Disclosure in European Competition Litigation Through the Lens of US Discovery

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The disclosure regime introduced by the EU Damages Directive is largely unprecedented in many EU Member States. Its implementation raises a number of thorny questions for both legal scholarship and practice. This contribution proposes a comparative analysis of Germany's implementation through the lens of US discovery as a means of exposing issues, testing weaknesses, and exploring potential solutions. While the US certainly does not get everything right, it has grappled with questions of disclosure for decades. This wealth of experience and case law provides a rich vein for European (civil law) legislators and practitioners alike to mine. To this end, we analyse the key uncertainties that persist in Germany's implementation: from the conditions and costs of disclosure, to the protections against disclosure, and the consequences of a breach. Each step of the way the US model serves as a preface to the German approach, providing context for a critical comparative analysis. We conclude with practical recommendations for the future.

Keywords: Disclosure, Discovery, Damages Directive, Comparative Law, European Law, German Law, US Law, Litigation Hold, Legal Privilege, Principle of Effectiveness

1 INTRODUCTION

The Antitrust Damages Directive 2014/104/EU[1] introduces a new regime for the disclosure of evidence in private antitrust proceedings. This marks a radical departure from the civil law procedural traditions of many Member States. The task of shoe-horning this new regime into existing and long-standing procedural systems was exceedingly complex. It is a striking testament to the intricacies of this task that the majority of Member States failed to meet the deadline for implementing the Damages Directive.[2] In practice, the success of the Directive will depend on its

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1 Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 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 Eueoprean Union, OJ L 349, 1–19 (5 Dec. 2014) ('**Damages Directive**' and '**Directive**').

2 Jurgita Malinauskaite & Caroline Cauffman, *The Transposition of the Antitrust Damages Directive in the Small Member States of the EU – A Comparative Perspective*, 9(8) J. Eur. Competition L. & Prac. 496 (2018).

Ruster, Dr. Andreas & Massow, Sebastian von. 'Disclosure in European Competition Litigation Through the Lens of US Discovery'. *World Competition* 43, no. 3 (2020): 347–372.

application by national courts. This will require judges trained in civil law jurisdictions to overcome their traditional instincts and depart from existing practice.

The difficulties in implementing the Directive are reflected in the implementing acts, in particular in Germany. The German implementation raises a number of questions that will occupy the courts for some time to come. It already seems likely that it will require a further intervention on the part of the legislative. Primarily, though, it will fall to the courts to develop solutions.

It stands to reason that judges qualified in civil law jurisdictions, much like their lawmakers, will find it difficult to beat the bounds of the new disclosure regime, let alone apply it. More than anything, this is down to a simple lack of experience. Civil law judges and lawmakers alike are unfamiliar with disclosure as a procedural mechanism and will need time to familiarize themselves with its workings and advantages, as well as its potential pitfalls. In the meantime, it can be instructive to have a look at those legal systems that have a long tradition of applying similar procedural mechanisms. For this reason we cast a glance across the Atlantic.

The US system of discovery and privilege is long-established and boasts a wealth of jurisprudence. As such, it provides a reservoir of problems and solutions which European courts can dip into when negotiating the unfamiliar new disclosure rules under the Directive. This is not to say that the US gets everything right. Far from it. The purpose of a comparative approach is to enable a critical interrogation of both systems,[3] and thereby increase the stock of solutions.[4] This essay broadly follows the classic methodology proposed by Zweigert and Kötz, presenting the US and European systems separately before moving in a second stage to a comparative analysis.[5] The European competition community is not without a healthy dose of scepticism towards the US model of private enforcement.[6] Whilst this may in part be justified, it should not blind us to valuable lessons.

A comparative analysis of US law can inform and elucidate the application of the European, and in particular the German, disclosure regime. It can help not only to uncover, but also to resolve fundamental uncertainties in the Directive's application. To this end we will briefly map out the relevant provisions under US, European and German law (**B**), before turning to a critical comparative evaluation of four key aspects of the regime and the respective issues and uncertainties linked to these: the conditions for disclosure (**C**); the costs of disclosure (**D**); the protections afforded against disclosure (**E**); and the consequences of a breach of disclosure obligations (**F**).

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3 Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* 14 (1996).

4 Zitelmann, Die Möglichkeiten eines Weltrechts, AöGZ 193, 201 ff. (1888).

5 Zweigert & Kötz, *supra* n. 3, at 31, 42 (1996); cf. also Henrik Spang-Hanssen & J. Paul Lomio, *Legal Research Methods in the US and Europe* , 231, 234 ff., 241 (2008).

6 Robert H. Lande, *The Proposed Damages Legislation: Don't Believe the Critics*, J. Eur. Competition L. & Prac. 123 (2014).

2 DISCLOSURE AND DISCOVERY IN THE US, EUROPE, AND GERMANY

The US has a long tradition of discovery, shaped over time by a wealth of caselaw and informed by the needs of the system of adversarial litigation that it serves (**I**). The same canot be said for the EU and many European jurisdictions, where applicable regimes have been various and sundry (**II.1**). Strictly speaking, Germany, like many civil law jurisdictions, traditionally has not had a real system of disclosure at all (**II.2**). In the limited and specialized field of competition litigation, the Damages Directive has now introduced a novel regime containing detailed provisions for a wide-reaching system of disclosure (**III.1**). The implementation of the Damages Directive into German law created an exceptional set of rules apart from the general rules and longstanding traditions (**III.2**).

2.1 US Law

Discovery in the US is a common law pre-trial procedure by which parties to a lawsuit can obtain evidence from the opposing party. Rooted in the early equitable pleading procedures before the English Court of Chancery, it originates in its modern US form from the New York reforms of the nineteenth century. These merged common law and equity rules of procedure and authorized what would later become modern deposition.[7] Discovery in its Anglo-American conception is firmly situated within private law and serves ultimately to further adversarial litigation in full possession of the relevant facts.

The present statutory basis for discovery in the US is found in the Federal Rules of Civil Procedure ('**FRCP**'). These determine the rules of discovery in the US federal court system and provide the template for many state court systems.[8] The drafters of the FRCP wanted cases to be resolved on their merits and proceeded on the assumption that once the parties learned all the relevant facts they would either settle or go to trial; as such, US discovery as it is conceived under the FRCP was in fact intended to increase the efficiency of the administration of justice and reduce the number of trials.[9]

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7 Alan K. Goldstein, *A Short History of Discovery*, 10 Anglo-Am. L. Rev. 257 (1981).

8 Some states have chosen to pursue their own models: cf. e.g. California, ss 2016–2036, Civil Discovery Act of 1986, Title 4 of the Code of Civil Procedure.

9 William A. Glaser, *Pretrial Discovery and the Adversary System* 11 (1968); Edson Rr. Sunderland, Foreword to George Ragland Jr., *Discovery Before Trial* iii (1932).

The primary mechanisms of discovery include interrogatories,[10] requests for production of documents,[11] and automatic disclosure.[12] The burden of instigating and managing the process lies squarely with the parties.[13] In this regard the FRCP provides both sword and shield. A party may file a motion to compel discovery from an uncooperative opponent.[14] Equally, it may defend itself against unduly burdensome discovery requests with a motion for a protective order.[15] The court only gets involved when cooperation between the parties breaks down. Established by court rule and enforceable by the court, discovery is a powerful tool. Parties can use it to compel their opponents to produce damaging documents and thereby ultimately win cases. Indeed, it is often a judiciously employed discovery strategy, rather than the trial itself, that determines the outcome of a case.[16]

It should be noted that in US civil litigation, the question of discovery ties into the precedent question of pleadings and the related broader issue of access to courts. This relationship was shaken up by two landmark Supreme Court decisions in *Twombly*[17] and *Iqbal*.[18] These decisions put an end to the previous system of notice pleading, which merely required claimants to give their opponents sufficient notice of their grievance, and replaced it with a standard of plausibility. The perceived stringency of this new threshold and the concomitant problem of access to courts has prompted some to advance the need for a modified form of discovery.[19] One particular concern is that an early dismissal at the pleading stage will preclude discovery that would otherwise have taken place under the supposedly more generous standard of notice pleading.[20] The extent to which plausibility pleading has actually affected access to courts and discovery practices remains unclear,[21] and some voices in the literature even propose that the new standard of plausibility actually furthers the liberal ethos of the FRCP.[22] Whilst this development does not impinge on our analysis, it is nevertheless an important reminder that the US system continues to evolve and that discovery is by no means an unchanging fixture of US civil procedure.

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10 Rule 33 FRCP.
11 Rule 34 FRCP.
12 Rule 26 (a) FRCP.
13 Rule 26 (f) (1), (2), (3) FRCP; Joseph W. Glannon, *Civil Procedure* 362 (2006).
14 Rule 37 (a) (1) FRCP.
15 Rule 26 (c) (1) FRCP.
16 Glannon, *supra* n 13.
17 *Bell Atlantic Corp v. Twombly*, 550 US 544 (2007).
18 *Ashcroft v. Iqbal*, 556 US 662 (2009).
19 Scott Dodson, *New Pleading, New Discovery*, 109(1) Michigan L. Rev. 53 (2010).
20 Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162(7) U. Pennsylvania L. Rev. 1839, 1849 (2014).
21 *Ibid.*; William H. J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83(2) U. Chicago L. Rev. 693 (2016).
22 Hubbard, *supra* n. 21.

2.2 European and German Law prior to the Damages Directive

We will now set out the state of the law in Europe generally, and in Germany specifically, prior to the Damages Directive, giving an indication of the lay of the land before the dramatic changes ushered in by the new regime.

2.2[a] *Various Disclosure Regimes Throughout EU Member States*

The legal landscape in Europe before the Directive was, though not entirely a patchwork, certainly a tale of two cities. There was a fundamental divide between common law and civil law systems – as indeed there still is.[23] As the progenitor of modern discovery, it can be no surprise that English law is more than familiar with wide-reaching discovery. By contrast, traditional civil law jurisdictions like France or Germany have developed fundamentally different systems. These generally place the onus on the claimant to produce the necessary evidence and only grant access to probative documents held by the defendant or third parties under strict limitations. Though the Netherlands, and to a lesser extent Portugal, both foresee some form of disclosure that approaches the common law tradition, they remain a far cry from the comprehensive and far-reaching discovery practiced in US litigation. On the whole, discovery remained a foreign concept in continental Europe.

2.2[b] *No Fully-Fledged Disclosure Regime in Germany*

Prior to the Damages Directive, Germany did not have a disclosure regime in the strict sense. In this regard it is important to understand the fundamental difference between the US and German systems. Like most common law systems, US litigation proceeds on the assumption that each party must provide the court with all the evidence at their disposal, regardless of whether it serves their case or not. US discovery operates to get all the cards out on the table before play commences. German civil procedure is fundamentally different. The rules on evidence are guided by the principle that each party need only provide such evidence as supports their own case (the so-called *Beibringungsgrundsatz*). As a rule, no party is compelled to supply their opponent with the materials that they might need to make their case.[24] With this in mind, we set out the few German provisions that constitute a limited exception to this rule and amounted to something approaching German-style disclosure before the Directive.

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[23] For an instructive overview, cf. David Ashton, *Competition Damages Action in the EU* 4.18–4.34 (2018), Ch. 4.

[24] BGH judgments in NJW 1990, 3151, NJW 1997, 128 (129), and NJW 2000, 1108 (1109).

2.2[b][i] §§ 142 ff. ZPO

Under §§ 142 ff. of the German Code of Civil Procedure ('**ZPO**'), courts could order a party or a third party to disclose certain evidence.[25] The order could be proposed by a party, but was ultimately at the discretion of the court.[26] The order itself was not enforceable against a party. Instead, the court took account of a party's refusal to disclose at a later stage when assessing the evidence.[27] The order could be enforced against third parties by administrative means.[28] However, third parties were not obliged to produce materials where this was unreasonable or they had a right of refusal to testify.[29] So far, it would seem that § 142 ZPO has not played a significant role in German antitrust damages proceedings with courts being hesitant to make use of the provision.[30] Whether the provision may yet have its day remains to be seen. For quite some time, legal practice will likely be dealing predominantly with 'old' cartels for which the new rules are not yet applicable. In this context courts might apply § 142 ZPO slightly more generously with the new rules in mind already.[31]

2.2[b][ii] § 242 BGB

In addition to this procedural rule, the German courts developed a general, albeit accessory, right to informationon on the basis of § 242 *Bürgerliches Gesetzbuch*, the good faith catch-all of the German Civil Code ('**BGB**').[32] This provision was especially useful to cartel victims when they needed access to certain information for determining the quantum of damages.[33] One of the problems with this provision is that the bar is quite high. In particular, claimants need to target very specific pieces of evidence and hence need to know exactly what they are looking for before they can request it.

§ 242 BGB would generally need to be enforced through a separate court action that serves no goal other than collecting information. However, such claim for access to information could also be bundled with a damages action, typically

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25 Hellmann & Ben Steinbrück, *Discovery Light – Informations- und Beweismittelbeschaffung im Rahmen von Kartellschadensersatzklagen* NZKart 164, 166 (2017).

26 BGH judgment of 26 June 2007, XI ZR 277/05; Jörn Fritsche, MüKo-ZPO, § 144, at 3 (2020); Reinhard Greger, Zöller-ZPO, § 144, at 2 (2020).

27 Hellmann & Steinbrück, *supra* n. 25; Astrid Stadler, Musielak/Voit-ZPO, § 142, at 7 (2020).

28 §§ 142 (2) 2d sentence in conjunction with §§ 386 et seq. ZPO.

29 § 142 (2) 1st sentence ZPO.

30 Hartwig Ollerdißen, Wiedemann-Kartellrecht, § 61, at 104 (2020).

31 Compare BGH, judgment of 12.7.2016, KZR 25/14 Lottoblock II, at 45.

32 Established BGH case law, cf. judgment of 28 Oct. 1953, II ZR 149/52; judgment of 6 Feb. 2007, X ZR 117/04; judgment of 28 Jan. 2015, XII ZR 201/13.

33 Alexander Fritzsche, Carsten Klöppner & Miriam Schmidt, *Die Praxis der privaten Kartellrechtsdurchsetzung in Deutschland Teil 2*, NZKart 501, 506 ff. (2016); Roman Inderst & Stefan Thomas, *Schadensersatz bei Kartellverstößen* 389 (2018); Rüdiger Lahme, *Die Eignung des Zivilverfahrens zur Durchsetzung des Kartellrechts* 233 (2010); Julia Topel, Wiedemann-Kartellrecht, § 50, at 134 (2020).

leaving the damages amount open at the beginning until the information to be collected would allow for the claimant to calculate her damages (so-called *Stufenklage* under § 254 ZPO). This was in theory the classic starting shot in German antitrust litigation, but was rarely used in practice.[34]

2.3 European and German law after the Damages Directive

The legal framework for competition litigation cases – as distinct from all other types of civil litigation! – has changed dramatically with the introduction of the Damages Directive. The following sections outline the new disclosure regime under the Directive (**1**) and its implementation in Germany (**2**).

2.3[a] *Disclosure under the EU Damages Directive*

The Damages Directive introduces a sweeping new disclosure regime in private antitrust proceedings. The aim is to tackle the evidentiary problem of 'information asymmetry' at the heart of antitrust litigation: the issue that much of the relevent evidence needed by a claimant to prove her case will be in the possession of the defendant or a third party and often not sufficiently known or accessible.[35]

The key provisions are to be found in Articles 5 to 8 of the Directive. These provisions aim at guaranteeing a minimum level of effective access to evidence in competition litigation cases thoughout all EU Member States.[36] To this end, Article 5 Damages Directive obliges Member States to ensure that 'national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control' upon request of the claimant, provided they have presented 'a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'.[37] The defendant is granted a similar right.[38] Article 6 Damages Directive makes additional provisions for the disclosure of evidence included in the file of a competition authority, in particular ensuring the absolute protection of leniency statements and settlement submissions.[39]

At the same time, the Directive is concerned to avoid overly broad and costly disclosure obligations that could create undue burdens for the parties and entail risks of abuse.[40] Article 5 Damages Directive accordingly emphasizes the concept

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34 Otto Teplitzky, *Wettbewerbsrechtliche Ansprüche und Verfahren*, Ch. 38. at 5 (2019).
35 COM (2013) 404 final, 13.
36 COM (2013) 404 final, 14.
37 Article 5 (1) first sentence Damages Directive.
38 *Ibid*.
39 Article 6 (6) Damages Directive.
40 COM (2013) 404 final, 14.

of 'relevance'.[41] Disclosure is thus limited to 'specified items' by the court or 'relevant categories of evidence circumscribed as precisely and as narrowly as possible'.[42] The disclosure of evidence is limited to that which is proportionate, in particular taking into account the scope and cost of disclosure,[43] as well as concerns of confidentiality.[44] This is designed to reduce the risk of so-called 'fishing expeditions', all too familiar to common law jurisdictions.[45] The Directive makes it clear that the rules on disclosure of evidence are minimum harmonization rules.[46] As a matter of scope, the Directive only applies to court orders. As such, it is of little consequence to Member States with a common law tradition, where discovery takes place largely between the parties without the need for court orders.[47]

The Directive has been heralded as introducing on an EU-wide level a system similar to common law discovery.[48] Whilst the Commission's original proposal was even bolder, the final result was tempered in negotiations, particularly by the wariness of Member States to open up their systems of evidence to new rules.[49] Nevertheless, commentators in civil law jurisdictions have warned of a legislative 'overkill', arguing that such a wide-ranging regime of disclosure is not compatible with the continental legal tradition.[50] In fact, Wagner-von Papp has argued convincingly that in practice, both these hopes and fears are without foundation.[51] On the whole, courts in the past have proven resilient to legislative change. As such, where courts are given the freedom to exercise their discretion, they will tend to do so in line with their previous practice. Common law jurisdictions have tried but ultimately failed to limit costly discovery,[52] whilst civil law jurisdictions have attempted to entice courts to order more extensive disclosure, also to little or no avail.[53]

The Directive thus marks a fundamental break with the procedural traditions of European civil law systems. Its success in practice will depend

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41 Article 5 (1), (2) Damages Directive.
42 Article 5 (2) Damages Directive.
43 Article 5 (3) (b) Damages Directive.
44 Article 5 (3) (c) Damages Directive.
45 Ashton, *supra* n. 23, at 4.54.
46 Article 5 (8) Damages Directive.
47 Ashton, *supra* n. 23, at 4.56.
48 David Ashton & David Henry, *Competition Damages Actions in the EU: Law and Practice*, at 4.059 (2013).
49 Compare Ashton, *supra* n. 23, at 4.56, 4.57.
50 Compare e.g. Christian Steinle, *Kartellschadensersatzrichtlinie - Auf dem Weg zum Sanktionsoverkill?*, EuZW 481, 482 (2014).
51 Florian Wagner-von Papp, *Access to Evidence and Leniency Materials* 6 SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733973 (accessed 28 July 2020).
52 The US, e.g. has made various changes to Rule 26 FRCP since 1983: Cf. *Ibid*., at fn. 27.
53 Germany has sought to reform §§ 142, 144 ZPO in 2001/02; France has introduced Arts 11, 138–42 nouveau code de procédure civile: Cf. Wagner-von Papp, *supra* n. 51, at fn. 28.

as much on the willingness of judicial practice to evolve, as on the laws that implement it.

2.3[b] *Implementation in Germany*

The implementation in Germany exemplifies the challenges faced by civil law jurisdictions in introducing the foreign concept of disclosure into existing procedural rules. Discovery is a mostly unknown concept to the German legal order. The integration of this new regime into existing German law posed one of the greatest challenges in implementing the Damages Directive, forcing the German legislator onto virgin territory.[54] The resultant antitrust reforms are conceived as a solution to the fundamental problem of privately enforcing claims for antitrust damages.[55] The legislative intention is that the introduction of a kind of pre-trial discovery should incentivize out-of-court settlement and thereby avoid complex antitrust damages litigation.[56] This objective forms the heart of the German transposition.[57] However, the extent to which it will achieve these aims remains to be seen.

2.3[b][i] The Right to Disclosure

The disclosure regime envisaged by the Damages Directive is implemented into German law primarily by § 33g *Gesetz gegen Wettbewerbsbeschränkungen* (German Act against Restraints of Competition, '**GWB**'). This provision grants both parties a right to the disclosure of evidence from opposing and third parties,[58] as well as an additional right to information.[59] The majority of private enforcement claims take the form of follow-on damages, in which the competition law infringement has already been bindingly established by the national competition authority or the Commission.[60] As a consequence, requests for disclosure can be expected to be

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54 Andreas Rosenfeld & Peter-Andreas Brand, *Die neuen Offenlegungsregeln für Kartellschadensersatzansprüche nach der 9. GWB-Novelle*, WuW 247 (2017); Kay Pipoh, Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU) in das deutsche Recht, NZKart 226 (2016).

55 Klumpe & Thomas Thiede, *usus der Praxis*, NZKart 471 (2016).

56 RegE, BT-Drs. 18/10207, 62; Cf. also Christian Kersting & Nicola Preuß, *Umsetzung der Kartellschadensersatzrichtlinie durch die 9. GWB-Novelle*, WuW 394 (2016); Hellmann & Steinbrück, *supra* n. 25, at 164, 165 ff.; Rupprecht Podszun & Stefan Kreifels, *uskunftsanspruch? Anmerkungen zum geplanten § 33g GWB*, GWR 67, 69 (2017); Rosenfeld & Brand, *supra* n. 54, at 247, 248.

57 Pipoh, *supra* n. 54 at 226.

58 § 33g (1), (2) GWB.

59 § 33g (10) GWB.

60 Compare Matthijs Kuijpers, et al., *Actions for Damages in the Netherlands, the United Kingdom, and Germany*, 6(2) J. Eur. Competition L. & Prac. 1,1 (2015).

mostly in service of establishing quantum of damages (claimant) or a pass-on defence (defendant).[61]

In fact, § 33g GWB overshoots the requirements laid down in the Damages Directive. Whilst Article 5 (1) Damages Directive only requires Member States to ensure that national courts are able to order disclosure upon request of a party, § 33g GWB goes so far as to create an independent substantive and personal right to this effect for the relevant parties.[62] This will be applicable in all claims brought after 26 December 2016.[63]

2.3[b][ii] Restrictions on Disclosure

The provision also provides for certain exceptions. Disclosure will be excluded where on balance it would be disproportionate.[64] In particular, the protection of trade and business secrets and other confidential information is to be taken into account, having regard to the precautions in place for their protection.[65] If sufficient protective measures are not available, a disclosure may be disproportionate for this reason alone and therefore be excluded.[66] Also exempt are settlement and leniency applications as well as certain documents related thereto,[67] and documents related to ongoing competition authority proceedings.[68] Finally, persons may refuse disclosure where they would have a right of refusal to testify.[69] The provision also provides for substantive follow-on claims for costs and damages,[70] and contains a prohibition on the exploitation of evidence.[71]

2.3[b][iii] Procedure

Each party can exercise the substantive rights in § 33g GWB by way of action in court and, if need be, have them enforced judicially. This can either be done as a form of pre-trial discovery before bringing a claim for damages,[72] or it can be done

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61 Rosenfeld & Brand, *supra* n. 54, at 247, 252; Hellmann & Steinbrück, *supra* n. 25, at 164, 165.
62 Hellmann & Steinbrück, *supra* n. 25, at 164, 169; Kersting & Preuß, *supra* n. 56, at 394; Podszun & Kreifels, *supra* n. 56, at 67, 69; Rosenfeld & Brand, *supra* n. 54, at 247, 248.
63 § 186 (4) GWB.
64 § 33g (3) GWB.
65 § 33g (3) No. 6 GWB.
66 Compare Government Explanatory Memorandum, BT-Drs. 18/10207 at 64 f. (2016); Nicola Preuß, *Kartellschadensersatz: Beweismittel*, in Kersting/Podszun, Die 9. GWB-Novelle, at 60.
67 § 33g (4) GWB.
68 § 33g (5) GWB.
69 § 33g (6) GWB.
70 § 33g (7) – (8) GWB.
71 § 33g (9) GWB.
72 Kersting & Preuß, *supra* n. 56, at 394; Podszun & Kreifels, *supra* n. 56, at 67, 69.

in the course of proceedings.[73] These rights to information can also be claimed independent of proceedings for damages and will accordingly suspend the statutory limitation on any damages claims.[74] To enable this flexibility, the GWB introduces special provisions that supplement the general rules of the Code of Civil Procedure, thereby better integrating these otherwise unfamiliar rights into the German system of civil procedural law.[75]

Whether these measures prove effective will depend in large part on their interpretation and application by the German courts. Experience would suggest that this could take quite a while. The jurisprudence on the 2005 Amendment to the GWB has only recently begun to coalesce into a coherent body of case law,[76] and even now higher regional courts continue to diverge on fundamental issues.[77] The disclosure regime envisioned by the Directive and transposed into German law by way of the 9th Amendment to the GWB in 2016/17 constitutes a radical change to the German procedural system. Judges will need time to grapple with the problems it raises.

3 UNCERTAINTIES REGARDING THE CONDITIONS OF DISCLOSURE

Looking at the German disclosure regime in more detail, the provisions of the GWB seem to raise more questions than they answer. The contradictory evaluations of German commentators are a marker of the uncertainty surrounding the scope of this new right. For some it flaunts the fundamental systematics of German procedural law, for others it is perfectly compatible; there are those that deem it entirely proportionate, whilst others decry it as dangerously far-reaching.[78] This section will set the U.S. (**I**) and German (**II**) regimes alongside each other as a means of exploring uncertainties in the German implementation with regard to the conditions of disclosure before providing a critical comparison of the two systems (**III**).

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73 § 89b (1), (2) GWB in conjunction with § 142 ZPO.

74 Compare § 33h (6) No. 3 GWB.

75 Podszun & Kreifels, *supra* n. 56, at 67, 68.

76 Rosenfeld & Brand, *supra* n. 54, at 247, 252.

77 Compare e.g. the Higher Regional Courts of Karlsruhe (judgment of 9 Nov. 2016, 6 U 204/15 Kart (2) – Grauzementkartell) and Düsseldorf (judgment of 18 Feb. 2015, VI-U (Kart) 3/14, U (Kart) 3/14 – Zementkartell) on the question of barring old claims under § 33 (5) GWB.

78 Hellmann & Steinbrück, *supra* n. 25, at 164, 165 ff.; Thomas Lübbig & Roman Mallmann, *Offenlegung von Beweismitteln gemäß dem Kabinettsentwurf für das 9. GWB-Änderungsgesetz*, NZKart 518 (2016); Podszun & Kreifels *supra* n. 56, at 67, 70; Rosenfeld & Brand, *supra* n. 54, at 247, 252; Rother, NZKart 1 (2017); Daniela Seeliger & Dorothee de Crozals, *Zukunftsweisend: Die 9. GWB-Novelle*, ZRP 37, 38 (2017).

3.1 Requirements of disclosure specified under US (case) law

The scope of discovery in the US is immense. This is the consequence of the extremely broad definition of what is 'relevant' and therefore discoverable.[79] A matter will be relevant if it is 'reasonably calculated to lead to the discovery of admissible evidence'.[80] It does not need to be admissible in evidence itself.[81] In an attempt to reduce the undue burden of discovery on defendants, the Supreme Court has introduced a requirement that antitrust plaintiffs demonstrate more than mere speculation on the basis of circumstantial evidence. As such, a complaint must cross 'the line bewteen possibility and plausibility'.[82] A recital supported by 'mere conclusory statements' would be insufficient.[83]

Certain disclosures are required automatically without request by the other party. These are defined broadly as a copy of 'all documents, electronically stored information, and tangible things' that the disclosing party has 'in its possession, custody or control' and may use to support its claims or defences.[84] The definition of 'possession, custody or control' is equally generous. It extends to include materials in third-party possession to which a party has legal or indeed actual access.[85] It even covers materials in the possession of former employees of a party.[86]

3.2 Requirements of Disclosure mostly Unclear under German (Statutory) Law

As envisaged by Article 5 (1) of the Directive, the German implementation distinguishes between disclosure requests by the claimant and by the defendant.

3.2[a] *The Claimant's Right to Disclosure*

§ 33g (1) GWB requires the claimant to 'credibly demonstrate to the satisfaction of the court' that they have a claim for damages. The jurisprudence has yet to formulate a clear line on what this entails in practice. Amongst commentators the issue is equally unsettled, not for want of controversial discussion.[87]

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79 Rule 26 (b) (1) FRCP.
80 FRCP, Notes of Advisory Committee on Rules – 1970 Amendment.
81 Rule 26 (b) (1) FRCP.
82 *Bell Atlantic Corp v. Twombly*, 550 US 544 (2007).
83 *Ashcroft v. Iqbal*, 556 US 662 (2009).
84 Rule 26 (a) (1) (A) FRCP.
85 *Bank of New York v. Meridien Biao Bank Tanzania Ltd.*, 171 F.R.D. 135, 146–47 (S.D.N.Y. 1997); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 236 F.R.D. 177 (S.D.N.Y. 2006).
86 Susan J. Becker, *Discovery from Current and Former Employees* 184 ff. (2005).
87 Compare e.g. Albrecht Bach & Christoph Wolf, *Neue Instrumente im Kartellschadensersatzrecht – Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung*, NZKart 285, 288 (2017); Hellmann &

Reading § 33g (1) GWB in light of Article 5 (1) Damages Directive, the claimant would have to provide 'a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'. At this point, the provision threatens to collapse into a Catch-22. The very reason for the existence of a right to disclosure is to address informational asymmetry – the problem that the reasonably avaible facts are insufficient to support a claim. If too high a threshold is set for establishing the 'plausibility' of a damages claim on the available evidence, the right to disclosure will be dead in the water.

It is difficult to predict how courts will decide in practice. On the current understanding of the phrase 'credibly demonstrate' under Germarn law, it would be sufficient if the claimant can make out a right on the basis of their claimed but unsubstantiated facts (a so-called *Schlüssigkeitsprüfung*).[88] However, the case law on the requirement for a conclusive submission based on 'concrete facts' in the context of § 242 BGB might suggest a different approach.[89] In these cases, courts have tended to adopt a relatively high threshold. [90] How courts tackle this question will be decisive in determining the practical efficacy of the claimant's right to disclosure under § 33g (1) GWB.

The wording of § 33g (1) GWB creates further uncertainty by requiring the claimant to specify the item to which she seeks access 'as precisely as possible on the basis of the reasonably available facts'. This formulation implements Article 5 (2) Damages Directive, which seeks to reduce the risk of overly broad discovery and fishing expeditions.[91] How German courts will apply this in practice, once again, remains uncertain, in particular given the lack of judicial experience in this regard. On the whole, commentators would seem to accept fairly broad and unspecific requests as meeting the requirement.[92] Whether courts will adopt this approach remains to be seen. What is certain is that it will take years before the German Regional and Higher Regional Courts have developed a consistent line of case law.[93]

Steinbrück, *supra* n. 250, at 164, 169 ff.; Gerhard Klumpe & Thomas Thiede, *Keeping the Floodgates Shut – Kartellschadensersatz nach der 9. GWB-Novelle*, NZKart 332, 336 (2017); Gerhard Klumpe & Thomas Thiede, *us Sicht der Praxis*, BB 3011, 3014 (2016); Klumpe & Thiede, *supra* n. 55; Podszun & Kreifels, *supra* n. 56, at 67, 71; Rosenfeld & Brand, *supra* n. 54, at 247, 248.

88 Hellmann & Steinbrück, *supra* n. 25, at 164, 169 ff.

89 Compare BGH, judgment of 26 June 2007, XI ZR 277/05; Jörn Fritsche, MüKo-ZPO, § 144, at 2 (2020); Zöller-*Greger*, ZPO, § 142, at 6 ff.; Ollerdißen, *supra* n. 30 at at 105.

90 Hellmann & Steinbrück, *supra* n. 25 at 167 .

91 Ashton, *supra* n. 23, at 4.54.

92 Bach & Wolf, *supra* n. 87.

93 Lübbig & Mallmann, *supra* n. 78, at 518, 519.

3.2[b] *The Defendant's Right to Disclosure*

§ 33g (2) GWB gives the party against whom competition damages are pending the right to require the surrender of any evidence necessary to defend against the claim from whoever is in possession of such evidence, provided they specify the item as precisely as possible on the basis of reasonably available facts. This provision serves the equality of arms and gains real practical significance for cartel members in the context of establishing a passing-on defence.[94] A satisfactory test for necessity has yet to be established by the courts. However, early indications would suggest that courts will find necessity where the disclosure of evidence is suited to the defence and no other evidence is available to the defendant.[95] Where the conditions for a passing-on defence are not met prima facie, for example, because there is not a relevant competitive downstream market, disclosure might not be necessary at all.[96] The provision only grants cartel members a pure means of defence, a shield to be used in defending a damages action, while it does not furnish them with a right to pre-trial disclosure.[97] In this regard, § 33g (2) GWB does not ensure full equality of arms, as the claimant can already invoke § 33g (1) GWB in the pre-trial phase. As far as the requirement of specifying items of evidence is concerned, the same considerations and problems apply as discussed above with regard to § 33g (1) GWB.

3.3 Comparison: Getting the Cards on the Table?

The central point of comparison strikes at the heart of any regime of access to evidence: how good are the rules at getting all the cards on the table? There are a number of differences to flag up here between US discovery and § 33g GWB.

The first central difference is that under US law disclosure is the rule, whilst under § 33g GWB it remains the exception. A US litigant is obliged to disclose evidence without request. A German litigant is only obliged to disclose evidence if their opponent requests it and a court of law grants the request by way of a formal decision, the same way a court would decide on a damages claim properly. This immediately places a procedural hurdle between German litigants and the evidence they seek to access, as they must actively claim it in court.

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94 Tilmann Makatsch & Babette Kacholdt, MüKo-GWB, GWB, § 33g at 44 (2020).
95 LG Hannover, 18 O 8/17, BeckRS 2017, at 78.
96 LG Hannover, 18 O 8/17, BeckRS 2017, at 81; cf also Alex Petrasincu & Boris Rigot, *Erstes Urteil in Sachen LKW-Kartell*, WuW 126, 128 (2018).
97 Joachim Bornkamm & Jan. Tolkmitt, Langen/Bunte-Kartellrecht, § 33 g, at 15; Gerald Mäsch, Berg/Mäsch-Kartellrecht, § 33g GWB at 16 (2018).

Arising out of this is a second difference. Since disclosure in Germany is construed as a right to particular documents, § 33g GWB imposes a requirement of specificity on the request for documents. By contrast, in the US each party is obliged to disclose anything that could reasonably lead to the discovery of material that would be admissible as evidence. This demonstrates the fundamental difference between the two systems. The US practice of party-led pre-trial discovery is designed to get as much out in the open as possible. In terms of providing maximum access to evidence, this is clearly more effective than § 33g GWB – though it creates other problems, as we will see.

Finally, the standards for discoverability vary. German law requires a litigant to establish that their entire claim for damages is credible, whilst a US litigant seeking access to documents need only establish that the materials themselves are relevant under fairly broad conditions. Even though the US standard of relevance has been circumscribed by a plausibility test, it remains much broader than the plausible claim test under § 33g (1) GWB.

On balance, US discovery is much more efficient at getting as much potential evidence on the table as possible. By contrast, the German right to disclosure places many more hurdles in the way of a litigant and a potentially relevant document. This could be a problem when it comes to ensuring the best possible access to damages for cartel victims and hence pose a threat to the effectiveness of private enforcement.

4 UNCERTAINTIES REGARDING THE COSTS OF DISCLOSURE

In addition to the legal requirements for disclosure, the associated costs are of major relevance in practice.

4.1 Immense Cost Risk for Defendants under US Discovery

The costs of US discovery can run to eyewatering sums.[98] Examples range from USD 432,219.16 for scanning 3,085,994 pages at 14¢ per page,[99] to a staggering USD 6.2 million to restore and print emails from 93 backup tapes.[100] Both the Supreme Court and the committee overseeing civil procedure rules have urged judicial oversight and restraint.[101] The Supreme Court has itself repeatedly sought to curb excessive fishing

[98] Compare Survey by the US Federal Justice Centre, cited in International Bar Association, EU Private Litigation Discovery Paper, Released 23 Sept. 2008, https://www.ibanet.org/Search/Search.aspx?query=discovery (accessed 09 Oct.19).

[99] *In re Bristol-Meyers Squibb Sec. Litig.*, 205 F.R.D. 437 (D.N.J. 2002).

[100] *Murphy Oil USA v. Fluor Daniel, Inc.*, 2002 WL 246439 (E.D. La.).

[101] *Crawford-El v. Bratton*, 523 US 574, 598 (1998) (Stevens, J.); Advisory Committee Note to the 2000 Amendments to Rule 26(b), 192 F.R.D, at 390.

expeditions, but with little success.[102] This is particularly dangerous for defendants, who bear the costs of disclosure. Claimants can exploit this to their advantage, as defendants will often prefer to settle, rather than risk the potentially huge costs of discovery.

4.2 Burden of (Reasonable) Costs on Claimants in Germany

§ 33g (7) GWB stipulates that the disclosing party can claim reimbursement of any disclosure costs that it 'may reasonably consider necessary'. This places the financial burden of disclosure squarely on the shoulders of the claimant. This is not required under the Damages Directive and met with strong criticism in Germany.[103] In particular, a successful claimant should not have to bear the costs of an unsuccessful defendant,[104] especially given the 'loser pays all' rule in German procedural law.[105] It remains disputed, whether the disclosing party can request payment in advance of disclosure, or maybe even has a right to withhold disclosure until payment has been made.[106] This is a key issue in practice. If the costs of disclosure prove prohibitively high, claimants may simply not make use of the provision. This would defeat the point of the Directive.

4.3 Comparison: A critical Element of Reasonableness

As far as costs are concerned, the US provides a striking warning for European practice, flagging up perhaps the most persistant and problematic pitfall of discovery. It is difficult to strike the right balance in this regard, and the issue remains difficult in both the US and Germany. It is telling that the Directive itself is silent on the question. Whether the US approach of placing the full burden on the defendant is the right one is debatable. The risks of abuse are clear. Nevertheless, it seems equally counterproductive to place the burden entirely on the party seeking disclosure. If the Directive and the GWB are supposed to relieve information asymmetries by making access to documents easier, costs surely put up a significant hurdle that could deter litigants.

It is imperative to avoid the abuses arising under the US system. A possible solution might be to distinguish between the type of claim. In claims for follow-on damages, where the illegal conduct of the undertaking has been conclusively and bindingly established by a competition authority, a compelling public policy argument might be

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[102] *Hickman v. Taylor*, 329 US 495 (1947); *Hansen v. Neumueller GmbH*, 163 F.R.D. 471 (D. Delaware 5 Oct. 1995); *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3rd Cir. 2004).

[103] Compare Alex Petrasincu, *Kartellschadensersatz nach dem Referentenentwurf der 9. GWB-Novelle*, WuW 330, 333 (2016).

[104] Bach & Wolf, *supra* n. 87, at 285, 291.

[105] § 91 (1) ZPO.

[106] Compare Bach & Wolf, *supra* n. 87, at 285, 291; Lilly Fiedler & us Niermann, *Neue Regeln zur Offenlegung von Beweismitteln: Wer zahlt die Zeche für die Kosten der Disclosure?*, NZKart 497, 498–501 (2017); Klumpe & Thiede, *supra* n. 87 at 3015–3016.

made that defendants should bear the (reasonable) costs of discovery. In any case, the German legislator's approach of implementing an element of 'reasonableness' of costs may make sense, as long as practitioners keep in mind and make sure that its application may under no circumstances make private enforcement inefficient.

5 UNCERTAINTIES REGARDING THE PROTECTIONS AGAINST DISCLOSURE

A further key uncertainty arises under § 33g GWB with regard to the protections against and the limitations of disclosure. One aspect of particular importance in this regard is attorney-client privilege. The stakes are high for lawyer-client communications in the context of antitrust law. It doesn't take a great deal of creativity to imagine lawyer-client communications containing incriminating information, possibly even clear-cut summaries of the facts supporting the allegedly anti-competitive behaviour in question.[107] Preventing access to these materials can determine the outcome of a case. As a comparison with the US will show, the narrow scope of protection for attorney-client privilege in German antitrust proceedings is cause for concern.

5.1 Powerful Protections in the US

The US regime is only able to sustain its wide-reaching powers of discovery through equally powerful protective rights afforded to lawyers and clients alike.

5.1[a] *Attorney-Client Privilege*

Under US law, a party may withhold information that is otherwise discoverable by claiming that it is privileged.[108] Attorney-client privilege is one of the oldest recognized privileges for confidential communications in the US[109] At its heart, attorney-client privilege seeks to guarantee that a client can communicate fully and frankly with their counsel.[110] In service of this fundamental right, courts have been cautious when limiting its scope.[111] As such, the crime-fraud exception only applies where the communications between client and attorney are 'in furtherance

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[107] Marion Schmid-Drüner, *Legal professional privilege after Akzo – case closed?*, Bucerius L. J. 25 (2011).
[108] Rule 26 (b) (5) (A) FRCP.
[109] *Swidler & Berlin v. United States*, 524 US 399, 403 (1998); *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U. S. 464, 470 (1888).
[110] *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) citing *Upjohn Co. v. United States*, 449 US 383, 389 (1981).
[111] Compare *Swidler & Berlin v. United States*, 524 US 399 (1998).

of' criminal activity.[112] Attorney-client privilege offers absolute protection and will not be overcome by arguments of necessity or undue burden. It thus represents a powerful defence against the probing inquiries of discovery.

The privilege applies to all communications relating to facts communicated between a client and their lawyer acting in their capacity as such for the purpose of seeking legal counsel. The privilege must have been claimed and not waived by the client.[113] It should be noted that only the specific communication containing the facts is privileged, not necessarily the underlying facts themselves.[114]

5.1[b] *Work-Product Doctrine*

In addition to attorney-client privilege, legal advice is protected by the work-product doctrine. This holds that any tangible material or its intangible equivalent obtained or produced by or for counsel in anticipation of litigation may be protected from discovery.[115] In scope, the work-product doctrine goes further than professional privilege, as it is not limited to communications between attorney and client. It also includes materials prepared by agents other than the attorney for the attorney.[116] In particular, work-product protection does not depend on an expectation of confidentiality and can protect materials other than communications, such as documents prepared by the lawyer that would not fall within attorney-client privilege.[117] In effect, however, the work-product doctrine remains weaker than attorney-client privilege. As the Supreme Court clarified, the work-product doctrine is not an absolute right, but a rebuttal presumption.[118] It can thus be overcome by an argument of 'substantial need' or 'undue hardship'.[119]

5.2 Limited German Attorney-client Privilege

Attorney-client privilege in Germany is traditionally very narrow. The implementation of the Damages Directive in Germany has done nothing to change this.

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[112] *In re Grand Jury Proceedings*, 87 F.3d 377 (1996); *In re Sealed Case*, 754 F.2d 395, 399 (D.C.Cir.1985); *In re Int'l Systems and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir.1982); *In re Murphy*, 560 F.2d 326, 338 (8th Cir.1977).

[113] *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 US 951, 83 S. Ct. 505 (1963); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950).

[114] *Upjohn Co. v. United States*, 449 US 383, 394 (1981).

[115] *Hickman v. Taylor*, 329 US 495 (1947); *United States v. Nobles*, 422 US 225 (1975).

[116] *United States v. Fort*, 472 F.3d 1106, 1116 (9th Cir. 2007).

[117] *Gen. Elec. Co. v. Johnson*, No. CIV.A.002855(JDB), 2006 WL 2616187 (D.D.C. 12 Sept. 2006) at [17].

[118] *Hickman v. Taylor*, 329 US 495 (1947).

[119] Rule 26 (b) (3) FRCP.

5.2[a] *§ 33g (6) GWB*

The GWB does not extend the protection of attorney-client privilege beyond that offered under existing German law. As such, § 33g (6) GWB merely grants persons the right to refuse to hand over evidence in those cases where they would be entitled to refuse to testify in civil proceedings. As far as the attorney-client relationship is concerned, this does not extend beyond the lawyer's right of refusal to testify under civil procedural law.[120] This right is fairly narrow, in line with the traditional rationale of attorney-client privilege in Germany as protecting the lawyer's duty of confidentiality. As such, it serves only to safeguard the special professional status of lawyers, rather than the broader interests of the client.[121] As a right its personal scope is limited to the lawyer and can only be exercised in the context of testimony. It cannot assist a defendant giving testimony, much less protect against pre-trial disclosure.

Absent a general regime of discovery, German civil procedure does not have a concomitant general rule of privilege beyond this limited right of refusal to testify. In addition to limited rights of refusal based on specific considerations, such as for example trade secrets,[122] there exists only a general accessory right to information arising under § 242 BGB out of general considerations of good faith which is in turn limitated accordingly by a general balancing of competing interests.[123] The German government seems to assume that this jurisprudence is also applicable to § 33g GWB.[124] How this would work in practice, however, is not clear. Indeed, it has been suggested that the fundamental principle of German procedural law – that parties only bring forward the evidence relevant to their position – could be fundamentally at odds with the cut and thrust logic of US discovery and privilege.[125] This is an important point, raising the broader question whether civil law conceptions of privilege are even sufficient to protect against common law style disclosure obligations – an issue that we discuss in depth elsewhere.[126]

The significance of § 33g (6) GWB in practice will likely be rather limited. It only affords the right to such persons as are in possession of the relevant evidentiary materials (*der Besitzer*). As such, on a strict reading it will only apply where disclosure is being requested from a lawyer in possession of the materials in

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120 § 383 (1) No. 6 ZPO.

121 Michael Huber, usielak/Voit-ZPO, § 383, at 1 (2020); Jürgen Damrau, MüKo-ZPO, § 383, at 2 (2016); Oliver Siebert, Saenger-ZPO, § 383, at 1 (2019).

122 §§ 809, 810 BGB; us Gehrlein, BeckOK-BGB, § 809 Rn. 5; § 810 Rn. 5 (2020).

123 Compare *Dirk Büch,uskunftsanspruch*, in Teplitzky Wettbewerbsrechtliche Ansprüche und Verfahren, at 21 ff. (2019).

124 Government Explanatory Memorandum, BT-Drs. 18/10207 at 63 (2016).

125 Compare Peter-Andreas Brand, *Grenzen zivilprozessualer Wahrheit und Gerechtigkeit*, NJW 3558 (2017).

126 Andreas Ruster & Sebastian von Massow, In for a Penny, in for a Pound: Legal Professional Privilege as a Shield Against Disclosure in Private Antitrust Litigation in Europe, 11 JECLAP 22 (2020).

question. The obvious problem here is that the client will most likely be in possession of copies of the same documents. When the client is asked to hand over such documents, § 33g (6) GWB can do nothing to help her. Though some have sought to extend the provision to undertakings, these readings fail to convince.[127] Not only is the wording of the provision clear. The explicit reference to the professional right of refusal ties the right specifically to the lawyer's duty of confidentiality.[128] In practice, the provision will thus be of no assisstance in the far more common scenario that a party to the dispute is ordered to disclose material in its own possession, for example advice prepared by lawyers.

One might reasonably ask whether this constitutes a sufficient implementation of the Directive. On balance, despite the narrow protection afforded, it would seem that it does. The Directive does not require a privilege that goes further than existing national rules. Merely that legal professional privilege applicable under Union or national law is given 'full effect'.[129] Legal professional privilege in Germany is construed traditionally as a right of the lawyer to safeguard her duty of confidentiality. § 33g (6) GWB does not fall short of this rationale, offering no less protection than the civil and criminal procedural rules already in place.

5.2[b] *Burden of the Courts*

A practical problem closely related to the attorney-client privilege is the treatment of exceptions. § 33g (3) GWB obliges the court to exclude disclosure where this would be disproportionate, having regard inter alia to scope, costs, and trade secrets. Equally, a party may seek to rely on confidentiality under § 33g (6) GWB when called upon to disclose large swathes of internal and possibly sensitive documentation. These provisions oblige courts to weigh up the competing interests and make a decision on each individual document. In the context of commercial antitrust litigation, where the documents can run to the hundreds of thousands, even millions, there is a serious risk that courts will be completely overburdened by these decisions. This alone could further impact the efficacy of a system that alreay provides insufficient protections. So far, Germany has not implemented a practical system to relieve judges in this regard. It remains to be seen, if and how the German judiciary will cope.

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127 Compare Bach & Wolf, *supra* n. 87, at 285, 290 ff.
128 Compare § 43a (2) *Bundesrechtsanwaltsordnung* (German Lawyers Act).
129 Article 5 (6) Damages Directive.

5.3 Comparison: Striking the Balance?

A key question that arises when analysing these provisions is whether the right balance has been struck when implementing the Damages Directive into German law. Generally, the US system places an effective sword (pre-trial discovery) in the hands of cartel victims while arming cartel members with a broad shield (client-attorney privilege and work-product doctrine). Historically, German law has been more hesitant on both sides, hence striking a different, but equally reasoned balance. However, the Damages Directive has forced German legislation to strengthen the sword by introducing a disclosure regime. One might wonder whether the shield might not need to be strengthened accordingly, especially since European case law might indeed allow for a uniform EU legal privilege.[130]

A second key difference visible from a comparison of the US and German regimes is the burden placed on courts by having to evaluate defences such as attorney-client privilege from potentially millions of documents. Under the German system, each document must be assessed individually by the court itself. US law provides relief in the form of so-called 'special masters'. These are authorized to make decisions on behalf of the court on issues such as confidentiality or the intervention of attorney-client privilege.[131] It is submitted that German courts might need to implement a similar system in order to avoid being overburdened by the new regime and thereby jeopardizing the efficacy of disclosure. Indeed, the German legislator has already shown a willingness to institute a comparable procedure in the context of procedural safeguards under § 89b (7) GWB designed to protect trade secrets and other confidential information.[132] The Federal Ministry of Economics and Energy has proposed that the court should be able to commission a publicly appointed expert to provide a specialist opinion on the necessary scope of the requisite protection.[133] The rationale behind this amendment is to relieve the courts of some of the burden associated with evaluating and redacting documents for trade secrets.[134] This would seem to indicate an awareness of the practical problems facing German courts in applying the GWB and may even herald an imminent change in the context of § 33g GWB.

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[130] Andreas Ruster & Sebastian von Massow, *In for a Penny, in for a Pound: Legal Professional Privilege as a Shield Against Disclosure in Private Antitrust Litigation in Europe*, 11 JECLAP 22 (2020).

[131] Anreas Ruster, *Zugang zu Informationen*, in Stancke,Weidenbach & Lahme (eds), Kartellrechtliche Schadensersatzklagen at 445 (2017).

[132] Compare Max-Niklas Blome & Alexander Fritzsche, *Der Schutz von Geschäftsgeheimnissen im Kartellschadensersatzprozess*, NZKart 247, 248 (2019).

[133] Federal Ministry of Economics and Energie, *Proposal for a Tenth Amendment to the Act Against Restraints of Compeition Towards a Focussed, Proactive, and Digital Competition Law 4.0*, https://www.d-kart.de/wp-content/uploads/2019/10/GWB-Digitalisierungsgesetz-Fassung-Ressortabstimmung.pdf (accessed 28 July 2020).

[134] *Ibid.*, at 150.

6 UNCERTAINTIES REGARDING THE CONSEQUENCES OF A BREACH

The final category of uncertainties under § 33g GWB concerns the consequences of a breach of the disclosure obligation. Sanctions imposed for withholding evidence are a key element in enforcing effective disclosure. According to the Damages Directive, national legislators must equip courts with 'effective, proportionate and dissuasive' sanctions against inter alia the breach of disclosure orders and the destruction of relevant evidence.[135] Indeed, the European legislator went so far as to stipulate expressly that the penalties available to national courts shall include the possibility to draw adverse inferences, such as presuming the relevant question of fact to be proven, dismissing claims and defences in whole or in part, or ordering payment of costs.[136] Whether § 33g GWB will act as an effective deterrent is highly questionable. This section will first consider the severe conequences of a breach under US law (**I**), before turning to the relatively weak consequences in Germany (**II**) as a means of drawing instructive comparisons for the implenetation of the Damages Directive (**III**).

6.1 Severe Consequences of a Breach in the US

The US provides a striking and instructive counterpoint in this regard. The consequences of breaching the rules of discovery can be grave. If a party fails to disclose or supplement information, it will be precluded from using that information to supply evidence on a motion, at a hearing, or at trial – unless the failure was substantially justified or is harmless.[137] This preclusion is automatic and does not require conferral.[138] If a motion to compel disclosure is granted, the court may require the uncooperative party to pay the requesting party's 'reasonable expenses' in bringing the motion.[139] If a party fails to obey an order to provide discovery, the court may take certain facts as established for the purposes of the action; more drastic still, the court may strike pleadings, enter default judgments, or even dismiss the action in its entirety.[140] In practice, the consequences of a breach can be enormous. Consider the plaintiff whose award of $ 400 million in damages was overturned when the Federal Circuit Court of Appeal held that documents destroyed by the plaintiff in fact fell within their disclosure obligations.[141] It should

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135 Article 8 (1)(a) and (b), (2) Damages Directive.
136 Article 8 (2) Damages Directive.
137 Rule 37 (c) (1) FRCP.
138 *Fulmore v. Home Depot*, U.S.A., Inc., 423 F. Supp. 2d 861, 871–72 (S.D. Ind. 2006).
139 Rule 37 (a) (5) (A) FRCP.
140 Rule 37 (b) (2) (A) FRCP.
141 *Hynix Semiconductor Inc GmbH v. Rambus Inc.*, 645 F. 3d 1336 (2011).

also be noted that sanctions are not limited to the disobeying party and can even extend to their legal counsel.[142]

These consequences are compounded by the so-called 'litigation hold' obligation. Courts have consistently held that companies are obliged to retain documents for the purposes of a potential discovery process as soon as a lawsuit becomes reasonably foreseeable. Courts have been strict in this regard. As such, a broad range of situations can trigger this obligation: discussions at management level about a complaint that could lead to legal proceedings;[143] the notification of an accident;[144] the return by the plaintiff of medicines that had been wrongly prescribed by the defendant;[145] the plaintiff's severe fall in a department store;[146] the fact that the plaintiff put forward its patent infringement position to the defendant.[147] In effect, this greatly broadens the scope of situations in which sanctions can be applied.

6.2 Weak Consequences in Germany

The sanctions under § 33g GWB would seem to fall far short of this and their efficacy as a deterrent remains unclear. The only explicit sanction is the provision for damages found in § 33g (8) GWB (**1**). All that remains beyond that are the general principles under German law concerning the obstruction of evidence (**2**). Neither promises to be particularly 'effective' or 'dissuasive' in practice.

6.2[a] *Liability for Damages under § 33g (8) GWB*

Under § 33g (8) GWB, the receiving party can claim damages if the disclosing party provides materials that are false or incomplete, or omits materials entirely. The disclosing party has to have acted with intent or gross negligence. The threat of damages is supposed to deter the obstruction of evidence and compel parties to comply with their disclosure obligations.[148] In practice, however, this sanction is completely toothless. The provision falls short in one key respect. Various commentators have pointed out that the provision puts the claimant in the impossible position of having to prove the damages incurred by non-disclosure through reference to the very information that the defendant refused to disclose in the

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142 Compare Adam M. Josephs, *The Availability of Discovery Sanctions for Violations of Protective Orders*, 80 U. Chi. L. Rev. 1355, 1356 (2013).
143 *Doe v. Norwalk Community College*, 248 F.R.D. 372, 377 (D. Conn. 2007).
144 *McCabe v. Wal-Mart Stores, Inc.*, 2016 WL 706191, at 2 (D. Nev. 22 Feb. 2016).
145 *Burton v. Walgreen Co.*, 2015 WL 4228854, at 3 (D. Nev. 10 July 2015) .
146 *Waters v. Kohl's Dep't Stores, Inc.,* 2015 WL 1519657, at 3 (N.D. Cal. 2 Apr. 2015).
147 *Apple Inc. v. Samsung Elec. Co., Ltd.,* 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012).
148 Compare Government Explanatory Memorandum, BT-Drs. 18/10207 at 65 (2016).

first place.[149] This is hardly sensible. As a deterrent in practice, § 33g (8) GWB is all bark and no bite.

6.2[b] *Applying the Principles on the Obstruction of Evidence*

In light of the patent shortcomings of § 33g (8) GWB, many commentators have turned to consider an application of the general principles on the obstruction of evidence.[150] Under German law, an obstruction of evidence will be made out where the disclosing party withholds or destroys evidence willingly or negligently with the intention of vitiating the evidentiary funtion of the material and thereby objectively rendering it difficult or impossible to establish the facts.[151] The consequences of an obstruction of evidence are heavily disputed by commentators.[152] In practice, however, the current jurisprudence of the *Bundesgerichtshof* (German Federal Supreme Court) leaves it to the discretion of the trying judge, foreseeing at most a reversal of the burden of proof.[153]

An application of these general principles to antitrust litigation is unproblematic. § 33g (8) GWB cannot be read as precluding the application of additional sanctions. In light of the overarching aims of § 33g GWB and the Damages Directive, the German legislator cannot have intended to deprive claimants of a further means of enforcing disclosure.[154]

Whether these principles would actually help a claimant is less clear. If, for example, the defendant were to destroy documentation required by the claimant to establish the cartel mark-up, a reversal of the burden of proof would be of little assistance. In general, German jurisprudence does not recognize a typical cartel premium – this must be established on a case-by-case basis.[155] As such, claimaints will generally be unable to provide a rough estimate of their damages. Without the necessary evidence for claimants to make even a vague submission, defendants will have nothing to refute.[156] Reversing the burden of proof in these circumstances clearly has no detrimental effect for the defendant. Galle and Popot-Müller have argued for a recourse to criminal liability for the suppression of documents.[157]

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[149] René Galle & Friederike Popot-Müller, *usgabepflicht nach § 33g GWB*, NZKart 317, 318 (2019); Klumpe & Thiede, *supra* n. 87 at 337; Rosenfeld & Brand, *supra* n. 54, at 247, 248; Mäsch, *supra* n. 97 at 38.

[150] Compare e.g. Ruster, *supra* n. 131 at 432; Preuß, *supra* n. 66 at [72]; Klumpe & Thiede, *supra* n. 87 at 3016.

[151] MüKo-ZPO, § 286, at 82 ff. (2020).

[152] Compare in detail Hanns Prütting, MüKo-ZPO, § 286 at 85–89 (2020).

[153] BGH judgment of 11 June 1952, II ZR 277/51; Galle & Popot-Müller, *supra* n. 149 at 318.

[154] Galle & Popot-Müller, *supra* n. 149.

[155] Compare René Galle, *Der Anscheinsbeweis in Schadensersatzfolgeklagen – Stand und Perspektiven*, NZKart 214, 219 (2016) .

[156] Galle & Popot-Müller, *supra* n. 149, at 317, 319.

[157] § 247 StGB (German Criminal Code); *Ibid*.

Whether this will be adopted is unclear and seems rather unlikely. It is ultimately for the German legislator to take action and remedy the obvious shortcomings of § 33g (8) GWB.

6.3 Comparison: Can German Disclosure be more than a Paper Tiger?

The question of sanctions presents perhaps the clearest case where Germany could take a leaf from the American playbook. The differences are drastic and, all importantly, so too are the resulting deterrent effects. As they stand, the German sanctions are toothless. Their efficacy as a serious deterrent is almost nonexistent. By contrast, the US regime attaches serious legal and financial consequences to an obstruction of evidence. Taken together with the stringent litigation hold obligation, US litigants are made to feel the sting of failing to meet their document retention and disclosure obligations. For a regime that ultimately seeks to adress problems of information asymmetry, the importance of this can hardly be overstated.

In reality, the current German law leaves little room for US influence to take hold. The provision in § 33g (8) GWB is conceived explicitly as a claim for damages and therefore has little to do with the measures available under US law. Meanwhile the general rules on obstruction of evidence in Germany as applied by the Federal Supreme Court leave little scope for expansion either. In this regard, the US example could be put to service in making an argument for a broader catalogue of consequences under the existing general rules – at least in the context of antitrust damages proceedings. In particular, the view put forward that an obstruction of evidence should result in the court assuming facts as proven to the detriment of the obstructing party and placing the burden on the obstructing party to disprove the assumption.[158] Ultimately, the German legislator would need to take action to remedy this shortcoming.

7 CONCLUSIONS

This contribution has sought to provide a critical overview of Germany's implementation of the Damages Directive as a means of flagging up some of the practical uncertainties arising with regard to the disclosure of evidence. By investigating this novel regime through the lens of US discovery, our goal was to highlight certain weaknesses and perhaps propose some possible solutions for the future.

First, concerning the scope of discovery. The example of a broad US discovery operating on a generous test of 'relevance' illuminates the extent to which

[158] Rolf Stürner, *Die Aufklärungspflicht der Parteien des Zivilprozesses* 242 ff. (1976).

the conditions in Germany are not clear enough. The scope of US discovery is by no means the answer – but at least litigants know what they are letting themselves in for. The same cannot be said for disclosure under § 33g GWB. It is ultimately up to judges to provide clarity on this issue. The requirement of 'specificity' under the Directive and the GWB can prove an effective counter to the risk of fishing expeditions so common in US discovery. Courts should, however, be careful not to be overly restrictive in this regard.

Second, a comparison with the US has shown the practical risks of abuse with regard to excessive costs of discovery. The German solution in § 33g (7) GWB is effective in avoiding this problem, however in doing so it creates a new one: it would run counter to the aims of the Directive if the cost of disclosure deterred prospective claimants. This rule requires calibrating.

Third, the protections against disclosure afforded by attorney-client privilege in Germany pale by comparison to the strong shield of US attorney-client privilege. This is not an issue in general – but it might become problematic in the specific context of antitrust damages. The traditionally broad discovery regime in the US requires a powerful counterbalance in the form of attorney-client privilege. Historically this has not been the case in Germany. However, the introduction of a novel disclosure regime through the Damages Directive might arguably have upset the balance in Germany. In terms of the practical application of the attorney-client privilege and various other protections in place, the US use of special masters could set an example for a German legislator already looking for ways to relieve the burden on courts.

Fourth, as far as the consequences of a breach are concerned, the US provides a strong example of how to maintain compliance with the rules of disclosure. The German solution in § 33g (8) GWB is useless compared to the stringent consequences of violations under US law. If sanctions are to act as an effective deterrent, as provided for under the Directive, the German legislator might look to the US for inspiration.

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