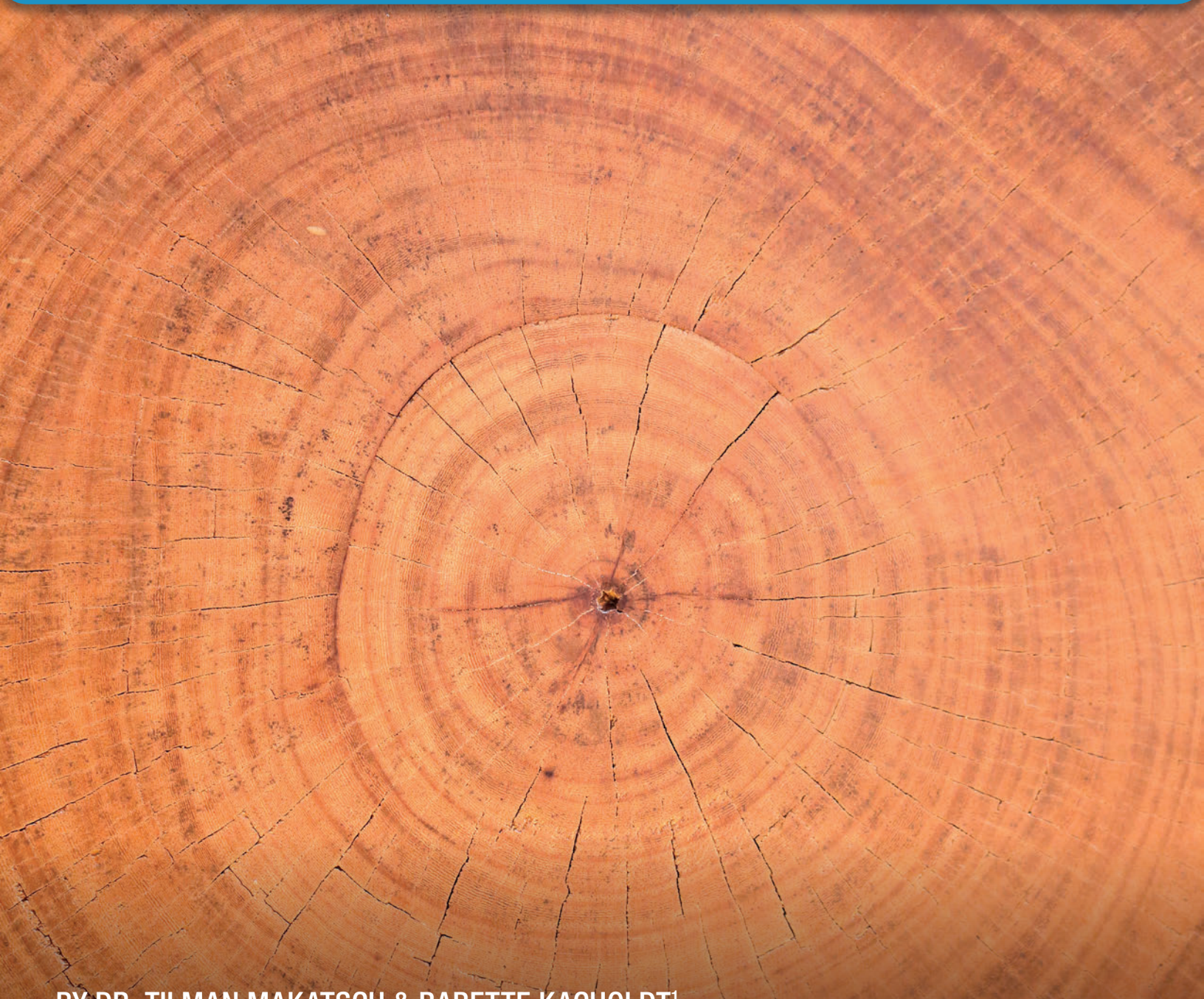
COMPETITION DAMAGES PROCEEDINGS IN GERMANY – THE NEW RULES ON DISCLOSURE



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I. INTRODUCTION

In 2017, the German Act Against Restrictions of Competition ("ARC") was amended to implement the EU Cartel Damages Directive ("Damages Directive").[2] The amendment aims to reinforce the claimants' position in damages proceedings relating to the infringement of EU and national competition law.[3] This aspect is also highlighted in the legislative materials provided by the German legislator.[4] The rules now enshrined in the ARC apply to claims for damages related to all types of competition law infringements. Thus, while this article focuses on cartel damages claims, the provisions described and analyzed below also apply, *mutatis mutandis*, for cases concerning, for example, vertical restraints or abuse of dominance.

Many rules set out in the Damages Directive were already part of the German system applicable to cartel damages proceedings. One of the most important new developments brought about by the implementation of the Damages Directive into German law is the introduction of disclosure rules, i.e. the possibility for a party to cartel damages proceedings to request disclosure of evidence and information from the respective other party to the cartel damages proceedings and third parties. These far-reaching provisions are an exception to the general rules governing civil litigation in Germany.[5]

This article provides a (non-exhaustive) overview of several important aspects of the newly created system of disclosure, including instances where the German legislator introduced rules that go beyond the requirements of the Damages Directive. It further highlights some of the issues parties may encounter, and makes suggestions on how to address them. So far, there are very few court decisions that deal with the new provisions. While this lack of guidance can lead to uncertainty, it can at the same time prove to be advantageous, as it allows parties to cartel damages cases to develop (new) arguments and to shape the interpretation of the new rules.

2 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 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 2014 L 349/1.

3 Damages Directive, recital 3 et seqq.

4 Publication of the Parliament (BT-Drs.) 18/10207, available at http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf, p. 1, 39.

5 To some extent, disclosure plays a role in cases dealing with violations of intellectual property rights. The system of disclosure applied in these cases is however regulated by fewer, less comprehensive legal provisions and is, to a large extent, based on case-law. Further, § 142 of the German Code of Civil Procedure also stipulates that in civil proceedings, one party may request disclosure of very specific documents from the other party. However, the scope of disclosure under this provision is very narrow, and it was hardly ever used in cartel damages proceedings.

II. APPLICABLE RULES, (POTENTIAL) ISSUES AND HOW TO DEAL WITH THEM

Upon implementing the provisions on disclosure included in the Damages Directive, the German legislator created a set of rules applicable only to damages proceedings based on breaches of competition law and not in respect to other civil (damages) proceedings.

A. Background

The rationale underlying the introduction of the rules on disclosure enshrined in the Damages Directive, as well as the provisions implementing the directive in Germany, was to remedy the – perceived – lack of information damages claimants were facing in the past.[6]

Some concerns were raised in the legal community that far-reaching discovery resembling proceedings in the U.S. would now also become part of cartel damages proceedings in Germany.[7] However, while further developments can only be predicted to a certain degree, it appears unlikely that "U.S.-style" discovery will be established in Germany: The German legislator sought to ensure that the system does not allow parties to cartel damages proceedings to embark on "fishing expeditions."[8] Indeed, a number of requirements have to be successfully met in order to request disclosure of evidence from the respective other party, or third parties, in cartel damages proceedings. These requirements are quite specific and distinguish the German system of disclosure from the discovery rules applicable to U.S. proceedings and the disclosure rules applicable to UK proceedings.

B. Content of the New Provisions on Disclosure

1. Relevant Provisions

The core element of the new system of disclosure, the "Right to have Evidence Surrendered and Information Disclosed," as the official translation of the provision reads,[9] is set out in Section 33g ARC. This provision is accompanied by specific procedural rules (see Sections 89b and 89d ARC).

2. System

The claim for access to evidence[10] and information can be raised by both the cartel victim (Section 33g (1) ARC) and the cartelist (Section 33g (2) ARC). Notably, when creating Section 33g (1) and (2) ARC, the German legislator went beyond the requirements of the Damages Directive. Section 33g (a) and (2) ARC grant a substantive right to request disclosure of specific pieces of evidence and/or information, rather than introducing mere procedural rules on disclosure,[11] although the latter would also have been sufficient to comply with the Damages Directive.[12]

Both the cartel victim and the cartelist may request disclosure from the respective other party, as well as from third parties. There are, however, some slight differences with respect to the requirements the cartel victim and the cartelist have to fulfill to successfully request disclosure.

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6 EU Cartel Damages Directive, Recital 15; see also legislative materials, Publication of the Parliament (BT-Drs.) 18/10207, available at http://dipbt.bundestag.de/doc/btd/18/102/1810207.pdf, p. 39.

7 Podszun, Stellungnahme zum Regierungsentwurf, S. 23; Podszun/Kreifels GWR 2017, 67, 69.

8 Preuß, WuW 2017, 301.

9 See the English translation of the ARC provided by the Federal Ministry of Justice and Consumer Protection, available at http://www.gesetze-im-internet.de/englisch_gwb/.

10 In cartel cases, evidence is mostly provided in the form of documents; other means of evidence (e.g. objects to inspect, such as electronic data) would also be admissible. In the following, where reference is made only to documents, the rules on disclosure also apply to other means of evidence.

11 BT-Drs. 18/10207, 62.

12 Klumpe/Thiede, NZKart 2016, 471, 471; Lübbig/Mallmann, NZKart 2016, 518, 519.

a) Requirements to be fulfilled by the cartel victim

- Pursuant to Section 33 (1) ARC, the cartel victim can request disclosure of documents or information which are necessary for a claim for damages, provided the cartel victim:
- credibly demonstrates to the satisfaction of the court that he has a claim for damages, and
- specifies the item(s) or information to be disclosed as precisely as possible on the basis of reasonably available facts.

The claim can also be raised pre-trial, i.e. prior to commencing an action for damages.

To date, there is no settled case law that specifies the amount and type of information cartel victims have to provide to "demonstrate" their claim "to the satisfaction of the court." In this context, it has to be kept in mind that disclosure is intended to help the claimant gain access to "evidence necessary for a claim for damages." Hence, it would appear illogical if the cartel victim was required to substantiate and provide evidence for his claim to the same extent that would be required to satisfy the court when it rules on the actual damages claim. Some guidance can be derived from the example set by the jurisprudence in cases dealing with violations of intellectual property ("IP") rights, where disclosure requires a "significant degree of probability" that there was an infringement of IP rights.[13] However, and until the courts provide further guidance, to minimize the risk that their request is thrown out, cartel victims at this stage can only be advised to be as comprehensive as possible when they request disclosure pursuant to Section 33g (1) ARC.

Further, Section 33g (1) ARC requires the claimant to specify the item to be disclosed as precisely as possible. There is no jurisprudence yet available on the level of detail required. Some guidance can be derived from the Damages Directive, which states in Article 5 (2) that the national legislators shall ensure that courts can also order the disclosure of "categories of evidence." This implies that the claimant cannot be required to, for example, identify individual documents. It remains to be seen whether courts will accept descriptions of evidence to be disclosed that reflect the approach taken by competition authorities when they issue requests for information.[14] Further, it is still unknown whether courts will consider e-searches to be a viable instrument to identify the relevant documents.

In this context, the question has been raised what type of information the claimant would actually need to establish and quantify damages claims – Section 33g (1) ARC refers to evidence "necessary" for a claim for damages.

At least in follow-on cases concerning hardcore cartels, the interplay between Section 33g (1) ARC and the binding effect of decisions issued by competition authorities, Section 33b ARC,[15] together with the statutory assumption that hardcore cartels cause damages now enshrined in Section 33a (2) ARC or the rules on prima facie evidence developed in case-law,[16] implies that in these cases cartel victims' requests for disclosure will center on documents and information required to quantify the harm caused by the cartel. In other cases, where there is no assumption that the competition law infringement caused harm (e.g. in cases concerning the abuse of dominance, or stand-alone cases), this will differ.

One item the cartel victim would in most (if not all) follow-on cases need access to is the competition authority's decision establishing the competition law infringement. Since access to this decision lies at the heart of any potential damages claim, and to avoid undue delays in granting the potential cartel victim access to the decision, the legislator introduced Section 89b (5) ARC. This procedural provision stipulates that the victim may apply for an interim order against the cartelist to disclose the decision. The provision stipulates that the applicant does not have to fulfill all the usual requirements for successfully applying for an interim order. The exact interpretation of this provision has been subject to debate among practitioners and scholars and was also the subject of one of the first court rulings on the new disclosure rules. Under the general rules for civil procedures in Germany, applicants for interim orders have to demonstrate that they have a claim, and that a decision is urgent.

13 See e.g. *Bornkamm/Tolkmitt* in: Langen/Bunte, Kartellrecht, 13th ed. 2018, Introduction to §§ 33 et seqq., para. 9.

14 For example. "Provide all emails sent by custodian X between date A and date B concerning the topic "price setting.""

15 Where damages are claimed for an infringement of a provision of the ARC or of Articles 101 or 102 TFEU, the German court ruling on the damages claim shall be bound by a finding that an infringement has occurred, as made in a final decision by the German competition authority, the European Commission, or the competition authority – or court acting as such – in another EU Member State. The same applies to such findings in final court judgements on appeals against any such decision.

16 According to the transitional provision of § 186 (3) ARC, § 33a (2) ARC is only applicable to claims for damages that arose after December 26, 2016, the deadline for the implementation of the EU Damages Directive (see Article 21 (1) of the Damages Directive). For claims that arose prior to this date, courts have in the past used rules on *prima facie* evidence developed by the jurisprudence. On December 12, 2018, the Federal Court of Justice handed down a judgment which might limit the scope of the application of *prima facie* evidence. At the time this article was prepared, the judgment had not yet been published, thus, the impact of the judgment on the rules on *prima facie* evidence could not be determined.

While there is consensus that applicants for an interim order would have to demonstrate that there is a certain degree of probability that they were harmed by the cartel (by providing e.g. a press release issued by the relevant competition authority, as well as proof that they purchased cartelized products from the cartelist during the cartel period), there is dissent on whether there is simply no requirement to demonstrate the urgency of the matter,[17] or whether there is a statutory assumption that the matter is urgent, which can be disproved by the claimant's behavior (e.g. if he waits too long to apply for an interim order after he learned about the cartel).[18] The Higher Regional Court in Düsseldorf followed the latter approach in a much-debated decision.[19] Other courts can be expected to follow this example.[20] Thus, claimants who intend to apply for an interim order pursuant to Section 89b (5) ARC are advised to file their application within weeks of learning about the competition authority's decision, to the extent that this is possible.[21]

b) Requirements to be fulfilled by the cartelist

Cartelists can also request disclosure of documents or information, provided they meet certain requirements. After damages proceedings have been initiated or disclosure has been requested by the cartel victim, these requirements mirror those to be fulfilled by the cartel victim. However, cartelists can only request pre-trial disclosure if certain additional conditions are fulfilled. In detail:

First, the cartelist can request disclosure of documents or information necessary for the defense against a claim for damages, provided:

- a case for a cartel damages claim is pending, or disclosure has been requested by the cartel victim, and
- the cartelist specifies the item(s) to be disclosed as precisely as possible on the basis of reasonably available facts.[22]

Second, prior to the initiation of proceedings by the cartel victim, the cartelist may request disclosure, provided he

- has applied for a declaratory decision that another party has no cartel damages claim against him, and
- he does not contest the infringement upon which the expected (alleged) claim for damages is based.

The majority of the cartelists' requests for disclosure will most likely focus on documents and information that are required to argue that the cartel victim did not suffer any harm because any overcharge related to the competition law infringement was passed on to customers on the downstream market (pass-on defense).

c) Proportionality

Both cartel victims' and cartelists' requests for disclosure will only be successful if the disclosure is proportionate (see Section 33g (3) ARC). The provision sets out a non-exhaustive list of aspects to take into consideration when determining whether disclosure would be proportionate:

1. the extent to which the claim is based on available information and evidence;

2. the scope of evidence and the costs of surrendering the evidence, in particular where such evidence is requested from a third party;

3. the exclusion of a discovery of facts that are not relevant for the enforcement of the claim or for the defense against such claim;

4. the binding effect of infringement decisions issued by competition authorities;

17 Langen/Bunte/*Bornkamm/Tolkmitt*, Kartellrecht, 13th ed. 2018, § 89b, para. 31

18 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

19 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

20 See, so far, Regional Court Stuttgart, judgment of June 20, 2018 – 30 O 79/18.

21 According to the Higher Regional Court Düsseldorf, applicants could be required to apply for an interim order within four weeks.

22 The discussion regarding the level of detail to be provided when specifying the documents to be disclosed described above in section 1.2.2.1 also applies with respect to the defendant.

5. the effectiveness of public antitrust enforcement;

6. the protection of operating and business secrets, as well as any other confidential information, and the protective measures taken for this purpose.

To date, there is no jurisprudence available that would provide guidance on the interpretation of the criteria listed above. However, a number of issues that need to be addressed by parties to damages proceedings have already been identified:

The scope of disclosure is directly related to the costs of disclosure: the broader the scope, the higher the costs, in particular if parties are requested to carry out e-searches across their IT-system. So far, it is unclear whether time-consuming and costly e-searches will be considered proportionate by the courts, and whether the amount of damages sought will play a role in the assessment. In any event, it would be advisable to map out the scope of e-searches as precisely as possible upfront, and to demonstrate why there are no other equally effective means to identify the relevant information.

Another area which can be expected to give rise to disputes is that of confidentiality claims, and especially the protection of business secrets included in documents to be disclosed. So far, there is no established practice in relation to cartel damages claims, and it is not quite clear yet what mechanisms will be used to protect business secrets. German courts dealing with cartel damages cases might follow the practice developed by courts dealing with IP cases.[23] Another option would be to use mechanisms that resemble "confidentiality rings" in UK cases.[24]

d) Cases in which disclosure is permanently or temporarily excluded

Disclosure is excluded if any provision that permanently or temporarily prohibits disclosure applies.

Most importantly, disclosure of immunity applications and settlement submission is permanently prohibited (Section 33g (4) ARC). This prohibition mirrors the prohibition set out in Article 6 (6) of the Damages Directive. The exception does not apply to so-called pre-existing documents, i.e. to documents that exist independently of the proceedings of a competition authority.[25] Section 33g (4) ARC seeks to reconcile the demands of public and private enforcement of competition law. Immunity applications are one of the most important means for competition authorities to discover – previously secret – cartels. Concerns were raised that undertakings would shy away from blowing the whistle if they were afraid that their confession of wrongdoing would be made available to potential damages claimants. Whether the same argument can be used to explain why settlement submissions shall be protected against disclosure may be debated, as settlements in essence allow for more efficient and faster termination of competition authority proceedings. Whether the prohibition of disclosure of immunity applications and settlement submissions is compatible with primary EU law is subject to debate.[26] In any event, it would be up to the European Court of Justice to rule on this question if it is submitted by a national court for a preliminary ruling. Until then, the provisions remain applicable.[27]

Further, disclosure is permanently excluded if a right to refuse disclosure applies (see Section 33g (6) ARC). This concerns members of the legal profession, as well as journalists and clerics,[28] and information that constitutes art and trade secrets.[29]

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23 In IP cases, a three-step procedure applies: (i) inspection of the piece of the relevant piece of evidence by an expert nominated by the court; (ii) preparation of an expert report that is made accessible to the court and the attorney of the respective opposing party, who is bound by secrecy and may not disclose any details *vis-à-vis* his client; (iii) decision of the court on disclosure of expert report *vis-à-vis* the party, possibly with redactions applied to the report.

24 Confidentiality rings or "clubs" refer to the imposition of restrictions in the disclosure process (e.g. determination of the individuals representing the opposing party who may access documents, and how the information they contain may be disseminated; in some cases, access to documents may even be granted solely to the opponent's external legal advisors). The exact scope of access and the restriction mechanism may be negotiated by the parties.

25 See § 33g (4) sentence 2 ARC; see also recital 28 of the Damages Directive.

26 See e.g. Kersting, WuW 2014, 564, 566 f.; Makatsch/Mir, EuZW 2015, 7, 9; Petrasincu, WuW 2016, 330, 333.

27 Where a party obliged to surrender evidence claims that a piece of evidence or parts thereof are excluded from disclosure because they constitute immunity applications or settlement statements, the party requesting disclosure may demand that the relevant documents are made available to the competent court for the sole purpose of examining the validity of this claim; see § 33g (4) sentence 3.

28 The latter can refuse disclosure only to the extent the documents or information relate to editorial work or pastoral work respectively, and not where they relate to matters purely concerning e.g. advertising or administrative matters of the church.

29 Courts may examine whether the exception applies, see § 33g (6) sentence 2.

Lastly, disclosure of documents is temporarily excluded until the final conclusion of the competition authority's proceedings against all parties involved if, and to the extent that, it contains (i) information that has been produced by a natural or legal person or association of persons specifically for the competition authority's proceedings; (ii) communications from the competition authority to the parties to the proceedings; or (iii) settlement submissions that have been withdrawn (see Section 33g (5) ARC).

3. Further applicable rules

The German legislator has introduced some additional rules that go beyond the requirements of the Damages Directive.

a) Reimbursement of costs

Whilst the costs of disclosing documents (or information) requested under Section 33g (1) and (2) ARC have to be taken into account to determine whether disclosure would be proportionate (see section 2.2.2.3 above; see also Article 5 (3) (b) of the Damages Directive), Section 33g (7) ARC stipulates that where the person or undertaking obliged to disclose documents or information incurs costs which may reasonably be considered necessary, the person or undertaking shall be entitled to claim reimbursement for these costs. The introduction of this provision has been criticized. It is unclear how it relates to the question of whether costs incurred render the disclosure disproportionate. One possible explanation is that proportionality does not only relate to costs in a monetary sense, but also to effort, time spent on the compilation of the relevant documents, etc. Another question that will have to be answered is how the "loser pays" rule applicable in German civil proceedings[30] affects Section 33g (7) ARC. One solution could be that expenses for reimbursements under Section 33g (7) ARC are taken into account when the amount to be paid by the losing party to compensate the winning party's expenses is determined, to avoid a situation in which a party has to bear considerable costs despite having won its case. On the other hand, it could be argued that the legislator sought to create a substantive provision, which must not be undermined by procedural rules. It remains to be seen which approach the court will follow in the future. In any event, to minimize risks, it is advisable for parties to cartel damages to ensure that costs for disclosure are kept under control, e.g. by carefully determining the information that is actually required to substantiate a claim, or the defense against a given claim. Further, it could be advisable for parties to negotiate the scope of the disclosure and the evidence sought, and to determine upfront whether evidence shall be identified by way of an – often costly – e-search, or whether there are other means of identification available, to avoid unnecessary costs.

b) Damages in case of incorrect or incomplete disclosure

The German legislator went beyond the requirements of the Damages Directive when he stipulated that, where a person or undertaking obliged to disclose evidence or information provides incorrect or incomplete evidence or information, they shall be liable for any damages incurred by the person or undertaking requesting disclosure (Section 33g (8) ARC). The Damages Directive itself only states that penalties available to the courts shall include the possibility of drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility to order the payment of costs (Article 8 (1)). Indeed, it will be difficult to determine the harm suffered where disclosure was incomplete or incorrect – a comparison would have to be made against the (hypothetical) situation that full or correct disclosure took place. Without the correct information being available, it will probably be impossible to make that comparison.

4. Interplay between disclosure pursuant to § 33g ARC and access to the competition authorities' files

Besides disclosure pursuant to Section 33g ARC, another source of information especially for cartel damages claimants could be the competition authorities' files. However, the German legislator determined that disclosure by the opposing party or third parties shall be the primary source of information in civil proceedings. Evidence or information from the authorities' files will only be made available if it is not available from other sources (Section 89c (1) No. 2 ARC). Therefore, whilst the German Federal Cartel Office was reluctant to grant access to its files beyond access to the fining decision prior to the entry into force of Section 89c ARC, it has now become even more difficult to access the evidence or information included in these files.

30 In German court proceedings, the "loser pays"-rule applies. However, only court fees and statutory minimum fees for attorneys are subject to the statutory obligation to reimburse the winning party; any costs for lawyers exceeding the minimum statutory fees have to be borne by the party itself.

C. Jurisprudence Concerning New Rules: Interpretation of the Transitional Provisions, § 186 ARC

So far, there are hardly any court decisions dealing specifically with the application of the new rules on disclosure.

Two subsequent decisions handed down by the Higher Regional Court Düsseldorf were, however, remarkable. They concerned, inter alia, the question of whether the new rules on disclosure are also applicable in cases where proceedings were initiated after December 26, 2016 (the deadline for the implementation of the damages directive into national law) while the claim arose prior to this date.[31] Eventually, the court held that only the procedural rules (Section 89b ARC), in conjunction with pre-existing general rules on disclosure enshrined in the Code of Civil Procedure (which are of limited scope), but not the substantive right to request disclosure (Section 33g ARC), would be applicable in these cases. This triggered a heated debate among scholars and practitioners, especially since the legislative materials and the provisions of the Damages Directive suggest a different interpretation of the law.[32] Nevertheless, it is to be expected that for the time being lower courts will follow the example set by the Higher Regional Court in Düsseldorf. It will be up to the parties to find arguments for why the procedural rules on disclosure are to be interpreted in a manner that leads to results equal, or at least close to, those of the direct application of the substantive rules on disclosure set out in Section 33g ARC.

III. CONCLUSION

It is to be expected that disclosure will be another area that will give rise to discussions in cartel damages proceedings, in particular as the new rules require interpretation in many instances, and there is little guidance available to date.

The question has been raised whether the new provisions will be used more frequently by cartel victims, or by cartelists. At least in follow-on cases, the answer is not as straightforward as it may appear at first glance: Cartel victims need access to various pieces of information beyond the competition authority's decision (which has a binding effect, Section 33b ARC) – as explained in the Introduction, the disclosure rules were introduced to reinforce their position. At the same time, the cartelists may also benefit from the new disclosure rules, especially in cases where they seek access to the information required to successfully raise a pass-on defense. Thus, they might indeed make use of the new rules on disclosure to gain access to information in the possession of the claimant to a greater extent than anticipated when the new rules were introduced.

It is not to be expected, however, that "U.S. style" discovery will now also be implemented in Germany. This assessment is reinforced by previous experience in German proceedings: While the Code of Civil Procedure contains a provision that enables a party to civil proceedings to request that the opposing party hands over documents,[33] courts were rather reluctant to apply this provision in practice, and hardly ever did so in cartel damages cases in the past.

It also remains to be seen whether the application of the newly created rules will lead to delays in cartel damages cases – there certainly is a risk that proceedings will be prolonged, especially since courts may stay proceedings on the substance of the damages claim while proceedings regarding disclosure are pending (Section 89b (4) ARC). Such a development would run counter to the interest of the cartel damages claimant, whose position the legislator intended to reinforce. At the same time, avoiding delays may also be in the interest of the cartelist, as during proceedings, interest will accrue which, in cases concerning large claims, can amount to sums that equal or even exceed the actual damage claim.

Overall, since neither courts nor legal advisors have had time yet to gain much experience with the new rules yet, parties to cartel damages proceedings are well advised to communicate openly with the courts and – to the extent that it is legally possible and strategically advisable – the opposing party to find a way of applying the new rules that prevents undue delays and avoids any unnecessary costs and other unpleasant surprises.

31 Higher Regional Court Düsseldorf, order dated April 3, 2018 – VI-W (Kart) 2/18; Higher Regional Court Düsseldorf, order dated May 7, 2018 – VI-W (Kart) 2/18.

32 See e.g. Petrasincu/von Steuben, NZKart 2018, 286; Soyez, WuW 2018, 368.

33 See § 142 of the Code of Civil Procedure.

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