ABA Section of Antitrust Law
Global Private Litigation 2017
Panel IV: Public Private Interface

Moving to a system of disclosure in German civil damages cases

by
Prof. Dr. Albrecht Bach

OPPENLÄNDER Rechtsanwälte
Börsenplatz 1
D-70174 Stuttgart
Germany

Like most continental European legal systems, Germany has long resisted attempts to introduce disclosure or even discovery. Discovery, by many, is treated as the very symbol of excessive US litigation patterns. The new Damages Directive[1] has forced Germany to adopt at least a limited system of disclosure. Article 6 of the Damages Directive required Germany to ensure that its courts are able to order disclosure of relevant evidence.

1. Legislative changes limited to competition law enforcement

It was apparent at the outset that measures to implement disclosure requirements had to be limited to private actions for competition law enforcement. There was strong resistance by the German Federal Ministry of Justice and large parts of the German legal community to even consider a modification of general rules of civil procedure in order to accommodate EU requirements.

The newly introduced disclosure provisions are part of the legislative package referred to as 9th Amendment to the German Act against Restraints of Competition (ARC). This Amendment was voted by the German parliament on 09 March 2017 and will most likely enter into force mid-May/early June 2017 following publication in the Federal Gazette. The 9th Amendment was primarily intended to implement the EU Damages Directive, but contains a number of other important modifications of the ARC.

The disclosure rules are enacted in two separate provisions. Section 33g ARC will contain the disclosure requirements, implementation of the proportionality test, restrictions regarding documents in files of competition authorities as well as leniency applications or settlement submissions. Section 33g ARC is complemented by Section 89b ARC on procedural aspects of disclosure. The new disclosure rules will enter into force the day following publication in the Federal Gazette, but will only apply to those proceedings in which a claim was filed after 26h December 2016. The German legislator thus treated the newly enacted disclosure

---

1 Directive 2014/104/EU of the European Parliament and of the Counsel of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition provisions of the Member States and of the European Union, OJ L 349/1 of 05 December 2014.

rules as national measures to implement non-substantive provisions of the Damages Directive pursuant to the Directive's Article 22 para 2.

2. General rules relating to disclosure of documents

In order to assess the significant changes brought about by 9th amendment to the ARC, it is useful to quickly describe the existing general rules with respect to production of documents in civil litigation. Pursuant to Section 142 German Code of Civil Procedure, the court may direct one of the parties or a third party to produce records or documents, as well as any other material, that is in its possession and to which one of the parties has made reference. This may, at first sight, look like a broad disclosure rule. German courts have, however, consistently erected significant barriers to use this provision for disclosure purposes. The jurisprudence is very restrictive with regard to both, specific identification of relevant documents and the need to have these documents produced to prove substantiated facts. German courts and commentators insist on this provision being only a minor deviation from the general principle according to which parties have to produce the evidence on their own. It is often stated that Section 142 German Code of Civil Procedure must not lead to "fishing expeditions" exploring the evidence held by the opponent or third parties.

It thus comes as no surprise that Section 142 German Code of Civil Procedure has remained basically inoperative in private enforcement actions. Although plaintiffs have frequently invoked this provision to obtain access to fining decisions or other documents, German courts have refrained from ordering production of these documents.

3. Substantive claim to disclosure of documents

Regarding disclosure, the German legislator did not merely copy the approach in Article 5 of the Damages Directive. To the surprise of many, already the first informal draft opted for a substantive claim to have certain documents disclosed.[2] This follows a similar approach chosen when

---

2 Referentenentwurf des Bundesministeriums für Wirtschaft und Energie.

implementing the IP Enforcement Directive[3] into German law. The respective provisions in the German Copy Right Act or the German Patent Act expressly entitle the holder of the IP right to obtain access to documents or, in the case of patents, to items which may infringe the IP right.[4] In the area of IP enforcement, grating a substantive right allowed for the use of injunctive relief to enforce disclosure. Apparently, this served as a kind of road map to the disclosure rules in the modified Act on Restraints of Competition.

Under Section 33g ARC, anyone in possession of evidence required to establish a potential damage claim – including the defendant and third parties – is obliged to disclose such pieces of evidence upon request of the claimant. This clearly is more than a procedural provision allowing the court to order production of these documents. A procedural approach most likely constitutes the minimum standard under the Damages Directive. It would have also been closer to the traditional approach under Section 142 Code of Civil Procedure.

The legislator fully intended to deviate from a merely procedural solution. Those harmed by cartels should be able to rely on the disclosure claim already prior to the commencement of court proceedings. This, according to the legislator, could facilitate out-of-court settlements.[5] In addition, the substantive claim allows for enforcement by injunctive relief.

Under the German concept, entitlement to disclosure is not limited to those harmed by cartels. In accordance with the Damages Directive, defendants may also seek disclosure of documents in their favour. Unlike the entitlement of those harmed, potential cartelists will, however, only be

---

3 Directive 2004/48/EC of the European Parliament and of the Counsel of 29 April 2004 on the enforcement of intellectual property rights, OJ L157 of 30 April 2004.

4 Refer to Section 101a German Copy Right Act according to which any person who infringes copy rights on a commercial scale may be required by the injured party to provide information without delay as to the origin and the distribution networks of infringing copies of other products; similarly, Section 140c German Patent Act provides that any person who with sufficient likelihood infringes a patent may be sued by the right holder for production of documents or inspection of an item if this is necessary for the purpose of establishing the claim of the right holder.

5 Statement of reasons for the government's draft of the 9th Amendment to the ARC, BT-Drucks 18/10207, p. 62.

able to claim access to evidence after a damage claim became pending (Section 33g para 2 ARC).

4. Difficult balancing exercise without precedent

In establishing a strict proportionality test, the German legislator, in principle, followed Article 5 of the Damages Directive. Disclosure of documents is therefore excluded to the extent it is disproportionate considering the legitimate interests of all parties and the third parties concerned. In order to determine proportionality, the courts have to operate a balancing test. However, German law added a number of items which seem to make disclosure orders less likely. Thus, following the balancing approach required to implement the proportionality test, German courts will also have to consider the binding effect of fining decisions, possible effects on public enforcement and, surprisingly, costs for producing the evidence.

5. Disclosure restrictions regarding public enforcement proceedings

The German legislation implements the restrictions with respect to evidence included in the file of a competition authority which follow from Article 6 of the Damages Directive. The documents blacklisted in Article 6 of the Damages Directive therefore cannot be disclosed pursuant to Section 33g ARC. This particularly applies to leniency statements and settlement submissions. With respect to other documents in the files of competition authorities, the German legislator further restricted the ability to order disclosure in hybrid cases. Claimants will have to wait until proceedings by competition authorities are closed against *all* parties before a German court can order disclosure of (i) information prepared specifically for the proceedings of competition authority or (ii) information that the competition authority has drawn up and sent to parties in the course of its proceedings as well as (iii) settlement submissions that have been withdrawn. This will considerably delay disclosure in all those cases in which the authority obtains settlements against most of the infringers but pursued normal proceedings against non-settling cartelists.

There is another area in which the German legislator went beyond the restrictions for disclosure contained in the Damages Directive. According

to Section 33g para 4 ARC, not only leniency statements and settlement submissions are to be excluded from disclosure, but also documents or records regarding the content of witness statements in proceedings by cartel authorities. Obviously, the German Federal Cartel Office (FCO) lobbied for the introduction of this additional restriction. It seems, however, extremely doubtful whether this restriction is in line with the legislative program of the Damages Directive. It corresponds to the FCO's practice to take express witness statements from persons who acted for the leniency applicant. In doing so, the FCO wants to bolster its case in subsequent appeals by non-leniency applicants. Nevertheless, the protocol of an examination of a witness is neither a leniency application nor a settlement submission. By excluding these documents, the German legislator further shifts the balance to the detriment of those harmed by cartels. In our view, the Damages Directive has defined a delicate balance between the interests of competition authorities to have certain categories of documents excluded and the broad disclosure interest of those entitled to full compensation. The German legislation implemented a different balance which is thus not in line with the Directive's requirements.

6. Compensation for costs of disclosure

In yet another respect the German legislator goes beyond the Damages Directive and modifies disclosure rules. Pursuant to Section 33g para 7 ARC, those obliged to produce documents are entitled to be reimbursed for "reasonable costs" associated with disclosure. The Damages Directive ignores any such rule. The German legislator claims that this constitutes a gap he is entitled to close.[6] This is a highly suspicious approach. Whilst it may be debatable to entitle third parties to reimbursement of some of their costs, it may definitely deter claimants to seek disclosure of evidence to which, under the Directive, they are entitled in order to realise their right to full compensation. The German legislator hasn't fully thought through his reimbursement approach. First of all, it is unclear why, given reimbursement, costs of disclosure should still be part of the proportionality test as described above. Second, there is no reason why a successful plaintiff should ultimately bear "reasonable costs" of disclosure

6 Statement of reasons for the government's draft of the 9th Amendment to the ARC, BT-Drucks 18/10207, p. 65.

incurred by any of the unsuccessful defendants. Definitely, during pending litigation regarding the damage claim, a defendant should not be entitled to realize any of these reimbursement claims. Even less, should defendants subject to disclosure be able to invoke general provisions on reimbursement for the production of goods under Section 811 German Civil Code as this would entitle the defendant to have reasonable costs advanced and to withhold production of documents.[7]

This would significantly disturb the disclosure mechanism deviced by the Damages Directive. Furthermore, it remains entirely unclear what could be reasonable costs with respect to disclosure. In our view, attorney fees can definitely not be included. To the extent disclosure orders would require the use of external service providers to deal with substantial amounts of electronic evidence, these costs may be regarded as "reasonable".[8] It has to be born in mind, however, that there is no disclosure practice in Germany and courts have never had to deal with disclosure costs as part of the costs of proceedings. Any standards for "reasonable costs" will therefore have to be developed in future jurisprudence.

7. Procedural implementation of disclosure

The new legislation opted for specific procedural provisions to implement the disclosure rules. These procedural rules translate difficulties of the legislator to accommodate the substantive claim for disclosure and traditional procedural elements. Surprisingly, the law refers to Section 142 German Code of Civil Procedure in order to implement access to documents and other forms of evidence. This seems to introduce an additional element of discretion the courts hold under this provision. It is difficult to reconcile additional discretion with the detailed catalogue for the proportionality test under Section 33g ARC.

Section 89b para 1 ARC has therefore to be construed in conformity with Section 33g ARC. To the extent the proportionality test leads to an entitlement of the claimant to disclosure, there is no additional discretion

---

7 Under Section 811 para 2 German Civil Code, the possessor of a thing or document may refuse presentation until the other party advances the costs and provides security for the risk.

8 This seems to be in line with US practice which seems to be opposed to award attorney costs for disclosure.

of courts under Section 142 German Code of Civil Procedure. This interpretation is confirmed with respect to the production of documents by third parties. Here, Section 89b para 2 ARC expressly refers to the proportionality tests and additional criteria under Section 33g paras 3 to 6 ARC.

Basically, the reference to Section 142 German Code of Civil Procedure adds little more than the ability to set a deadline for the production of documents and to direct that the materials so produced remains with the court registry for a period to be determined. Of lesser importance is the possibility to direct that records or documents prepared in a foreign language be translated by an authorized translator. This may, however, create a significant burden to the extent the disclosure sought concerns large amounts of electronically stored documents in a foreign language.

Section 89b para 6 ARC expressly entitles the court to order disclosure of documents or information for which the holder claims confidentiality. The court may order disclosure to the extent it is expedient for the enforcement of a damage claim or defence claim and, considering all aspects of the individual case, the disclosure interest prevails.

8. Injunctive relief

Amongst the most hotly debated provisions of the modified ARC was the initial proposal to allow for disclosure by means of injunctive relief. Originally, the courts would have been entitled to order disclosure of "means of evidence" by way of injunctive relief.[9] During the legislative process, this provision was significantly modified and restricted. Pursuant to Section 89b para 5 ARC, injunctive relief will be limited to the production of the respective decision of the competition authority establishing the infringement of German competition rules or Articles 101, 102 TFEU. This significantly reduces the value of the substantive disclosure claim granted under Section 33g ARC and largely removes the ability to obtain significant evidence prior to entering into full scale

9 Government's draft of the 9th Amendment to the ARC, BT-Brucks. 18/10207, § 89b (5).

litigation. Even a vague resemblance to pre-trial discovery is now clearly excluded.

As the disclosure of the decision establishing the infringement is specifically mentioned, it is questionable whether the general proportionality rules under Section 33g para 3 ARC remain applicable if those harmed by an infringement apply for this type of injunctive relief. The law obviously considers that the full decision may be disclosed pursuant to an injunction. However, the opponent has to be heard prior to the court order. The opponent may thus request for various reasons to restrict disclosure to a modified document. This obviously raises issues of business secrets and confidential information.

9. How to deal with business secrets and confidential information

The Damages Directive requires, for the proportionality test to be applied when ordering disclosure, to consider to which extent the documents to be disclosed contain confidential information and what arrangements are in place for protecting such confidential information. The German legislator translated this requirement almost literally into its own proportionality test. The legislator, however, failed to answer the question what are proper arrangements to protect confidential information in the respective proceedings. The legislation remains silent regarding the redaction of documents or confidential hearings. Basically, the entire responsibility to deal with confidential information and to device suitable means is left with the courts. Pursuant to Section 89b para 7 ARC, the courts will take all measures required in order to safeguard protection of business secrets and other confidential information. The government, when stating the reasons for its draft, considered that this was enough to entitle the courts to develop a practice similar to mechanisms applied in IP enforcement when dealing with business secrets and confidential information. In particular, the government mentioned restrictions regarding the number of persons having access to the information and specific secrecy obligations imposed on them.

It is true that, in IP matters, German courts had developed solutions which, overall, are practicable.[10] They cannot be transferred easily to competition litigation. In IP matters, courts rely on independent experts in order to determine whether or not there is a breach of patent or copyright. These are questions of fact or of science. The questions to be answered with respect to disclosure in competition matters are, however, of a legal nature. The assessment to which extent certain information contains business secrets or is needed in order to enforce a damage claim cannot be delegated to independent experts. They require assessment by the court and, in an adversarial system, require access by counsel to the parties. The court may well order additional confidentiality obligations for outside counsel. It is, however, not entirely clear whether there are sufficient sanctions in order to make these confidentiality undertakings work. There is no clear German equivalent to English rules on contempt of court. It remains questionable what type of sanctions would apply if confidentiality obligations were breached.

It is apparent that the availability of disclosure in Germany will, to a very substantial part, depend on the ability of its courts to device procedural mechanisms similar to those developed by English courts. Unfortunately, this development cannot rely on any guidance by the legislator. Under the strict constitutional rules in Germany, it seems questionable whether the mere entitlement to "adopt necessary measures" to protect confidential information is sufficiently precise to justify restrictions.

10. Conclusion

Guided by the Damages Directive, Germany moves to a system of disclosure in civil damages cases. The legislator is confident that the courts will themselves develop the necessary rules and techniques to make disclosure work. They may take some inspiration from IP enforcement. Nevertheless, there is very little guidance on all practical issues of disclosure. Large uncertainties remain. In particular, there are more than

---

10 In patent infringement cases courts typically order inspection by a court-appointed expert. The expert report may contain business secrets. The courts therefore may order that access to the report is restricted to those outside counsels who gave a confidentiality undertaking not to share the report's content with their own client. For details see BGH judgement of 16 November 2009, X ZB 37/08 "Lichtbogenschnürung" available as juris-document or in GRUR 2010, 318 – 322.

20 specialized courts for competition law enforcement in Germany. All those courts will have to make their own tentative steps into the territory of disclosure so far unknown to continental European judges.