

Dr. Kathrin Nordmeier, Noerr LLP and Dr. Julia Schwalm, Morrison & Foerster (International) LLP <sup>1</sup>

### I. No U.S.- Style Discovery in Most European Countries

Most European jurisdictions, like Germany, have no U.S.-style discovery. Instead, they rely on the burden of proof. Each party has to prove the facts advantageous to them, but the burden of proof may shift according to the ability to access certain evidence. So parties in civil proceedings have a high incentive to disclose evidence themselves, to disprove the opponent's point.

It is very rare for German courts to order a party to disclose evidence as a matter of civil procedure. Disclosure most usually requires a disclosure claim under substantive law:

#### 1. Limited Disclosure in Civil Litigation

One of the basic principles of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO) is the "principle of contribution," meaning that the court will only consider facts and evidence contributed or "presented" voluntarily by the parties and is not going to investigate evidence "ex officio." The court will not force a party to disclose evidence. The concept of a large-volume exchange of documents and evidence as ordered by the court contradicts one of the fundamental principles of German civil procedure.

The only exception to this rule is section 142 ZPO, which allows courts to order disclosure of certain individual documents to which the parties have referred. There is very little similarity to discovery, though: (i) the documents, their specific relevance to the case as well as their content need to be described in detail by the requesting party, so there can be no "fishing expeditions," search terms, or classes of documents; (ii) the court can, but does not have to, order the disclosure, and (iii) the parties can refuse to disclose. This last point does not render disclosure orders useless, though, because the court may, and most likely will, draw adverse inference from a refusal to disclose documents.

There have been few cases since 1900 in which judges have made use of the possibility to order disclosure of documents.

#### 2. Instead: Disclosure Obligations in Special Relationships

Consequently, the German lawmakers – and the German courts – have instead granted claims for disclosure in specific relationships to counter structural information asymmetry. A distribution agent has a right to inspect the principal's books and documents (section 87c German Commercial Code (*Handelsgesetzbuch*, HGB)). This includes even electronically-kept business documents, but all this is strictly limited to the information relevant to the agent's claim for commission.<sup>2</sup> In damage claims, including cartel damage claims, courts have awarded claimants disclosure claims against the defendants, to enable the claimants to assess the gains the defendants made from the damaging event.<sup>3</sup> A former director of a stock corporation may claim access to company documents to defend himself.<sup>4</sup> There are other similar claims,<sup>5</sup> either by law or based on court decisions, but all in specific contexts.

## II. Hague Convention on Taking of Evidence Abroad

That the possibilities of obtaining evidence from an opposing party are very limited in German litigation does not necessarily mean that the same is true for the cross-border taking of evidence. With regards to cross-border taking of evidence, the United States of America as well as many European countries including Germany, France, Italy and the Netherlands are contracting parties to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention). Pursuant to article 1 of the Hague Evidence Convention, in civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence or to perform some other judicial act. Article 12 of the Hague Evidence Convention provides that the execution of a Letter of Request may be refused only to the extent that in the State of execution the execution of the Letter does not fall within the functions of the judiciary or the State addressed considers that its sovereignty or security would be prejudiced thereby.

Hence, in principle, discovery requests originating from U.S. proceedings could be executed in all Contracting States. However, e.g. Germany, France, Italy and the Netherlands have declared that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries under article 23 of the Hague Evidence Convention. Letters of Request issued for the purpose of obtaining depositions of witnesses located in a Contracting State are generally executed in the other Contracting States. However, article 9 of the Hague Evidence Convention provides that the judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. Accordingly, for example, the German courts will hear witnesses as is common practice in German proceedings. That means that the judge is the first to ask questions. The parties may ask additional questions once the judge has finished. No true cross-examination takes place and no verbatim transcript is prepared. The hearing of a witness in Germany seldom takes longer than one or two hours. There are no detailed rules of evidence that apply to witness testimony as in the U.S., e.g. there are no rules proscribing hearsay evidence nor are there rules as to the form of a question.

In 1987, the U.S. Supreme Court held in *Societe Nationale v. District Court* that the Hague Evidence Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory.<sup>6</sup> Hence, a U.S. litigant may serve discovery requests on a foreign party under the Federal Rules of Civil Procedure. The German courts, however, take the position that requests for the taking of evidence must come through the Hague Evidence Convention or will not be enforced on German territory. German parties may – from a German point of view voluntarily – decide to fulfill requests for the production of documents. Yet, U.S. style depositions without the involvement of a German judge can only be conducted on the premises of the U.S. Consulate General in Frankfurt or in certain other very limited situations set forth in verbal notes exchanged by the U.S. and the German government in the 1950s and late 1970s/early 1980s.<sup>7</sup>

## III. New Rules on Disclosure of Evidence in Germany: Implementation of Directive 2014/104/EU into German Law

The status quo of very limited disclosure of evidence in German civil proceedings has changed, but only for antitrust damages litigation. Directive 2014/104/EU (the Damages Directive) defined a minimum standard for disclosure of evidence in future cartel damage proceedings; however, Member States were free to go beyond the scope of the Damages Directive, article 5 para. 8 of the Damages Directive.

In part, Germany did just that when implementing the Damages Directive in section 33g and 89b of the German Competition Act (*GWB*).<sup>8</sup> Overall, the disclosure obligation is again a claim under substantive law and not a change to the rules of civil procedure. Both parties may demand disclosure of evidence. The claimant, however, has to first substantiate their damage claim with the means available to them, section 33g para. 1 *GWB*, which means that claimants will probably not file for disclosure of evidence until they can rely on the binding effect of an Antitrust Authority decision regarding the antitrust violation. Disclosure is ordered only after weighing the interests of both parties, section 33g para. 3 *GWB*. The leniency applicant is protected as far as possible, as is evidence in the hands of an attorney, section 33g pa-ras 4-6 *GWB*. However, how the latter will be handled in practice is one of the many unresolved issues of the new laws.

In what can be considered either an effective implementation of the Damages Directive or going beyond its scope, claimants may demand disclosure of the Antitrust Authority's decision by way of a (facilitated) preliminary injunction, section 89b para. 5 *GWB*.

In light of mechanisms that facilitate proof of (cartel) damages in German civil proceedings, it remains to be seen whether claimants will truly profit from these rules. Currently, claimants quantify an estimate of the damages suffered through expert opinions by competition economists. This has usually been sufficient to meet the necessary (lightened) standard of proof.

Even if defendants have to disclose evidence, it is unclear how helpful this evidence can be in terms of quantifying damages reliably. In a typical price fixing cartel, it may be helpful to have the cartelists' meeting minutes specifying exactly by how much the price is altered. Many cartels are not that simple, though. They may revolve around illegal information exchange or market or customer allocation. In those cases, evidence will most often not be relevant with regard to the "but for" price, so it will still need to be estimated. Therefore, even when evidence is disclosed, economic expert opinions will likely still be necessary and the most sought-after document for claimants will most likely be the unredacted decision by the Antitrust Authority.

This is different for defendants. Until the Damages Directive was implemented, defendants had little chance of getting evidence to prove a passing-on defense. So section 33g para. 2 *GWB* is a particularly significant change in legislation.

#### **IV. First German Court Decisions on sections 33g and 89b *GWB***

So far, there are only a few published decisions on the German provisions transforming the Damages Directive into German law. One German Court of Appeals and two German District Courts have applied these provisions in four cases, therefore taking a restrictive approach, with the clear intent of avoiding extensive U.S. style discovery.

The District Court of Stuttgart entered a judgment on 12 December 2019,<sup>9</sup> rejecting what the court called "extensive" requests to provide cartel-relevant information under sections 89b *GWB* and 142 *ZPO*. The court denied these requests, emphasizing that sections 89b *GWB* and 142 *ZPO* did not permit for an examination of the facts "ex officio."<sup>10</sup> Consequently, an order for provision of evidentiary documents could only be made where the plaintiff could show these documents were of specific relevance to their case and could specify the individual documents required, which the plaintiff had failed to do.<sup>11</sup> The court affirmed that an unspecific request to hand over "entire document collections, documentations or complete correspondence"<sup>12</sup> was not within the scope of the sections 89b *GWB* and 142 *ZPO*.

In the second set of proceedings, the same chamber of the District Court of Stuttgart took an even clearer position.<sup>13</sup> In that case, the plaintiff purchased and leased trucks. The defendant was an automobile manufacturer that, as set forth in a decision of the European Commission, had participated in a cartel encompassing the trucks purchased and leased by the plaintiff. The plaintiff's "extensive" requests included a request for the production of all contracts and correspondence between the defendant and a leasing company regarding the trucks that were subject to the cartel as well as a request for the production of all documents directly referring to the trucks subject to the complaint. After repeating the statements already set forth in the judgment of 12 December 2019 as to the law, the court held that:

*An order under section 142 ZPO is not possible. By formulating their claim broadly (e.g. 'all contracts and correspondence between the defendants and the M.C. GmbH regarding the trucks at issue' or 'all available documents, regardless of their form [...] [omission in original], which are immediately connected to the trucks at issue'), the applicant is trying to procure sweeping disclosure of all (potentially) relevant documents. As the defendants have correctly pointed out, the applicant is effectively seeking the kind of 'discovery' possible under US law, which, however, the ZPO does not permit.*<sup>14</sup>

The court then dismissed the application for the same reasons as in its prior judgment, viz. that the applicant had neither established why the documents were of specific relevance to her case nor specified the documents sought while stressing that all other possible legal basis for such an order were also intended to avoid sweeping, unspecified disclosure.<sup>15</sup>

The other cases concern section 89b para. 5 GWB.<sup>16</sup> In these decisions, the courts use the fact that granting a preliminary injunction under German law requires "urgency" to turn down requests for the production of the unredacted decision of the Antitrust Authority.

In the case decided by the Düsseldorf Court of Appeals on 3 April 2018,<sup>17</sup> the applicants were preparing a claim for damages resulting from the 1997 – 2011 trucks cartel.<sup>18</sup> To this end, they sought a preliminary injunction compelling the cartel members to provide them with an unredacted copy of the European Commission's decision as well as all of the documents referred to as evidence in the decision's footnotes.

The Düsseldorf Court of Appeals held against the applicants based on several independent lines of reasoning. Among other reasons, and applying the general requirements of German procedural law, the court held that a preliminary injunction required the matter to be too urgent to wait for a final decision on the merits. While section 89b para. 5 GWB modified this by creating a rebuttable presumption of urgency, it did not dispense with that requirement altogether. Applying this to the case at hand, the court held that the applicants had rebutted this presumption themselves by waiting for several months before commencing proceedings. In addition, the court held that the applicants' claim would in any case have exceeded the ambit of section 89b para. 5 GWB, since that provision extended only to the European Commission's decision itself and would not have covered the documents referred to in the European Commission's decision's footnotes.

This approach of the Düsseldorf Court of Appeals was followed by the District Court of Stuttgart, that held that the applicant had rebutted the presumption of urgency that section 89b para. 5 GWB requires by waiting for more than four months before filing the application for a preliminary injunction.<sup>19</sup>

## V. Legislative reversal of the Düsseldorf Court of Appeals' order

This obvious reluctance of the German courts to implement discovery into German civil proceedings has triggered legislative action. On 24 January 2020, the Federal Ministry for Economic Affairs and Energy introduced draft legislation amending the GWB.<sup>20</sup>

Regarding section 89b para. 5 GWB, the draft proposes the addition of the sentence that “[a]n order under section 89b para. 5 (1) does not require particular urgency”.<sup>21</sup> The draft explicitly notes the Düsseldorf Court of Appeals’ decision and criticizes that it impedes procedural efficiency.<sup>22</sup> The draft criticizes that the court’s interpretation forces claimants for cartel damages to initiate proceedings for disclosure at a point in time where they have not yet decided conclusively whether they should even consider the possibility of bringing a damages claim. This would lead to ultimately unnecessary litigation where the claimants later decide not to bring damages proceedings.<sup>23</sup>

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<sup>1</sup> Dr. Kathrin Nordmeier, Noerr LLP, Deutschland and Dr. Julia Schwalm, Partner, Morrison & Foerster (International) LLP

<sup>2</sup> Stuttgart Court of Appeals, *Oberlandesgericht Stuttgart, OLG Stuttgart*, order of 31 July 2019 – 5 W 23/19.

<sup>3</sup> German Federal Court of Justice, *Bundesgerichtshof, BGH*, judgment of 6 February 2007 – X ZR 117/04, no. 15; District Court of Hannover, *Landgericht Hannover, LG Hannover*, judgment of 16 February 2017 – 25 O 28/13.

<sup>4</sup> German Federal Court of Justice, *Bundesgerichtshof, BGH*, judgment of 4 November 2002 – II ZR 224/00, no. 9.

<sup>5</sup> Section 101a German Copyright Act, *Urheberrechtsgesetz, UrhG*; section 140c German Patent Act, *Patentgesetz, PatG*; section 51a German Limited Liability Company Act, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*, to name a few more.

<sup>6</sup> *Societe Nationale v. District Court*, 482 U.S. 522 (1987).

<sup>7</sup> 1955 U.S.T. Lexis 485.

<sup>8</sup> German Competition Act, *Gesetz gegen Wettbewerbsbeschränkungen, GwB*, English translation available at [http://www.gesetze-im-internet.de/englisch\\_gwb/](http://www.gesetze-im-internet.de/englisch_gwb/), last retrieved 14 February 2020.

<sup>9</sup> District Court of Stuttgart, *Landgericht Stuttgart, LG Stuttgart*, judgment of 12 December 2019 – 30 O 27/17.

<sup>10</sup> *Ibid.* no. 119.

<sup>11</sup> *Ibid.* no. 120.

<sup>12</sup> *Ibid.* no. 119 – author’s translation.

<sup>13</sup> District Court of Stuttgart, *Landgericht Stuttgart, LG Stuttgart*, judgment of 19 December 2019 – 30 O 8/18.

<sup>14</sup> *Ibid.* no. 46 – author’s translation.

<sup>15</sup> *Ibid.* no. 48.

<sup>16</sup> Discussed above at III.

<sup>17</sup> Düsseldorf Court of Appeals, *Oberlandesgericht Düsseldorf, OLG Düsseldorf*, order of 3 April 2018 – VI-W (Kart) 2/18.

<sup>18</sup> See [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2582](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582), last retrieved 14 February 2020.

<sup>19</sup> District Court of Stuttgart, *Landgericht Stuttgart, LG Stuttgart*, judgment of 20 June 2018 – 30 O 79/18.

<sup>20</sup> Draft of a Tenth Amendment Amending the Competition Act for a Focussed, Proactive and Digital Competition Law 4.0, *Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0, GWB-Digitalisierungsgesetz*, available at <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf>, last retrieved 14 February 2020.

<sup>21</sup> *Ibid.*, p. 54 – author’s translation.

<sup>22</sup> *Ibid.*, p. 153.

<sup>23</sup> *Ibid.*, p. 153.