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# How to obtain and use US discovery in European private antitrust actions

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In July 2012, Germany's antitrust authority, the *Bundeskartellamt*, imposed €124.5 million in fines on four German railway track makers. These included business units of ThyssenKrupp, Vossloh, and Voestalpine, and were for allegedly operating a rail track price-fixing cartel between 2001 and 2011.

Austria-based Voestalpine acted as a whistleblower in the matter and received some leniency when it came to the penalties. Vossloh acquired Stahlberg Roensch, its unit hit by the fine, in 2010. As such, a large portion of the fine will be shouldered by the unit's former owner. The investigations of other companies still continue and criminal investigations against several individual cartel members are ongoing; such investigations usually continue beyond any fining decision against the company (although criminal sanctions for antitrust infringements are limited to bid rigging in Germany).

German state railway operator Deutsche Bahn was and still is in talks with the companies involved in the price-fixing cartel, attempting to come to an agreement regarding the damages to be paid by the cartelists to Deutsche Bahn. In December 2012, Deutsche Bahn filed suit against the rail track suppliers, seeking damages before the regional court of Frankfurt am Main. The damages in question reportedly may reach €750 million ($993 million). Deutsche Bahn has sued ThyssenKrupp, Moravia Steel, Vossloh and the former owner of Stahlberg Roensch. Deutsche Bahn did not, however, sue the whistleblower Voestalpine. Talks are on and Voestalpine will probably agree to pay its share to Deutsche Bahn soon.

Even though the German civil court is bound to the findings of the antitrust authority with respect to the fact that anticompetitive behavior took place, the issue of damages will have to be proven in a private antitrust action. One of the main hurdles for plaintiffs before German courts is the lack of effective discovery; something which is available in the US, and to a lesser degree in the UK and other Commonwealth countries.

German plaintiffs or defendants, however, may be able to take advantage of an old US federal law, enacted in the mid-19th century and amended in 1964, to obtain discovery in the US that could be used in German and other EU private proceedings. In light of this, it is interesting to consider how US-style discovery can be obtained for use in European private antitrust actions, with a special focus on Germany, under title 28 of the United States Code (USC) section 1782(a), which provides that a US district court 'may order' a person residing or found in that court's district to give testimony or produce documents 'for use in a

proceeding in a foreign or international tribunal, ... upon the application of any interested person.'

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**Antitrust follow-on actions in Europe**

The private enforcement of antitrust rules has been possible in the EU since the Treaty of Rome was enacted in 1957. This understanding was also confirmed by the European Court of Justice in its decisions in *Courage v Crehan*, ECJ, Case C-453/99 (2001) and in *Manfredi*, ECJ, Joined Cases C-295/04 to C-298/04 (2006). In practice, however, private antitrust litigation hardly exists in the EU. In a study completed in 2004 for the European Commission (EC), private enforcement of antitrust laws was found to be in a state of 'total underdevelopment'. And things have not really changed since then. The EC concluded that this lack of private enforcement is largely due to various legal and procedural hurdles in the EU member states' rules governing actions for antitrust damages before national courts. Indeed, European antitrust damages cases display a number of particular issues that are often insufficiently addressed by traditional rules of civil liability and procedure in the various jurisdictions. This, in turn, gives rise to a great deal of legal uncertainty. These issues include the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants, and an unfavorable risk balance for plaintiffs.

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Several reasons can be identified for the underdevelopment of private antitrust litigation in Europe. First, compared with the US, Europe's system of competition law enforcement has traditionally been less geared toward achieving deterrence through the private plaintiffs' lawsuits. In the US, such private enforcement is much more developed. Indeed, public enforcement by the US Department of Justice (DoJ) and Federal Trade Commission (FTC) was added only at a later stage. Second, under the US system, plaintiffs may obtain an award of treble damages, which is not the case in the EU. Third, the US system provides a powerful set of discovery tools, which are not available in most of the 27 EU member states.

Finally, the US system provides for collective or so-called class actions, as well as contingency fees for lawyers, which are also not available to most litigants in the EU.

**No discovery in Germany and many other member states**

Private antitrust cases are particularly fact-intensive. Some of the most important facts, such as the infringement of antitrust and competition laws, are usually proven by the antitrust authorities. Whenever the GermanBundeskartellamt or the European Commission finds a breach of competition law, victims of the infringement can rely on a decision from such bodies as binding proof of antitrust liability in subsequent civil proceedings for damages. The same is true for many, but not all, other EU member states.

> ***"Compared with the US, Europe's system of competition law enforcement has traditionally been less geared toward achieving deterrence through the private plaintiffs' lawsuits."***

However, much of the key evidence needed to prove antitrust damages is often held by the defendant or third parties, and the plaintiff usually does not have sufficient information about such evidence. One of the most critical issues for litigants in Germany, as in many other European jurisdictions, is the lack of pre-trial discovery that exists in the US. The parties in US proceedings have far-reaching discovery tools at hand and wide access to information from the other parties. Under the US Federal Rules of Civil Procedure (FRCP), discovery is the pre-trial phase of a lawsuit, during which each party can obtain non-privileged evidence from the opposing party by means of discovery devices. This includes requests for: answers to interrogatories; production of documents and other items (including electronically stored information (ESI)); and admissions and depositions. Today, the production of ESI plays a major role in US government actions and private lawsuits. Discovery can also be obtained from non-parties through the use of subpoenas. Moreover, the US courts oversee the discovery process. Thus, when parties object to discovery requests, the requesting party may seek the assistance of the US court by filing a motion to compel discovery.

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A similar process with similar tools, known as disclosure, is provided under the laws of England and Wales. All parties to civil court proceedings in England and Wales must disclose relevant documents, subject to some exceptions. The scope of documents subject to mandatory disclosure in English proceedings is more limited than the discovery allowed under the broader and more general US standard. In the UK, a party is only required to disclose documents that adversely affect its own case, or that support or adversely affect another party's case. By contrast, under the US discovery rules, the opposing party may seek discovery "regarding any non-privileged matter that is relevant to any party's claim or defense" (FRCP 26(b)(1)). Further, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.".

Under UK law, however, the obligation to disclose documents extends to those that are within a party's "possession, custody or power." So if a party in a UK action has the power to call for relevant documents –a parent company for example – from a subsidiary company located in the US, an application under section 1782, such as described below, may not be necessary in English proceedings.

**Discovery pursuant to 28 USC section 1782(a)**

European antitrust litigants seeking discovery in the US for use in foreign private antitrust litigation have an old but very powerful tool available to them: section 1782(a) of Title 28 of the USC (Section 1782). Section 1782 allows private antitrust (and other) litigants in foreign proceedings to take advantage of the comparatively liberal approach to US discovery under certain circumstances. Such US discovery may include the production of documents, ESI (electronic discovery), other tangible evidence, as well as sworn deposition testimony of

witnesses. Note, however, that the ability to conduct such discovery is not automatic — a US district court must grant permission to conduct Section1782 discovery.

The text of Section 1782(a) provides as follows:

*'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.*

*A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.'*

**Two-step analysis regarding Section 1782 requests**

Following the US Supreme Court's 2004 decision in *Intel Cor. v. Advanced Micro Devices, Inc, 542 US 241 (2004),* US courts use a two-step analysis when considering applications for discovery made under section 1782(a).

First, the US district court will examine certain "mandatory factors" to determine whether certain elements required on the face of the statute have been satisfied. Second, it will consider a number of additional "discretionary factors" in deciding whether to exercise its discretion to permit Section 1782 discovery. *Id.* at 256-59, 264-65.

**Mandatory factors**

As the text of Section 1782 above clearly reveals, there are four mandatory factors that a party requesting discovery under the section must establish. First, a Section 1782 request must be made 'by a foreign or international tribunal' or by 'any interested person.' An 'interested person' includes, but is not required to be, a party to the foreign proceeding, a foreign sovereign, or a designated agent of a foreign sovereign. An 'interested person' also includes any other person possessing reasonable interest in obtaining judicial assistance.

> ***"Note that the ability to conduct such discovery is not automatic — a US district court must grant permission to conduct Section1782 discovery."***

Second, the request must seek evidence, whether it be the 'testimony or statement' of a person or the production of 'a document or other thing'. In practice, this usually is a request for evidence in the form of depositions and/or document requests.

Third, the Section 1782 discovery must be 'for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation'. Under the US Supreme Court's decision in *Intel*, the relevant inquiry is whether the foreign body acts as a first-instance decision maker, rendering a dispositive ruling responsive to a complaint and reviewable in court (542 US at 257-58). A 'foreign or international tribunal' under Section 1782 includes, among others, courts and intergovernmental arbitral bodies.

Fourth, the 'person' from whom discovery is sought must 'reside' or be 'found' in the district of the US district court in which the application for Section 1782 discovery is brought. Physical presence in the applicable district of the US is enough for a person to be 'found' there. Therefore, it is even possible to target European visitors coming to the US for a few days, if the timing is right.

**Discretionary factors**

If the mandatory factors are established, the decision to permit Section 1782 discovery is still within the discretion of the US district court. In exercising this discretion, courts are guided by four factors set out by the Supreme Court in the 2004 *Intel* decision.

First, courts consider whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach and thus accessible absent Section 1782 aid. Specifically, 'when the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'

> ***"If the mandatory factors are established, the decision to permit Section 1782 discovery is still within the discretion of the US district court."***

Second, the US courts examine 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.'

Third, the US courts consider whether the Section 1782 application 'conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States.'

Fourth, the US courts review the Section 1782 application to determine whether it contains 'unduly intrusive or burdensome requests'; such discovery requests 'may be rejected or trimmed'. Therefore, a court may refuse to allow Section 1782 discovery on the grounds of undue burden, or it may permit the discovery only if the scope is limited or measures are taken to make the discovery less onerous or intrusive.

Finally, the district court 'may deny the Section 1782 application where [the court] suspects that the discovery is being sought for the purposes of harassment.' *Brandi-Dohrn v IKB Deutsche Industriebank*, 673 F.3d 76, 81 (2d Cir. 2012).

> ***"The district court 'may deny the Section 1782 application where [the court] suspects that the discovery is being sought for the purposes of harassment.'"***

A district court's discretion is not unlimited, however. Section 1782 states: 'District courts must exercise their discretion under Section 1782 in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in [US] federal courts and encouraging foreign countries by example to provide similar means of assistance to [US] courts."

**Other factors addressed by US courts regarding Section 1782**

US courts have addressed other important issues regarding Section 1782. First, the US Supreme Court in *Intel*held that Section 1782 was not subject to a 'foreign-discoverability'

requirement. Therefore, there is no requirement that evidence sought in the US under Section 1782 be discoverable under the laws of the foreign country that is the locus of the underlying action. In reaching this conclusion, the Supreme Court reasoned that concerns about maintaining parity among adversaries in litigation did not provide a sound basis for a foreign-discoverability rule. Rather, when discovery is sought by an interested person, 'a district court could condition relief upon that person's reciprocal exchange of information', and 'the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate'.

Second, the US Supreme Court explicitly rejected the requirement that the foreign proceeding be 'ending' or 'imminent'. Instead, the Supreme Court held that the foreign proceeding need only "be within reasonable contemplation."

Third, US courts generally will not refuse Section 1782 discovery solely because a foreign tribunal has not yet had the opportunity to consider the discovery request. However, some US courts in exercising discretion do take into account the actions, if any, an applicant has taken in the foreign jurisdiction to obtain the discovery.

**Recent developments**

A recent decision by the US Court of Appeals for the Second Circuit expands the scope of discovery that foreign litigants may seek in the US under Section 1782. In March 2012, the Second Circuit held that a district court may issue a subpoena under Section 1782, even if the evidence sought would not be admissible in the foreign proceeding. This ruling, reversing a decision of the Southern District of New York, may impose greater discovery obligations on US entities in response to requests from foreign litigants.

> ***"Some US courts in exercising discretion do take into account the actions, if any, an applicant has taken in the foreign jurisdiction to obtain the discovery."***

The case, *Brandi-Dohrn v IKB Deutsche Industriebank*, 673 F.3d 76 (2d Cir. 2012), relates to a securities fraud action brought in a German Regional Court (*Landgericht*) by a German shareholder against IKB, a German bank. The plaintiff alleged that the bank had failed to disclose the extent of its exposure to collateralized debt obligations backed by US subprime mortgages. The German *Landgericht* dismissed the case in August 2010 and plaintiff Brandi-Dohrn appealed the action to the German Higher Regional Court (*Oberlandesgericht*). More than a year after the case was dismissed, Brandi-Dohrn filed an application under Section 1782 in the Southern District of New York, asking the US district court to issue subpoenas to three non-parties in the US to obtain documents and depositions for use in his German appellate proceeding, and also by other clients in similar suits against the German bank.

The District Court of the Southern District of New York quashed the subpoenas on the ground that the evidence sought by Brandi-Dohrn was unlikely to be admitted by the German appellate court and, therefore, was not 'or use' in a foreign proceeding. In March 2012 the Second Circuit reversed, noting that the US Supreme Court has rejected the 'foreign discoverability rule', which would bar a district court from ordering production of evidence that would not be discoverable in the foreign jurisdiction. The Second Circuit saw no reason why a 'foreign admissibility rule' should not suffer the same fate, finding that there 'is no statutory basis for any admissibility requirement," consistent with decisions from the First, Third and Ninth Circuits.

**Obtaining evidence for European follow-on actions**

Section 1782 requests can also be used in private antitrust litigation in Europe. Under the procedural laws of Germany and virtually all other EU member states, a claimant has to sufficiently demonstrate and prove it has damage suffered as a result of the anticompetitive behavior. The overcharge is one measure of damages under antitrust law. It is the difference between the artificially inflated price resulting from defendant's anticompetitive conduct — such as price fixing — that is paid by the purchaser, and the price the purchaser would have paid without the anticompetitive conduct. Tto comply with the burden of proof, a plaintiff in a private antitrust damage action has to submit evidence of the damage suffered and the causality between the infringement and the damage. If such evidence is located in the US, or if a person can be found in the US with the power to produce relevant documents, ESI, or provide testimony in a deposition, a Section 1782 discovery request can be a powerful tool to collect such evidence for use in German or other foreign proceedings.

> ***"A Section 1782 discovery request can be a powerful tool to collect such evidence for use in German or other foreign proceedings."***

Parties in US private antitrust actions generally use discovery requests to seek broad categories of non-privileged documents and other tangible evidence that will help determine the amount of damages arising from anticompetitive conduct. Parties typically seek internal correspondence, transactional data, price lists, other price information, supply information, business plans and projections, market share information, and alleged conspiratorial communications with competitors. Plaintiffs also routinely seek discovery of all documents produced pursuant to subpoena to — or seized by — the government, grand jury materials, and materials submitted as part of leniency applications relating to the anticompetitive conduct at issue. Parties also seek the source materials underlying any formal submissions a company has made to the government.

**Outlook**

Recent US cases indicate that the role of Section 1782 applications in foreign actions will continue to broaden and grow. Parties must take care to meet the mandatory and discretionary requirements of Section 1782 in their applications but, where they do, a German party to a private antitrust action may be able to obtain significant information to develop — or defend — claims of antitrust damages pursuant to a Section 1782 application.

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very well covered and include the right amount of detail."

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