

# TRANSPARENCY UNVEILED: ACCESS TO INFORMATION IN DIGITAL MARKETS ACT PROCEEDINGS AT MEMBER STATE LEVEL – THE GERMAN AND AUSTRIAN EXPERIENCE

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*Access to information is essential in order to guarantee fundamental procedural rights under EU law – in particular in order to make full use of the right of defence. At the same time, access to information ensures the greatest possible transparency for all parties and stakeholders. As another key point, access to information is also crucial in order to strengthen private enforcement, which is the second essential pillar of the effective enforcement of EU law in competition law. This article outlines the options provided for accessing information in the context of the new DMA in selected Member States, namely Austria and Germany. This article is part 2 on the issue of ‘Transparency Unveiled: Access to Information in Digital Markets Act Proceedings’.*

## 1 INTRODUCTION

The Digital Markets Act<sup>1</sup> contains a novel framework to ensure contestability and fair digital markets. Next to a plethora of substantive obligations for the so-called ‘gatekeepers’, the Digital Markets Act (DMA) provides for a sophisticated multi-layered enforcement system. The Commission constitutes the core enforcer of the DMA, with the Member States and their national competition authorities (NCAs) only having limited roles.<sup>2</sup> Furthermore, private enforcement of the DMA in national courts has been subject to much discussion.<sup>3</sup>

In this multi-layered enforcement system, and similarly to the related enforcement of EU competition law, procedural tools and rights are of considerable importance. In this context, access to information is decisive for stakeholders. For gatekeepers or undertakings or associations of undertakings concerned by DMA procedures, access to information is

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<sup>1</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (DMA).

<sup>2</sup> Eg NCAs must inform the Commission when initiating investigations against gatekeepers under national competition law according to Articles 38(1), (2), (3), (5) DMA and once the Commission opens an investigation, the respective NCA must close its own and also report on the status of its investigations according to Article 38(7) DMA. See also Alexandre De Strel et al, ‘Effective and Proportionate Implementation of the DMA’ (2023) Centre on Regulation in Europe (CERRE) <<https://ssrn.com/abstract=4323647>> accessed 15 April 2024.

<sup>3</sup> Rupperecht Podszun, ‘Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act’ (2022) 13(4) Journal of European Competition Law & Practice 254.

crucial to: protect the rights of the defence, complement the right to be heard vis-à-vis the enforcement authority and guarantee equality of arms vis-à-vis opponents in private enforcement proceedings.<sup>4</sup> Third parties may require access to information in order to understand the basis on which decisions that may affect them are being made or to gather information necessary for private enforcement actions. Rules that enable third parties to access information intend to compensate for the information asymmetry that usually exists.<sup>5</sup> For third parties that potentially suffered from harm caused by violations of the DMA-provision, access to documents referring investigations under the DMA are vital to establish their claim in the first place.<sup>6</sup> Moreover, it ensures that the fundamental principle of equality of arms under EU law is complied with, which can be derived from Article 6 ECHR<sup>7</sup> and which particularly plays an important role when it comes to private enforcement.<sup>8</sup> In general, access to information more broadly serves the principle of open justice, accountability, and transparency, fostering the general understanding and public confidence in DMA enforcement and public confidence.<sup>9</sup>

This article deals with access to information in the context of DMA enforcement from a perspective of national level applicable in the context of the DMA. For this purpose, we have chosen diverging approaches on Member State level, namely from the perspective of both Austrian and German law, respectively. As the DMA itself<sup>10</sup> holds quite limited possibilities for access to information – in particular when it comes to third parties – it is worth taking a closer look at the situation on a national level of the Member States. It poses the question of which instruments for access to information are provided by national civil procedural law. Due to the substantive proximity to competition law, it is also necessary to clarify whether the applicable procedural rules of the Member States are also applicable in connection with the DMA. This is particularly worthwhile due to the associated applicability of the Damages Directive and the differentiated regulatory regime for the disclosure of information contained therein.

## 2 GERMANY

In order to gain an overview of the legal regime for access to information, both competition law and civil procedural possibilities are analysed in this section. In Germany, the DMA is not only materially close to the DMA but also close in a technical sense. Therefore, it is worth looking at the scope and limits of the respective provisions concerning access to information

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<sup>4</sup> OECD, 'Access to the case file and protection of confidential information – Background Note' (2019), 6 <[https://one.oecd.org/document/DAF/COMP/WP3\(2019\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2019)6/en/pdf)> accessed 15 April 2024.

<sup>5</sup> For competition law see comparably recital 15 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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] OJ L349/1 (Damages Directive).

<sup>6</sup> For competition law see comparably joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse v Commission* EU:T:2006:151

<sup>7</sup> *Zayidov v Azerbaijan (No 2)* App no 5386/10 (ECtHR, 24 June 2022) para 87.

<sup>8</sup> For competition law see comparably Recital 15 Damages Directive.

<sup>9</sup> Marios Costa, 'Accountability through Transparency and the role of the Court of Justice' in Ernst Hirsch Ballin, Gerhard van der Schyff, and Marteen Stremmer LLM (eds), *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society* (F.M.C. Asser Press The Hague 2019).

<sup>10</sup> As Hornkohl provided in her paper (Lena Hornkohl, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level', in this issue).

which are held by national (procedural) competition law. Subsequently, the implementation of the Representative Actions Directive (RAD)<sup>11</sup> as well as civil procedural law in general and, lastly, the possibilities held by the Freedom of Information Act are also examined.

## 2.1 DISCLOSURE RULES IN GERMAN COMPETITION LAW

The DMA – explicitly<sup>12</sup> – does not constitute competition law, even though there are certain overlaps in terms of aim and purpose.<sup>13</sup> As the Damages Directive can only be applied with regards to infringements of competition law,<sup>14</sup> its disclosure rules do not apply to the DMA by virtue of EU law.<sup>15</sup> However, with the recent 11<sup>th</sup> Amendment of the German competition act, the Act Against Restraints of Competition (ARC), Germany has been the first EU Member State to integrate infringements against Articles 5, 6, and 7 DMA into its domestic competition law private enforcement system.<sup>16</sup> According to the German ARC amendment, the German rules transposing the Damages Directive apply also to the respective DMA infringements, which offer the widest possible access to information available. Prospective claimants and defendants for DMA damages proceedings will have a wide access to information and enjoy equivalent rights to parties in competition damages proceedings.

### 2.1[a] *Overview of the German disclosure rules*

When transposing the Damages Directive, Germany included special rules on disclosure which are applicable in the context of competition private enforcement proceedings in its ARC, which will only be discussed in an overview here.<sup>17</sup> The German competition disclosure rules can be found in Section 33g and Sections 89b – 89e ARC. They apply to all proceedings relating to damages actions under Section 33a ARC, including those for the mentioned infringements of Articles 5, 6, and 7 DMA. The German competition disclosure framework follows the Chapter 2 Damages Directive impetus but also goes a bit beyond it. Section 33g ARC foresees a substantive disclosure claim that can be filed pre-trial and independently from any competition damages proceedings.<sup>18</sup> Sections 89b – 89e ARC include the provisions for claiming disclosure and antitrust damages within the same proceedings.<sup>19</sup> Under these rules, disclosure is available for both the (future) claimant and defendant. Disclosure can be requested of anyone in possession of evidence or information. Competition authorities are not covered by this understanding, but there is a dedicated

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<sup>11</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (2020) OJ L409/1.

<sup>12</sup> Recital 11 DMA.

<sup>13</sup> Belle Beems, ‘The DMA in the broader regulatory landscape of the EU: an institutional perspective’ (2022) 19(1) European Competition Journal 1.

<sup>14</sup> Article 1(1) Damages Directive.

<sup>15</sup> Lena Hornkohl, ‘Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level’, in this issue.

<sup>16</sup> Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze, BGBl. 2023 I Nr. 294 vom 06.11.2023.

<sup>17</sup> Lena Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021) 187–227.

<sup>18</sup> Daniel Higer, *Offenlegung von Beweismitteln nach der 9. GWB-Novelle* (LIT Verlag 2020) 134.

<sup>19</sup> Gerhard Klumpe and Thomas Thiede, ‘Auskunftsklagen nach der GWB-Novelle – Gedankensplitter aus der Praxis’ (2016) 4 Neue Zeitschrift für Kartellrecht 471.

provision allowing disclosure from the file of competition authorities in Section 89c ARC, which is, however, not available pre-trial.<sup>20</sup> Disclosure ensures that the evidence necessary for the assertion of a claim for damages or to defend against such a claim is available to the beneficiary. The prerequisite for such disclosure is that the party credibly demonstrates that it has such a claim, or a claim is being asserted against it. The evidence needed must be specified as precisely as possible on the basis of reasonably available facts, which includes categories of evidence.<sup>21</sup> The German disclosure provisions include the black list for leniency statements and settlement submissions, which can never be disclosed, as well as the grey list for certain documents not disclosable during the public enforcement proceedings.<sup>22</sup> Furthermore, proportionality of disclosure constitutes an important limitation.<sup>23</sup> Section 89b(7) ARC further specifically mandates that confidential information needs to be protected.<sup>24</sup>

### 2.1[b] *Applicability in the context of the DMA*

The described German ARC rules provide for the widest possibilities of access to information for DMA enforcement. In the context of DMA damages proceedings and pre-trial, (possible) claimants and defendants can ask for disclosure of necessary evidence and information, i.e. if said party specifies the evidence as precisely as possible on the basis of reasonably available facts and restrained by the above-mentioned limitations according to Sections 33g, 89b et seq. ARC. This includes inter-partes disclosure and also disclosure of documents in the file of the competition authority. Consequently, under the German provisions, (possible) claimants and defendants for DMA damages proceedings will have a wide access to information and enjoy equivalent rights to parties in competition damages proceedings.

At the same time, the application of the ARC disclosure regime is necessarily limited. Disclosure is only given in the context of DMA damages proceedings. It cannot be obtained for purposes other than proceedings, even in the context of other types of private enforcement actions outside of damages proceedings. Thus, disclosure to access information, e.g. for judicial review against DMA enforcement decisions, is not covered. Furthermore, disclosure necessary for other types of private enforcement actions, such as injunctions (per Section 33 ARC), i.e. actions so that the gatekeeper refrains from infringing the DMA, are not covered by the ARC regime. Injunctions might be particularly relevant when it comes to the private enforcement of the DMA, as private parties affected by DMA violations will be particularly interested in stopping infringements in national courts, which at the same time

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<sup>20</sup> Thomas Lübbig and Roman A Mallmann, 'Offenlegung von Beweismitteln gemäß dem Kabinettsentwurf für das 9. GWB-Änderungsgesetz' (2016) 4 *Neue Zeitschrift für Kartellrecht* 518, 521.

<sup>21</sup> Albrecht Bach and Christoph Wolf, 'Neue Instrumente im Kartellschadenersatzrecht – Zu den Regeln über Offenlegung, Verjährung und Bindungswirkung' (2017) 5 *Neue Zeitschrift für Kartellrecht* 285, 289.

<sup>22</sup> See on the different categories Case C-57/21 *RegioJet* EU:C:2023:6.

<sup>23</sup> Rupprecht Podszun and Stephan Kreifels, 'Kommt der Ausforschungsanspruch? – Anmerkungen zum geplanten § 33 g GWB' (2017) *GWR* 67, 69.

<sup>24</sup> Lena Hornkohl, 'Die neue Mitteilung der EU-Kommission über den Schutz vertraulicher Informationen in Kartellschadenersatzklagen und ihre Anwendung im deutschen Recht' (2020) 22 *Europäische Zeitschrift für Wirtschaftsrecht* 957.

supplements the Commission enforcement of such non-compliance.<sup>25</sup> Yet, the disclosure rules under the ARC are only relevant for third party enforcement in the form of damages actions. Not every infringement of the DMA might even cause damages of third parties or might lead to damages suitable for private enforcement actions, e.g. quantifiable damages.<sup>26</sup>

The ARC rules will be most relevant to obtaining disclosure in the inter-partes relationship, where much evidence and information will be available in the hands of the gatekeepers or third parties relevant for third party damages actions. Given the mitigated specification obligations under the ARC rules as compared to normal German civil procedural disclosure rules,<sup>27</sup> broad categories of relevant evidence and information are accessible. Similar to competition damages actions, for DMA damages actions the regime will be particularly useful for obtaining evidence on the occurrence and amount of any harm inferred on third parties through DMA infringements, as will information on internal calculations, market position, purchasing behaviour, which is required for the concrete calculation of damages and which usually lies in the hands of the gatekeeper or other third parties and not as much in the hands of the competition authorities.<sup>28</sup>

However, the ARC regime cannot overcome the general lack of access to the file of the Commission in its capacity as the main DMA enforcement authority. Section 89c ARC covers disclosure of documents in the file of a competition authority. According to Section 48 ARC, the ‘competition authorities’ in the scope of the ARC are constituted only of the Federal Cartel Office (Bundeskartellamt), the Federal Ministry for Economic Affairs and Energy, and the supreme Land authorities competent according to the laws of the respective Land. Whenever the ARC refers to the European Commission as a competition authority, it specifically refers to the European Commission next to where it mentions the competition authorities, such as in Section 33b ARC. National competition authorities are only involved to a limited extent, e.g. they must be informed if sanctions are imposed on gatekeepers under national competition law.<sup>29</sup> Conversely, NCAs must also inform the Commission when initiating investigations against gatekeepers under national competition law.<sup>30</sup> Once the Commission opens an investigation, the respective NCA has to close its own and also report on the status of its investigations.<sup>31</sup> The DMA therefore pursues a semi-centralistic approach and thus deviates from the prevailing enforcement tradition of EU law. This makes perfect sense in the digital economy, as online platforms generally operate across borders and there are not particular specifications or peculiarities within the respective national markets of

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<sup>25</sup> Lena Hornkohl and Alba Ribera Martínez, ‘Collective Actions and the Digital Markets Act: A Bird Without Wings’ (November 19, 2023) <<http://dx.doi.org/10.2139/ssrn.4637661>> accessed 15 April 2024 with reference to Rolf Albrecht, ‘Digital Markets Act kommt – Regulierung von Plattformen und Auswirkungen auf Unternehmen’ (2022) *Gesellschafts- und Wirtschaftsrecht* 181, 182.

<sup>26</sup> Kati Cseres and Laurens de Korte, ‘The role of third parties in the public enforcement of the Digital Markets Act’ (forthcoming).

<sup>27</sup> See below at 2.2[a].

<sup>28</sup> For competition law see Lena Hornkohl, ‘Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht’ (2018) 12 *Wirtschaft und Wettbewerb* 607, 612.

<sup>29</sup> DMA Article 38(1). See also Jasper van den Boom, ‘What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws’ (2023) 19 (1) *European Competition Journal* 57, 65.

<sup>30</sup> DMA Article 38(1), (2), (3), (5).

<sup>31</sup> DMA Article 38(7).

Member States.<sup>32</sup> In contrast, the enforcement of traditional competition rules –in particular, Articles 101 and 102 TFEU – is clearly decentralized, as it is carried out by the individual member state’s NCAs.<sup>33</sup> However, given the limited involvement of national authorities in the enforcement of the DMA, access to their files is less relevant.

## 2.2 OTHER DISCLOSURE AND TRANSPARENCY RULES IN GERMAN LAW

Given the limits of the specific disclosure regime under the ARC, German law offers two pathways for further access to information, albeit being themselves limited in scope: the general civil procedural disclosure rules of the German Civil Procedure Code,<sup>34</sup> which also apply in the context of the RAD implementation,<sup>35</sup> and the German Freedom of Information Act.<sup>36</sup> For this purpose, it will be explained for which cases these two approaches are appropriate in connection with the DMA and to which requirements a disclosure is linked in this case, such as the extent of the substantiation requirement.

### 2.2[a] *German Civil Procedure Code*

The German Civil Procedure Code contains limited disclosure rules,<sup>37</sup> which are applicable in the context of the DMA but only offer limited access to information.

Most prominent is the rule in Section 142 Civil Procedure Code, the order to produce documents within the framework of the court’s conduct of proceedings.<sup>38</sup> According to Section 142(1) Civil Procedure Code, the court can order a party or a third party to produce the documents in his or her possession and other documents to which a party has referred. Section 142(1) Civil Procedure Code generally can be used in all private DMA enforcement proceedings outside of the dedicated ARC provisions described above.<sup>39</sup> Therefore, the lack of disclosure for injunctions of the ARC disclosure regime can be filled with the (more limited) provision of Section 142(1) Civil Procedure Code.

There are strict limits to the production of documents under this provision. For example, Section 142(1) Civil Procedure Code is not suitable for obtaining information per se, only evidence. Furthermore, the provision only offers inter-partes disclosure, not disclosure from the file of authorities. Most importantly, the document must further be sufficiently explicitly or implicitly specified and be based on the existence of a conclusive submission by the party relating to specific facts.<sup>40</sup> Consequently, this order does not help parties with a lack of information and who therefore wish to use Section 142(1) Civil

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<sup>32</sup> Ranjana Andrea Achleitner, ‘Das Durchsetzungsregime im Digital Markets Act: Private Enforcement unerwünscht?’ (2023) ZöR 287, 295.

<sup>33</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003) Article 5.

<sup>34</sup> Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781).

<sup>35</sup> § 12 Verbraucherrechtgedurchsetzungsgesetz.

<sup>36</sup> Informationsfreiheitsgesetz vom 5. September 2005 (BGBl. I S. 2722).

<sup>37</sup> Verena Dorothea Kern, *Urkundenvorlage bei Kartellschadensklagen* (Mohr Siebeck 2020) chapter 1.

<sup>38</sup> Lena Hornkohl, ‘Überwindung von ungewissen Sachverhalten – Ist die Zeit reif für eine allgemeine Offenlegung von Beweismitteln im deutschen Zivilprozess?’ (2021) 2 Zeitschrift für das gesamte Verfahrensrecht – GVRZ 17, paras. 4 - 5.

<sup>39</sup> See above at 2.1[a].

<sup>40</sup> BGH of 16 March 2017 - I ZR 205/15, NJW 2017, 3304; BT-Drs. 14/6036, 121.

Procedure Code for the purpose of obtaining information to access their enforcement options.<sup>41</sup> Particularly in the case of information asymmetries possible in the context of DMA infringements, if an asserted claim is sufficiently probable and the necessary documents have been designated as precisely and accurately as possible, but cannot be precisely designated, a disclosure for such documents would be preferable in order to satisfy the interest in information. Generally, Section 142 Civil Procedure Code is limited to disclosure in proceedings, hence it is not available outside of DMA private enforcement proceedings pre-trial or for other purposes. Lastly, the order is generally issued *ex officio* and not at the request of a party, which accordingly has no right to such a request.<sup>42</sup>

## 2.2[b] Freedom of Information Act

While the German Freedom of Information Act, similar to the Transparency Regulation, follows the different *ratio legis* of guaranteeing transparency of public conduct, it can be used in order to obtain information and evidence for DMA private enforcement or other actions of third parties and has been used so for competition law in the past.<sup>43</sup> Section 89c ARC on disclosure of evidence from the file of the competition authority does not exclude the rules of the Freedom of Information Act.<sup>44</sup> The Freedom of Information Act works very similar to the Transparency Regulation and is therefore only discussed briefly here. The Freedom of Information Act gives access to official information from the authorities of the Federal Government.<sup>45</sup> Sections 3–6 Freedom of Information Act limit this access, e.g. in order to protect special public interests or business secrets, similar to the discussed limitations of the Transparency Regulation on EU level.<sup>46</sup>

In the context of DMA damages proceedings, the inter partes disclosure rules of the ARC will be superior, as they can be used to obtain information on the harm itself.<sup>47</sup> The Freedom of Information Act might still be relevant for DMA stand-alone actions, pre-trial access to German authorities files and outside of damages actions, particularly for injunctive actions, where the ARC regime is not applicable.<sup>48</sup> But even then, in the context of the DMA, the Freedom of Information Act is only very partially useful, given the discussed limited involvement of national authorities for DMA enforcement.<sup>49</sup> It only covers access to official information from the authorities of the Federal Government of Germany, not the Commission or other Member States.

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<sup>41</sup> BGH of 27 May 2014 - XI ZR 264/13, NJW 2014, 3312; see also BGH of 14 June 2007 - VII ZR 230/06, NJW-RR 2007, 1393.

<sup>42</sup> Critical Raphael Koch, *Mitwirkungsverantwortung im Zivilprozess* (Mohr Siebeck 2013) 350.

<sup>43</sup> Konstantin Seifert, 'Informationsbeschaffung für Kartellschadensersatzverfahren – Kommen Geschädigte (noch) an die Akte des Bundeskartellamtes?' (2017) *Neue Zeitschrift für Kartellrecht* 512, 517.

<sup>44</sup> Hornkohl, 'Zugang zu Dokumenten der Kartellbehörde durch Informationsfreiheitsrecht' (n 28) 612.

<sup>45</sup> Section 1 Freedom of Information Act.

<sup>46</sup> Lena Hornkohl, 'Transparency Unveiled: Access to Information in Digital Markets Act Proceedings on EU Level', in this issue, 4.3.

<sup>47</sup> See above 2.1[b].

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

### 3 AUSTRIA

To this end, it will be examined here whether the Austrian legal system allows any special disclosure regime to be applicable with regards to the DMA. It is also explained whether a system for procedural competition law comparable to the German legal system is conceivable. In addition, the extent to which the Austrian Code of Civil Procedure allows access to information will be examined. In connection with official transparency, the recently enacted Freedom of Information Act is also examined in more detail.

#### 3.1 (NO) SPECIAL DISCLOSURE RULES FOR DMA PRIVATE ENFORCEMENT IN AUSTRIA

Several possibilities for private enforcement of the DMA exist in Austria, which are discussed briefly in the following sections. The applicability of national disclosure rules depends on the extent to which private enforcement is possible in the Austrian legal system. The possibilities for disclosure within competition law in the broader sense are therefore reviewed, namely competition law and unfair competition law, which are regulated in two different legal acts.

##### 3.1[a] *Competition law*

Prior to the amendment of the Austrian competition act, the Cartel Act,<sup>50</sup> disclosure in competition procedure was limited to the right of third parties to demand access to court files, which could even be denied if the parties refuse to give their consent.<sup>51</sup> Since the implementation of the Damages Directive, however, the Cartel Act provides for specific disclosure rules. The rules for disclosure under national competition law represent an extension of the general disclosure rules of the Code of Civil Procedure discussed below<sup>52</sup> and provide for a specific disclosure regime with regard to competition infringements.<sup>53</sup>

Nevertheless, this highly differentiated disclosure regime for private enforcement of competition law is not accessible for DMA-violation private enforcement. The respective provisions are particularly created to transform the Damages Directive into national law, which as described above, does not apply to the DMA regime.<sup>54</sup> Contrary to Germany, Austria has not included the DMA in its national competition damages regime. As described above, even though competition law violations can go in hand with DMA violations and are applied in parallel, the DMA is not competition law, and a violation of the DMA does not equate to a competition law violation.<sup>55</sup>

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<sup>50</sup> Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005) BGBl I Nr 61/2005.

<sup>51</sup> The reliance of access to information from the consent of the parties led to an (ongoing) discussion, whether this very provision is in line with EU law. See Matthias Ranftl and Natalie Harsdorf-Borsch, ‘§ 39 KartG 2005’ in Alexander Egger and Natalie Harsdorf-Borsch (eds), *Kartellrecht* (Linde Verlag Wien 2022) para 31.

<sup>52</sup> See below at 3.2[a].

<sup>53</sup> Alexander Egger and Christian Gänser, ‘§ 37j KartG 2005’ in Alexander Egger and Natalie Harsdorf-Borsch (eds), *Kartellrecht* (Linde Verlag Wien 2022) para 3.

<sup>54</sup> See above at 2.1.

<sup>55</sup> See above at 2.1[b].



### 3.1[b] Other possibilities for private enforcement of the DMA in Austria

Nevertheless, private enforcement of the DMA remains possible under both the Unfair Competition Act<sup>56</sup> and general tort law.

Section 1(1) Unfair Competition Act provides for the possibility to claim damages that result from unfair business practices. An unfair business practice in the sense of Section 1(1) Unfair Competition Act first requires conduct that violates legal acts that aim to grant fair competition. These legal acts can either be national law or EU law, including EU secondary law.<sup>57</sup> The second condition for Section 1(1) Unfair Competition Act is that the violation cannot be based on an unreasonable legal opinion.<sup>58</sup> Due to the *telos* of the DMA – which is above all to prevent users from unfair practices of gatekeepers<sup>59</sup> – the DMA can be considered as legal act aiming to grant fair competition in the sense of Section 1(1) Unfair Competition Act.<sup>60</sup>

Moreover, tort law provision Section 1311 Austrian General Civil Code<sup>61</sup> foresees a claim of damages that derive from the infringement of certain provisions. These provisions must be of protectionary nature, i.e. a provision particularly aiming to prevent violations of the legal interests of an individual or a specific group of people.<sup>62</sup> Competition law is considered to be of protectionary nature,<sup>63</sup> since it also aims to directly or indirectly prevent harm to market participants.<sup>64</sup> A comparable purpose is reflected in Articles 5–7 DMA, which also provide for gatekeepers' obligations with respect to third parties (namely business users and end users), hence why a protective nature can be attributed to those provisions.<sup>65</sup> Private enforcement – namely raising damages claim – could therefore be based on Section 1311 Austrian General Civil Code.

However, neither the Unfair Competition Act, nor the Austrian General Civil Code provide for disclosure rules or other rules on access to information dedicated specifically to the context of DMA private enforcement. Therefore, the general rules discussed in the following section have to be used.

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<sup>56</sup> Bundesgesetz gegen den unlauteren Wettbewerb, BGBl. Nr. 448/1984.

<sup>57</sup> Andreas Frauenberger et al, '§ 1' in Andreas Wiebe and Georg E Kodek (eds), *UWG* (2nd edn, MANZ Verlag Wien 2023) para 865.

<sup>58</sup> Andreas Frauenberger et al, '§ 1' in Andreas Wiebe and Georg E Kodek (eds), *UWG* (2nd edn, MANZ Verlag Wien 2023) para 871.

<sup>59</sup> Recital 7 DMA.

<sup>60</sup> Achleitner, 'Das Durchsetzungsregime im Digital Markets Act' (n 32) 291.

<sup>61</sup> Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811 (latest version: BGBl. I Nr. 182/2023).

<sup>62</sup> Judith Schacherreiter, '§ 1311' in Andreas Kletečka and Martin Schauer (eds) *ABGB-ON<sup>1.09</sup>* para 9 (Stand 1.1.2023, rdb.at); also Friedrich Harrer, '§ 1311' in Michael Schwimann and Georg E Kodek (eds), *ABGB Praxiskommentar<sup>4</sup>* (4th edition, LexisNexis Verlag Österreich 2017) para 7.

<sup>63</sup> OGH 4 Ob 46/12m pt 4.3. See also Georg Stülfried and Peter Stockenhuber, 'Schadenersatz bei Verstoß gegen das Kartellverbot des Art 85 EG-V' (1995) wbl 301, 345.

<sup>64</sup> Case C-312/21 *Tráficos Manuel Ferrer* EU:C:2023:99 para 42.

<sup>65</sup> Achleitner, 'Das Durchsetzungsregime im Digital Markets Act' (n 32) 290, with reference to Henner Schläfke and Immo Schuler, '§ 13 DMA als Gegenstand von Private Enforcement' in Jens Peter Schmidt and Fabian Hübener (eds), *Das neue Recht der digitalen Märkte: Digital Markets Act* (Nomos 2023) 164.

### 3.2 OTHER DISCLOSURE AND TRANSPARENCY RULES IN AUSTRIAN LAW

As shown above, procedural competition law is not applicable outside competition law in the narrower sense. However, private law enforcement can very well take place by way of private law infringement of competition law in the broader sense. No specific procedural rules are provided in this context, which mandates recourse must to civil procedural law. In addition, particular attention should be paid to the recently adopted Freedom of Information Act at national level in Austria, as it is designed to provide for more administrative transparency.

#### 3.2[a] *Austrian Civil Procedure Code*

Section 303 Austrian Civil Procedure Code<sup>66</sup> lays down the possibility for a party to an action to ask for the disclosure of documents held by the opposing party or even by a third party. The rationale behind this rule is one hand to strengthen the procedural fact finding and on the other hand to meet the requirements of the EU-law principle of equality of arms, which can be derived from Article 6 ECHR.<sup>67</sup>

Similar to the German provision,<sup>68</sup> in the application for disclosure the demanding party has to state that the requested documents contain information which is necessary for their individual line of evidence.<sup>69</sup> In addition, the request for disclosure must include the exact name of the requested document so that the obligor knows which document he has to submit. This is intended to reflect the fact that Section 303 is particularly not intended to serve as a basis for discovery evidence.<sup>70</sup> This is – due to national case law – also still in line with the requirements of Article 6 ECHR.<sup>71</sup>

Disclosure of these documents can either be refused due to the obligation of confidentiality, for reasons of professional secrecy or for other ‘equal reasons’ that would justify a denial of disclosure.<sup>72</sup> Also, disclosure of (necessary) procedural documents is deemed a general procedural obligation for parties to collaborate. Consequently, it does not depend on whether it can also be qualified as a material claim.<sup>73</sup>

When it comes to access to documents held by authorities, Section 303 is not applicable, as it only provides for disclosure inter partes. Section 219, however, provides for access to court files for the parties involved as well as for third parties. While the parties

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<sup>66</sup> Zivilprozessordnung, RGBl. Nr. 113/1895.

<sup>67</sup> Georg E Kodek, ‘III/1 § 303 ZPO’ in Hans W Fasching and Andreas Konecny (eds), *Zivilprozessgesetze* (3rd edn, MANZ Verlag Wien 2023) para 12.

<sup>68</sup> See above 2.2[a].

<sup>69</sup> See e.g. Kodek (n 67) para 1.

<sup>70</sup> 2 Ob 987, 988/52 SZ 26/42.

<sup>71</sup> 7 Ob 354/62; <sup>71</sup> Georg E Kodek, ‘III/1 § 303 ZPO’ in Hans W Fasching and Andreas Konecny (eds), *Zivilprozessgesetze* (3rd edn, MANZ Verlag Wien 2023) para 12.

<sup>72</sup> Alexander Wilfinger, ‘§ 306 ZPO’ in Martin Spitzer and Alexander Wilfinger (eds), *Beweisrecht* (MANZ Verlag Wien 2020) para 1; Helmut Ziehensack, ‘§ 306’ in Johann Höllwerth and Helmut Ziehensack (eds), *ZPO Praxiskommentar* (LexisNexis Wien 2019) para 1.

<sup>73</sup> Alexander Wilfinger, ‘§ 303 ZPO’ in Martin Spitzer and Alexander Wilfinger (eds), *Beweisrecht* (MANZ Verlag Wien 2020) para 4.

involved have to be granted unconditional<sup>74</sup> access to the procedural file as a whole<sup>75</sup>, third parties' access depends on either the consent of all<sup>76</sup> parties involved or their legal interest. As this provision should not serve an interest of mere expedition of information, this legal interest needs to be sufficiently substantiated.<sup>77</sup> Besides, the claim for access to evidence according to section 219 requires an existing court file and therefore an ongoing process.<sup>78</sup>

### 3.2[b] Freedom of Information Act

After a long time, and facing low performance on international rankings on transparency,<sup>79</sup> the Austrian legislator has now addressed the tension between official secrecy on the one hand and the official duty to provide information on the other. The Austrian Freedom of Information Act<sup>80</sup> was passed on 15 February 2024<sup>81</sup> and will enter into force on 1 September 2024. This legal act intends to make governmental action more transparent for each individual. It also serves to complement the constitutionally enshrined guarantee for access to information.<sup>82</sup>

The legal term 'information' in the sense of Section 2(1) Freedom of Information Act will cover any record created for the purpose of official or entrepreneurial uses. Information of public interest according to Section 2(1) Freedom of Information Act should be made openly accessible by the responsible authority proactively, whereas any other information is subject to a specific request. The latter can be carried out in any form. Furthermore, the existing rules for access to files from the General Administrative Procedure Act<sup>83</sup> can be applied analogously.<sup>84</sup>

Similar to the German Freedom of Information Act, the Freedom of Information Act also only applies vis-à-vis Austrian public authorities according to Section 1, not the European Commission.<sup>85</sup> In so far as national authorities enforce the DMA or are included in the enforcement of the DMA, which is, as already mentioned<sup>86</sup> very limited, the Freedom of Information Act will also apply on access to information on DMA proceedings. Consequently, the Freedom of Information Act in connection to the DMA will only lead to

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<sup>74</sup> 6 Ob 11/78; 4 Ob 115/14m.

<sup>75</sup> Apart from certain documents, such as internal reports, minutes of internal discussions or drafts of judgments. See Edwin Gitschthaler, '§ 219' in Walter H Rechberger and Thomas Klicka (eds), *Kommentar zur ZPO* (5th edn, Verlag Österreich 2019) para 5.

<sup>76</sup> Gitschthaler (n 75) para 3/1.

<sup>77</sup> 9Ob237/98p; see also Johann Höllwerth, '§ 219' in Johann Höllwerth and Helmut Ziehensack (eds), *ZPO Praxiskommentar* (LexisNexis Wien 2019) para 9; Gitschthaler (n 75) para 3/2.

<sup>78</sup> Martin Trenker, '§ 219' in Georg E Kodek and Paul Oberhammer (eds), *ZPO-ON* (as per 9.10.2023, rdb.at) para 1.

<sup>79</sup> Legislative commentary 2238 on Governmental Proposal, 1 <[https://www.parlament.gv.at/dokument/XXVII/I/2238/fname\\_1587266.pdf](https://www.parlament.gv.at/dokument/XXVII/I/2238/fname_1587266.pdf)> accessed 15 April 2024.

<sup>80</sup> Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Informationsfreiheitsgesetz erlassen wird, BGBl. I Nr. 5/2024.

<sup>81</sup> See Parliamentary correspondence, no. 124 from 15.02.2024, <[https://www.parlament.gv.at/aktuelles/pk/jahr\\_2024/pk0124#XXVII\\_I\\_02238](https://www.parlament.gv.at/aktuelles/pk/jahr_2024/pk0124#XXVII_I_02238)> accessed 15 April 2024.

<sup>82</sup> Legislative commentary 2238 on Governmental Proposal (n 79).

<sup>83</sup> Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG, BGBl. Nr. 51/1991.

<sup>84</sup> Legislative commentary 2238 on Governmental Proposal (n 79) 10.

<sup>85</sup> *ibid* 5.

<sup>86</sup> See above 2.1[b].

limited access to information and at the same time limited transparency vis-à-vis the general public in Austria.

Moreover, similar to the Transparency Regulation on EU level or the German Freedom of information act, this right is not to be granted unconditionally, as there are several limitations that should face the opposing right to privacy. Most importantly, the authority subject to inquiry can oppose confidentiality reasons when it comes to disclosure information but needs to apply a proportionality test when justifying a refusal.<sup>87</sup>

#### 4 CONCLUSION

Access to information has an importance that should not be underestimated. On the one hand, it makes a decisive contribution to private enforcement, which, together with public enforcement, ensures the effective application of EU law. On the other hand, it can guarantee procedural principles enshrined in EU law, particularly the Charter of Fundamental Rights.

As Germany has incorporated the DMA-articles referring to DMA-infringement into its domestic competition law private enforcement system, the German rules transposing the Damages Directive can be applied. This enables the widest possible access to information available. As a limiting factor, disclosure is only given in the context of DMA damages proceedings and cannot be used, e.g. for judicial review against DMA enforcement decisions. The possibilities within the German Civil Procedure Code are limited to disclosure within proceedings and is therefore not applicable e.g. in pre-trial stages. The German Freedom of Information Act only covers access to official information from the authorities of the Federal Government of Germany, not the Commission or other Member States. Consequently, in the context of the DMA, the Freedom of Information Act is only very partially useful.

Contrary to Germany, Austria has not included the DMA in its national competition damages regime. The provisions for disclosure in competition law (namely the Cartel Act) are particularly created to transform the Damages Directive into national law, and therefore the disclosure regime for private enforcement of competition law is not accessible for DMA-violations. There are no specific procedural rules provided for this, which is why recourse must be made to civil procedural regulations. Similar to the German Freedom of Information Act, the Austrian Freedom of Information Act also only applies vis-à-vis Austrian public authorities, not the European Commission. Therefore, this provision is only applicable where the national authorities are involved in the enforcement of the DMA.

To sum it up: the DMA itself contains certain possibilities for access to the file and information overall. The gatekeepers, undertakings or associations of undertakings concerned have the widest possibilities for access to information. Third parties mainly have to take recourse to general procedural rules which are limited (particularly compared to competition law) and also still highly differing between member states. In view of the relevance of private enforcement and its dependence on access to information for third parties, considerable room for improvement exists.

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<sup>87</sup> § 6 öIFG, see also Legislative commentary 2238 on Governmental Proposal (n 79) 8.

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