



## **Comments on the**

### **Draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts**

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- (1) CDC Cartel Damage Claims ('CDC') is the European pioneer in the field of private enforcement and has developed the concept of bundling damage claims of multiple companies affected by competition law infringements. The concept has been endorsed by Art. 2(4) of the EU Damages Directive. With its pan-European and multidisciplinary team of legal, economic, funding, negotiation, and IT experts CDC is dedicated to ensuring effective compensation of corporate victims and minimising costs and risks in relation to the complex litigation of damage claims. Based on a genuinely European approach, CDC has brought some of the largest competition law damage actions in Europe so far which resulted in effective compensation payments to corporate victims of competition law infringements.
- (2) Based on its day-to-day experience over the last 15 years, CDC welcomes the opportunity to comment on the European Commission's draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts ('Communication').

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## **A. The Commission should provide guidance on the novel access to evidence procedure and not narrowly focus on the protection of confidential information**

- (1) It is surprising that the Commission focuses its Communication very narrowly on the protection of confidential information. Instead the Commission should take the opportunity and provide national courts at least with some fundamental guidance on the overarching issue of the disclosure of evidence in the context of private enforcement actions.
- (2) In most EU jurisdictions the implementation of Directive 2014/104<sup>1</sup> ('Damages Directive') resulted in the availability of novel and previously unknown disclosure mechanisms specifically in the area of competition damage actions. Judges across the EU are therefore currently struggling with these mechanisms and require guidance on more aspects than merely the question of confidentiality. The draft of the Commission therefore falls short of the true needs of national judges.
- (3) In CDC's view the Commission should include some further guidance on how national courts should apply the respective implementation mechanisms regarding access to evidence as foreseen in Articles 5 to 8 of the Damages Directive in the light of EU law principles. The guiding principles that the Directive and EU law foresee in this respect are the principle of proportionality and the principle of effectiveness.
- (4) Putting emphasis on these principles seems even more necessary taking into account that in practice the new disclosure mechanisms are currently mainly - and often excessively - used by infringers in the context of the passing-on defence and not by claimants to substantiate their damages. It is standard practice for infringers to put forward the pass-on defence combined with extensive disclosure requests. This is in particular challenging for national courts in many jurisdictions which are not (yet) familiar with the novel disclosure mechanisms. In practice this results in significant additional costs and delays in already lengthy proceedings. This is especially true for countries, such as Germany, which have foreseen that separate interim court decisions on the access to evidence can be challenged by separate appeal proceedings (see e.g. Section 89b (3) German Act against restraints of competition).

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<sup>1</sup> Directive 2014/104/EU of November 26, 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 European Union, [2014] O.J. L349/1.

## **B. The Commission should put more emphasis on the guiding EU law principles which national judges have to apply in the context of access to evidence requests and the protection of confidential information**

- (5) The entry into force of the Damages Directive has empowered national judges to order disclosure of evidence, even if this contains confidential information. For many judges these powers are novel. In its Communication the Commission therefore rightly aims to assist national courts to deal with the effective and practical protection of confidential information “*without jeopardising the interests of claimants (e.g. victims of infringements), in substantiating their claims*”<sup>2</sup>.
- (6) In order to achieve this aim the Commission should put more emphasis, possibly in an introductory chapter, on the guiding EU law principles which national judges have to apply when making use of their power to order access evidence under the national implementation of Articles 5 to 8 of the Damage Directive. These guiding principles of EU law in the field are not always equally known or evident for judges across the EU, even if the Commission is offering training for judges. Such introductory chapter should start with stressing and reiterating that the Member States, including the courts, have to ensure that “*all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically or excessively difficult the exercise of the Union right to full compensation*” (Art. 4 Damages Directive). It seems also important to include key judgments of the European Courts more prominently in the text of the Communication instead of footnotes.
- (7) In this respect it seems important to remind the national judges that by implementing the Damages Directive, Member States had committed to ensure its full effectiveness and the achievement of its very objective which is the strengthening of private competition law enforcement<sup>3</sup>. It should be stressed and reiterated in the Communication that Member States, including the courts, have to ensure that each victim of infringements “*is able to claim and to obtain full compensation for that harm*” (Art. 3 Damages Directive).
- (8) While it is possible to refuse the access to a document justified by the presence of business secrets the European Courts have made clear that in the context of damage claims resulting from the infringement of EU competition law there is an overriding public interest in disclosure<sup>4</sup> where the

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<sup>2</sup> Commission Information, Public consultations: Targeted consultation on a draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts, retrieved 16 October 2019: [https://ec.europa.eu/competition/consultations/2019\\_private\\_enforcement/index\\_en.html](https://ec.europa.eu/competition/consultations/2019_private_enforcement/index_en.html).

<sup>3</sup> Judgment of 10 October 2013, *Spedition Welter GmbH v Avanssur SA*, C-306/12, EU:C:2013:650, paragraph 30.

<sup>4</sup> Judgment of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, EU:T:2011:752, paragraph 39.

claimant proves that such disclosure will enable him “*to obtain the evidence needed to establish its claim for damages as it had no other way of obtaining that evidence*”<sup>5</sup>.

- (9) In addition, the Commission should emphasise the established case law of the European Courts that the interest to avoid damage actions for violation of competition law can never be considered as an interest deserving protection<sup>6</sup>, having regard to the fact that any individual has the right to an effective remedy<sup>7</sup> and the right to claim damages for loss caused by the breach of directly effective EU competition rules<sup>8</sup>.
- (10) The Commission should underline that in accordance with recital 23 of the Damages Directive national courts have to ensure the proportionality of disclosure orders as well as requests for the protection of confidentiality. Besides the scope of the respective disclosure and protection of confidentiality requests, the impact on the duration and the costs of the proceedings are elements to be taken into account.
- (11) Finally, national courts have to ensure that in particular extensive and costly disclosure orders and/or confidentiality requests do not infringe the EU law principle of effectiveness and the right to obtain full compensation. As the Commission rightly pointed out in its guide on the quantification of harm ‘*excessive difficulties in exercising the right to damages guaranteed by EU law and therefore concerns in view of the principle of effectiveness could arise, for instance, through disproportionate costs*’.<sup>9</sup>

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<sup>5</sup> Judgment of 27 February 2014, *European Commission v EnBW Energie Baden-Württemberg AG*, C-365/12, EU:C:2014:112, paragraph 132.

<sup>6</sup> *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, *supra* note 4, paragraph 49.

<sup>7</sup> Charter of Fundamental Rights of the European Union, Article 47.

<sup>8</sup> Judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465, paragraph 24 and 26; Judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04, EU:C:2006:461, paragraph 59 and 61.

<sup>9</sup> Commission Staff Working Document, “Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European union accompanying the communication from the commission on quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European union”, SWD(2013) 205 (11.6.2013), recital 10.

**C. The Commission should more clearly state which information can be regarded as confidential and which information cannot be regarded as confidential**

**i. Definition of Confidential Information**

***The definition of confidential information should be clearer and highlight the case-law of the CJEU. The current definition provided in the Communication seems to be less strict than the definition provided in other Commission documents. The Commission should notably provide a list of information/ data/ documents that cannot be considered as confidential, for instance the information related to the functioning of secret cartels. This seems as well necessary from the perspective of the unity of EU law. Such clarification will significantly help national judges, and in practice will avoid a high number of (delaying) procedures on the same question across the EU.***

(12) Article 2(1) of the Trade Secrets Directive<sup>10</sup> defines trade secret as information which meets three requirements: “[i]t is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) It has commercial value because it is secret; and (iii) It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.”

(13) The EU case-law has clarified that information can only be confidential, if it is ‘objectively, worthy of protection’.<sup>11</sup> There is thus a reasonableness test that judges may apply in the context of their assessment of whether information deserves protection or not. In any event, it is already evident from the definition chosen by the Commission in its Communication that any information and data exchanged between competitors in the context of anticompetitive practices, in particular if relating to prices, margins, volumes or customers cannot be regarded as confidential as the infringers have willingly deprived themselves of the secrecy of the respective information. The Commission should clarify this point as well as the reasonableness test in its Communication.

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<sup>10</sup> Directive (EU) 2016/943 of June 8, 2016, on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [2016] O.J. L349/1.

<sup>11</sup> Judgment of 28 January 2015, *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 65 : “(i) that it is known only to a limited number of persons, (ii) that its disclosure is liable to cause serious harm to the person who has provided it or to third parties and (iii) that the interests liable to be harmed by disclosure are, objectively, worthy of protection”.

- (14) While the European courts have highlighted that business secrets of the infringers (or companies in general) involved in competition proceedings afford protection<sup>12</sup>, such protection of business secrets cannot be absolute. The protection of business secrets and confidential information needs to be balanced with other legitimate interests such as the requirement of effective legal protection and the right to full compensation claim damages as the consequence of the breach of EU competition law. Already in the context of the White Paper the Commission stated that: “[t]he likelihood that confidential information plays a central role in proceedings for damages makes it indispensable that the protection granted to confidential information is not disproportionate and does not de facto preclude the exercise of the right to compensation ”.<sup>13</sup> This statement should be included in the Communication.
- (15) The Commission should also include a statement in the Communication that according to the interpretation of the Regulation 1049/2001<sup>14</sup> in *EnBW*<sup>15</sup> judgement, the victim’s right to claim damages and the general principle of protection of victim’s fundamental rights is a matter of public concern which national courts should take into account when deciding on confidentiality requests.
- (16) In view of the recent *Skanska* judgment<sup>16</sup> the Commission should clarify that information on the structure of an undertaking which is necessary for a victim to identify the relevant legal entity/-ies liable for the damages caused by the competition law infringement of the undertaking cannot be regarded as a business secret as this would deprive the victim from its right to full compensation and thus undermine the full effectiveness of Article 101 TFEU. The practice shows that infringers try to hide required information on the (re)structure of their undertakings.
- (17) The Commission should more clearly emphasise in the Communication that information typically loses its confidential or commercial character due to the passage of time. In its *Evonik Degussa* judgement the CJEU stated that: ‘information which was secret or confidential, but which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties’<sup>17</sup>.

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<sup>12</sup> *Ibid.*, paragraph 28.

<sup>13</sup> Commission Staff Working Document, “Paper accompanying the white paper on Damages actions for breach of the EC antitrust rules”, SEC(2008) 404 (2.4.2008), recital 114.

<sup>14</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

<sup>15</sup> Judgment of the Court (Third Chamber), 27 February 2014, *European Commission v EnBW Energie Baden-Württemberg AG*, Case C-365/12

<sup>16</sup> Judgment of 14 March 2019, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, C-724/17, EU:C:2019:204.

<sup>17</sup> Judgment of 14 March 2017, *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2017:205, paragraph 64.

(18) The Commission has already adopted a more detailed and clearer approach, for instance, in the *Guidance on confidentiality claims during Commission antitrust procedures* from 2018. In this document the Commission provides definitions of business secrets<sup>18</sup> and other confidential information<sup>19</sup> in a more detailed way (taking the inspiration from the *Notice on access to file*<sup>20</sup>). Already for consistency reasons the Commission should apply the same definition and the same level of detail in the Communication.

(19) Given the lack of experience of judges in many jurisdictions with disclosure mechanism and the fact that the right for compensation in cases of the infringement of Art. 101 and 102 TFEU is rooted in EU law<sup>21</sup>, the Commission should strongly advise Member States and their national courts to apply a similar approach to the definition of confidential information as the Commission in its own administrative proceedings. This would serve the unity of EU law and be in line with the aim of the Damages Directive to achieve a more level playing field across the EU.

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<sup>18</sup> Guidance on confidentiality claims during Commission antitrust procedure, (2018), recital 9: “[b]usiness secrets are confidential information about an undertaking’s business activity of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter’s interests. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy”.

<sup>19</sup> Guidance on confidentiality claims during Commission antitrust procedure, (2018), recital 10: “[o]ther confidential information is information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of Justice of the European Union has acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. Therefore, the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous. The category of other confidential information also includes military secrets”.

<sup>20</sup> Commission Notice, “Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004”, C325/07 (22.12.2005) recital 18: “[i]n so far as disclosure of information about an undertaking’s business activity could result in a serious harm to the same undertaking, such information constitutes business secrets (3). Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.”; recital 19: “[t]he category ‘other confidential information’ includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The Court of First Instance and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures (4). Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous”; recital 20: “[t]he category of other confidential information also includes military secrets”.

<sup>21</sup> *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, supra note 14

## ii. Information that is not confidential

***More importantly, the Communication shall clarify the types of information that can never be considered as confidential. This would in practice widely facilitate the preparation of disclosure and access to documents request, reduce unnecessary court procedures on the same questions across the EU as well as speed up the decision-making by national courts.***

- **Facts relating to the infringement can never be confidential**

(20) In line with the case law of the EU courts the Commission should include a clear statement in the Communication that information related to the facts and the functioning of the infringement can never be covered by the confidentiality. This even in the case where such information has been provided in the Leniency statement<sup>22</sup>. According to the *Evonik Degussa*<sup>23</sup> judgement following the opinion of the Advocate General Szpunar<sup>24</sup>, the information cannot be classified as confidential or as being covered by professional secrecy solely because it was contained in statements submitted via the leniency program.

(21) The Commission has already adopted the similar approach in its different documents such as the *DG Competition informal guidance paper on confidentiality claims*<sup>25</sup> or the *Guidance on confidentiality claims during Commission antitrust procedures*<sup>26</sup>.

- **Other information**

(22) Firstly, according to the Commission, if the business secret is already known outside the undertaking it loses its confidential nature<sup>27</sup>. This would typically be the case for information that was the subject of anticompetitive practices with other undertaking(s).

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<sup>22</sup> Commission Notice, “Notice on Immunity from fines and reduction of fines in cartel cases”, C298/17 (8.12.2006) recital 31.

<sup>23</sup> Judgment of the Court (Grand Chamber) of 14 March 2017, *Evonik Degussa GmbH v European Commission*, Case C-162/15.

<sup>24</sup> Opinion of Advocate General Szpunar delivered on 21 July 2016 in Judgment of the Court (Grand Chamber) of 14 March 2017, *Evonik Degussa GmbH v European Commission*, Case C-162/15.

<sup>25</sup> DG Competition informal guidance paper on confidentiality claims, (2012), recital 2: “[p]ublic information as well as evidence pertaining to the alleged infringement cannot be accepted as confidential”.

<sup>26</sup> Guidance on confidentiality claims during Commission antitrust procedure, (2018), recital 17: “[i]t should be noted that oral corporate statements that have been supplied in an application for immunity from or a reduction of fines under the Leniency Notice<sup>21</sup> cannot by definition contain any business secrets or other confidential information, as they are a presentation of undertaking’s knowledge of a cartel and its role therein”.

<sup>27</sup> Commission Working Documents, “European Commission Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for application of Articles 101 and 102 TFEU”, Module 12 Access to file and confidentiality”, (March 2012), paragraph 32.

(23) Secondly, the Commission consistently applies in its own cases that the following information shall not be considered as business secrets and other confidential information:

- *“data from or about another company (such as price announcements, sales data etc. other than received pursuant to a contract with that company), unless confidentiality has been claimed (e.g. to prevent revelation of the knowledge of this information);*
- *information made known outside the company concerned (such as price targets, increases, dates of implementation and customer names, if made known to third parties);*
- *facts relating to an application for immunity or a reduction of fines, where these facts aim at providing evidence of an alleged infringement, unless the disclosure of such facts could harm the Commission’s leniency policy;*
- *names and positions of employees or other persons involved in an infringement.”*<sup>28</sup>

(24) These elements should be included in the Communication.

### iii. Differentiated treatment of information in possession of infringers and non-infringers

***The Commission should clarify that information in possession of a non-infringer as a matter of principle is more likely to benefit from confidentiality than information in the possession of infringers.***

(25) It is clear from the Damages Directive that the confidentiality requests of infringers are to be treated differently compared to confidentiality requests of non-infringers. Art. 5 (5) states that as a matter of principle “[t]he interest of undertaking to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection”<sup>29</sup>. In addition, and as pointed out above, information about the infringement which is in the possession of the infringer does also not qualify as confidential information.

(26) This implies that information in the possession of a non-infringing parties as well as data and information on markets and/or products that were not subject to the infringement of EU competition law shall deserve a higher degree of confidentiality protection. This should in particular be the case

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<sup>28</sup> Commission Working Documents, “European Commission Antitrust Manual of Procedures, Internal DG Competition working documents on procedures for application of Articles 101 and 102 TFEU”, Module 12 Access to file and confidentiality”, (March 2012), paragraph 31.

<sup>29</sup> Directive 2014/104/EU, *supra* note 1, Article 5(5).

where such information would give infringers insight into the competitive and commercial conduct of its customers and/or its competitors. A situation where infringers would as a result of their infringement get access to information of high strategic and commercial value should be avoided.

#### **D. The Commission should provide national courts with guidance on safeguards against disproportionate disclosure / confidentiality requests**

*The Communication should provide guidance on minimum safeguards concerning disproportionate disclosure request from the part of the defendants in the context of the pass-on defence.*

(27) Interestingly most of the cases where the new national disclosure mechanisms based on Art. 5 to 8 of the Damages Directive are used in practice concern disclosure requests of defendants in the context of the pass-on defence. The pass-on defence typically requires an economic analysis of the downstream markets, potentially over several levels of the supply chain.

(28) In practice, defendants while invoking the passing-on defence have issued very extensive data and document requests which – if granted - would result in a significant increase of the costs and a long delay of the proceedings. As the Commission has rightly stated in the context of its guide on quantification “[e]xcessive difficulties in exercising the right to damages guaranteed by EU law and therefore concerns in view of the principle of effectiveness could arise, for instance, through disproportionate costs or through overly demanding requirements regarding the degree of certainty and precision of a quantification of the harm suffered”<sup>30</sup>. The same reasoning applies to the costs and burden resulting from excessive disclosure requests in the context of the quantification of a potential pass-on. This is the more relevant as the costs of disclosure requests as well as potential confidentiality claims should play a key role in the assessment of the proportionality according to Article 5(3)(b) of the Damages Directive.

(29) This type of procedural abuse of the disclosure rules introduced by the Damages Directive may be exemplified by the disclosure request of one of the members of the trucks cartel in a damage action launched by the German municipality of Göttingen before the Landgericht Hannover (Regional Court of Hannover) in 2017<sup>31</sup>. The information request by the cartel member is more than four pages long and contains for example, the access to all documents and data relating to the claimant’s public waste management, street cleaning and fire prevention levies, including reports from auditors, describing any changes that have occurred during the period.

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<sup>30</sup> Commission Staff Working Document, *supra* note 9, recital 8.

<sup>31</sup> Judgement of 18 December 2017, Regional Court of Hannover, Ref. 18 O 8/17.

(30) The relevant part of the judgment by the Regional Court Hannover (translated to English) can be found in the **Annex 1**.

(31) It would be helpful if the Commission confirms safeguards based on the principles of proportionality and effectiveness against this type of procedural abuse in the Communication by stating that, for example, national courts may dismiss disclosure requests that are excessive, unjustified and/or unnecessary.

### **E. The Commission should de facto avoid unnecessary disclosure and confidentiality requests before national courts by adopting substantial infringement decisions**

(32) According to Article 30 of Regulation 1/2003, the Commission shall publish decisions regarding the finding of an infringement. The decision shall include the names, the main content and the penalties.

(33) The Commission therefore has the power to publish decisions which contain many of the substantial facts which the victims of an infringement require in order to substantiate their damage claims. By adapting more detailed decisions the Commission would avoid that parties involved in damage actions have to launch subsequent disclosure and confidentiality requests.

(34) Following information should be contained in any Commission decision, including settlement decisions:

- The names of legal entities that are addressees of the administrative decision and therefore the part of the 'undertaking' in terms of Article 101 TFEU as interpreted by the recent case-law of the CJEU<sup>32</sup>. This also includes information related to the seats of the undertakings involved which may be necessary for the establishment of an alternative jurisdiction under the EU rules<sup>33</sup>.
- The precise definition of the affected product and geographic market. This is necessary not only for the identification of the affected products and/or services and thus the quantification of the harm, but also for the identification of the applicable law<sup>34</sup>.

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<sup>32</sup> *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, *supra* note 14.

<sup>33</sup> Regulation 1215/2012 of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012], O.J. L001.

<sup>34</sup> Regulation 864/2007 of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), [2007], O.J. L199/40.

- Precise duration of the infringement for each participant. This information is compulsory for bringing a substantiated claim.
- Dates and places where the infringement was committed, given that each place where an illicit act occurred establishes an alternative jurisdiction where victims may bring their claims according to the EU private international law as interpreted by the CJEU<sup>35</sup>.
- The precise description of the infringement, including individual cartel meetings, the content of the anticompetitive conduct, e.g. discussions of prices, quotas and/or capacities agreed. As mentioned above, these facts of the infringement can never be considered as confidential.
- Information on the effective implementation of the anticompetitive practice, including price developments on the affected market if applicable.

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<sup>35</sup>Regulation 1215/2012, *supra* note 33; Judgment of 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS N.V.*, C-451/18, EU:C:2019:635; *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, *supra* note 4.

**ANNEX 1****Regional Court of Hannover**

18 O 8/17

Delivered on 18.12.2017

(...)

The defendant claims that the Court should  
dismiss the action.

In addition, the defendant claims that the Court should

1. in the alternative, in the event that the Court of First Instance does not consider the defendant's arguments concerning the lack of concern of superstructures or for proof of those items (in particular superstructures) which cannot at present be deducted from the total purchase price cited by the applicant (in particular serial nos. 3, 5 and 10 of the detailed remunerations set out in the application, pp. 3 et seq.) to be sufficient, to pay the applicant pursuant to Paragraph 89(b)(1)(i). V. m. with § 33 g Paragraph 2 and Paragraph 10 GWB n. F. i. V. m. with § 142 ZPO, to provide the following information or to transmit evidence to the defendant:

Contract history concerning the purchase of superstructures and additional equipment from third-party manufacturers for the vehicles at issue in the dispute, including offers, invoices and communication regarding preparation of offers, conclusion and execution of contracts.

2. in the alternative, in the event that the Court of First Instance does not consider the statements relating to the public benefits received for the purchase of the fire-fighting vehicles at issue (in particular serial Nos 3, 5 and 13 of the detailed remunerations set out in the application, p. 3 et seq.) to be sufficient, to submit them to the plaintiff pursuant to Paragraph 89b(1)(i) of the first paragraph of Article 89b of the Rules of Procedure. V. m. with § 33 g Para. 2 and Para. 10 GWB n. F. i. V. m. with § 142 ZPO, to provide the following information or to transmit evidence to the defendant, whereby the information given under 2.a) in the form of electronic tables in a common format, compatible with Microsoft Excel or comparable spreadsheet programs, alternatively, if and to the extent that the information is not available to the plaintiff in electronic format, in the form of documents containing this information, and the subjects of the application listed under 2. b) in the form of documents, alternatively in the form of information, are to be provided or transmitted:

(a) the amount of the public grants or allocations received by the Land Niedersachsen - directly or indirectly via the Landkreis Göttingen - in the period 2000 to 2011 to promote municipal fire protection;

(b) documents explaining the extent to which the applicant used public grants or allocations from the Land Niedersachsen to promote municipal fire protection for the acquisition of the fire-fighting vehicles at issue (in particular serial numbers 3, 5 and 13 of the detailed references set out in the application, pp. 3 et seq.).

3. in the alternative, if the Court of First Instance does not consider the statements concerning the passing on of allegedly increased acquisition costs to the tax debtors to be sufficient, to pay to the plaintiff under Paragraph 89(b)(1)(i) of the Rules of Procedure. V. m. § 33 g para. 2 and para. 10 GWB n. F. i. V. m. § 142 ZPO to provide the plaintiff with the following information for the period from the respective previous year of the acquisition of the respective truck at issue up to the time of disclosure, but in the event of an interim sale of the respective truck at issue or other withdrawal of the respective truck from the plaintiff's fixed assets only up to and including the year of the sale or withdrawal, or to transmit evidence to the defendant, whereby the subject-matter of the application listed under 3. a), 3. b) and 3. c) must be submitted in the form of electronic tables in a common format, compatible with Microsoft Excel or comparable spreadsheet programs, alternatively, if and insofar as the information is not available to the applicant in electronic format, in the form of documents containing this information, and the subject-matter of the application listed under 3. d) must be submitted in the form of documents, alternatively, in the form of information:

a) the costs of the plaintiff's facilities in which the trucks at issue in the dispute were or will be used, determined in accordance with § 5 (2) sentence 1 NKAG (or corresponding predecessor provisions), with a description of all changes which occurred during the respective period;

b) the charges levied for public disposal and street cleaning, showing all changes which occurred during the period in question;

(c) the charges levied on fire-fighting operations, showing any changes that occurred during the period;

(d) documents explaining how the applicant's public waste management, street cleaning and fire prevention levies are determined, including reports from auditors, describing any changes that have occurred during the period.

4. the applicant pursuant to Paragraph 89(b)(1)(i) thereof V. m. to order § 33 g (2) and (10) GWB n. F. i. V. m. to § 142 ZPO to provide the following information or to transmit evidence to the defendant, whereby the information given under 4. a) in the form of electronic tables in a common format, compatible with Microsoft Excel or comparable spreadsheet programs, alternatively, if and insofar as the information is not available to the plaintiff in electronic format, in the form of documents containing this information, and the subjects of the application listed under 4. b) in the form of documents, alternatively in the form of information:

a) Type and duration of use and annual mileage of the vehicles in dispute, book values of the vehicles in dispute since their respective acquisition, type and amount of depreciation for wear and tear;

b) Tax documents relating to the period from the year of acquisition of the respective truck at issue until the date of disclosure, including information on the tax burden and refunds and auditor's reports; in the event of an interim sale of the trucks at issue or other withdrawal of the truck from the plaintiff's fixed assets, however, only up to and including the year of the sale or withdrawal.

5. of the applicant pursuant to Paragraph 89b(1)(i) of the first subparagraph of that article V. m. § 33 g (2) and (10) GWB n. F. i. V. m. § 142 ZPO with regard to all vehicles at issue in the dispute, to provide the following information or evidence to the defendant, whereby these, insofar as they are available in electronic format, are to be provided in the form of electronic tables of a common format, compatible with Microsoft Excel or comparable spreadsheet programs as well as additionally in the form of documents containing this information, alternatively in the form of information:

a) whether and which of the vehicles at issue have since been sold;

b) at which gross and net sales price (i.e. excluding value added tax and after deduction of all discounts granted) the disputed vehicles were sold;

c) when the disputed vehicles were sold;

d) to whom the disputed vehicles (name and address) were sold;

e) the manner in which the disputed vehicles were sold in each case (e.g. personal sale, award, return to the manufacturer);

f) the age and mileage of the vehicles sold at the time of sale, and

g) whether and which factors reduce the value of the vehicles sold (e.g. damage).

6. the plaintiff according to § 89 b Abs. 1 i. V. with § 33 g para. 2 and para. 10 GWB n. F. i. V. with § 142 ZPO with regard to all vehicles in dispute, to provide the following information or to transmit evidence to the defendant,

(a) Amount of compensation payments and bonuses, rebates and discounts received from third-party manufacturers in connection with the so-called fire brigade cartel (Bundeskartellamt case B12-11/09 and B12-12/10);

b) for which vehicles the compensations described under 6. a) were granted.

(...)