Round Table 1: Disclosure of documents held by a party (Florian Wagner-von Papp)

1. Has the legislator in your jurisdiction opted for a substantive claim for information, or procedural disclosure rules? (*Materiellrechtlicher oder prozessualer Anspruch auf Offenlegung*?)

2. What are the elements for the claim/disclosure obligation? (*Anspruchsvoraussetzungen*?)

    a. Has your jurisdiction retained the Directive's elements ‘relevance’ (*Elemente, die die Plausibilität eines Schadensersatzanspruchs ausreichend stützen*) and ‘control’ (Verfügungsgewalt)?

    b. If it has retained the ‘control’ element (*Verfügungsgewalt*): how would you expect courts in your jurisdiction to assess ‘relevance’ (relevant *for what*?)?

    c. If it has retained the ‘control’ element : how would you expect courts in your jurisdiction to assess ‘control’ (eg, under what circumstances would physical evidence be in the ‘control’ of a parent company (*Konzernmutter*) where it is in the possession of a subsidiary (Tochtergesellschaft)? Would an undertaking have control over social media communications of their employees, and/or the information on company devices (z. B. Pc, die im Eigentum des Unternehmens stehen) and/or bring-your-own-devices (BYOD)?)?

    d. What is your expectation (presumably based on experience with pre-existing national rules) of how narrowly categories have to be specified? Is it necessary that the category is specified in such a way that *all* documents falling into that category need to be relevant, or is it sufficient that *some* of the documents falling into the category will (or may?) be relevant? How will courts deal with cases where the claimant has understandably very little information about how to specify the category?

3. Have there been disclosure rules (or claims for information) prior to the Damages Directive in your jurisdiction?

    a. If so, how were they applied in practice?

    b. If previously existing disclosure rules (or claims for information) were handled restrictively, what were the reasons, and would you expect these reasons to inform the courts’ application of the new (post-Directive) rules as well?

    c. Have courts in your jurisdiction referred to the principles espoused by the Court of Justice in *Laboratoires Boiron* when applying the previously existing rules?

4. Who bears the costs of disclosure? Are they separate from the (presumably ‘loser pays’) cost allocation, or are they part and parcel of the overall litigation costs? Does the court have discretion to allocate the disclosure costs differently (eg, where the costs of disclosure are perceived as disproportionate)? What about the costs of third-party disclosure?

5. With regard to the timing of disclosure – can disclosure be enforced prior to filing the claim for damages ('pre-litigation disclosure')?

6. With regard to confidential information (Geschäftsgeheimnisse):

    a. How is confidential information generally treated in your jurisdiction (is there an established practice of, for example, confidentiality rings, restriction of confidential information to expert witnesses etc), and/or have special rules been introduced to comply with Article 5(4) of the Directive?

    b. Is there practice on what information is to be considered confidential (contrast *Evonik Degussa* (5-yr old information usually non-confidential) with *Agrofert* and *Pilkington*, pointing to the protection of 30-yr old information in the Transparency Regulation)?

    c. How do courts deal with the disclosure of third-party information that may be confidential (*Pergan*)?

7. With regard to legal professional privilege (LPP; Article 5(6) of the Directive):

    a. What are the LPP rules in your jurisdiction? Have the rules on LPP been changed in the course of the implementation of the Damages Directive?

    b. How would you expect the courts in your jurisdiction to apply private international (conflicts) rules to determine the 'relevant' LPP rules in cross-border cases – would they apply the lex fori, determine the law applicable to the lawyer-client contract, the lex loci contractus, the law with the most significant relationship to the lawyer-client relationship?

    c. How would courts in your jurisdiction deal with self-incriminating information (either of the defendant or of its employees)?

Round table 2: Disclosure of evidence included in the file of a competition authority (Alex Petrasincu)

- In a first round, everyone should report on their national rules transposing Article 6
    - This should cover the black (Art. 6 para. 6: no disclosure at all) and grey lists (Art. 6 para. 5: disclosure only after proceedings being closed), but also
    - The institutional aspects (i.e., the question of whether and how the courts can order national competition authorities or the European Commission to disclose certain information and documents)

- In a second round, everyone should then report on the national rules transposing Article 7.
    - As we will likely not have a lot of time left, we will probably need to keep this discussion rather short.

Round Table 3: Binding effects of decisions (Jens Uwe Franck)

- Do you consider the implementation "correct"? Why/Why not?

- Is there any "goldplating" (Gesetzgeber geht über Richtlinienvorgaben hinaus)? (E.g. with regard to Article 9(2): binding effect of decisions of foreign NCAs?)

- Has the national legislature given the rule a broader scope of application (*Anwendungsbereich*)? (E.g.: Applicable in case of injunctions or class (collective) actions or if a party invokes nullity (*Nichtigkeitseinwand*) of a contract? Binding effect beyond the finding of an "infringement of competition law", e.g. with regard to culpability (if required under national law) or calculation of damages?)

- If the same or a similar rule existed before the Directive: Have there been any controversial issues that have been clarified through the Directive or on the occasion of the implementation of the Directive? Any past adjudication that is in particular worth to be reported?

Topic 4: Limitation Periods (*Verjährungsregeln*) (Remien)

Core issues: probably, 1, 2, 4, 5, 6. Perhaps less central: 3, 7, 8

1: 5 years or more? (*Länge der Verjährungsfrist*)

FR (L. 482-1), IT (art. 8 I , NL (6:193s): 5 years
UK: EN 6 years (s. 18 (1)), Sc:5 years (??) (s. 18 (2))
DE: 5 years, § 33h I GWB, but plus rest of year, § 33h II GWB (*Ultimoverjährung*)

2: Objective cut-off period/absolute period? – cf. Recital 36 sentence 5 (*Absolute Verjährungshöchstfristen*)

NL: 20 years, Art. 6:193s BW
DE: 10 years, § 33h III GWB (claim accrued + infringement ceased)
30 years, § 33h IV GWB (after the infringement)
… ??

3: Limitation – effects etc.? (*Wann tritt Verjährung ein?*)

DE: § 33h V GWB
UK: s. 17, 20, 24-27 (??)

4: Action of competition authority, cf. art. 10 (4) 1 Dir. (*Verjährung während laufendem behördlichen Verfahren?*)

DE, IT (art. 8 II), NL (6:193t II), UK (s. 21): suspension (*Hemmung der Verjährung*)
FR: Art. 462-7 – interruption (*Neubeginn*)

Suspension of the period stops its running temporarily without erasing the period already completed. Interruption erases the period of limitation acquired to date and starts a new period of the same length as the previous one.

Difference taking action = start of formal investigation/proceedings (*Wann beginnt Hemmung/Neubeginn der Verjährung? Bereits mit Beginn der Untersuchung oder erst mit Eröffnung des Verfahrens durch Kartellbehörde*?)
DE: GWB bill amended 8.3.2017

5: Limitation period for recovery of contribution by other infringer (joint and severable liability) according to art. 11 (5) Dir. (*Verjährung von Ansprüchen auf Innenausgleich von den Mitkartellanten*)

DE: § 33 VII GWB: 5 years starting at the time of payment of damages
…

6: Immunity recipient (*Kronzeuge*)/SMEs (*KMU – Kleine und mittlere Unternehmen*), cf. Art. 11 (4) subpar. 2 Dir – reasonable limitation period

DE: § 33h VIII GWB – end 1 year plus 5 years
FR: Art. L 482-1 (2)
IT: Art. 9 IV: 5 years

7: Consensual dispute resolution (*Hemmung während Verhandlungen*), cf. Art. 12 Dir.

NL: Art. 6:193t BW
UK: s. 22
Application of general rules, FR Art. 2238 Cc, DE § 204 I Nr. 4, 11 BGB

8: Collective proceedings (*Verfahren des kollektiven Rechtsschutzes*)

UK: s. 23

Round Table 5: Effects of consensual settlement agreements for follow-on actions (Thomas B. Paul)

1. Article 19 – Novelty or well-established concept: To what extent does Article 19 introduce a change to previous practice in the respective jurisdictions?

2. Likely impact of the Directive: Will it help to facilitate more bilateral settlements (*Vergleich zwischen zwei Parteien*)?

3. A public policy perspective (*rechtspolitische Perspektive*): Did the Directive get it right?

    a. … in providing only one standard solution?

    b. … in respect to holding settling co-infringers liable if the other cartelists are unable to pay, but allowing this rule to be expressly excluded?

4. A practical perspective: Typical pitfalls (*Fallen*) when agreeing to a bilateral settlement

    a. … for the settling injured party (*sich vergleichendes Kartellopfer*): What does it mean practically to adjust claims (*Anpassung des noch einzuklagenden Betrags*) brought against non-settling co-infringers under Article 19(1)?

    b. ... for the settling co-infringer: Treatment of umbrella damages (*Schäden von Kartellopfern, die bei Nichtkartellanten gekauft haben*)?

5. Other possible question: How do or how will national courts handle parallel proceedings in order to determine the portion that the non-settling co-infringers still have to pay to victims or are still permitted to recover for the remaining claim from the settling co-infringer?