"The Implementation of the EU Antitrust Damages Directive into Member State Law"

10. Studientag am Freitag, 5. Mai 2017, in Würzburg

Handout

Topic 1: Disclosure of documents that lie in the control of the parties

a) Antitrust Damages Directive 2014/104/EU of 26th Nov. 2014[1]

Article 5

Disclosure of evidence

1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

This paragraph is without prejudice to the rights and obligations of national courts under Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

[1] **Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0104.**

5. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

6. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.

7. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.

8. Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

b) France[2]

Article L483-1 Code de commerce

Les demandes de communication ou de production de pièces ou de catégorie de pièces formées en vue ou dans le cadre d'une action en dommages et intérêts par un demandeur qui allègue de manière plausible un préjudice causé par une pratique anticoncurrentielle mentionnée à l'article L. 481-1 sont régies par les dispositions du code de procédure civile ou celles du code de justice administrative sous réserve des dispositions du présent chapitre.

Lorsqu'il statue sur une demande présentée en application du premier alinéa, le juge en apprécie la justification en tenant compte des intérêts légitimes des parties et des tiers. Il veille en particulier à concilier la mise en œuvre effective du droit à réparation, en considération de l'utilité des éléments de preuve dont la communication ou la production est demandée, et la protection du caractère confidentiel de ces éléments de preuve ainsi que la préservation de l'efficacité de l'application du droit de la concurrence par les autorités compétentes.

Article R483-1 Code de commerce

La catégorie de pièces mentionnée à l'article L. 483-1 est identifiée, de manière aussi précise et étroite que possible, par référence à des caractéristiques communes et pertinentes de ses éléments constitutifs, tels que la nature, l'objet, le moment de l'établissement ou le contenu des documents dont la communication ou la production est demandée.

Article L483-2 Code de commerce

Lorsque à l'occasion d'une instance en réparation d'un dommage causé par une pratique anticoncurrentielle, fondée sur l'article L. 481-1, il est fait état ou est demandée la communication ou la production d'une pièce dont il est allégué par une partie ou un tiers ou dont il a été jugé qu'elle est de nature à porter atteinte à un secret des affaires, le juge peut, d'office ou à la demande des parties, si la protection de ce secret ne peut être autrement assurée, décider que les débats auront lieu et que la décision sera prononcée hors la présence du public. Il peut, à la même fin et sous la même condition, déroger au principe du contradictoire, limiter la communication ou la production de la pièce à certains de ses éléments, restreindre l'accès à cette

[2] **See Ordonnance n° 2017-303 of 9th March 2017 (available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034160223&categorieLien=id) and Décret n° 2017-305 of 9th March 2017 (available at https://www.legifrance.gouv.fr/eli/decret/2017/3/9/JUSC1624992D/jo/texte).**

pièce et adapter la motivation de sa décision aux nécessités de la protection du secret des affaires, sans préjudice de l'exercice des droits de la défense.

Article R483-5 Code de commerce

Lorsqu'il considère que la communication ou la production intégrale de la pièce est de nature à porter atteinte à un secret des affaires mais qu'elle est nécessaire à la solution du litige ou à l'exercice des droits de la défense, le juge l'ordonne dans les conditions prévues par la présente section et selon les modalités qu'il fixe.

Article R483-6 Code de commerce

Lorsqu'une des parties est une personne morale, le juge, après avoir recueilli son avis, désigne la ou les personnes physiques pouvant, outre ses conseils, avoir accès à la pièce et assister aux débats.

Article R483-7 Code de commerce

La décision rejetant la demande de communication ou de production de la pièce ou de la catégorie de pièces n'est susceptible de recours qu'avec la décision sur le fond.

L'ordonnance enjoignant la communication ou la production de la pièce ou de la catégorie de pièces litigieuse peut faire l'objet d'un recours en annulation ou réformation devant le premier président de la cour d'appel de Paris.

Article R483-14 Code de commerce

Les parties à l'instance, les tiers et leurs représentants légaux peuvent être condamnés par la juridiction saisie au paiement d'une amende civile d'un montant maximum de 10 000 €, sans préjudice des dommages et intérêts qui seraient réclamés, dans l'un quelconque des cas suivants :

1° Le défaut de respect ou le refus de se conformer à une injonction de communication ou de production de pièces ;

2° La destruction de pièces pertinentes en vue de faire obstacle à l'action prévue au présent titre ;

3° Le non-respect des obligations imposées par une injonction du juge protégeant des informations confidentielles ou le refus de s'y conformer.

Le juge peut également tirer toute conséquence de fait ou de droit au préjudice de la partie ayant été à l'origine de l'un quelconque des comportements mentionnés au présent article.

c) Italy[3]

Art. 3 del decreto legislativo

Ordine di esibizione

1. Nelle azioni per il risarcimento del danno a causa di una violazione del diritto della concorrenza, su istanza motivata della parte, contenente l'indicazione di fatti e prove ragionevolmente

[3] **See Decreto legislativo of 19th January 2017 (available at http://www.gazzettaufficiale.it/eli/id/2017/01/19/17G00010/sg).**

disponibili dalla controparte o dal terzo, sufficienti a sostenere la plausibilita' della domanda di risarcimento del danno o della difesa, il giudice puo' ordinare alle parti o al terzo l'esibizione delle prove rilevanti che rientrano nella loro disponibilita' a norma delle disposizioni del presente capo.

2. Il giudice dispone a norma del comma 1 individuando specificatamente e in modo circoscritto gli elementi di prova o le rilevanti categorie di prove oggetto della richiesta o dell'ordine di esibizione. La categoria di prove e' individuata mediante il riferimento a caratteristiche comuni dei suoi elementi costitutivi come la natura, il periodo durante il quale sono stati formati, l'oggetto o il contenuto degli elementi di prova di cui e' richiesta l'esibizione e che rientrano nella stessa categoria.

3. Il giudice ordina l'esibizione, nei limiti di quanto e' proporzionato alla decisione e, in particolare:

a) esamina in quale misura la domanda di risarcimento o la difesa sono sostenute da fatti e prove disponibili che giustificano l'ordine di esibizione;

b) esamina la portata e i costi dell'esibizione, in specie per i terzi interessati;

c) valuta se le prove di cui e' richiesta l'esibizione contengono informazioni riservate, in specie se riguardanti terzi.

4. Quando la richiesta o l'ordine di esibizione hanno per oggetto informazioni riservate, il giudice dispone specifiche misure di tutela tra le quali l'obbligo del segreto, la possibilita' di non rendere visibili le parti riservate di un documento, la conduzione di audizioni a porte chiuse, la limitazione del numero di persone autorizzate a prendere visione delle prove, il conferimento ad esperti dell'incarico di redigere sintesi delle informazioni in forma aggregata o in altra forma non riservata. Si considerano informazioni riservate i documenti che contengono informazioni riservate di carattere personale, commerciale, industriale e finanziario relative a persone ed imprese, nonche' i segreti commerciali.

5. La parte o il terzo nei cui confronti e' rivolta la istanza di esibizione hanno diritto di essere sentiti prima che il giudice provveda a norma del presente articolo.

6. Resta ferma la riservatezza delle comunicazioni tra avvocati incaricati di assistere la parte e il cliente stesso.

Art. 6 del decreto legislativo

Sanzioni

1. Alla parte o al terzo che rifiuta senza giustificato motivo di rispettare l'ordine di esibizione del giudice a norma dell'articolo 3 o non adempie allo stesso il giudice applica una sanzione amministrativa pecuniaria da euro 15.000 a euro 150.000 che e' devoluta a favore della Cassa delle ammende.

2. Salvo che il fatto costituisca reato, alla parte o al terzo che distrugge prove rilevanti ai fini del giudizio di risarcimento il giudice applica una sanzione amministrativa pecuniaria da euro 15.000 a euro 150.000 che e' devoluta a favore della Cassa delle ammende.

3. Alla parte o al terzo che non rispetta o rifiuta di rispettare gli obblighi imposti dall'ordine del giudice a tutela di informazioni riservate a norma dell'articolo 3, comma 4, il giudice applica una sanzione amministrativa pecuniaria da euro 15.000 a euro 150.000 che e' devoluta a favore della Cassa delle ammende.

4. Alla parte che utilizza le prove in violazione dei limiti di cui all'articolo 5 il giudice applica una sanzione amministrativa pecuniaria da euro 15.000 a euro 150.000 che e' devoluta a favore della Cassa delle ammende.

[…]

d) United Kingdom[4]

Power of High Court in Northern Ireland to order disclosure etc by non-parties

31. —(1) On the application of a party to competition proceedings, where it appears to the High Court in Northern Ireland that evidence relevant to the proceedings is likely to be in the possession, custody or power of a person who is not a party to the proceedings, the court may order the person—

(a) to disclose whether such evidence is in the person's possession, custody or power, and

(b) if it is, to produce it—

(i) to the applicant, or

(ii) on such conditions as may be specified in the order, to the applicant's legal adviser or other professional adviser.

(2) An order under sub-paragraph (1) must not be made if the court considers that compliance with it would be likely to be injurious to the public interest.

(3) Rules of court may make provision specifying circumstances in which a court may or may not make an order under sub-paragraph (1).

(4) The power under sub-paragraph (3) includes power to make incidental, supplementary

and consequential provision.

(5) Sub-paragraph (1) is without prejudice to the exercise by the High Court in Northern

Ireland of any power to make orders which is exercisable apart from this paragraph.

[4] **See Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (available at http://www.legislation.gov.uk/uksi/2017/385/pdfs/uksi_20170385_en.pdf).**

e) Germany[5]

§ 33g GWB

Anspruch auf Herausgabe von Beweismitteln und Erteilung von Auskünften

(1) Wer im Besitz von Beweismitteln ist, die für die Erhebung eines auf Schadensersatz gerichteten Anspruchs nach § 33a Absatz 1 erforderlich sind, ist verpflichtet, sie demjenigen herauszugeben, der glaubhaft macht, einen solchen Schadensersatzanspruch zu haben, wenn dieser die Beweismittel so genau bezeichnet, wie dies auf Grundlage der mit zumutbarem Aufwand zugänglichen Tatsachen möglich ist.

(2) Wer im Besitz von Beweismitteln ist, die für die Verteidigung gegen einen auf Schadensersatz gerichteten Anspruch nach § 33a Absatz 1 erforderlich sind, ist verpflichtet, sie demjenigen herauszugeben, gegen den ein Rechtsstreit über den Anspruch nach Absatz 1 oder den Anspruch auf Schadensersatz nach§ 33a Absatz 1 rechtshängig ist, wenn dieser die Beweismittel so genau bezeichnet, wie dies auf Grundlage der mit zumutbarem Aufwand zugänglichen Tatsachen möglich ist. Der Anspruch nach Satz 1 besteht auch, wenn jemand Klage auf Feststellung erhoben hat, dass ein anderer keinen Anspruch nach § 33a Absatz 1 gegen ihn hat, und er den der Klage zugrunde liegenden Verstoß im Sinne des § 33a Absatz 1 nicht bestreitet.

(3) Die Herausgabe von Beweismitteln nach den Absätzen 1 und 2 ist ausgeschlossen, soweit sie unter Berücksichtigung der berechtigten Interessen der Beteiligten unverhältnismäßig ist. Bei der Abwägung sind insbesondere zu berücksichtigen:

[…]

Das Interesse desjenigen, gegen den der Anspruch nach § 33a Absatz 1 geltend gemacht wird, die Durchsetzung des Anspruchs zu vermeiden, ist nicht zu berücksichtigen.

[…]

[5] See Gesetzentwurf of 7th Novemer 2016 (available at http://dip21.bundestag.de/dip21/btd/18/102/1810207.pdf) and Beschlussempfehlung of the Bundestag's Committee for Economic Affairs and Energy of 8th March 2017 (available at http://dip21.bundestag.de/dip21/btd/18/114/1811446.pdf).

Topic 2: Disclosure of evidence included in the file of a competition authority

a) Directive 2014/104/EU

Article 6

Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, where national courts order the disclosure of evidence included in the file of a competition authority, this Article applies in addition to Article 5.

2. This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001.

3. This Article is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.

4. When assessing, in accordance with Article 5(3), the proportionality of an order to disclose information, national courts shall, in addition, consider the following:

(a) 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 file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and

(c) in relation to paragraphs 5 and 10, or upon request of a competition authority pursuant to paragraph 11, the need to safeguard the effectiveness of the public enforcement of competition law.

5. National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

6. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency statements; and

(b) settlement submissions.

7. A claimant may present a reasoned request that a national court access the evidence referred to in point (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.

8. If only parts of the evidence requested are covered by paragraph 6, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Article.

9. The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

10. Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence.

11. To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought.

Article 7

Limits on the use of evidence obtained solely through access to the file of a competition authority

1. Member States shall ensure that evidence in the categories listed in Article 6(6) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

2. Member States shall ensure that, until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6(5) which is obtained by a natural or legal person solely through access to the file of that competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority and which does not fall under paragraph 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

b) France

Article L483-4 Code de commerce

Le juge ne peut pas ordonner à l'Autorité de la concurrence, au ministre chargé de l'économie, à toute autorité de concurrence d'un autre Etat membre ou à la Commission européenne la production d'une pièce figurant dans son dossier lorsque l'une des parties ou un tiers est raisonnablement en mesure de fournir cette pièce.

Article L483-5 Code de commerce

Le juge ne peut pas enjoindre la communication ou la production d'une pièce comportant :

1° Un exposé écrit ou la transcription de déclarations orales présenté volontairement à une autorité de concurrence par une personne mentionnée à l'article L. 481-1 ou en son nom, et contribuant à établir la réalité d'une pratique anticoncurrentielle prévue aux articles L. 420-1 et 101 du traité sur le fonctionnement de l'Union européenne et à en identifier ses auteurs, en vue de bénéficier d'une exonération totale ou partielle de sanctions en application d'une procédure de clémence ;

2° Un exposé écrit ou la transcription de déclarations orales présenté volontairement à une autorité de concurrence par une personne mentionnée à l'article L. 481-1 ou en son nom, traduisant sa volonté de renoncer à contester la réalité des griefs qui lui sont notifiés et la responsabilité qui en découle, ou reconnaissant sa participation à une pratique anticoncurrentielle et la responsabilité qui en découle, établi pour permettre à l'Autorité de la concurrence d'appliquer la procédure prévue au III de l'article L. 464-2, ou au ministre chargé de l'économie d'appliquer la procédure prévue au deuxième alinéa de l'article L. 464-9 ou aux autorités de concurrence des autres Etats membres et à la Commission européenne d'appliquer une procédure simplifiée ou accélérée.

Cette interdiction s'applique également aux passages d'une pièce établie à l'occasion d'une enquête ou d'une instruction devant une autorité de concurrence et qui comporteraient une transcription ou citation littérale des exposés mentionnés aux alinéas précédents.

Le juge écarte des débats les pièces mentionnées au présent article qui seraient produites ou communiquées par les parties lorsque ces pièces ont été obtenues uniquement grâce à l'accès au dossier d'une autorité de concurrence.

Article L483-6 Code de commerce

A la demande d'une partie, le juge vérifie le contenu de la pièce figurant dans le dossier d'une autorité de concurrence dont il est allégué qu'elle relève de l'interdiction prévue à l'article L. 483-5. A cette fin, il se fait communiquer cette pièce par la personne ou l'autorité de concurrence qui la détient et en prend seul connaissance. Il peut, hors la présence de toute autre personne, entendre l'auteur de la pièce litigieuse assisté ou représenté par toute personne habilitée.

Le juge peut se prononcer hors la présence du public. Il adapte la motivation de sa décision aux nécessités de la protection de la confidentialité de la pièce concernée.

Article L483-8 Code de commerce

Tant que la procédure concernée n'est pas close par une décision adoptée par l'Autorité de la concurrence sur le fondement du I de l'article L. 464-2 et des articles L. 462-8, L. 464-3, L. 464-6 ou L. 464-6-1, par le ministre chargé de l'économie sur le fondement des premier et deuxième alinéas de l'article L. 464-9 ou par une autorité de concurrence d'un autre Etat membre de

l'Union européenne ou la Commission européenne sur le fondement de dispositions équivalentes, le juge ne peut pas enjoindre la communication ou la production d'une pièce comportant :

1° Des informations préparées par une personne physique ou morale mentionnée à l'article L. 481-1 ou toute autre personne physique ou morale concernée, ainsi que par les autorités administratives que l'Autorité de la concurrence consulte, aux fins d'une enquête ou d'une instruction menée par une autorité de concurrence ;

2° Des informations établies par une autorité de concurrence et communiquées à la personne physique ou morale mentionnée à l'article L. 481-1 ou à toute autre personne physique ou morale concernée au cours de la procédure ;

3° Un exposé écrit ou une transcription ou citation littérale d'un exposé écrit ou oral, mentionné au 2° de l'article L. 483-5, lorsque la personne mentionnée à l'article L. 481-1 auteur de l'exposé s'est retirée unilatéralement de la procédure.

Le juge écarte des débats les pièces mentionnées aux 1° à 3° qui seraient produites ou communiquées par les parties alors que la procédure concernée n'est pas close lorsque ces pièces ont été obtenues uniquement grâce à l'accès au dossier d'une autorité de concurrence.

Article L483-9 Code de commerce

Les articles L. 483-5 et L. 483-8 ne s'appliquent pas à une pièce qui existe indépendamment de la procédure engagée devant une autorité de concurrence, qu'elle figure ou non dans le dossier de ladite autorité.

Article R483-11 Code de commerce

Lorsque la pratique anticoncurrentielle invoquée à l'appui d'une action fondée sur l'article L. 481-1 fait également l'objet d'une procédure en cours devant une autorité de concurrence, les parties concernées par cette procédure l'informent de toute demande, qu'elles ont formée ou dont elles sont destinataires, ayant pour objet la communication ou la production de pièces figurant dans le dossier de l'autorité.

Article R483-12 Code de commerce

Une autorité de concurrence peut, de sa propre initiative, donner son avis écrit sur une demande de communication ou de production de toute pièce figurant dans son dossier dont la juridiction est saisie. L'autorité de concurrence transmet cet avis aux parties.

Article R483-13 Code de commerce

Pour s'assurer qu'une pièce relève de l'interdiction prévue à l'article L. 483-5, le juge peut demander l'avis de l'autorité de concurrence compétente et lui communiquer à cet effet la pièce concernée. Cet avis préserve la confidentialité des informations contenues dans la pièce. Le greffe communique cet avis aux parties et, le cas échéant, au tiers détenteur de ladite pièce.

Le juge peut statuer sans audience, après avoir informé les parties et, le cas échéant, le tiers détenteur de la pièce litigieuse de la date du prononcé de sa décision.

c) Italy

Art. 4 del decreto legislativo

Esibizione delle prove contenute nel fascicolo di un'autorita' garante della concorrenza

1. Il giudice ordina l'esibizione di prove contenute nel fascicolo di un'autorita' garante della concorrenza quando ne' le parti ne' i terzi sono ragionevolmente in grado di fornire tale prova.

2. Il giudice ordina l'esibizione di prove contenute nel fascicolo di un'autorita' garante della concorrenza a norma dell'articolo 3 e secondo quanto disposto dal presente articolo.

3. Quando il giudice valuta la proporzionalita' dell'ordine di esibizione considera altresi':

a) se la richiesta e' stata formulata in modo specifico quanto alla natura, all'oggetto o al contenuto dei documenti presentati a un'autorita' garante della concorrenza o contenuti nel fascicolo di tale autorita' o con una domanda generica attinente a documenti presentati a un'autorita' garante della concorrenza;

b) se la parte richiede l'esibizione in relazione all'azione per il risarcimento del danno a causa di una violazione del diritto della concorrenza;

c) se sia necessario salvaguardare l'efficacia dell'applicazione a livello pubblicistico del diritto della concorrenza in relazione a quanto previsto dalle disposizioni di cui ai commi 1 e 4, o nel caso

di richiesta di un'autorita' garante della concorrenza ai sensi del comma 7.

4. Il giudice, solo dopo la conclusione del procedimento da parte dell'autorita' garante della concorrenza, puo' ordinare l'esibizione delle seguenti categorie di prove:

a) informazioni rese nell'ambito di un procedimento di un'autorita' garante della concorrenza;

b) informazioni che l'autorita' garante della concorrenza ha redatto e comunicato alle parti nel corso del suo procedimento;

c) proposte di transazione, ove specificamente disciplinate, che sono state revocate.

5. Il giudice non puo' ordinare a una parte o a un terzo di esibire prove aventi ad oggetto dichiarazioni legate a un programma di clemenza o proposte di transazione, ove specificamente disciplinate. In ogni caso l'attore puo' proporre istanza motivata perche' il giudice, che puo' chiedere assistenza solo all'autorita' garante della concorrenza, acceda alle prove di cui al periodo precedente al solo scopo di garantire che il loro contenuto corrisponda alle definizioni di cui all'articolo 2, comma 1, lettere n) e p). Gli autori dei documenti interessati possono chiedere al giudice di essere sentiti. In nessun caso il giudice consente alle altre parti o a terzi l'accesso a tali prove. Quando il giudice accerta che il contenuto delle prove non corrisponde alle definizioni di cui all'articolo 2, comma 1, lettere n) e p), ne ordina l'esibizione secondo le disposizioni di cui ai commi 4 e 6.

6. Il giudice puo' ordinare l'esibizione delle prove che non rientrano nelle categorie di cui ai commi 4 e 5, primo periodo, anche prima della conclusione del procedimento da parte dell'autorita' garante della concorrenza.

7. Quando l'autorita' garante della concorrenza intende fornire il proprio parere sulla proporzionalita' della richiesta di esibizione puo' presentare osservazioni al giudice. Al fine di consentire all'autorita' garante della concorrenza di esercitare la facolta' di cui al periodo precedente, il giudice informa la medesima autorita' delle richieste di esibizione, disponendo la trasmissione

degli atti che ritiene a tal fine rilevanti. Le osservazioni dell'autorita' sono inserite nel fascicolo d'ufficio a norma dell'articolo 96 delle disposizioni di attuazione del codice di procedura civile.

8. Nei casi di cui al comma 4, quando sui fatti rilevanti ai fini del decidere e' in corso un procedimento davanti a un'autorita' garante della concorrenza ed e' necessario salvaguardare l'efficacia dell'applicazione a livello pubblicistico del diritto della concorrenza, il giudice puo' sospendere il giudizio fino alla chiusura del predetto procedimento con una decisione dell'autorita' o in altro modo.

9. Sono fatte salve le norme e prassi previste dal diritto dell'Unione o le specifiche disposizioni nazionali sulla protezione dei documenti interni delle autorita' garanti della concorrenza e della corrispondenza tra tali autorita'.

Art. 5 del decreto legislativo

Limiti nell'uso delle prove ottenute solo grazie all'accesso al fascicolo di un'autorita' garante della concorrenza

1. Le prove che rientrano in una delle categorie di cui all'articolo 4, commi 4 e 5, primo periodo, comunque ottenute dalle parti anche mediante l'accesso al fascicolo sono ammesse negli stessi limiti di cui all'articolo 4, commi 4 e 5.

2. Le prove che rientrano nella categoria di cui all'articolo 4, comma 6, comunque ottenute dalle parti solo mediante l'accesso al fascicolo possono essere utilizzate nell'azione per il risarcimento del danno solo dalla parte che le ha ottenute o dal suo successore nel diritto.

d) United Kingdom

Restriction in relation to settlement submissions and cartel leniency statements

28. For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order in respect of—

(a) a settlement submission which has not been withdrawn, or

(b) a cartel leniency statement (whether or not it has been withdrawn).

Restriction in relation to investigation materials

29. For the purposes of competition proceedings, a court or the Tribunal must not make a disclosure order in respect of a competition authority’s investigation materials before the day on which the competition authority closes the investigation to which those materials relate.

Restriction in relation to material in a competition authority's file

30.—(1) For the purposes of competition proceedings, 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.
(2) 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.

e) Germany

§ 53 GWB

Tätigkeitsberichte und Monitoring

[…]

(5) Das Bundeskartellamt soll jede Bußgeldentscheidung wegen eines Verstoßes gegen § 1 oder 19 bis 21 oder Artikel 101 oder 102 des Vertrages über die Arbeitsweise der Europäischen Union spätestens nach Abschluss des behördlichen Bußgeldverfahrens auf seiner Internetseite mitteilen. Die Mitteilung soll mindestens Folgendes enthalten:

1. Angaben zu dem in der Bußgeldentscheidung festgestellten Sachverhalt,

2. Angaben zu der Art des Verstoßes und dem Zeitraum, in dem der Verstoß begangen wurde,

3. Angaben zu den Unternehmen, die an dem Verstoß beteiligt waren,

4. Angaben zu den betroffenen Waren und Dienstleistungen,

5. den Hinweis, dass Personen, denen aus dem Verstoß ein Schaden entstanden ist, den Ersatz dieses Schadens verlangen können, sowie,

6. wenn die Bußgeldentscheidung bereits rechtskräftig ist, den Hinweis auf die Bindungswirkung von Entscheidungen einer Wettbewerbsbehörde nach § 33b."

§ 89c GWB

Offenlegung aus der Behördenakte

(1) In einem Rechtsstreit wegen eines Anspruchs nach § 33a Absatz 1 oder nach § 33g Absatz 1 oder 2 kann das Gericht auf Antrag einer Partei bei der Wettbewerbsbehörde die Vorlegung von Urkunden und Gegenständen ersuchen, die sich in deren Akten zu einem Verfahren befinden oder in einem Verfahren amtlich verwahrt werden, wenn der Antragsteller glaubhaft macht, dass er

1. einen Anspruch auf Schadensersatz nach § 33a Absatz 1 gegen eine andere Partei hat und

2. die in der Akte vermuteten Informationen nicht mit zumutbarem Aufwand von einer anderen Partei oder einem Dritten erlangen kann.

Das Gericht entscheidet über den Antrag durch Beschluss. Gegen den Beschluss findet sofortige Beschwerde statt.

[…]

(3) Das Ersuchen nach Absatz 1 oder um die Erteilung amtlicher Auskünfte von der Wettbewerbsbehörde ist ausgeschlossen, soweit es unverhältnismäßig ist. Bei der Entscheidung über das Ersuchen nach Absatz 1, über das Ersuchen um die Erteilung amtlicher Auskünfte von der Wettbewerbsbehörde sowie über die Zugänglichmachung oder Auskunftserteilung nach Absatz 2 berücksichtigt das Gericht neben § 33g Absatz 3 insbesondere auch

1.die Bestimmtheit des Antrags hinsichtlich der in der Akte der Wettbewerbsbehörde erwarteten Beweismittel nach deren Art, Gegenstand und Inhalt,

2.die Anhängigkeit des Anspruchs nach § 33a Absatz 1,

3.die Wirksamkeit der öffentlichen Durchsetzung des Kartellrechts, insbesondere den Einfluss der Offenlegung auf laufende Verfahren und auf die Funktionsfähigkeit von Kronzeugenprogrammen und Vergleichsverfahren.

(4) Die Wettbewerbsbehörde kann die Vorlegung von Urkunden und Gegenständen, die sich in ihren Akten zu einem Verfahren befinden oder in einem Verfahren amtlich verwahrt werden, ablehnen, soweit sie Folgendes enthalten:

1.Kronzeugenerklärungen,

2.Vergleichsausführungen, die nicht zurückgezogen wurden,

3.interne Vermerke der Behörden oder

4.Kommunikation der Wettbewerbsbehörden untereinander oder mit der Generalstaatsanwaltschaft am Sitz des für die Wettbewerbsbehörde zuständigen Oberlandesgerichts oder dem Generalbundesanwalt beim Bundesgerichtshof.

[…]

f) Netherlands[6]

AFDELING 1A TOEGANG TOT BESCHEIDEN IN ZAKEN BETREFFENDE SCHENDING VAN MEDEDINGINGSRECHT

Artikel 844
1. Deze afdeling is van toepassing op zaken waarin inzage, afschrift of uittreksel van bescheiden als bedoeld in artikel 843a wordt gevorderd wegens een inbreuk op het mededingingsrecht als bedoeld in artikel 193k, onderdeel a, van Boek 6 van het Burgerlijk Wetboek.
2. Voor de toepassing van deze afdeling wordt onder een mededingingsautoriteit verstaan een mededingingsautoriteit als bedoeld in artikel 193k, onderdeel c, van Boek 6 van het Burgerlijk Wetboek.

[6] Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), available here: https://www.eerstekamer.nl/behandeling/20170209/publicatie_wet/document3/f=/vkbkd0tlboux.pdf.

Artikel 845
In afwijking van het in artikel 843a, vierde lid, bepaalde is degene die bescheiden omtrent een vordering tot schadevergoeding wegens een inbreuk op het mededingingsrecht te zijner beschikking of onder zijn berusting heeft, niet gehouden inzage, afschrift of uittreksel daarvan te verschaffen, indien daarvoor gewichtige redenen zijn.

Artikel 846
1. Geen inzage, afschrift of uittreksel wordt verschaft van de volgende, enkel uit het dossier van een mededingingsautoriteit afkomstige bescheiden:
a. clementieverklaringen, en
b. verklaringen met het oog op een schikking.
2. De in het eerste lid bedoelde bescheiden leveren geen bewijs op voor een vordering tot schadevergoeding wegens een inbreuk op het mededingingsrecht.

[…]

Topic 3: Limitation periods

a) Directive 2014/104/EU

Recital 36

National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by a competition authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer. Member States should be able 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.

Article 10

Limitation periods

1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

(a) of the behaviour and the fact that it constitutes an infringement of competition law;

(b) of the fact that the infringement of competition law caused harm to it; and

(c) the identity of the infringer.

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. 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. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

b) France

Article L482-1 Code de commerce

L'action en dommages et intérêts fondée sur l'article L. 481-1 se prescrit à l'expiration d'un délai de cinq ans. Ce délai commence à courir du jour où le demandeur a connu ou aurait dû connaître de façon cumulative :

1° Les actes ou faits imputés à l'une des personnes physiques ou morales mentionnées à l'article L. 481-1 et le fait qu'ils constituent une pratique anticoncurrentielle ;

2° Le fait que cette pratique lui cause un dommage ;

3° L'identité de l'un des auteurs de cette pratique.

Toutefois, la prescription ne court pas tant que la pratique anticoncurrentielle n'a pas cessé.

Elle ne court pas à l'égard des victimes du bénéficiaire d'une exonération totale de sanction pécuniaire en application d'une procédure de clémence tant qu'elles n'ont pas été en mesure d'agir à l'encontre des auteurs de la pratique anticoncurrentielle autres que ce bénéficiaire.

Article L462-7 para. 4 Code de commerce

Tout acte tendant à la recherche, à la constatation ou à la sanction de pratiques anticoncurrentielles par l'Autorité de la concurrence, une autorité nationale de concurrence d'un autre Etat membre de l'Union européenne ou la Commission européenne interrompt la prescription de l'action civile et de l'action indemnitaire engagée devant une juridiction administrative sur le fondement de l'article L. 481-1. L'interruption résultant d'un tel acte produit ses effets jusqu'à la date à laquelle la décision de l'autorité de concurrence compétente ou de la juridiction de recours ne peut plus faire l'objet d'une voie de recours ordinaire.

c) Italy

Art. 8 del decreto legislativo

Termine di prescrizione del decreto legislativo

1. Il diritto al risarcimento del danno derivante da una violazione del diritto della concorrenza si prescrive in cinque anni. Il termine di prescrizione non inizia a decorrere prima che la violazione del diritto della concorrenza sia cessata e prima che l'attore sia a conoscenza o si possa ragionevolmente presumere che sia a conoscenza di tutti i seguenti elementi:

a) della condotta e del fatto che tale condotta costituisce una violazione del diritto della concorrenza;

b) del fatto che la violazione del diritto della concorrenza gli ha cagionato un danno;

c) dell'identita' dell'autore della violazione.

2. La prescrizione rimane sospesa quando l'autorita' garante della concorrenza avvia un'indagine o un'istruttoria in relazione alla violazione del diritto della concorrenza cui si riferisce l'azione per il diritto al risarcimento del danno. La sospensione si protrae per un anno dal momento in cui la decisione relativa alla violazione del diritto della concorrenza e' divenuta definitiva o dopo che il procedimento si e' chiuso in altro modo.

d) United Kingdom

Time limits for bringing competition proceedings

17. —(1) Under the law of England and Wales and the law of Northern Ireland, proceedings in respect of a competition claim may not be brought before a court or the Tribunal after the end of the limitation period for the claim determined in accordance with this Part of this Schedule.

(2) Under the law of Scotland—

(a) proceedings in respect of a competition claim may not be brought before a court or the Tribunal after the end of the prescriptive period for the claim determined in accordance with this Part of this Schedule, and

(b) accordingly, an obligation in respect of the loss or damage that is the subject of the claim is extinguished, except where the subsistence of the obligation in relation to which the claim is made was relevantly acknowledged before the end of that period.

(3) Section 6 of the Prescription and Limitation (Scotland) Act 1973(a) (extinction of obligations by prescriptive periods of 5 years) does not apply in relation to an obligation described in sub-paragraph (2).

(4) The following provisions of the Prescription and Limitation (Scotland) Act 1973 apply for the purposes of, or in relation to, sub-paragraph (2) as they apply for the purposes of, or in relation to, section 6 of that Act—

(a) section 10 (relevant acknowledgment)(b);

(b) section 13 (prohibition of contracting out)(c);

(c) section 14(1)(c) and (d) (computation of prescriptive periods).

Length of limitation or prescriptive period

18.—(1) The limitation period is 6 years.

(2) The prescriptive period is 5 years.

(3) But see—

(a) the provision in paragraphs 20 to 25 for the running of the period to be suspended in certain circumstances, and

(b) paragraph 23(5), which extends the period in certain circumstances.

Beginning of limitation or prescriptive period

19.—(1) The limitation or prescriptive period for a competition claim against an infringer begins with the later of—

(a) the day on which the infringement of competition law that is the subject of the

claim ceases, and

(b) the claimant's day of knowledge.

(2) "The claimant's day of knowledge" is 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 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.

(3) Where the claimant has acquired the right to make the competition claim from another person (whether by operation of law or otherwise) —

(a) the reference in sub-paragraph (2) to the day on which the claimant first knows or could reasonably be expected to know something is to be read as a reference to the first day on which either the claimant or a person in whom the cause of action was previously vested first knows or could reasonably be expected to know it, and

(b) the reference to the claimant in sub-paragraph (2)(c) is to be read as a reference to the injured person.

(4) In sub-paragraph (3), "injured person", in relation to a competition claim, means a person who suffered the loss or damage that is the subject of the claim.

(5) Where a person ("P") has acquired an infringer's liability in respect of an infringement of competition law from another person (whether by operation of law or otherwise)—

(a) the reference to an infringer in sub-paragraph (1) is to be read as a reference to P, but

(b) the references to the infringer in sub-paragraph (2) are to be read as references to the original infringer.

(6) The references in sub-paragraphs (2) and (3) to a person knowing something are to a person having sufficient knowledge of it to bring competition proceedings.

(7) This paragraph has effect subject to the provision in paragraphs 20 to 25, which defers the beginning of the limitation or prescriptive period in certain circumstances.

Suspension during investigation by competition authority

21.—(1) Where a competition authority investigates an infringement of competition law, the period of the investigation is not to be counted when calculating whether the limitation or prescriptive period for a competition claim in respect of loss or damage arising from the infringement has expired.

(2) The period of an investigation by a competition authority begins when the competition authority takes the first formal step in the investigation.

(3) The period of an investigation by a competition authority ends—

(a) if the competition authority makes a decision in relation to the infringement as a result of the investigation, at the end of the period of one year beginning with the day on which the decision becomes final, and

(b) otherwise, at the end of the period of one year beginning with the day on which the competition authority closes the investigation.

e) Germany

§ 33h GWB

Verjährung

(1) Ansprüche aus § 33 Absatz 1 und § 33a Absatz 1 verjähren in fünf Jahren.

(2) Die Verjährungsfrist beginnt mit dem Schluss des Jahres, in dem

1. der Anspruch entstanden ist,

2. der Anspruchsberechtigte Kenntnis erlangt hat oder ohne grobe Fahrlässigkeit hätte erlangen müssen

a) von den Umständen, die den Anspruch begründen, und davon, dass sich daraus ein Verstoß nach§ 33 Absatz 1 ergibt, sowie

b) von der Identität des Rechtsverletzers und

3. der den Anspruch begründende Verstoß nach § 33 Absatz 1 beendet worden ist.

(3) Ansprüche aus § 33 Absatz 1 und § 33a Absatz 1 verjähren ohne Rücksicht auf die Kenntnis oder grob fahrlässige Unkenntnis von den Umständen nach Absatz 2 Nummer 2 in zehn Jahren von dem Zeitpunkt an, in dem

1.der Anspruch entstanden ist und

2. der Verstoß nach § 33 Absatz 1 beendet wurde.

(4) Im Übrigen verjähren die Ansprüche in 30 Jahren nach dem Verstoß nach § 33 Absatz 1, der den Schaden ausgelöst hat.

(5) Verjährung tritt ein, wenn eine der Fristen nach den Absätzen 1, 3 oder 4 abgelaufen ist.

(6) Die Verjährung eines Anspruchs nach § 33 Absatz 1 oder nach § 33a Absatz 1 wird gehemmt, wenn […]

f) Netherlands

Artikel 193r

De rechter kan een procedure waarin vergoeding van schade wordt gevorderd wegens een inbreuk op het mededingingsrecht voor ten hoogste twee jaar aanhouden, indien partijen betrokken zijn bij buitengerechtelijke geschillenbeslechting in verband met die vordering.
Artikel 193s
Een rechtsvordering tot vergoeding van schade door een inbreuk op het mededingingsrecht verjaart door verloop van vijf jaren na de aanvang van de dag, volgende op die waarop de inbreuk is stopgezet en de benadeelde met de inbreuk, de schade die hij dientengevolge lijdt en de daarvoor aansprakelijke persoon bekend is geworden of redelijkerwijs bekend kan worden geacht, en in ieder geval door verloop van twintig jaren na de aanvang van de dag volgende op die waarop de inbreuk is stopgezet

Topic 4: Binding effect of decisions of national authorities

a) Directive 2014/104/EU

Recital 34

(…) To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.

Article 9

Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

b) France

Article L481-2 Code de commerce

Une pratique anticoncurrentielle mentionnée à l'article L. 481-1 est présumée établie de manière irréfragable à l'égard de la personne physique ou morale désignée au même article dès lors que son existence et son imputation à cette personne ont été constatées par une décision qui ne peut plus faire l'objet d'une voie de recours ordinaire pour la partie relative à ce constat, prononcée par l'Autorité de la concurrence ou par la juridiction de recours.

Une décision qui ne peut plus faire l'objet d'une voie de recours ordinaire pour la partie relative au constat de l'existence et de l'imputation d'une pratique anticoncurrentielle, prononcée par une autorité de concurrence ou par une juridiction de recours d'un autre Etat membre de l'Union européenne à l'égard d'une personne physique ou morale, constitue un moyen de preuve de la commission de cette pratique. (…)

c) Italy

Art. 7 del decreto legislativo

Effetti delle decisioni dell'autorita' garante della concorrenza

1. Ai fini dell'azione per il risarcimento del danno si ritiene definitivamente accertata, nei confronti dell'autore, la violazione del diritto della concorrenza constatata da una decisione dell'autorita' garante della concorrenza e del mercato di cui all'articolo 10 della legge 10 ottobre 1990, n. 287, non piu' soggetta ad impugnazione davanti al giudice del ricorso, o da una sentenza del giudice del ricorso passata in giudicato. Il sindacato del giudice del ricorso comporta la verifica diretta dei fatti posti a fondamento della decisione impugnata e si estende anche ai profili tecnici che non presentano un oggettivo margine di opinabilita', il cui esame sia necessario per giudicare la legittimita' della decisione medesima. Quanto previsto al primo periodo riguarda la natura della violazione e la sua portata materiale, personale, temporale e territoriale, ma non il nesso di causalita' e l'esistenza del danno.

2. La decisione definitiva con cui una autorita' nazionale garante della concorrenza o il giudice del ricorso di altro Stato membro accerta una violazione del diritto della concorrenza costituisce prova, nei confronti dell'autore, della natura della violazione e della sua portata materiale, personale, temporale e territoriale, valutabile insieme ad altre prove.

3. Le disposizioni del presente articolo lasciano impregiudicati le facolta' e gli obblighi del giudice ai sensi dell'articolo 267 del trattato sul funzionamento dell'Unione europea.

d) United Kingdom

Decisions of member State competition authorities

35.—(1) For the 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.

[...]

e) Germany

§ 33b GWB

Bindungswirkung von Entscheidungen einer Wettbewerbsbehörde

Wird wegen eines Verstoßes gegen eine Vorschrift dieses Teils oder gegen Artikel 101 oder 102 des Vertrages über die Arbeitsweise der Europäischen Union Schadensersatz gefordert, so ist das Gericht an die Feststellung des Verstoßes gebunden, wie sie in einer bestandskräftigen Entscheidung der Kartellbehörde, der Europäischen Kommission oder der Wettbewerbsbehörde oder des als solche handelnden Gerichts in einem anderen Mitgliedstaat der Europäischen Union getroffen wurde. Das Gleiche gilt für entsprechende Feststellungen in rechtskräftigen Gerichtsentscheidungen, die infolge der Anfechtung von Entscheidungen nach Satz 1 ergangen sind. Diese Verpflichtung gilt unbeschadet der Rechte und Pflichten nach Artikel 267 des Vertrages über die Arbeitsweise der Europäischen Union.

f) Netherlands

Artikel 161a
Een onherroepelijk besluit houdende een inbreukbeslissing van de Autoriteit Consument en Markt levert onweerlegbaar bewijs op van de vastgestelde inbreuk in een procedure waarin schadevergoeding wordt gevorderd wegens een inbreuk op het mededingingsrecht als bedoeld in artikel 193k, onderdeel a, van Boek 6 van het Burgerlijk Wetboek.

Topic 5: Effect of consensual settlements on subsequent damages actions

a) Regulation 1/2003[7]

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.

2. When competition authorities of the Member States 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 which would run counter to the decision adopted by the Commission.

b) Directive 2014/104/EU

Recital 51

To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

[7] 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.

Recital 52

Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, 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 already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

Article 19

Effect of consensual settlements on subsequent actions for damages

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party.

2. Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.

3. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

The derogation referred to in the first subparagraph may be expressly excluded under the terms of the consensual settlement.

4. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

c) France

Article L481-13 Code de commerce

La victime qui a conclu une transaction avec l'un des codébiteurs solidaires ne peut réclamer aux autres codébiteurs non parties à la transaction que le montant de son préjudice diminué de la part du préjudice imputable au codébiteur partie à la transaction. Les codébiteurs non parties à la transaction ne peuvent réclamer au codébiteur partie à celle-ci une contribution à la somme qu'ils ont payée à cette victime.

Sauf stipulation contraire, la victime peut réclamer au codébiteur partie à la transaction le paiement du solde de son préjudice imputable aux autres codébiteurs solidaires non parties à la transaction après les avoir préalablement et vainement poursuivis.

Article L481-14 Code de commerce

Pour fixer le montant de la contribution qu'un codébiteur peut récupérer auprès des autres codébiteurs solidaires, le juge tient également compte de l'ensemble des indemnités déjà versées par les codébiteurs en exécution d'une transaction antérieurement conclue par eux avec l'une des victimes de la pratique anticoncurrentielle.

d) Italy

Art. 16 del decreto legislativo

Effetti della composizione consensuale delle controversie sulle successive azioni per il risarcimento del danno

1. Nelle azioni per il risarcimento del danno da violazione del diritto della concorrenza, il soggetto danneggiato che ha partecipato ad un accordo che compone la controversia non puo' chiedere la parte di danno imputabile al coautore della violazione che vi ha partecipato ai coautori che non vi hanno partecipato.

2. I coautori della violazione che non hanno partecipato ad un accordo che compone la controversia non hanno regresso nei confronti dei coautori della violazione che vi hanno partecipato per la parte del danno a questi imputabile.

3. Quando i coautori della violazione che non hanno partecipato all'accordo che compone la controversia sono insolventi, detratta la parte di danno imputabile al coautore che ha partecipato all'accordo, il soggetto danneggiato puo' chiedere il risarcimento ai coautori della violazione che hanno partecipato all'accordo, salvo che le parti che hanno partecipato all'accordo che compone la controversia lo abbiano espressamente escluso.

4. Fermo il disposto dell'articolo 2055, secondo comma, del codice civile, nel determinare la misura del regresso dovuto dal coautore della violazione a ciascuno degli altri coautori della violazione responsabili per il danno cagionato dalla violazione del diritto della concorrenza, il giudice tiene conto del risarcimento corrisposto dal predetto coautore interessato nell'ambito di un accordo che compone la controversia concluso in precedenza.

5. Le disposizioni del presente articolo si applicano anche quando il procedimento di composizione consensuale della controversia e' definito con la pronuncia del lodo di cui al capo IV del Titolo VIII del libro IV del codice di procedura civile.

e) United Kingdom

Effect of consensual settlement on the amount of a claim

39.—(1) Where loss or damage arising from an infringement of competition law is the subject of—

(a) a consensual settlement, and

(b) a competition damages claim by the settling complainant,

the amount of the settling complainant's claim is reduced by the settling infringer's share of the loss or damage.

[…]

Effect of consensual settlement for the settling infringer

40.—(1) Where loss or damage arising from an infringement of competition law is the subject of a consensual settlement, the settling complainant ceases to have a right of action against the settling infringer in respect of the loss or damage.

(2) Sub-paragraph (1) has effect regardless of the terms of the consensual settlement.

(3) Sub-paragraphs (1) and (2) do not apply where—

(a) an undertaking other than the settling infringer is liable to pay damages to the settling complainant in respect of loss or damage which arises from the infringement,

(b) that undertaking is (or, if there is more than one, those undertakings are) unable to pay damages corresponding to the outstanding amount of the settling complainant's claim, and

(c) the settling infringer's liability for that amount is not expressly excluded by the terms of the consensual settlement.

Effect of consensual settlement on contribution between defendants

41.—(1) Where—

(a) loss or damage arising from an infringement of competition law is the subject of a consensual settlement,

(b) it is also the subject of a competition damages claim by the settling complainant,

and

(c) an undertaking other than the settling infringer is liable to pay damages to the settling complainant in respect of the loss or damage that is the subject of the claim, that undertaking may not recover contribution from the settling infringer in respect of the loss or damage under section 1 of the Civil Liability (Contribution) Act 1978 or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

[…]

f) Germany

§ 33f GWB

Wirkungen des Vergleichs

(1) Wenn nicht anders vereinbart, wird im Falle einer durch einvernehmliche Streitbeilegung erzielten Einigung (Vergleich) über einen Schadensersatzanspruch nach § 33a Absatz 1 der sich vergleichende Gesamtschuldner in Höhe seines Anteils an dem Schaden von seiner Haftung gegenüber dem sich vergleichenden Geschädigten befreit. Die übrigen Gesamtschuldner sind nur zum Ersatz des Schadens verpflichtet, der nach Abzug des Anteils des sich vergleichenden Gesamtschuldners verbleibt. Den Ersatz des verbliebenen Schadens kann der sich vergleichende Geschädigte von dem sich vergleichenden Gesamtschuldner nur verlangen, wenn der sich vergleichende Geschädigte von den übrigen Gesamtschuldnern insoweit keinen vollständigen Ersatz erlangen konnte. Satz 3 findet keine Anwendung, wenn die Vergleichsparteien dies in dem Vergleich ausgeschlossen haben.

(2) Gesamtschuldner, die nicht an dem Vergleich nach Absatz 1 beteiligt sind, können von dem sich vergleichenden Gesamtschuldner keine Ausgleichung nach § 33d Absatz 2 für den Ersatz des Schadens des sich vergleichenden Geschädigten verlangen, der nach Abzug des Anteils des sich vergleichenden Gesamtschuldners verblieben ist.

g) Netherlands

Artikel 193o

1. Na een schikking wordt de vordering tot schadevergoeding van de bij de schikking betrokken benadeelde verminderd met het aandeel dat de bij de schikking betrokken inbreukpleger heeft gehad in de schade die de benadeelde door de inbreuk op het mededingingsrecht heeft geleden.
2. Een bij een schikking betrokken benadeelde kan alleen een niet bij de schikking betrokken inbreukpleger aanspreken voor de vergoeding van de na de schikking resterende vordering tot schadevergoeding. De niet bij de schikking betrokken inbreukpleger kan met betrekking tot deze vordering tot schadevergoeding geen bijdrage vorderen van de bij de schikking betrokken inbreukpleger.
3. Indien niet bij een schikking betrokken inbreukplegers na een schikking niet bij machte zijn om de met de resterende vordering tot schadevergoeding overeenstemmende schade van een bij de schikking betrokken benadeelde te vergoeden, is de bij de schikking betrokken inbreukpleger ook aansprakelijk voor deze schade.
4. Lid 3 mist toepassing indien uitdrukkelijk anders is bepaald in de voorwaarden van de schikking.