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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Germany**

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More documents related to this discussion can be found at
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1. Introduction

1. Access to the case file is an important step in all contentious antitrust and merger cases. The inspection of files complements the fundamental procedural rights such as the right to due legal process, the right to be heard and the right of defence. Yet, the right to access the file cannot be unlimited and must be balanced against the legitimate interest of the protection of confidential information including business and trade secrets. This note provides a brief outline of the subject (2.), describes what type of information is accessible by which party while taking into account the different enforcement proceedings of the Bundeskartellamt such as administrative proceedings (3.) and administrative offence proceedings (4.) and ends with a conclusion (5.)

2. Outline

2. German law gives access to the Bundeskartellamt's case files in competition proceedings. Access is granted in the context of administrative proceedings as well as administrative offence proceedings.¹

3. The main objective of providing access to the case file is protecting the parties' right of defence. Another goal is providing interested third parties with the possibility to refute the facts on which the Bundeskartellamt relies to adopt the decision. A further intention of providing access to evidence to third parties is to make sure that they are aware of the basis on which decisions that may affect them are adopted. Finally, providing access to the case file for the general public promotes transparency and the rule of law.

4. These objectives can mainly be attributed to the right to a fair trial guaranteed in Art. 6 of the European Convention on Human Rights, the rule of law guaranteed by Art. 20(3) Basic Law for the Federal Republic of Germany (Grundgesetz; hereinafter "GG")² and the right to be heard guaranteed by Art. 103(1) GG.

5. The extent of the information that can be accessed depends on the type of proceeding and on the type of party requesting access. In general, investigated parties and merging parties are granted more information than other interested third parties or the general public.

6. Access to the case file is only granted upon request. Due to the administrative system, the decision if and to what extent applicants will be granted access to the case file is at the discretion of the respective decision divisions of the Bundeskartellamt. In exercising its discretion, the Bundeskartellamt will find a balance between the benefits of the right to access the case file and other interests to be taken into consideration, such as

¹ More information with regard to due process of the Bundeskartellamt can be found in the ICN CAP template of the Bundeskartellamt, available at: <https://www.internationalcompetitionnetwork.org/frameworks/>.

² An English version is available at: https://www.gesetze-im-internet.de/englisch_gg/.

the effectiveness of enforcement. Except for very exceptional cases, confidential information enjoys absolute protection.

7. In Germany, settlements and commitments are not associated with a limitation of the right to access the file. Even though these procedures aim to speed up the proceeding, the parties involved in such procedures enjoy the same degree of due process and procedural safeguards as in the context of a regular decision.

8. The Bundeskartellamt's decisions can be challenged before a court and are therefore subject to judicial review.

9. For the purpose of this note, access to the case file is defined as the party's right to examine evidence in possession of the Bundeskartellamt.

10. In general, a case file with regard to an enforcement proceeding comprises every document related to the proceeding since the Bundeskartellamt is obliged to record all essential circumstances with regard to its proceeding. The case file thus contains the complete documentation regarding a certain proceeding that was submitted or accrued in correlation with this proceeding.

11. As in many other jurisdictions, there is no definition of the term confidential information in Germany. The term "business and trade secrets" is also not legally defined. According to German jurisprudence, business and trade secrets of an enterprise are understood to be facts that are related to the enterprise, that are only known to a limited group of persons and the secrecy of which is worthy of protection.³ A secret is already assumed to exist if the information is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.⁴ Business secrets can contain all kinds of information - e.g. calculations, turnover, market strategies, prices or conditions - that are of importance for the recent or future market position of the enterprise from which this information derives. This also includes older facts that are still of importance.

12. Regardless of the request for access to the case file, the Bundeskartellamt also complies with general transparency rules. The Bundeskartellamt is obliged to report to the government on its activities and on the situation and development in its field of responsibilities every two years, Sec. 53(1) German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen; hereinafter "GWB").⁵ This report is also available to the public.

13. The Bundeskartellamt also informs the public on a continuous basis on its activities as well as on the situation and development in its field of responsibilities pursuant to Sec. 53(4) GWB. In this regard, the Bundeskartellamt publishes an annual report as well as press releases and offers the possibility to search for published decisions and case summaries relating to the ban on cartels, control of abusive practices, merger control and public procurement law via its case database.

³ Federal Administrative Court, decision of January 4, 2005, BVerwG 6 B 69.04; Federal Constitutional Court, decision of March 14, 2006, BvR 2087/03, 1 BvR 2111/03 – "Deutsche Telekom"; Federal Court of Justice, decision of January 21, 2014, EnVR 12/12.

⁴ Düsseldorf Higher Regional Court, decision of July 6, 1977, Kart. 2/77 – "Anzeigenpreise".

⁵ An English version is available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf.

14. Next to transparency and reporting obligations of the Bundeskartellamt the German law contains many rules regarding the protection of confidential information that safeguard confidential information in the possession of the Bundeskartellamt. Civil servants such as the members of the decision divisions of the Bundeskartellamt are bound by a confidentiality obligation⁶ and face severe punishment if they violate that obligation. A public official who unlawfully discloses a business or trade secret shall be liable to imprisonment not exceeding one year or a fine. If the offender acts for material gain or with the intent of enriching himself or another or of harming another, penalty shall be imprisonment not exceeding two years or a fine.⁷

3. Access to the case file in administrative proceedings

15. Public enforcement by the Bundeskartellamt can be subdivided into administrative proceedings such as merger and non-merger administrative proceedings and administrative offence proceedings also called fine proceedings.⁸

16. The following chapter will focus on administrative proceedings in accordance with the special procedural rules in Sections 54 to 62 GWB complemented by the more general rules of the Administrative Procedure Act (Verwaltungsverfahrensgesetz; hereinafter “VwVfG”).⁹

17. While merger proceedings are always conducted as administrative proceedings, the Bundeskartellamt has the discretion to decide on whether to handle anticompetitive agreements or the abuse of a dominant or powerful position as administrative proceedings or administrative offence proceedings depending on the seriousness of the infringement, the complexity of the legal assessment and the likelihood of proving intention or negligence.

3.1. Inspection of case files by participants

18. Key provisions regarding the access to the case file are Sec. 29 and 30 VwVfG in conjunction with Sec. 54(1) 3 GWB.

19. According to Sec. 29(1) VwVfG the Bundeskartellamt allows participants to inspect the documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests.

20. The parties to the proceeding are entitled to apply for access to the case file. According to Sec. 54(2) No 1-3 GWB parties to the administrative proceeding before the

⁶ Sec. 67(1) Federal Civil Service Act (Bundesbeamtengesetz; BBG).

⁷ Sec. 203 German Criminal Code (Strafgesetzbuch; StGB); an English version is available at: http://www.gesetze-im-internet.de/englisch_stgb/index.html.

⁸ More information regarding the different enforcement proceedings can be found at the 2019 OECD Note by Germany available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2019/OECD_2019_Public_Working_%20Party_No_3_%20on_%20Cooperation_and_Enforcement.html?nn=3590148

⁹ An English Version is available at: https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.html.

Bundeskartellamt are inter alia those who have applied for proceedings to be initiated (e.g. merging parties), undertakings against which the proceedings are directed (investigated parties) and persons whose interests will be substantially affected by the decision and who, upon their application, have been admitted by the Bundeskartellamt to the proceedings (interested third parties).

21. Parties are granted access to the case file where knowledge of its contents is necessary in order to assert or defend their legal interests. Therefore, parties to the proceeding are generally granted access to the case file. However, the extent of access might be limited by the legal interest of a party.

22. Access to the participants is granted upon request at any stage of the proceeding until the proceeding is closed. The decision of when access is actually granted is at the discretion of the Bundeskartellamt.¹⁰ Therefore, the specific moment at which access is granted may vary. Thereby, the Bundeskartellamt takes into consideration that the parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the Bundeskartellamt's decision and should have a meaningful opportunity to respond to such concerns.

23. The inspection of the documents shall take place in the offices of the record-keeping authority, i.e. the Bundeskartellamt.¹¹ In practice, due to the short duration of the proceedings the Bundeskartellamt provides copies of the requested documents in consultation with the requesting party and at the applicant's expense.

3.2. Exemptions

24. Exemptions to the right to access the case file are provided in Sec. 29(1) 2, 29 (2) and 30 VwVfG.

25. Draft decisions and work directly connected with the preparation of the final decision are not part of the file. This provision safeguards the administrative decision-making process from being disturbed and prevents misunderstandings on the side of the participants.

26. Besides, the Bundeskartellamt is not obliged to allow the inspection of documents where this would interfere with the orderly performance of the authority's tasks¹², where knowledge of the contents of the documents would be to the disadvantage of the country as a whole or of one of the Länder (federal states)¹³, or where proceedings must be kept secret by law or by their very nature, i.e. in the rightful interests of participants or of third parties.¹⁴

27. The exemption pursuant to Sec. 29(2) first alternative VwVfG affects not only the scope of the access to the file but also and in particular the question at what stage of competition proceeding access is granted. Notably, in non-merger administrative proceedings it may occur that the request for access in an ongoing proceeding is rejected

¹⁰ Düsseldorf Higher Regional Court, decision of August 23, 2017, VI Kart 5/16 (V).

¹¹ See Sec. 29(3) VwVfG.

¹² Sec. 29(2) first alternative VwVfG.

¹³ Sec. 29(2) second alternative VwVfG.

¹⁴ Sec. 29(2) third alternative VwVfG.

because the inspection of documents would interfere with the orderly performance of the Bundeskartellamt's investigations. In this case parties will be granted access to the case file after the issuance of the statement of objections.

28. The rejection of the request to access the Bundeskartellamt's case file is also possible and, in general, needed insofar as confidential information is affected¹⁵. Protected are legitimate interests of the public as well as the private sector. Confidentiality interests are often subject to special provisions, e.g. data protection laws. Private security interests can especially include trade and business secrets. In general, competitively sensitive information has to be protected from being shared among competitors.

29. In case one of the exemptions applies, the Bundeskartellamt has to balance the different interests against one another. As a rule, confidential information such as business and trade secrets enjoy absolute protection.

30. Where the party's interest in access to the case file is outweighed by conflicting interests, the Bundeskartellamt grants access to a non-confidential version of the file, where respective parts of the file are blackened. If necessary, the Bundeskartellamt is allowed to completely reject the request to access the file. However, such a solution would be of a very exceptional nature due to the great significance of the access to the case file for the right to a fair trial.

3.3. Legal protection

31. The Bundeskartellamt's decision not to grant access to the case file in full or in part can be challenged and is therefore subject to judicial review. Even though this decision is no final decision it has the character of an independent administrative act according to Sec. 35 VwVfG. Legal protection against the decision not to grant access to the case file is by analogy with Sec. 44 VwVfG only possible in the context of an appeal against the final decision. The review is held by the Düsseldorf Higher Regional Court.¹⁶ On the other hand, the Bundeskartellamt's decision to grant access to evidence can also be challenged by a submitting party.¹⁷

3.4. Access to case files during appeal proceedings

32. After the Bundeskartellamt's proceeding is closed, merging parties, investigated parties and interested third parties have the possibility to request access to the Bundeskartellamt's case files during the judicial review.¹⁸ Access to Bundeskartellamt's files, supplementary files, expert opinions and other information is only possible with the Bundeskartellamt's consent. The agency can refuse to grant access to its records if this is necessary for important reasons, in particular to protect trade or business secrets.¹⁹ In turn, the appellate court may, after hearing the party affected by such disclosure, order by decree that the evidence be disclosed to the extent that such evidence is relevant for the decision,

¹⁵ See Sec. 29 (2), 30 VwVfG.

¹⁶ Sec. 63 GWB.

¹⁷ Higher Regional Court of Düsseldorf, decision of January 22, 2003, VI-Kart 22/01 (V).

¹⁸ Sec. 72(2), (3) GWB.

¹⁹ Sec. 72(2) 2 GWB.

provided that there is no other way to ascertain evidence and, considering all circumstances of the particular case, the significance of the matter in protecting competition outweighs the interests of the party affected in maintaining confidentiality.²⁰

3.5. Access to the case file for the general public

33. In 2006 the Freedom of Information Act (Informationsfreiheitsgesetz; hereinafter “IFG”)²¹ entered into force. Under this act, every citizen is unconditionally entitled to gain access to official information from the authorities of the federal government upon request - and thus also from the Bundeskartellamt - provided there are no reasons for an exception and no overriding specific legal provisions.

34. The Freedom of Information Act generally covers all official information held by public authorities of the Federal Government. The right of access includes all records serving official purposes, irrespective of the mode of storage, i.e. documents as well as data stored in an electronic, optical, acoustical or other manner. Therefore, the right of access not only comprises the access to the case file but to all information in the possession of the Bundeskartellamt. Exempted are drafts and notes which are not intended to form part of a file pursuant to Sec. 2 IFG.

35. According to Sec. 1(2) IFG the types of access to information may include furnishing information, granting access to files and providing information in any other manner. The applicant has the right to choose between these options, Sec. 1(2) 1 IFG. The authority may deviate from the requested type of access to information for important reasons only.

36. Access to information can be ruled out or refused if public interests or third party’s interests have to be protected pursuant to Sec. 3, 4, 5 and 6 IFG.

37. The entitlement to access to information shall inter alia not apply where disclosure of the information may have detrimental effects on internal or external security interests, the course of current judicial proceedings, a person’s entitlement to a fair trial or the pursuit of investigations into criminal, administrative or disciplinary offences and where disclosure of the information may endanger public safety, Sec. 3 IFG.

38. Applications for access to information should also be rejected for drafts relating to rulings and studies and decisions relating directly to the preparation of rulings, insofar as and for as long as premature disclosure of the information would obstruct the success of the ruling or impending official measures, Sec. 4 IFG. Internal notes on discussions of the Bundeskartellamt are therefore exempt from disclosure.

39. With regard to the protection of personal data, access to such data may only be granted where the applicant’s interest in obtaining the information outweighs the affected party’s interests warranting exclusion of access to the information or where the affecting party has provided his or her consent, Sec. 5 IFG. Special types of personal data within the meaning of Sec. 3(9) of the Federal Data Protection Act (BDSG) may only be transferred subject to the express consent of the third party concerned.

40. Ultimately, no entitlement to access to information shall be granted where such access compromises the protection of intellectual property or business and trade secrets.

²⁰ Sec. 72(4) GWB; Federal Court of Justice, decision of February 2, 2010, KVZ 16/09.

²¹ An English version is available at: http://www.gesetze-im-internet.de/englisch_ifg/index.html.

Access to business or trade secrets may only be granted subject to the data subject's consent, Sec. 6 IFG.

41. However, it should be noted that provisions in other legislation with regard to access to official information will take precedence over the request pursuant to Sec. 1 IFG. This does not apply to the above-mentioned right to access the file pursuant to Sec. 29 VwVfG.²² The claim to investigate the documents according to Sec. 1 IFG can be asserted next to the claim pursuant to Sec. 29 VwVfG.

42. The decision of the Bundeskartellamt not to grant access according to Sec. 1 IFG can be challenged. The review will be conducted by the Administrative Court of Cologne.

4. Access to case file in administrative offence proceedings

43. The following chapter will focus on administrative offence proceedings. The Bundeskartellamt opens such proceedings in particular in cases of cartel agreements leading to particularly severe distortions of competition. Such agreements will often take the form of agreements between competitors on prices, quantities, geographic areas or customer groups ("hardcore cartels").

44. In administrative offence proceedings the provisions of the German Competition Act apply as well as the provisions of the Federal Administrative Offences Act (Gesetz über Ordnungswidrigkeiten; hereinafter "OWiG")²³. The OWiG contains the general provisions for most enforcement activities of the German Federal Government or Länder (federal states) against violations of public law. Since the OWiG refers to the German Code of Criminal Procedure (Strafprozessordnung; hereinafter "StPO")²⁴, procedural law is closely linked to criminal law.²⁵

4.1. Access to the case file for defendant or defence council

45. The right to request access to the file can be exercised by the defence council of a defendant pursuant to Sec. 147 (1) StPO or by the defendant himself pursuant to Sec. 147(4) StPO.

46. During an administrative offence proceeding, the defence counsel has comprehensive access to the file under the condition of not endangering the investigations for the period of the investigation.²⁶ In turn, the council must ensure confidentiality.

47. If investigations have not yet been marked as concluded on the file, the defence counsel may be refused inspection of the files or of individual parts of the files, as well as inspection of officially impounded pieces of evidence, insofar as this may endanger the

²² Sec. 1(3) IFG.

²³ An English version is available at: https://www.gesetze-im-internet.de/englisch_owig/.

²⁴ An English version is available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.pdf.

²⁵ E.g., rights of defence like "nemo tenetur principle" or "benefit of doubt" have to be observed.

²⁶ Sec. 147 StPO.

purpose of the investigation.²⁷ This is not applicable for records concerning the examination of the accused or concerning such judicial acts of investigation to which the defence counsel was or should have been admitted and the inspection of expert opinions.²⁸

48. An appeal against the Bundeskartellamt's rejection to access the case file in an ongoing investigation is only possible by way of exception. In 2018 the Local Court of Bonn confirmed again that a respective request was inadmissible or rather impermissible in an ongoing cartel proceeding.²⁹

49. The Bundeskartellamt informs the persons and companies concerned in writing of the accusation (statement of objections) and gives them the opportunity to comment. The defendant shall be granted access to the case file under the same conditions of the defense council.³⁰ However, inspection of the files shall be refused if overriding interests worthy of protection constitute an obstacle thereto or if the purpose of the investigation appears to be jeopardised.³¹

4.2. Access for party who claims damage

50. The application to access the case file can be made before the action has been brought forward pursuant to Sec. 406e StPO. After the action has been brought forward by a damage claimant the respective court may request that the competition authority disclose documents and items that are included in its files pursuant to Sec. 89c GWB.

4.2.1. Access pursuant to Sec. 406e StPO

51. These provisions are the most relevant in the Bundeskartellamt's practice with regard to disclosure. Today, there is hardly any fine decision by the Bundeskartellamt that is not followed up by private damages actions. Consequently, in almost every cartel case in which the Bundeskartellamt issues a fining decision, there is at least one request for access to the file. Between 2017 and 2018 the Bundeskartellamt received more than 95 requests for access to the case file.³²

52. Upon conclusion of a cartel proceeding, the parties who potentially suffered damage from cartel infringements can request access to the Bundeskartellamt's fine decision to obtain information for their private damages claims if they show a legitimate interest pursuant to Sec. 406e (1) StPO.

53. On the other hand, access to the fine decision or rather parts of it can be refused if overriding interests worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. This applies especially to personal data of personally affected parties, the amount of the fine or business secrets. It may also be refused if the purpose of

²⁷ Sec. 147(2) StPO.

²⁸ Sec. 147(3) StPO.

²⁹ Local Court of Bonn, decision of May 8, 2018, 52 OWi 25/18 [b].

³⁰ Sec. 147(4) StPO.

³¹ Sec. 147(4) StPO.

³² https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20Taetigkeitsbericht%202017_2018.pdf?__blob=publicationFile&v=6

the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be rejected if the proceedings could be considerably delayed thereby.³³

54. Those affected by the requests (in particular the parties to the proceedings, but also third parties) must be heard before access to the file is granted. As a consequence, the Bundeskartellamt might grant access to a confidential version where business secrets or personal data have to be blackened.

55. Based on that, the Bundeskartellamt has developed a regular decisional practice in this area which usually consists of only granting access to the fining decision which contains all the relevant information about the acting individuals and the infringement as such, including the infringement period as well as the products affected by the infringement.³⁴

56. Access to other parts of the file - e.g. leniency materials, pieces of evidence or settlement submissions - is usually denied as these parts of the file are outside the scope of the legitimate interest of the applicant.³⁵

57. The non-disclosure of leniency applications is justified by the public interest to detect and prosecute cartel infringements.³⁶ Leniency applications are subject to particularly strict confidentiality, since access to leniency material would endanger future cartel investigations (within the meaning of Sec.406e (2) StPO) as it might deter future leniency applicants from bringing forward an application for leniency.³⁷

58. While private enforcement – at first sight – seems to be weakened by the provisions of the EU Cartel Damage Directive on the strict confidentiality of leniency documents, a closer consideration leads to the opposite conclusion: since private enforcement largely depends on the successful detection of cartel infringements, the protection of leniency programs also ensures the possibility to take private legal action against damage from cartel infringements and receive compensation. In fact, private damages actions would not be possible without the preliminary work of the competition authority.

59. The European Courts have also been seized of a number of important cases on the balance between the protection of leniency programmes on the one hand and the facilitation of damages claims on the other hand over the last year. The most widely discussed case is the Pfleiderer case.³⁸ The case was referred to the Local Court of Bonn, which referred the case to the European Court of Justice (ECJ). In a private proceeding a third party had

³³ Sec. 406e(2) StPO.

³⁴ More information could be found at: https://www.bundeskartellamt.de/DE/Kartellverbot/Materialien/Amtsgericht_Bonn/Entscheidungen_AG_Bonn_node.html.

³⁵ Bundeskartellamt, press release of August 27, 2012, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/27_08_2012_Kronzeugen_OLG.html?nn=3591568.

³⁶ Düsseldorf Higher Regional Court, decision of August 13, 2018, V-2 Kart 1-3/17.

³⁷ Local Court of Bonn, decision of April 19, 2016, 52 OWi 9/16.

³⁸ Decision of June 14, 2011, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=E5F273AEFBE9C338F5F62191355670E8?text=&docid=85144&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&c id=53395>.

requested access to the Bundeskartellamt's files in an administrative offence proceeding in order to prepare its private damages claim.³⁹ Pfleiderer, a customer of a décor paper cartel, who sued the cartelists for damages, requested information from the Bundeskartellamt's proceedings against the cartel, including leniency documents. The ECJ ruled that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected under EU law (right to claim damages vs. effectiveness of enforcement of competition law). In applying the ECJ decision the Local Court of Bonn refused disclosure for that particular case. Pfleiderer was not granted access to the leniency applications of the cartel participants.

60. If third parties demand access to the case file in administrative offence proceedings, the Bundeskartellamt will use the statutory limits of its discretionary powers to grant or refuse access to documents which include competitively sensitive information⁴⁰. Cartel agreements themselves are not business secrets and are not protected as such.

61. In general, access to the case file is granted upon request at any stage of the proceeding. An attorney may inspect the files for the injured party but the latter may also inspect the files on its own.

62. The Bundeskartellamt's decision not to grant access to the case file in full or in part can be challenged and is therefore subject to judicial review.⁴¹ The Regional Court of Bonn has confirmed the practice of the Bundeskartellamt throughout in its decision.⁴²

4.2.2. Access to the case file pursuant to Sec. 89c GWB

63. The EU Cartel Damages Directive of 26 November 2014 has introduced claims for access to information in the context of Cartel Damages Claims. These provisions have been transformed into German Law by virtue of the 9th amendment to the German Competition Act adopted on 31 March 2017.

64. In appeals against the Bundeskartellamt's decisions, persons and associations of persons whose interests are substantially affected by the decision and who, upon their application, have been admitted by the cartel authority to the proceedings, may inspect the court files. Pursuant to Sec. 89c(1) GWB, claimants can also request the court to disclose documents included in the Bundeskartellamt's file. Therefore, the claimant has to substantiate his claim and that it is not possible for him to obtain the information from the other party or from a third person with reasonable effort. The decision if and to what extent

³⁹ Parts of this paper are based on Germany's contribution to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. DAF/COMP/WP3/WD(2010)35 and Germany's contribution to the October 2011 roundtable on "Institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency", OECD Doc. DAF/COMP/WP3/WD(2011)77.

⁴⁰ Sec. 46(1) OWiG in combination with Sec. 474, 475, 406e StPO.

⁴¹ 406e(4) 2 StPO.

⁴² Local Court of Bonn, decision of April 19, 2016, 52 OWi 9/16; decision of April 27, 2016, 52 OWi 75/15 and 52 OWi 76/15; more information could be found in the activity report of the Bundeskartellamt 2017/2018, p. 32 (German version), available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeit%202017_2018.pdf?__blob=publicationFile&v=6.

access to the files is granted is at the discretion of the Düsseldorf Higher Regional Court. The request pursuant to Sec. 89c(1) GWB or the request for the disclosure of official information by the Bundeskartellamt is ruled out where this is disproportionate.⁴³

65. Before making evidence accessible or disclosing information, the court has to hear those affected by the disclosure and the Bundeskartellamt pursuant to Sec. 89c (2) 2 GWB.

66. The Bundeskartellamt can prevent inspections of its records if this is necessary for important reasons, in particular to protect business secrets or other confidential information.⁴⁴ The Bundeskartellamt may also refuse the disclosure of certain documents such as leniency applications, settlements and internal notes of the Bundeskartellamt.⁴⁵ The rejection of the Bundeskartellamt can be judicially reviewed pursuant to Sec. 89c(4) 2 in conjunction with Sec. 89b(8) GWB by the Düsseldorf Higher Regional Court. Upon application by a party, the court has to examine whether the case file includes leniency statements or settlement submissions and has to submit the evidence to the requesting party if it does not include leniency statements or settlements.⁴⁶ Consequently, only these document types enjoy full protection from disclosure following a request to access the case file pursuant to Sec. 89c GWB.

67. In order to prevent the claimant from bypassing the aforementioned disclosure procedure, the claimant cannot access the Bundeskartellamt's files based on Sec. 406e and 475 StPO – except for the fining decision.⁴⁷ Hence, before the action will be brought to court the damage claimant can still assert his right to access the case file with regard to the Bundeskartellamt's fine decision according to Sec. 406e StPO.

68. The decision of the Düsseldorf Higher Regional Court is subject to judicial review.⁴⁸

4.3. Request for access to the case file by other third parties

69. Beside the request for access to the case file by parties who potentially suffered damage there is also the possibility to apply for access by those who refer to other legal information interests pursuant to Sec. 474, 475, 476 StPO. This includes inter alia requests from other law courts or from scientists for research purposes. Compared to the above-mentioned requests for access to the case file those requests are quite rare.

4.4. Access to the case file for the general public

70. The Freedom of Information Act is not applicable in an administrative offence proceeding due to the subsidiarity to the special provisions in the StPO.

71. However, beside the above-mentioned transparency obligations, the Bundeskartellamt communicates on its website each fining decision concerning a violation

⁴³ Sec. 89c(3) GWB.

⁴⁴ Sec. 89c(2) 2, 3 GWB.

⁴⁵ Sec. 89c(4) GWB.

⁴⁶ Sec. 89c(4) in conjunction with 89b (8) GWB.

⁴⁷ Sec. 89c(5) 2 GWB.

⁴⁸ Sec. 171 et seq. GWB.

of Sec. 1 or 19-21 GWB or Art. 101 or 102 of the TFEU no later than upon conclusion of the authority's fine proceedings. The notice contains inter alia information on the facts established in the fining decision, information on the type of the infringement and the period during which the infringement occurred, information on the undertakings which were involved in the infringement and information on the goods and services affected.⁴⁹

5. Conclusion

72. Nowadays, there are hardly any administrative offence proceedings of the Bundeskartellamt without requests for access to the case file. The right to access the case file is of crucial importance to the right of defence and the rule of law. Therefore, the Bundeskartellamt is committed to guaranteeing full respect for the rights of defence of parties in competition procedures and attaches particular importance to transparency. However, there are strong reasons why the right to access the file has to be balanced against the need to protect confidential information. Otherwise the Bundeskartellamt would give rise to subsequent problems such as the unlawful disclosure of trade and business secrets.

⁴⁹ Sec. 53(5) GWB.