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The International Comparative Legal Guide to:

Cartels & Leniency 2016

9th Edition

A practical cross-border insight into cartels and leniency

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2015

ISBN 978-1-910083-71-0
ISSN 1756-1027

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Disclosure and Protection of Evidence in Light of the Damages Directive and Recent EU Case Law

Ingrid Vandenborre

Thorston C. Goetz

Skadden, Arps, Slate, Meagher & Flom LLP

1. Introduction

On 26 November 2014, the European Parliament and the Council adopted Directive 2014/104/EU 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 (the "***Damages Directive***"). The Damages Directive entered into force on 26 December 2014 and Member States need to implement it in their legal systems by 27 December 2016.

The Damages Directive contains detailed provisions relating to the disclosure of evidence in actions for damages before national courts that seek to strike a balance between a claimant's right to access evidence in support of its private damages claim and the protection of leniency programmes through the distinct treatment of material provided to competition authorities in the course of the administrative investigation pursuant to an immunity or leniency application.

The Damages Directive is without prejudice to rules and practices on public access to documents under Regulation (EC) No 1049/2001 (the "***Transparency Regulation***"). However, the EU courts have consistently confirmed that a different treatment of requests for access to the file under the Transparency Regulation would undermine the protection of commercial interests or the purpose of the European Commission's (the "***Commission***") investigations, thereby significantly restricting the use of the Transparency Regulation as an alternative path for access. The Damages Directive, and national legislation implementing its provisions, will therefore likely constitute the most efficient and reliable basis for private damage claimants to obtain access to the Commission's file.

At the same time, the General Court has affirmed the Commission's policy of disclosing more detail in its public decisions, thereby supporting an alternative or complementary source of evidence in actions for damages.

2. The Damages Directive's Provisions on the Disclosure and Protection of Evidence

The right to proportional disclosure

As a matter of principle, and based on the observation that "*competition law litigation is characterized by an information asymmetry*", the Damages Directive acknowledges a general right for a claimant "*to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence*" (Preamble, recital 15). However, this statement of principle is circumscribed by a number of conditions and exceptions.

First, the claimant must present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages (Article 5.1). Disclosure can thus only be ordered if the claimant has made a plausible assertion, on the basis of facts reasonably available to the claimant, that it has suffered harm that was caused by the defendant. While the claimant does not have to specify individual items of evidence, the claimant is under a duty to specify items or categories of evidence "*as precisely and as narrowly as possible*" (Article 5.2). The Damages Directive is unambiguous that "*fishing expeditions*", i.e. non-specific or overly broad disclosure requests, should be prevented. Requests for the general disclosure of documents in a competition authority's file or of documents submitted by the defendant in the administrative procedure would therefore not be permissible under Article 5.2 of the Damages Directive.

Second, the claimant's obligation to precisely and narrowly circumscribe the evidence in its disclosure request is mirrored by an obligation on the national court to order the disclosure of evidence only to the extent that disclosure would be proportionate, taking into account: (i) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (ii) 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; and (iii) 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 (Article 5.3 (a)-(c)).

Third, as further discussed below, where national courts order evidence that is included in the file of a competition authority, i.e. the Commission's or a national competition authority's administrative file, specific rules apply that seek to protect certain categories of information from disclosure. Importantly, those rules are not restricted to orders directed against the competition authority itself, but also to disclosure orders against private parties, *e.g.* the defendant in a private damages action, in relation to copies of those same file documents that are in the possession of the private party.

The protection of specific categories of evidence

As a general rule, complementing the proportionality requirement in Article 5.3, Article 6.4 of the Damages Directive stipulates that when assessing the proportionality of an order for disclosure of

evidence that is in the file of a competition authority, the national court shall consider: (i) 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; (ii) whether the request relates to an action for damages before a national court; and (iii) the need to safeguard the effectiveness of the public enforcement of competition law (Article 6.4 (a)-(c)). The latter consideration would allow national courts to take into account general public enforcement interests (*e.g.*, the interest of encouraging undertakings to cooperate with the investigation and volunteer incriminating evidence pursuant to a leniency programme).

More specifically, the Damages Directive provides for an increased level of protection for certain categories of documents.

Absolute exemption from disclosure

Leniency statements and settlement submissions benefit from an absolute exemption from disclosure, i.e. national courts cannot order disclosure at any point in time (Article 6.6). Leniency statements only comprise the corporate statement, i.e. the oral or written information provided *voluntarily* by, or on behalf of, an undertaking or natural person to the competition authority specifically for the purpose of obtaining immunity or a reduction of fines under the Commission's or a national competition authority's leniency programme. Pre-existing information, i.e. information that exists irrespective of the proceedings of a competition authority, is not protected by the absolute ban of disclosure (Preamble, recital 16). The exemption from disclosure does, however, extend to literal quotations of a leniency statement or a settlement submission in other documents (Preamble, recital 26).

Importantly, by categorically exempting leniency statements and settlement submissions from disclosure, the Damages Directive inherently takes the position that the CJEU's rulings in *Pfleiderer* (Case C-360/09) and *Donau Chemie* (Case C-536/11), that required national courts to balance interests on a case-by-case basis when assessing the scope of disclosure, do not apply to those two categories of documents. The *Pfleiderer* and *Donau Chemie* judgments expressly noted that the national court's competence to conduct a balancing exercise derives from the "*absence of EU rules governing the disclosure of documents for the purpose of antitrust damages actions*" (see, *e.g.*, *Donau Chemie*, at paragraph 25). Following the entry into force of the Damages Directive, including "*EU rules governing the disclosure of documents for the purpose of antitrust damages actions*" that were absent at the time of the *Pfleiderer* and *Donau Chemie* judgments, the categorical exemption of leniency statements and settlement submissions now is provided for in EU rules.

Temporary exemption from disclosure

Information that was prepared by a party specifically for the proceedings of a competition authority (*e.g.*, a party's responses to data requests or replies to a Statement of Objections or Letter of Facts), information that the competition authority has drawn up and sent to the parties in the course of the proceedings (e.g., the Statement of Objections or Letter of Facts), and settlement submissions that have been withdrawn benefit from a temporary exemption from disclosure, i.e. these categories of evidence can be ordered to be disclosed by a national court only after the competition authority, by adopting a decision or otherwise, has "*closed its proceedings*" (Article 6.5). It is not entirely clear from the text of the Damages Directive whether the temporary exemption from disclosure applies also pending an appeal. Given that a competition authority may have to reopen an investigation after a successful appeal, there are good arguments that a temporary exemption from disclosure should be considered to apply throughout the entire appeal procedures until the competition authority's decision has become final.

Importantly, even after the competition authority has closed its proceedings, the disclosure of information that qualified for the temporary exemption from disclosure would still be subject to the general requirement of proportionality as embodied in Articles 5.3 and 6.4 of the Damages Directive. This applies in particular for the national court's obligation to assess the "*need to safeguard the effectiveness of the public enforcement of competition law*" (Article 6.4 (c)). To that end, the balancing exercise introduced in the *Pfleiderer* and *Donau Chemie* judgments would apply to information that would no longer qualify for the temporary exemption from disclosure. Indeed, in its Opinion dated 5 May 2014 submitted to the English High Court in the context of the *MasterCard* litigation (C(2014) 3066 final – Opinion of the European Commission – *Interchange fee litigation before the judiciary of England & Wales: Wm. Morrison Supermarkets plc and Others v. MasterCard Incorporated and Others*), the Commission proposed that as regards materials voluntarily provided to the Commission, such as replies to Statements of Objections, it is for the national courts to assess on a case-by-case basis whether there are overriding reasons for refusing the disclosure of such documents. In the Commission's view, the disclosure of replies to a Statement of Objections may not be liable to deter the undertakings under investigation from cooperating with competition authorities, although there may be a need to protect the confidentiality of commercially sensitive third-party information in the context of disclosure. The *MasterCard* case file included a substantial volume of third-party business secrets that required protection. The Commission therefore considered that the national court is obligated to take such measures, as appropriate, to protect third-party confidential information, *e.g.*, through a confidentiality ring or further redactions.

No exemption from disclosure

The evidence that does not fall in any of the categories qualifying for absolute or temporary exemption from disclosure may be the subject of an order for disclosure by national courts at any time (Article 6.9). This category of information includes "*pre-existing information*", such as emails and minutes of meetings, even if submitted in the context of an immunity or leniency application. However, even for that category of information, the general rules on proportionality of the disclosure and the specificity of the disclosure request apply. Arguably, the requirement introduced by the *Pfleiderer* and *Donau Chemie* rulings that the interests for and against disclosure are balanced also find application in relation to these documents.

Use restrictions

The Damages Directive provides for additional safeguards in the form of use restrictions imposed on parties that obtained evidence through access to a competition authority's file. For example, evidence falling within the scope of the absolute or temporary exemption from disclosure, and which is obtained solely through access to the file of a competition authority, is deemed inadmissible or otherwise protected under applicable national rules (Articles 7.1 and 2.2; in the case of documents that are subject to a temporary exemption from disclosure, the additional safeguard applies also only until the competition authority has closed its proceedings).

Penalty provisions

The Damages Directive's rules on disclosure are reinforced by the penalty provision of Article 8, which requires Member States to ensure that national courts are able to effectively impose penalties on "*parties, third parties and their legal representatives*" in the event of: (i) their failure or refusal to comply with the disclosure order of any national court; (ii) their destruction of relevant evidence; (iii) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; and (iv) their breach of the limits on the use of evidence provided for in the Damages Directive.

With respect to the "*destruction of evidence*", the Preamble of the Damages Directive suggests that the relevant point in time when evidence should be preserved is when "*a claim for damages is initiated or … an investigation by a competition authority is started*" (Preamble, recital 33).

Although Member States are free in determining what penalty to apply in relation to breaches of the disclosure requirements, the Damages Directive prescribes that the penalties shall include the possibility "*to draw adverse inferences*", such as presuming an issue to be proven or dismissing claims or defences in whole or in part, and the possibility to order the payment of costs (Article 8.2).

Amendments to Regulation 773/2004 and Commission Notices

On 3 August 2015, the Commission adopted amendments to Regulation 773/2004 and four related Notices (Access to the File, Leniency, Settlements, Cooperation with National Courts) aimed at aligning the Notices with the Damages Directive. In addition, with respect to the File Access Notice, a provision (§ 9) was added pursuant to which evidence that proved unrelated to the subject matter of the Commission's investigation may be returned to the undertaking from which they have been obtained. Upon return, these documents will no longer constitute part of the file, thus removing them from the scope of material to be subject to a request for access. This helps ensure that leniency applicants face no impediments to disclosing information to the Commission, even when it is not certain whether this information will ultimately be relevant to the infringement identified.

3. Restricted Access to Evidence Under the Transparency Regulation 1049/2001

Private damages claimants have frequently tried to invoke the Transparency Regulation as a legal basis for requesting access to documents in the Commission's administrative file. Application of the Transparency Regulation is not specific to competition law or competition proceedings but is available to all parties, regardless of whether they are involved in the Commission's investigation.

However, application of the Transparency Regulation in relation to files of competition law proceedings has been consistently rejected by the Commission on the basis of a general presumption that disclosure of documents in competition proceedings will undermine the protection of the commercial interests of the companies involved in those proceedings and the protection of the purpose of the inspections. In its judgment in *EnBW Energie Baden-Württemberg* of 27 February 2014 (Case C-365/12P), the CJEU sanctioned the Commission's practice and expressly confirmed that the Commission is not under an obligation to carry out a specific, individual examination of each of the documents in a file. In its reasoning, the CJEU expressly referred to the restrictive file access rules under the specific antitrust legislation, i.e. Regulations 1/2003 and 773/2004, which would need to be respected in the interpretation of the general file access rules set forth in Regulation 1049/2001. The CJEU's ruling confirms that Regulation 1049/2001 does not take primacy over Regulation 1/2003 or 773/2004 and that each of the regulations must be applied in a manner compatible with the other and which enables them to be applied consistently. The same reasoning arguably applies also in the context of the disclosure rules of the Damages Directive.

However, the general presumption against disclosure under the Transparency Regulation does not rule out the possibility of showing that disclosure of a *specific* document is necessary and therefore not covered by the general presumption against disclosure, or that there is an overriding public interest in disclosure of the document.

In its recent *Axa* judgment of 7 July 2015 (Case T-677/13), the General Court held that the Commission's systematic deletion of references to leniency documents, namely submission dates and document names, could not be justified by a general presumption that all information relating to leniency applications must be protected from disclosure in order to safeguard the efficacy of its leniency programme. Referring to the CJEU's judgment in *Donau Chemie*, the General Court held that the Commission has to assess, on a case-by-case basis, what information in its file index must be disclosed, in particular where – as in the case at issue – the claimant already commenced an action for damages before a national court for damages allegedly incurred by the cartel that was investigated by the Commission.

While disclosure of the Commission's file index, including references to submitted leniency documents, falls far short of obtaining access to the actual documents on the file, a claimant may be able to use the Commission's file index to substantiate disclosure requests in damages actions before national courts, as required also by the Damages Directive.

4. Publication of More Detailed Cartel Decisions

Another important aspect relating to the disclosure of evidence was addressed in two judgments of the General Court of 28 January 2015 relating to the hydrogen peroxide cartel (Case T-345/13 *Akzo Nobel* and Case T-341/12 *Evonik Degussa*). In those judgments, the General Court endorsed the Commission's new policy of publishing, years after the initial decision, a more detailed decision which included information that the Commission, due to the passing of time, considered no longer confidential. Importantly, it also included information based on leniency applications that had been redacted in the public version of the decision so that the information could not be traced back to a particular leniency applicant. In relation to the latter point, the General Court confirmed the Commission's position that it is for the Commission to balance the effectiveness of its leniency programme against the interest of parties in the disclosure of information contained in the Commission's cartel decisions. The General Court expressly held that the specific protection accorded to leniency statements, including under the Commission's Leniency Notice, "*relate only to the disclosure of documents submitted to it voluntarily by undertakings wishing to benefit from the leniency programme and to the disclosure of statements made by those undertakings in that connection*". In other words, the protection may not extend to the content of the submitted information provided that, as the Commission has done, "*all information that might permit, directly or indirectly, identification of the source of the information communicated to it by the applicant with a view to benefiting from the leniency programme*" has been removed in the non-confidential version of the decision.

5. Conclusion

The Damages Directive contains carefully balanced rules relating to the disclosure of information in the files of the EU Commission or national competition authorities. These provide *inter alia*, that leniency statements are permanently exempt from disclosure whereas pre-existing documents can be disclosed subject to a proportionality and balancing test. While documents can also be made accessible pursuant to the Transparency Regulation, the Commission's consistent practice is to invoke a general presumption against a broad or general disclosure of antitrust file documents to ensure that the specific provisions of the Damages Directive are not undermined. However, a damages claimant may be able to obtain access to documents that can be specifically identified, such as the Commission's file index. Moreover, the Commission may increasingly seek to make more detailed information available in the public version of its decisions, either immediately or through re-issuance of the decision after a period of time.

Ingrid Vandenborre
Skadden, Arps, Slate, Meagher & Flom LLP
523 Avenue Louise, Box 30
1050 Brussels
Belgium

Tel: +32 2 639 0336
Fax: +32 2 641 4036
Email: Ingrid.Vandenborre@skadden.com
URL: www.skadden.com

Ingrid Vandenborre is a partner in Skadden's Brussels office, focusing on EU and international merger control and competition law enforcement. Ms. Vandenborre repeatedly has been selected for inclusion in *Chambers Global: The World's Leading Lawyers for Business*, and she is described as "a technically excellent lawyer who holds her own at oral hearings, and has excellent contacts". She consistently has been named as a leading practitioner in her field by *Chambers Europe* and repeatedly has been selected for inclusion in *Who's Who Legal* guides in both competition and life sciences. She was chosen as a "Rising Legal Star" for antitrust by *Law360* and recognised by *Global Competition Review* on various occasions, including being profiled as a leading antitrust attorney in its 2013 "Women in Antitrust" issue, selected for its 2012 "40 Under 40" list and shortlisted in the "Lawyer of the Year – 40 and Under" at the GCR Awards 2013.

Thorsten C. Goetz
Skadden, Arps, Slate, Meagher & Flom LLP
An der Welle 3
60322 Frankfurt
Germany

Tel: +49 69 74 220 167
Fax: +49 69 133 839 167
Email: Thorsten.Goetz@skadden.com
URL: www.skadden.com

Thorsten Goetz is a European Counsel in Skadden's Frankfurt and Brussels offices. Prior to joining Skadden, Mr. Goetz worked in the London office of a leading U.K. firm. He has wide-ranging experience in European Union and international merger control cases, as well as cartel enforcement and abuse of dominance matters. His clients are from a broad range of industries, including pharmaceutical/life sciences, chemicals, financial services, energy, travel and telecommunications, among others. Mr. Goetz advises clients on antitrust aspects of complex cross-border M&A and joint ventures. He has worked on numerous transactions requiring international antitrust merger control approvals both in Europe and worldwide. Mr. Goetz also advises clients in cartel cases, as well as competition law issues relating to vertical agreements and dominance. He has represented clients in Article 101 investigations in relation to cartels, strategic alliances, distribution arrangements and other vertical agreements, as well as in Article 102 investigations, both before the European Commission, the European Courts and national competition authorities.

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

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