

Disclosure in Antitrust Damages Actions in Europe

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Universität Wien & The European Circle for Competition Damages

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About GQL Attorneys-at-Law PartmbB

- Highly specialized boutique law firm exclusively for damaged parties of competition law infringements
- Clients have engaged us regarding the firetruck, rail way, sugar, and pesticides cartel (DE) as well as GIS, cable, and trucks cartel (EU)
- We have litigated benchmark cases, e.g. German Federal Court in trucks
- We have an established and reliable network with litigation funders
- Our membership in the European Circle for Competition Damages allows us to advise in transnational cases in cooperation with leading experts and lawyers of competition law

Status quo of disclosure in DE

- 1. Thesis: Disclosure remains a toothless tiger
 - ✓ Costs, duration, necessity
- 2. Thesis: The FCO is hindering private enforcement
 - ✓ If private enforcement is necessary to achieve the objectives of full compliance with Art. 101 and Art. 102 TFEU, the German FCO is a barrier
- 3. Thesis: The Damage Directive has (not yet) changed things for the better
 - ✓ ARC Legislation even went further, but in practice no improvement for claimants

1. Thesis A toothless Tiger

- In Art. 101 TFEU/ Sec. 1 ARC cases regularly no access to docs from the fines procedure or docs from the defendants and interveners
- In Art. 102 TFEU/ Sec. 18 ff. ARC a secondary burden of proof for the defendant can lead to access to docs (stand-alone cases)
- Access to file of the FCO highly restricted; at most, a generously blackened version of the fines decision is made available
- A claimants' lawyer assessment:
 - ✓ As long as the courts support claimants in substantiating their claims by lowering the burden of proof (prima facie, presumptions, secondary burden of proof for defendants), further disclosure is nice to have but not a *conditio sine qua non* in most cases

2. Thesis The FCO in the way...

- ...of effective private enforcement as an indispensable addition to public enforcement
- No non-confidential fines decision published in Art. 101 TFEU/ Sec. 1 ARC cases (after 2009)
 - ✓ Access to file can take years as defendants prolong the procedure and file claims
 - ✓ No other information from the file is made available
 - ✓ Access is restricted and exclusive to the individual applicant – what about bundled claims?
- Same for Art. 102 TFEU/ Sec. 18 ff. ARC decisions after 2009
- Loophole of Freedom of Information Act has been closed by legislator in 2021 (for administrative proceedings)



3. Thesis No change for the better