



Freshfields Bruckhaus Deringer

Disclosure of Evidence

A civil law jurisdiction perspective

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A civil law perspective



General trends in relation to disclosure

- General reluctance for disclosure in civil law jurisdictions:
 - Disclosure is usually possible under existing general civil procedural rules but is not very commonly used
 - Some jurisdictions have specific competition-related rules
- Varying level of protection of privileged documents (cf Germany, Netherlands)
- Claims for confidentiality usually successful
- Use of witness statements usually possible but will vary from one MS to another
- Some divergence on access to Commission/ NCA's documents post-Pfleiderer
- Still huge supremacy of the UK in follow-on damages actions, incl. due to extensive disclosure rules





UK rules: the benchmark?

- Extensive disclosure in the UK:
 - Standard vs specific disclosure
 - Parties usually ordered to disclose all documents within their control, which support as well as adversely affect their own case AND the other party's case
 - Pre-trial disclosure also possible, subject to proportionality (cannot be too speculative nor fishing expedition)
- Strong protection of privileged and leniency documents
- Protection of confidential documents, subject to confidentiality rings
- Disclosure of confidential version of Commission decisions have been ordered in the past, subject to confidentiality ring
 - But subject to redaction of (i) leniency, (ii) privileged and (iii) “Pergan” material
- *Little changes to be expected from the implementation of the Damages Directive on disclosure (but clearer rules on leniency and settlement submissions)*



- **Current state of disclosure (pre-Directive) :**
 - Principle of “party control”
 - No discovery; very limited disclosure rules – only if specific and necessary and hardly granted in practice
 - Even if granted: defendant can still refuse to produce evidence (but then the point will be deemed to be proven by the claimant)
- **Expected changes in national law :**
 - Civil procedural rules may need some adaptations with regards disclosure
 - But in practice: likely that current rules will be argued to be sufficient
 - Judges are expected to continue to take a restrictive view of disclosure
- **Progress towards implementation :**
 - Draft legislation currently being discussed between the Ministry of Economy and Ministry of Justice
 - Implementing legislation will need to go through parliament
 - Adoption expected in the first half of 2017



- **Current state of disclosure (pre-Directive) :**
 - Relatively effective procedural rules to obtain disclosure of evidence
 - Request needs to be justified and will be tested by judge
 - Possibility to organise pre-trial witness hearings (quite unique tool, sometimes used to put pressure on counterpart to settle)
- **Expected changes in national law :**
 - Limited impact of the Directive on disclosure rules
 - May provide more clarity on type of documents subject to disclosure order
 - Clarification on protection of leniency statements and settlement submissions
- **Progress towards implementation :**
 - Proposed changes subject to public consultation back in Oct/Nov 2015
 - Currently before the Parliament
 - Adoption expected on time



- **Current state of disclosure (pre-Directive) :**
 - Very limited scope for disclosure under general civil procedural rules
 - subject to stringent conditions,
 - limited to “must-have” documents,
 - general reluctance of judges reluctant to grant disclosure
 - Effective disclosure pre-trial through “pre-trial disclosure order” obtained *ex parte*, increasingly used in civil litigation (including in competition cases)
- **Expected changes in national law :**
 - Likely limited impact of the Directive on disclosure as general rules exist
 - Some adaptation needed as NCA will have an obligation to disclose relevant documents (compared to an option to do so currently)
- **Progress towards implementation :**
 - Working group but no transparency on proposed changes
 - Will be adopted by ordinance (so limited public debate)
 - Adoption expected on time

What's next? looking into a crystal ball...



Still some scope for “interpretation” at national level

- Scope of disclosure will remain subject to judge’s own sensitivity, *inter alia* through their interpretation of what is sufficiently “precise, narrow and proportionate”
- Scope of privilege (see Germany)
- Use of documents obtained through discovery proceedings before foreign courts? Use of documents subject to privilege in some countries but “discoverable” in others?
- Disclosure of documents submitted with leniency applications?
- Access to witnesses?

Impact on forum shopping in the EU?

- No huge changes expected: UK’s supremacy will remain (subject to Brexit...)
- Changes will take time, as judges’ mentality will adapt to the “right of disclosure” of claimants

Thank you

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