

# Disclosure in antitrust damages actions – a perspective of national courts

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# I. Introduction

- Important role of procedural law in cartel damages cases
- **Characteristic features** of these cases:
  - Typically litigation is preceded by a proceeding before competition authorities (most actions are *follow-on* actions)
  - Tension between public and private enforcement
  - Asymmetry of information
  - Multitude of victims because of „*passing-on defense*“
- Damages Directive only addresses the first three of these aspects (see recital 13)

# II. A historical perspective

## ▪ German Code of Civil Procedure 1877

- "a manifest of liberal procedural codes"
- Emphasis on parties' responsibility to ascertain the facts and to bring in the evidence
- Duty to cooperate or to **disclose** only under **substantive law**
- „*nemo tenetur se accusare*“, „*nemo tenetur edere contra se*„
- German Supreme Court: no party is under an obligation to provide its adversary with material for his winning the lawsuit which he does not have himself.

- **Austrian Code of Civil Procedure 1895**

- More duties for the parties to cooperate (more than under substantive law)
- *Franz Klein*: emphasis on **public purpose** of civil procedure
  - *Klein* criticised traditional maxim that a party should not be under an obligation to support the other party (calling this like a "war without Red Cross")
  - *Klein* knew about discovery by interrogatories and discovery of documents in English law
    - Disclosure requirements in small claims cases (under an 1873 act) were a "great idea" ("*herrlicher Gedanke*" )

- Example: duty to **disclose documents** even if they are not so-called "joint documents"
  - **Disadvantages:**
    - Not directly enforceable (only adverse inferences in weighing the evidence)
    - Only limited disclosure duties for third parties (§ 308 ZPO)
- Different regime for **access to court files** of other proceedings
  - ("legal interest" required)
- (later) different regime for **access to files of competition proceedings**
  - (consent of all parties required, § 39 Abs 2 KartG)

# III. The CJEU's balancing approach

- CJEU C-360/09, *Pfleiderer* (2011)
  - The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.
  - It is, however, for the **courts and tribunals of the Member States**, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law.

- C-536/11, *Donau Chemie* (2013)
  - According to the **AG**, it does not suffice that procedural rules do not render damage claims “practically impossible or excessively difficult”, but they must also ensure that such claims can be made in an “accessible, prompt and reasonably cost effective” way (para. 47 of the Opinion).
  - **CJEU**: “any request for access to the [cartel file] must be assessed on a **case-by-case basis** [by the national courts], taking into account all the relevant factors of the case” (para. 43).
  - “Given the importance of the actions for damages brought before national courts in ensuring the maintenance of effective competition in the EU... the argument that there is a risk that access to evidence contained in a file in competition proceedings... may undermine the effectiveness of a leniency programme... **cannot justify a refusal to grant access to that evidence**” (para. 46).



# IV. The Damages Directive and implementing legislation

- Damages Directive
  - (see also Art 18 RAD. But RAD does not apply to cartel damages)
- **Several “pillars”** for overcoming the information deficit of claimants:
  - **Binding effects** of decisions in cartel proceedings (and publication of this decision)
    - Austrian Supreme Court: publication should include the names of the respective cartel members (RS0129323)
      - Austrian Supreme Court: While cartel proceedings are not primarily aimed at facilitating the recovery of damages, in interpreting section 37 KartG the legislature’s intent has to be taken into account. Therefore the facts have to be stated as clearly as possible. (16 Ok 14/13)
  - **Disclosure provision** (§ 37j KartG)
  - **Access to files of cartel court**
    - Continuing applicability of CJEU *Pfleiderer* and *Donau Chemie*?
    - Austrian Supreme Court: yes (16 Ok 1/22s, 16 Ok 1/23t) (depending on whether this is necessary in light of the publication of the decision and of the disclosure provisions under § 37j KartG)

# Disclosure orders against private parties (§ 37j KartG)

- New disclosure requirement applies to **all kinds of evidence** ("in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;" , Art 2 subpara. 13)
- § 37j KartG uses §§ 305 Austrian Civil Procedure Code as a model, **but:**
  - Applies to all kinds of evidence (not only documents)
  - Applies to parties to the proceeding as well as **third parties**
  - Confidentiality per se is not a valid reason for refusal to comply
  - **Enforceable court** order for disclosure
  - Different rules on appeals against such an order

- Disclosure only **after** the **complaint** has been filed
  - No pre-filing discovery
- complaint has to be substantiated at least by facts and evidence accessible to claimant with reasonable efforts and sufficiently supporting the plausibility of the claim for damages
- **Dual purpose:**
  - relaxing the pleading requirements under § 226 ZPO
  - Minimum threshold for disclosure applications

## ■ § 37j KartG

- Offenlegung von Beweismitteln
- § 37j. (1) In Verfahren, die Ersatzansprüche aus einer Wettbewerbsrechtsverletzung zum Gegenstand haben, reicht es aus, wenn die **Klage zumindest soweit substantiiert** ist, als diejenigen Tatsachen und Beweismittel enthalten sind, die dem Kläger mit zumutbarem Aufwand zugänglich sind und die die **Plausibilität** eines Schadenersatzanspruchs ausreichend stützen.
- (2) Auf **begründeten Antrag** einer Partei kann das Gericht in Verfahren nach Abs. 1 der Gegenpartei oder einem Dritten nach ihrer Anhörung auftragen, Beweismittel offenzulegen, die sich in ihrer Verfügungsgewalt befinden, einschließlich solcher Beweismittel, die vertrauliche Informationen enthalten, wenn die Offenlegung unter Berücksichtigung der berechtigten Interessen aller Parteien und der betroffenen Dritten verhältnismäßig ist. Auch ein **Dritter**, von dem Offenlegung begehrt wird, kann gemäß § 307 Abs. 1 ZPO vom Gericht vernommen werden.
- (3) Der Kläger oder der Beklagte muss Beweismittel oder relevante Kategorien von Beweismitteln, deren Offenlegung nach Abs. 2 begehrt wird, so genau und so präzise wie möglich abgrenzen, wie dies auf der Grundlage der mit zumutbarem Aufwand zugänglichen Tatsachen möglich ist.
- (4) Bei der **Prüfung der Verhältnismäßigkeit** im Sinn des Abs. 2 sind die berechtigten Interessen aller Parteien und betroffenen Dritten gegeneinander abzuwägen; insbesondere ist zu berücksichtigen, .....

- **„Procedural solution“:** not substantive law claim for disclosure, but application to the (trial) court
- **Note:** Granting of a disclosure order is not a substitute for properly introducing the evidence into the proceeding; this has to be done by the applicant.
- **Prerequisites:**
  - „in proceedings pursuant to para. 1“: proceedings in which the complaint was sufficiently substantiated
  - evidence in control of the other party,
  - even if it contains confidential information,
  - If disclosure, taking into account the interests of all parties, is proportionate.

- § 37j para 4: **Balancing of interests**
  - To what extent allegations are supported by accessible facts and evidence which justify the application
  - Scope and costs of disclose (no „*fishing expedition*“)
  - Whether the evidence contains confidential information and what measures are in place to protect this information,
  - Interest not to be liable for damages is not to be taken into account (para. 5).

## Measures for the **protection of confidential information** (§ 37j Abs 6)

- Disclosure of excerpts
- Exclusion of the public at trial
- Limitation of the people obtaining knowledge of the evidence
- Summary of the evidence by an expert (which does not contain confidential information)
- No exhaustive list of measures („especially“)

## **Appeal and enforcement** (§ 37j para 8 and 9)

- Interlocutory appeal if application is granted
- If application is denied: no interlocutory appeal
- Enforceable only after order has become final.
- **Enforcement** pursuant to § 79 AußStrG, i.e. by trial court, not by way of separate enforcement proceedings
- In addition refusal by other party can justify an adverse inference (see Art 8 para 2 Directive)
- Also damages (particularly against third parties)



# Disclosure from the files of other courts and administrative authorities (§ 37k)

- Request by trial court by way of request for judicial assistance if evidence cannot be adduced by the parties with reasonable efforts
- Not a court decision, but a request
  - § 37k uses the term „order“
- Prerequisites are essentially the same as for disclosure orders against private parties
- Additional requirements
  - specificity of description of evidence,
  - need to limit disclosure in order to preserve the efficiency of public enforcement,
  - statement of the competition authority.

- **„Grey list“** (§ 37k para 3, Art 6 para 5 Directive):
  - Disclosure only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:
    - information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
    - information that the competition authority has drawn up and sent to the parties in the course of its proceedings;
    - (c) settlement submissions that have been withdrawn.
- **Black list**(§ 37k para 4): no disclosure of
  - Declarations of cooperating parties and settlements
  - Does not apply to *pre-existing information*, recital28, Art 2 No 13 Directive)

## **Inadmissible evidence:**

- Restrictions also apply to applications of the parties (§ 37 para. 5)
- Use of evidence from the files of a competition authority is inadmissible to the extent its disclosure cannot be ordered by the court.
- Submission into evidence from files of cartel authority is only permissible by the person who has obtained this information by an inspection of the file or by the successor in interest to such person.
- Unauthorized use: fine up to EUR 100,000 (§ 37m Z 3)

# V. Practical difficulties

- Two "pillars" of information are dealt with by different courts
  - Cartel Court (= special panels of Vienna Court of Appeals) for competition proceedings (including decisions on access to file) and Cartell Appeals Court (= special panel of Austrian Supreme Court) and Courts of Appeals (regular panels) and Austrian Supreme Court (regular panels)
  - Superior Courts and Vienna Commercial Court (*Landesgerichte, Handelsgericht*) for cartel damages lawsuits
  - No specialisation in courts dealing with cartel damages lawsuits
- Balancing decisions are always case-by-case decisions, little guidance by judges' own expertise (b/c of lack of specialisation) and by appellate courts
- Publication of decisions still often contains only rudimentary information

# VI. Are we asking the right questions?

- Relationship between public and private enforcement
  - Different aims
    - Competition authorities focus on putting an end to cartel activity (i.e. future-oriented approach)
    - Damages actions necessarily focus on the past
- Conceptual problems *de leg ferenda*: Do we strike the right balance between protection of cooperating cartel members and protection of victims?
  - Leniency programs for intentional tortfeasors not willing to compensate victims???
  - Few incentives for informers possible in the law of damages (in civil law systems)
    - E.g. no „de-trebling“ (U.S.)
- Passing-on defense
  - Shifts losses to consumers (atomization of losses)
  - Works only in legal systems with powerful collective redress mechanisms

# Thank you for your attention!



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