

Access to evidence: experiences from the Netherlands

Disclosure in Antitrust Damages Actions in Europe
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General provision for access to evidence (art. 843a DCCP)

- Requirements for claiming access to evidence:
 - Legitimate interest
 - Sufficiently specified (set of) documents or electronic data
 - Regarding a legal relationship between the parties
 - In the possession or at the disposal of the opposing party

- Access can be denied in case of:
 - Legal privilege
 - 'Weighty reasons', e.g. confidentiality (personal or business)

Implementation of Directive 2014/104/EU

- Dutch legislator:
 - General provision already provides broader access to evidence than required by the Directive
- In practice:
 - Courts reject claimants' requests for access to evidence (so far...)

Main rejection and potential explanations for postponement (and reluctance)

- Note: follow-on proceedings in NL are often bundled claims (assignments or named claimants) initiated by (commercial) litigation vehicles/funders
- Claims for access to evidence rejected for being “premature” (air cargo, trucks):
 - Claimants opting for two-stage proceedings: (i) liability (ii) quantum of damages
 - Debate about validity of assignments and affectedness
 - (“Professional” standard for litigation vehicles???)
- Limited resources court; time and costs involved (assessment and arrangements re confidentiality)

Trucks (all pending before District Court Amsterdam)

- Claim for access to statement of objections:
 - Motion submitted in June 2018
 - Hearing in November 2020

- Well-substantiated case (first stage):
 - Approx. 200.000 truck transaction/registration documents
 - Theory of harm (Harrington/Schinkel)
 - “Ryder”-brief

Decision 22 September 2021, ECLI:NL:RBAMS:2021:5297



- Claimants are entitled to more information regarding the nature and scope of the infringement to mitigate the obvious information asymmetry
- Access to statement of objections rejected:
 1. Not the right document, since it was drafted by the Commission without hearing the truck manufacturers and provisional
 2. Access 'to some extent' premature
 3. Truck manufacturers unilaterally offered limited access to other documents ("starting point")

Final remark

Directive recital 27:

“The rules in this Directive on the disclosure of documents (...) ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages.” [emphasis added]

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