National Development

Balancing Disclosure and the Protection of Confidential Information in Private Enforcement Proceedings: The Commission's Communication to National Courts

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I. Introduction

On 20 July 2020 the European Commission adopted a Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law ('the Communication').[1]

The Communication follows up on the important changes brought about by the Damages Directive adopted in 2014,[2] which removes obstacles to getting full compensation for harm suffered due to EU antitrust infringements, including obstacles to accessing evidence. With regard to the latter, the Damages Directive requires that Member States ensure that national courts have the power to order disclosure of evidence containing confidential information, if a number of criteria are fulfilled.[3] Member States are also required to ensure that national courts have at their disposal effective measures to protect such confidential information, while ensuring the exercise of the right to full compensation.[4]

Key Points

- Disclosure of evidence and protection of confidentiality are two aspects of private enforcement proceedings that by definition are in tension.
- The Communication further builds on the rules of the Damages Directive to address this. It sets out a number of practical issues that a national court could consider for selecting effective measures to protect confidentiality when ordering the disclosure of evidence.
- The Communication seeks to contribute to a more efficient handling of disclosure issues by national courts to the benefit of parties and national judges.

It is in this context that the Commission identifies in the Communication measures for protecting confidential information, which national courts may decide to order when dealing with disclosure requests. The Communication is not binding on national courts. It aims to provide inspiration and guidance so that national courts have the means to strike the right balance, between the right to access relevant evidence and the need to protect confidential information.

This article gives an overview of the main developments and considerations that led the Commission to adopt the Communication, highlights some key considerations for disclosure requests in private enforcement actions, and gives an overview of effective measures for the protection of confidential information included in the Communication. The article concludes with some of

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1 Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law, OJ C 242, 22.7.2020, p. 1–17.

2 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 (OJ L 349, 5.12.2014, p.1) ('Damages Directive').

3 See Article 5(1) of the Damages Directive.

4 See Article 5(4) of the Damages Directive. For the right to full compensation see Article 3 of the Damages Directive, codifying the previous case law of the CJEU C-453/99, *Courage and Crehan*, ECLI:EU:C:2001:465, paragraph 26; see also C-295/04, *Manfredi*, ECLI:EU:C:2006:461, paragraph 60.

the authors' reflections on the expected impact of the Communication.

II. Developments and considerations that led to the Communication

Access to evidence is crucial for enabling claimants to bring actions for damages and more generally for ensuring equality of arms between claimants and defendants. Evidence of competition law infringements is often kept secret by the infringers, which means that it can be very hard for victims to know about or obtain the relevant information to claim compensation for the harm suffered.

One of the primary points of divergence between Member States identified prior to the Damages Directive was that different national rules applied to access to evidence. As the Commission noted in its Impact Assessment accompanying the Damages Directive, with the exception of a few Member States at the time (most notably the UK), the lack of adequate rules on *inter partes* disclosure of evidence in court meant that there was no effective access to evidence for victims of a competition law infringement seeking antitrust damages.[5]

These differences between national rules risked leading to inequalities and uncertainty concerning the conditions under which victims can exercise their right to compensation.[6] The uneven playing field was also reflected on the concentration of damages claims in essentially three jurisdictions prior to the adoption of the Damages Directive.[7] More generally, only few antitrust prohibition decisions by the Commission were subsequently followed by damages actions.[8] This is indicative of the obstacles victims faced for claiming compensation.

The Damages Directive, adopted in 2014, introduced rules to change the uneven landscape for damages actions in the EU. Specific rules and safeguards are foreseen to ensure easier access to evidence, while preventing 'fishing expeditions'.[9]

By 2018, all Member States had implemented the Damages Directive in their national systems,[10] paving the way for a more levelled playing field for damages actions. And even though there is not yet much experience with the application of the rules of the Damages Directive in the Member States, first indications show that damages actions are becoming more widespread following the adoption of the Damages Directive. A 2019 study indicates not only a sharp increase in damages actions between 2014 and 2019, but also that cases are much more widespread now in the EU.[11]

This however also means that national courts are and will be faced more and more with questions concerning disclosure of confidential information, as the national implementing rules of the Damages Directive will increasingly apply. Due to the above-mentioned asymmetry of information between claimants and defendants, a big part of the litigation process in damages actions focusses on the disclosure of evidence. Since a lot of the concerned information is confidential, judges are faced with a very high burden with disclosure requests.[12] If the

5 See Commission Staff Working document, Impact Assessment Report, Damages actions for breach of the EU antitrust rules, accompanying the proposal for the Damages Directive {COM(2013) 404 final} {SWD(2013) 204 final} ('Impact Assessment for the Damages Directive'), paragraph 51.

6 As also put by Commissioner Almunia in his 2013 speech on Antitrust Damages, '*to get hold of the evidence, most national laws require a detailed description of individual documents, such as "an email message from A to B, on date X concerning subject Y". It goes without saying that most victims simply cannot meet this standard*', https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_887.

7 In the period preceding the adoption of the Damages Directive, the vast majority of large antitrust damages actions were being brought in three European jurisdictions, in the UK, Germany and the Netherlands. See Impact Assessment for the Damages Directive, n 5, paragraph 52.

8 In the period from 2006 to 2012, out of the 54 final cartel and antitrust prohibition decisions taken by the Commission, actions for damages in one or more Member States followed only 15 of these decisions. In 2013, the Commission was not aware that any action for damages based on a Commission decision had been filed in 20 out of 28 Member States. See Impact Assessment for the Damages Directive, n 5, paragraph 52.

9 See in particular Articles 5 and 6 of the Damages Directive.

10 Only seven Member States implemented the Damages Directive within the deadline expiring 27 December 2016. A total of 18 Member States implemented the Directive in 2017 and three in 2018. As a result, the Commission closed all of the infringement procedures for non-communication of transposing measures by January 2019. See European Commission—Fact Sheet, January infringements package: key decisions, 24 January 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_462. For an overview of the national implementation of the main rules of the Damages Directive, see Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU 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, SWD(2020) 338 final, 14.12.2020.

11 See Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges (2019 ed.)*, November 2019, Concurrences N° 4–2019, Art. N° 92227. According to this study, the total number of cases, by date of first judgment, was approximately 50 at the beginning of 2014 and, after a sharp increase, amounted to 239 in 2019. These 239 cases came from 13 Member States. With regard to the increase of damages actions in Germany see also Lukas Rengier, Cartel Damages Actions in German Courts: What the Statistics Tell Us, Journal of European Competition Law & Practice, Volume 11, Issue 1–2, January–February 2020, p. 72–81. Also from the example of the follow-on litigation in relation to the 2016 Commission decision in the *Trucks* case (Case AT.39824), antitrust damages actions seem to be increasingly brought in EU jurisdictions that so far had few such cases, e.g., Austria, Belgium, France, Hungary, Ireland, Italy, Spain see e.g., 2018 MAN Annual Report, p. 54, available at https://www.corporate.man.eu/man/media/content_medien/doc/global_corporate_website_1/investor_relations_1/gb/2018_56/GB2018_ENG_geschuetzt.pdf.

12 Even judges in more experienced jurisdictions may face a high burden with disclosure requests. See here MLex report of 22 June 2020 '*Disclosure demands in cartel damages lawsuits are "troublesome", CAT president says*', MLex Market Insight, https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1201262&siteid=244&rdir=1, according to which, the President of the UK Competition Appeal Tribunal reportedly noted that disclosure disputes around antitrust damages claims are increasingly tricky to manage.

national courts do not have appropriate means to protect confidentiality, the risk is that:

- national courts may not order, or only order in a limited number of cases, the disclosure of evidence containing confidential information. This could lead to serious difficulties for claimants in damages actions when it comes to obtaining access to the evidence relevant for proving their claims;
- national courts may order the disclosure of evidence containing confidential information potentially impinging on rights of parties and third parties.

Although the Damages Directive introduced rules to facilitate access to evidence for victims of competition law infringements across the EU, it did not impose on Member States specific requirements on how confidential information should be protected. Article 5(4) of the Damages Directive requires Member States to ensure that national courts have at their disposal effective measures to protect confidential information, but left it to the discretion of the national legislator to choose the measures that are most fitting for each national civil procedural system.

Several stakeholders consulted by the Commission in 2019 have indicated the need for more guidance on the use of measures for the disclosure of evidence in national proceedings.[13] With the adoption of the Communication, the Commission aims to provide inspiration and guidance to Member States and national courts with regard to the type of measures that could, depending on the national procedural rules and the specific circumstances of the case, be put in place to protect confidential information effectively in the context of disclosures in private enforcement actions.[14]

III. Relevant considerations for disclosure of evidence and confidentiality in private enforcement actions

Disclosure of evidence and protection of confidentiality are two aspects of private enforcement proceedings that by definition are in tension.

The Damages Directive attempts to address this. On the one hand, it requires that access to evidence is granted as long as the claim is plausible, the evidence requested relevant and the request proportionate.[15] On the other hand, it requires that in the proportionality assessment the national judge considers the legitimate interests of parties, including whether the evidence contains confidential information and what measures are in place for protecting it.[16]

The underlying idea is that the confidentiality of the information should not be an absolute bar to its disclosure. National courts should be able to order disclosure of evidence containing confidential information where they consider it relevant to the damages claim.[17] Absolute protection from disclosure exists only for leniency statements and settlement submissions.[18]

But what information is regarded as confidential and needs to be protected?

The Damages Directive does not define the notion of confidential information. The Communication also does not propose an all-encompassing definition of what constitutes confidential information in private enforcement proceedings. However, the Communication does set out concisely the guidance from the case law of the EU courts that national judges can take into account in their assessment.[19] In line with the case law, information that meets the following cumulative conditions is considered as confidential: (i) it is known only to a limited number of persons; (ii) the disclosure of it could cause serious harm to the person who provided it or third parties; and (iii) the interests liable to be harmed by its disclosure are, objectively, worthy of protection.[20]

EU law and national law may also define specific categories of confidential information.[21] Taking into account the national and EU rules in place, it is for national courts to decide what may constitute confidential information in private enforcement proceedings. Such assessment needs to take place considering the specific circumstances of the case (for example, the parties of the litigation, the passage of time at the moment of disclosure). Therefore, regardless of an existing assessment that may have taken place in the context of public enforcement, national courts

13 A targeted public consultation on a draft text of the Communication ran from 29 July 2019 to 18 October 2019. The contributions of stakeholders can be found here: https://ec.europa.eu/competition/consultations/2019_private_enforcement/index_en.html

14 The Communication covers civil proceedings before national courts relating to the application of Articles 101 and 102 of the TFEU. This includes actions for damages, but also other types of private enforcement actions, such as declaratory actions or actions for injunctions. This also means that the Communication does not apply to proceedings before the Commission and national competition authorities.

15 Article 5(1) of the Damages Directive.

16 Article 5(3)(c) of the Damages Directive.

17 Article 5(4) of the Damages Directive.

18 Article 6(6) of the Damages Directive.

19 Communication, paragraph 19.

20 Communication, paragraphs 20–23.

21 See, for example, Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ('Trade Secrets Directive'), OJ L 157, 15.6.2016, p. 1–18.

will most likely need to assess the confidentiality of information anew in the context of disclosures relevant for private enforcement actions.

IV. Measures for the protection of confidential information

As mentioned above, national courts should have at their disposal appropriate measures to protect confidential information when ordering the disclosure of relevant evidence.[22] The Communication sets out a number of practical issues that a national court could consider for selecting effective measures to protect confidentiality when ordering the disclosure of evidence, subject to the rules applicable in each jurisdiction and the specific circumstances of the case.

A. General considerations for the selection of the measures

The Communication suggests that there is not a one-fits-all measure for disclosure and proposes a number of key factors that judges may consider for selecting effective measures in each specific case. The following highlights some of these factors:[23]

- **the nature and commercial/financial/strategic value of the information and the relationships between the parties:** the type of information concerned and the relationship between the parties is particularly relevant to assess among others, whether or not the data can be disclosed in an aggregated manner, whether it must be anonymised before disclosure, or which of the parties' representatives (internal or external only) can access the information.
- **the extent of the disclosure request and the number of parties (and third parties) concerned**: some measures might score better in terms of efficiency than others when considering the volume of the documents requested to be disclosed and the number of parties or originators of the information.
- **the administrative burdens and costs for the system or for the parties:** measures may have a different impact on costs or administrative steps for the national judicial system; on costs for the disclosing parties; or even on the overall length of the proceedings.
- **the ability of the national judge to sanction in case of non-compliance or refusal to comply with disclosure orders:** the lack of effective sanctions in some cases may render the measures ineffective.[24]

In any case and as a general principle, the measure selected by the judge to protect confidential information should not impede the exercise of the right to compensation.[25] This means that protective measures that would effectively deprive the claimant of access to evidence relevant for its claim would not strike the required balance between access to justice and the right to protect confidentiality.

B. Specific measures for the protection of confidential information

The Damages Directive refers to some possible measures that could be used across the EU to protect confidential information, such as the possibility of redacting sensitive passages in documents, conducting hearings *in camera*, restricting the persons allowed to see the evidence and instructing experts.[26]

The Communication elaborates further on specific measures for the protection of confidential information that judges may use during the national proceedings (redactions, confidentiality rings, the appointment of experts, and *in camera* hearings) and highlights the need for protection even after the proceedings have been concluded. The public consultation that the Commission conducted on the Communication confirmed that these measures are the most common measures already used in some jurisdictions.

The Communication also sets out the advantages and pitfalls of using certain measures and proposes practical guidance on how to improve the effectiveness and/or workability of these measures.

1. Redactions

Redaction is the procedure of editing documents by removing the confidential information. This is a measure that seems to be available in most jurisdictions.

As noted in the Communication, for ensuring the effectiveness of this measure, it is important that disclosing parties redact only what is strictly necessary, and that redacted information is replaced by a meaningful non-confidential summary, so that the information disclosed is sufficient for the exercise of the rights of the

22 Article 5(4) of the Damages Directive.
23 Communication, paragraph 32.
24 Article 8(c) of the Damages Directive requires that national courts are able to effectively sanction failure or refusal to comply with the obligations imposed by a national court order protecting confidential information.
25 See also Recital 18 of the Damages Directive.
26 Article 5(4) and recital 18 of the Damages Directive.

party requesting its disclosure. Redaction can be an effective measure to protect confidential information when the volume of confidential information that is subject to disclosure is limited and the confidential information concerns market data or figures (e.g. turnover, profits, market shares, etc.) which can be meaningfully redacted or summarised.[27]

2. Confidentiality rings

Confidentiality ring is a measure that ensures the disclosure of confidential information only to defined categories of individuals. The use of confidentiality rings is unknown or unfamiliar to most jurisdictions, especially to jurisdictions less experienced with private enforcement proceedings.[28] The Commission has some experience with confidentiality rings through its public enforcement and through its cooperation with national courts that have applied this measure in their proceedings.[29] This experience, along with the input received during the public consultation, informed the section of the Communication on the use of confidentiality rings.

Confidentiality ring members may include the external advisers of the parties, including external legal counsel, or in-house legal counsel and/or other company representatives, depending on the nature of the confidential information.[30] National courts may need to grant different access rights to the information disclosed in the confidentiality ring to different members of the confidentiality ring.

Confidentiality ring is a tool that can be particularly effective for the disclosure of quantitative or very sensitive commercial data that are not possible to summarise meaningfully, and/or to give access to voluminous files.[31]

The Communication provides guidance on the relevant key issues for organising a confidentiality ring, such as the identification of the documents to be placed in the ring, and the composition of the ring, i.e. who can access what information, and their different access rights as well as some logistical issues (e.g. facilities needed, personnel, e-disclosure etc.). The Communication also notes that judges may request that the members of a confidentiality ring submit written undertakings that they will protect confidentiality before being granted access to the relevant information. These undertakings may include penalties for the violation of the confidentiality obligations.

3. Appointment of experts

National courts may decide to appoint a third-party expert who is granted access to confidential information. The experts may be ordered, for example, to prepare a non-confidential report or summary of the information that is then made available to the party requesting disclosure. The use of court-appointed experts is a method known to some jurisdictions.[32]

The Communication discusses the appointment of the experts, the content of the reports they are ordered to draft, the need to sign confidentiality obligations before accessing the confidential information and declare conflicts of interests. National courts may be able to appoint experts from a list of 'court-approved' experts or from a list of experts proposed by the parties. National courts may also need to decide which party will bear the expert's costs.

The use of experts may be an effective measure, for instance, where the disclosure request concerns very sensitive, quantitative or technical information, where the disclosure request concerns large amount of third-party information or the disclosure requires further access to confidential documents containing underlying data.[33]

4. Measures related to hearings, the publication of judgments and access to the court records

The protection of confidential information should not necessarily cease with the ordered disclosure or the end of the legal proceedings. Therefore, the Communication

27 Communication, paragraphs 41–43.

28 Some Member States have included rules on the use of confidentiality rings in their legislation transposing the Damages Directive (e.g. Austria, Italy, Poland) only recently so confidentiality rings may not have been used yet in domestic proceedings. The (former EU Member State) UK has been an exception as confidentiality rings have been more used in accordance with the existing procedural rules (see for example, the Competition Appeal Tribunal Guide to Proceedings, 1 October 2015).

29 See Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ C 308, 20.10.2011, p. 6–32, paragraphs 96 and 97; Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, paragraph 9; and Guidance on the use of confidentiality rings in Commission proceedings, available at http://ec.europa.eu/competition/antitrust/conf_rings.pdf. See, also, Commission Opinion of 22 December 2014 following a request under Article 15(1) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *The Secretary of State for Health and others v Servier Laboratories Limited and others*, C(2014) 10264 final, available at http://ec.europa.eu/competition/court/confidentiality_rings_final_opinion_en.pdf.

30 Communication, paragraphs 61–69.

31 Communication, paragraphs 52–54.

32 For example, this measure exists in Belgium, France, Germany, Italy and Greece.

33 Communication, paragraphs 88–90.

proposes measures for protecting confidential information during the proceedings as well as in their aftermath.[34]

The Communication deals with the use of *in camera*/closed hearings so that national courts discuss confidential information in proceedings not open to all parties. It also addresses the possible confidentiality issues arising from the notification of judgments to parties, the publication of the ruling and possible access to court records. National courts may have to anonymise or redact confidential information from the publicly available version of a judgment or restrict access to part of the case file or the entire file.

V. The impact of the Communication: What to expect?

As mentioned above, the Communication is merely proposing measures which, on the basis of the experience of some national courts, as well as the Commission's experience in handling confidentiality claims, could provide effective solutions to national judges handling disclosure requests. It seeks to raise awareness within Member States and national courts, and contribute to a more efficient handling of disclosure in private enforcement proceedings, to the benefit of parties and national judges.

However, one has to be conscious of the fact that at this moment in time few jurisdictions may be able to implement the measures proposed in the Communication. It is a harsh reality that national courts often may lack the human and financial resources, the infrastructure and even appropriate legal basis to implement some of these measures.[35] Therefore, it remains to be seen if and how each jurisdiction will manage to implement these measures as part of their standard practice.

The expected further increase in damages claims will most likely increase pressure on Member States and national courts to deal with disclosure and confidentiality issues in a more systematic way and find effective means to protect confidentiality, while respecting the scarce resources of national courts. The hope is that the Communication will feed into these reflections, in order to strengthen further the crucial role national courts play in compensating victims of EU antitrust infringements.

Given the importance of access to evidence for facilitating damages claims, the Commission should continue to monitor relevant national developments. It is also expected that the case-law will shed further light on several issues concerning private enforcement in the near future. Once sufficient experience from the application of the national implementing rules of the Damages Directive has accumulated, the Commission should consider evaluating the need for adopting more detailed rules in this area.

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34 Communication, Section IV. Such measures exist in several Member States, for example, Belgium, France, Germany, the Netherlands.

35 See for example in this regard the observations of the presiding judge of the District Court of Dortmund, Dr. Gerhard Klumpe, in WUW 04.09.2020, Issue 09, p. 445, available here https://research.owlit.de/document/9fdd81cc-d1ec-3e14-801a-3ce49f9ba7f4