling co-infringer can in turn claim against the injured party under the indemnity.

33. The Damages Directive, in Article 19, chooses alternative (i): the claim of the injured party is reduced by the settling infringer’s share of the harm inflicted on the injured party. The non-settling infringers may not seek contribution from the settling infringers. Exceptionally, the injured party may go back to the settling infringer(s) after all for a second helping, but only where (1) the remaining share of the claim cannot be recovered from the non-settling infringers, and (2) the settling parties have excluded this possibility expressly in their settlement agreement. An unanswered question to which Article 19 gives rise is why the settling infringer would *not* want to exclude this residual liability, and whether it would not have made more sense to imply this wish to exclude

12 Art. 6:193o, para. 2, Civil Code

13 Explanatory Memorandum, p. 17.

14 Art. 6:193o, para. 2, Civil Code.

15 Art. 6:193o, para. 3, Civil Code.

16 Art. 6:193o, para. 4, Civil Code

17 *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981).

18 C. R. Leslie, Judgment-Sharing Agreements, *Duke Law Journal* 2009, Vol. 58, 747.

19 See *Jameson v. Central Electricity Generating Board* [2000] 1 A.C. 455, 472 (per Lord Hope of Craighead, quoting from *Tung Man Sit v. Capacious Investments Ltd.* [1996] A.C. 514, 522): “A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff (...) but it does operate to reduce the amount recoverable in the second action.”

20 *Heaton v. Axa Equity & Law Life Assurance Society* [2002] UKHL 15, [2002] 2 A.C. 329 [4]; B. Hollway, D. Howe, P. McGahan and D. Shah, Cartel damages settlements and the Damages Directive: The end of the road for contribution claims? *Global Competition Litigation Review* 2017, Vol. 10(1), 16.

21 Hollway et al., n. 12, at 16–17.

22 Such an indemnity was suggested by Lord Bingham in *Heaton v. Axa Equity & Law Life Assurance Society* [2002] UKHL 15, [2002] 2 A.C. 329 [9] (as the fifth of five “significant points” to be borne in mind).

residual liability as a default; the need for an express provision looks like little more than a trap for the unwary.

**34.** The provisions of Article 19 of the Damages Directive are implemented in paragraphs 39 to 41 of the new Schedule 8A to the Competition Act 1998. Paragraph 39 provides that the “*settling complainant’s claim is reduced by the settling infringer’s share of the loss or damage,*” “*regardless of the terms of the consensual settlement.*” Paragraph 40 provides that the settling complainant ceases to have a right of action against the settling infringer “*regardless of the terms of the consensual infringement,*” unless the non-settling co-infringer(s) is or are unable to pay the remaining share of the claim and such liability is not expressly excluded in the consensual settlement. Finally, paragraph 41 provides that the non-settling infringer(s) may not recover contribution from the settling infringers, regardless of the terms of the consensual settlement.

**35.** It seems that overall the change in the approach in English law forced by the Damages Directive has been welcomed in England (which is quite a feat for any rule of EU law).<sup>23</sup> On this occasion I am only slightly more sceptical than the English. The Coase theorem teaches us that in principle the default rule does not matter, provided only that transaction costs are sufficiently low. We have seen that in the US and in England parties often depart from the default rule, and so perhaps Article 19 of the Damages Directive is indeed the solution that parties would hypothetically bargain for. From this perspective, however, it is questionable whether making the position to a large extent *mandatory* instead of only providing for *default* rules was the best option. It seems that the only reason for making these issues mandatory would be if one wanted to replicate the effect that the no-contribution rule in the US law has; and that solution, while probably incentivising claimant-friendly settlements, runs counter the decision to pursue compensation and not deterrence with European damages claims.

F. W.-v. P. ■

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<sup>23</sup> Hollway et al., n. 12, at 21; see also Department for Business, Energy & Industrial Strategy, Competition Policy – Damages for breaches of competition law – government response to consultation (December 2016), para. 124 (noting that Blackstone “*felt that Article 19 represented a welcome rebalancing of risk around CDR to ensure that it was more equally borne by the claimant and defendant*”).

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