

Role of access to evidence in antitrust damages actions

Hon.-Prof. Dr. Hanno Wollmann

3 November 2023

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 26 November 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***(Text with EEA relevance)*

Whereas

(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

(15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties, including public authorities. [...]

Article 4

Principles of effectiveness and equivalence

In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. [...]

but:

Article 7 Charter of Fundamental Rights
Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

CHAPTER II

DISCLOSURE OF EVIDENCE

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.

Note:

Whereas (19) This Directive affects neither the possibility under the laws of the Member States to appeal disclosure orders, nor the conditions for bringing such appeals.

Directive 2004/48/EC on the enforcement of intellectual property rights ("**IPR Enforcement Directive**"):

- Art 6: "*Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. (...)*"

Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing ("**Class Action Directive**")

- Art 18: "*Member States shall ensure that, where a qualified entity has provided reasonably available evidence sufficient to support a representative action, and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court or administrative authority is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law, subject to the applicable Union and national rules on confidentiality and proportionality. Member States shall ensure that, if requested by the defendant, the court or administrative authority, is also able to equally order the qualified entity or a third party to disclose relevant evidence, in accordance with national procedural law.*"
-

Proposal for a directive of the European Parliament and of the Council on liability for defective products COM(2022) 495 final ("**Product Liability Directive**")

- Article 8: "*Member States shall ensure that national courts are empowered, upon request of an injured person claiming compensation for damage caused by a defective product ("the claimant") who has presented facts and evidence sufficient to support the plausibility of the claim for compensation, to order the defendant to disclose relevant evidence that is at its disposal. (...)*"
-

Note:

(1) The ‘disclosure scheme’ introduced with the EU Damages Directive coexists with pre-existing general civil procedure rules on access to evidence in the Member States, and it coexists with the pre-existing power of courts to request the European Commission (and, eventually, national competition authorities) to transmit any legal, economic or procedural information in its possession, both in accordance with national law. The national rules of civil procedure in this matter – and, even more so, the legal cultures in the Member States – vary considerably, not least along the traditions of adversarial versus inquisitorial models of procedure.

(2) Prior to the Directive, disclosure rules already existed in some Member States (Cyprus, Ireland, Luxemburg, the Netherlands, Sweden, and formerly England and Wales). However, most Member States had pre-existing stricter and limited discovery tools, with little culture or tradition in the implementation of a ‘disclosure scheme’.

(3) The ‘disclosure scheme’ under the Directive is available both for stand-alone and follow-on claims, and for claims regarding harm caused by cartels or by any other antitrust infringements.

Whereas

(26) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities. To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence. [...]

Those limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law.

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. [...]

„Black list“:

(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.

But (“white listed”):

Preamble (28) National courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority (**‘pre-existing information’**).

Article 6

Disclosure of evidence included in the file of a competition authority

„Grey list“:

(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.
-

Quote from *Francisco Marcos*, **Access to evidence: the "Disclosure Scheme" of the Damages Directive**, Working Paper IE Law School, 2022:

The disclosure scheme is devised to operate expeditiously and swiftly within the main damages' proceedings (or briefly before commencing that action), as an ancillary tool. But the reality, in some Member States, is that it becomes an additional case on the court docket, subject to the same delays. The discovery process can be long and tenuous, especially if the courts take a rigid approach to the matter and the counterparty uses all possible tools to demur it. In sum, the lack of experience in most Member States has led to profuse strategic behavior in court, mainly by defendants, to quash and delay any potential damages claims through all possible means. [...]

For inexperienced, wary plaintiffs who venture into the realm of discovery, they may find themselves lost in an intractable rigmarole, that does not ease at all the proof of harm and the quantification of the overcharge. In complex cartels, like the trucks' cartel, motions for disclosure can become a labyrinth without exit.

Quote from *Lena Hornkohl*, **Public Compensation for Private Harm: Fair Funds for Consumer Competition Law Redress**, *World Competition*, forthcoming:

[...] the Fair Fund system could ease the interplay of public and private enforcement, particularly in cases involving leniency. Academia and practice are noticing a decline in leniency applications and blame the incentives for private enforcement created with the EU Damages Directive, which seem to fail to effectively protect leniency applicants from follow-on damages actions. Some Member States are considering introducing an exemption from damages claims for leniency applicants to encourage leniency applications. Yet, excluding or restricting liability [...] could negatively affect the ability of harmed individuals to receive full compensation for the harm caused by a violation of competition law.

Fair Funds could [...] mitigate any such negative consequences. The exemption or limitation of civil liability for immunity recipients could be combined with the introduction of a Fair Fund distribution system. By distributing the collected public fines or disgorged profits through parallel Fair Funds, where the immunity recipient would be naturally exempted or whose liability would be subordinated, it would be possible to compensate harmed parties for the absence of a defendant in follow-on damages actions. Therefore, the Fair Fund distribution would be parallel to the already possible follow-on damages actions, from which an immunity recipient would be exempted or whose liability would be subordinated. Similarly to US securities law, the Fair Fund would serve to augment the pool of funds available to compensate harmed persons of competition law violations. This approach would also be advantageous for violators seeking leniency, as their leniency application would lead to predictable proceedings and outcomes.
