

Protection of confidential information in court proceedings?

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On 20 July 2020, the European Commission published a [Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law](#). It aims to provide guidance to national courts on handling confidential information in competition related litigation.

Background

Antitrust violations result in considerable damage to companies, consumers and ultimately the entire economy. In particular, the number of follow-on claims, i.e. damages claims of victims of cartel infringements in the aftermath of the fining proceedings has continuously increased recently.

Access to evidence is essential in enforcing such damages claims. However, the relevant information is often sensitive and contains business secrets. Still, this must not thwart the enforcement of the claim as such. According to the [Cartel Damages Directive](#), Member States must ensure that the defendant or third parties can be obliged by the court to disclose such confidential information if it supports the plausibility of the claim and if the disclosure request is proportionate. Furthermore, the court must consider the requested information to be relevant to the claim. At the same time, the court must order effective measures to protect confidential information.

In this conundrum, the new Communication Notice aims at providing more clarity, especially as the legal situation can differ considerably from one Member State to another.

Overview

The Communication is not binding on national courts. It provides an overview of the various means of protection of confidential information and their effectiveness. Technically, it relates not only to antitrust damages actions but also to actions for declaratory relief and injunctions.

It sets out a number of possible protective measures that national courts may take, depending on their rules of procedure. For choosing the appropriate measure in a given case, it recommends first to take into account the specific circumstances of the individual case, the type of information requested, the scope of disclosure and the relationship between the parties. The Communication further discusses the specific suitability of the various protection measures and their operational purposes:

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- Confidentiality rings

A so-called confidentiality ring can be an effective, efficient and procedurally economic means of protecting confidential information while maintaining the full evidential value of the information. Information is only released to a specific, limited group of individuals. Generally, this eliminates the need for lengthy document redactions. The Notice contains information on how to organize and set up such confidentiality rings, how to grant access rights to individual members, as well as general logistics.

- Redacting confidential information

Redactions are also a suitable protective means, especially for market data that can be replaced by representative ranges. In view of the effort involved, the Commission considers redactions more appropriate for cases with limited confidential information. In the interest of efficiency when handling redaction requests, the Commission recommends national guidelines.

- Appointment of experts

The appointment of an expert can also be an effective safeguard measure, especially for particularly sensitive information that can be meaningfully aggregated. Especially with a large number of potentially confidential documents, it may be more efficient for a court to have an expert assessing confidentiality claims.

- In camera hearings, publication of the decision and access to court records

During the hearing and in the aftermath, the handling of confidential information often still plays a role. The Commission also describes useful protective means for this stage, such as the option of conducting certain parts of the hearing in camera or at least excluding references to confidential information during the public hearing. For the period following the decision, the Commission considers the publication of a non-confidential version of the decision and limited access to the court file to be appropriate safeguards.

Conclusion

Some aspects of the Notice provide helpful guidance to Member State courts on the protection of confidential information, particularly with regard to confidentiality rings and redactions. It remains to be seen to what extent it will actually offer new aspects in view of the best practices that are already established.

If you have any questions regarding the protection of confidential information in anti-trust litigation, [Anna Huttenlauch](#) and [Rita Zuppke](#) will be happy to assist.