

European Commission: Protection of business secrets in court proceedings for anti-trust infringements

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On 22.07.2020, the European Commission ("Commission") published its notice on "*Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law*" in the Official Journal of the European Union (2020/C 242/01). In the notice, the Commission provides the national courts of the Member States with guidance on how to treat requests for the disclosure of evidence containing business secrets.

Follow-up to EU 2014 Damages Directive

In 2014 the EU passed the Directive on certain rules governing actions for damages under national law for competition law infringements of the competition law provisions of the member states and of the European Union (2014/104/EU, "*Damages Directive*"). The Damages Directive sets out rules governing the disclosure of evidence for claimants and defendants in anti-trust damages cases. At the core of these rules is the national court's authority to order the disclosure of evidence at the claimant's and defendant's request to overcome information asymmetries that exist in anti-trust damages cases. The Directive also provides that the member states must take measures to protect business secrets (confidential information) in the evidence that is disclosed. As the member states have already adopted the Damages Directive in their national laws, the national courts have been set the challenging task of ordering the requested disclosure of evidence for claimants or defendants while, at the same time, having to protect confidential information. The Commission's current communication explains the Commission's interpretation of the directive's provisions on the disclosure of evidence and aims to aid the courts at finding adequate solutions.

Three ways to protect confidential information

In the communication, the Commission suggests the following to protect confidential information when disclosing evidence:

- Redacting confidential information in the evidence to be disclosed (para 36 to 49);
- Confidentiality rings (para 50 to 85); or
- Appointment of experts (para 86 to 97).

The redaction of confidential information is a standard procedure used, for example, in competition authority proceedings. The main difficulty in anti-trust damages cases is the risk of the redaction process excluding substantive information which is important for an assessment of the damages claim. In other words: it can be the requested confidential information itself that is required for the claimant's or defendant's case to be successful.

The communication, therefore, proposes two alternative ways to protect confidential information:

1.) **Confidentiality rings:** A confidentiality ring consists of external advisers of the parties (e.g. external legal counsel) or in-house legal counsel or other company representatives. Only these persons will be granted access to the confidential information after having signed undertakings for the confidential treatment of certain information included in the confidentiality ring. The level of access of the various confidentiality ring members is at the national court's discretion. Therefore, external legal advisors might get complete access to all confidential information, whereas in-house legal counsel or other company representatives may only get limited access (e.g. no commercially sensitive information). The Commission's communication is very detailed and includes practical guidance to the national courts that may be used to facilitate these kinds of proceedings.

2.) **Appointment of experts:** Appointing an expert is similar to forming a confidentiality ring, although only an external expert appointed by the court will be granted access to the confidential information.

Additional points covered in the communication

The Commission also addresses how to protect confidential information during and following the court proceedings after the proposed measures (redaction, confidentiality rings or experts) have been used. The Commission suggests limiting the principle of open justice or even allowing proceedings to take place in private (*in camera* proceedings), as a solution to protect confidential information throughout the proceedings. Access to the confidential information would in these cases be limited to the parties of the proceedings. The communication also deals with the protection of confidential information in written judgements and how to limit access to the court files by third parties during and after the trial.

Protection of confidential information and fair trial?

All of the measures suggested by the Commission beg the question whether the court may base its decision in an anti-trust damages cases on information, which has not been made fully available to both parties. An example of this might be if the court rejects a damages claim on the basis of the confidential information of the defendant only being disclosed to the claimant's lawyers (e.g. as members of a confidentiality ring), but not to the claimant. Another example is if the court grants damages to the claimant and rejects the pass-on defense raised by the defendant on the basis of information from the claimant. Doing so could constitute a breach of the other party's right to a fair trial. This was, for example, the approach taken by German courts in the past. The only workable solution that can be taken from the communication would be a confidentiality ring with access of at least certain employees of the other party (e.g. inhouse legal). Therefore, while the communication provides the national courts with tools to solve the challenge of disclosing evidence whilst protecting confidential information the challenge to avoid a violation of the right to a fair trial remains unsolved. The Commission does not provide a clearway to ensuring the latter. Therefore, the national courts will have to implement the suggestions by trial and error to establish what scope their national constitutional law or even the European Charter of Fundamental Rights or the European Convention of Human Rights leaves to use the Commission's toolkit.

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