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EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law

(2020/C 242/01)

I. SCOPE AND PURPOSE OF THIS COMMUNICATION

1. This Communication concerns the protection of confidential information in civil proceedings before national courts concerning the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU').

2. Depending on the applicable national rules, private enforcement actions before national courts in the EU may take different forms, for example, damages actions, declaratory actions or actions for injunctions. During the last few years, the number of so-called follow-on damages actions, by which a victim of a competition law infringement claims damages following the decision of a competition authority or a final ruling by a review court, is rapidly growing ([1]).

3. Access to evidence is an important element for enforcing the rights that individuals, including consumers and undertakings, or public authorities derive from Articles 101 or 102 TFEU in private enforcement actions before national courts.

4. National courts may thus receive requests for disclosure of evidence in proceedings for the private enforcement of EU competition law. National courts will need to ensure effective private enforcement actions by granting access to the relevant information for substantiating the respective claim or defence if the conditions for its disclosure are met. At the same time, national courts need to protect the interests of the party or third party whose confidential information is subject to disclosure.

5. To this end, national courts should have at their disposal measures to protect confidential information in a way that does not impede the parties' effective access to justice or the exercise of the right to full compensation ([2]).

6. In particular, in damages actions, the Damages Directive ([3]) requires Member States to ensure that national courts have the power to order disclosure of evidence containing confidential information, if a number of criteria are fulfilled. Member States shall also ensure that national courts have at their disposal effective measures to protect

([1]) Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges* (2019 ed.), Concurrences Review No 4-2019, Art. No 92227, November 2019, available at www.concurrences.com

([2]) In relation to the right to compensation, see judgment of the Court of Justice of 5 June 2014, *Kone AG and Others* v *ÖBB-Infrastruktur AG*, Case C-557/12, EU:C:2014:1317, paragraphs 21 and 22.

([3]) 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').

such confidential information, while ensuring the exercise of the right to full compensation ([4]). This is important because national courts may have limited resources to handle disclosure requests.

7. In this context, this Communication identifies measures that may be considered by national courts when dealing with disclosure of confidential information in private enforcement actions.

8. This Communication aims to be a source of inspiration and guidance for national courts, and is not binding on them. It does not modify or bring about changes to existing EU ([5]) or Member State laws nor to the national procedural rules applicable to civil proceedings or to legal professional privilege ([6]). In particular, the measures to protect confidential information set out in Section III of this Communication may be used if they are available under and compatible with national rules, as well as with the rights of the parties in judicial proceedings as recognised under EU and national law.

II. REQUESTS FOR THE DISCLOSURE OF EVIDENCE CONTAINING CONFIDENTIAL INFORMATION BEFORE NATIONAL COURTS

A. Relevant considerations for disclosure requests of evidence

9. In the context of private enforcement of EU competition law, the ability of the parties to civil proceedings (claimant(s) and defendant(s)) to exercise effectively their rights may depend on the possibility to access relevant evidence. However, such evidence may not always be in the possession of or readily accessible to the party that bears the burden of proof.

10. Therefore, upon request of a party, national courts may decide to order the disclosure of evidence. Disclosure will be subject to national procedural rules as well as to administrative and procedural economy considerations.

11. In particular, for damages actions, the Damages Directive requires Member States to provide for the right for claimants and defendants to obtain disclosure of evidence relevant to their claim or defence under the following conditions ([7]).

12. First, national courts shall determine whether the claim for damages is plausible and whether the disclosure request concerns relevant evidence and is proportionate ([8]). The Damages Directive stipulates that the assessment of proportionality should consider the scope and cost of disclosure, including preventing non-specific searches for information that is unlikely to be of relevance for the parties in the procedure. Very broad or generalised disclosure requests will likely fail to meet such requirements ([9]).

([4]) See Article 5 of the Damages Directive. See also recital 18 of the Damages Directive.

([5]) This Communication is, for instance, without prejudice to the provisions of: Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1); Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39); or Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).
This Communication is also without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43), which concerns transparency and is intended for disclosure of information to the wider public; see judgment of the General Court of 12 May 2015, *Unión de Almacenistas de Hierros de España* v *Commission*, Case T-623/13, EU:T:2015:268, paragraph 86, and judgment of the Court of Justice of 27 February 2014, *Commission* v *EnBW Energie Baden-Württemberg AG*, Case C-365/12 P, EU:C:2014:112, paragraphs 100-109. Following the transposition of the Damages Directive, claimants can fully rely on the national rules transposing Articles 5 and 6 of it for the disclosure of relevant information.

([6]) For damages actions, see Article 5(6) of the Damages Directive.

([7]) See recital 15 and Article 5(1) of the Damages Directive.

([8]) See Article 5(1) and (3) of the Damages Directive; See, also, observations of the Commission to the UK High Court of Justice of 27 January 2017 pursuant to Article 15(3) of Regulation (EC) No 1/2003, in the EURIBOR case, paragraph 24, available at http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

([9]) See recital 23 of the Damages Directive regarding the principle of proportionality and the prevention of fishing expeditions, i.e. non-specific or overly broad searches of information that is unlikely to be of relevance for the parties to the proceedings.

13. Second, disclosure requests shall identify specified items of evidence or relevant categories of evidence '*as precisely and as narrowly as possible*' based on reasonably available facts ([10]). Categories of evidence might be identified by the reference to common features of its constitutive elements such as the nature, object or content of the documents sought to disclose, the time during which they were drawn up or other criteria. For example, a request for categories of evidence could refer to sales data of company A to company B of product Y between years N and N + 5.

14. Third, regarding the disclosure of information included in the file of the Commission or of a national competition authority, the Damages Directive specifies that, when assessing the proportionality of a disclosure order, a national court must, among others, consider whether '*the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority*' ([11]).

15. It must be recalled that the Damages Directive provides that leniency statements and settlements submissions can never be disclosed (also known as 'black list documents') ([12]). Moreover, if the Commission or a national competition authority has not yet closed its proceedings, the national court cannot order the disclosure of information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; of information that the competition authority has drawn up and sent to the parties in the course of its proceedings; or of settlement submissions that have been withdrawn (also known as 'grey list documents') ([13]).

16. National courts may order any of the parties (defendant and/or claimant) or third parties to disclose information that lies in their control ([14]). In most cases, one of the parties or a third party to the proceedings will hold the evidence required. In some instances, the defendant(s) will possess evidence relevant for finding an infringement or defining its temporal scope, obtained through access to a competition authority's file (e.g. pre-existing documents, responses to requests for information, etc.). In other cases, for instance, in a damages action, the defendant or claimant might possess additional evidence that was not included in a competition authority's file but that is relevant to a damages claim or defence (e.g. concerning the causal link between the infringement and the harm, quantifying the harm ([15]), estimating a possible 'passing-on' of an overcharge by the defendants ([16]), etc.). This may be particularly the case for information concerning customer-specific prices, revenues or other data such as the pricing behaviour of the purchasers, etc.

17. If the parties or any other third party could not produce the evidence sought and the request for disclosure concerns a document in the file of the Commission or a national competition authority, the national court may address an order for disclosure to them ([17]).

([10]) See recital 16 and Article 5(2) of the Damages Directive.

([11]) Article 6(4)(a) of the Damages Directive.

([12]) Article 6(6) of the Damages Directive.

([13]) Article 6(5) of the Damages Directive.

([14]) Article 5(1) of the Damages Directive.

([15]) Communication from the Commission on quantifying harm in antitrust damages actions (OJ C 167, 13.6.2013, p. 19), and Practical Guide, quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (11.6.2013).

([16]) For example, where a defendant argues that the claimant has passed on to its own customers the overcharge from the infringement (so called passing-on defence), the defendant might require access to evidence that is in possession of the claimant or third parties. See, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (OJ C 267, 9.8.2019, p. 4).

([17]) See Article 4(3) TEU on the principle of sincere cooperation between the Union and the Member States and Article 15(1) of Regulation (EC) No 1/2003 as regards requests for information to the Commission. In damages actions, Article 6(10) of the Damages Directive specifically provides that disclosure from a competition authority is only a measure of last resort ('*Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence*').

B. **Confidential information**

18. The protection of business secrets and other confidential information is enshrined in Article 339 TFEU and also a general principle of EU law ([18]). However, the fact that information is of a confidential nature is no absolute bar to its disclosure in national proceedings ([19]). National courts will decide what may constitute confidential information for the private enforcement of EU competition law on a case-by-case basis pursuant to national and EU rules and relevant jurisprudence.

19. For that reason, this Communication does not seek to provide a definition of confidential information. Nevertheless, inspiration might be drawn from the jurisprudence of the EU courts and the Commission's practice ([20]).

20. The EU courts qualify as confidential information that meets the following cumulative conditions ([21]):

(i) it is known only to a limited number of persons; and

(ii) its disclosure is liable to cause serious harm to the person who provided it or to third parties; and

(iii) the interests liable to be harmed by the disclosure of confidential information are, objectively, worthy of protection.

21. In relation to the first condition, information may lose its confidential nature as soon as it becomes '*available to specialist circles or capable of being inferred from publicly available information*' ([22]).

22. In relation to the second condition, it is worth noting that to assess the potential for causing harm it is relevant to consider first the nature of the information. Disclosure of information that has commercial, financial or strategic value is usually considered capable of causing serious harm ([23]). Second, it is necessary to consider how recent the

([18]) See judgment of the Court of Justice of 14 February 2008, *Varec* v *Belgian State*, Case C-450/06, EU:C:2008:91, paragraph 49. See, also, judgment of the Court of Justice of 24 June 1986, *Akzo Chemie* v *Commission*, Case C-53/85, EU:C:1986:256, paragraph 28; judgment of the Court of Justice of 19 May 1994, *SEP* v *Commission*, Case C-36/92 P, EU:C:1994:205, paragraph 37, and judgment of the Court of Justice of 19 June 2018, *Baumeister*, Case C-15/16, EU:C:2018:464, paragraph 53. The protection of confidential information is also a corollary of everyone's right to respect for his or her private and family life laid down in Article 7 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391) (see also judgment in *Varec* v *Belgian State*, cited above, paragraph 48).

([19]) Judgment of the General Court of 18 September 1996, *Postbank*, Case T-353/94, EU:T:1996:119, paragraphs 66 and 89; see also, for inspiration, Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, p. 54 ('Notice on Cooperation with National Courts'), paragraph 24; and Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 325, 22.12.2005, p. 7) ('Access to File Notice'), paragraph 24. See, also, Articles 3 and 9 of Directive (EU) 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 (OJ L 157, 15.6.2016, p. 1) ('Trade Secrets Directive').

([20]) See, for example, Access to File Notice, paragraphs 17-19, Chapter 11 of DG Competition's Manual of Procedure for the application of Articles 101 and 102 TFEU (available at https://ec.europa.eu/competition/antitrust/antitrust_manproc_11_2019_en.pdf), and Guidance on confidentiality claims during Commission antitrust procedures, paragraphs 8-17 (available at https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf).
However, depending on the circumstances, national courts may need to assess the confidentiality of information anew in the context of private enforcement actions, even if it had been established in the context of the public enforcement of EU competition law. For instance, parties to administrative proceedings may have made confidentiality claims vis-à-vis other parties to the administrative proceedings, but may need to make different claims vis-à-vis the parties requesting disclosure before the national court in civil proceedings. This would also apply to third parties from whom the Commission or a national competition authority might have obtained information during the administrative proceedings. Due to the passage of time between different proceedings, it may be also relevant that information is assessed anew as to whether or not it has lost its confidential nature (see, also, paragraph 22 below).

([21]) Judgment of the General Court of 30 May 2006, *Bank Austria* v *Commission*, Case T-198/03, EU:T:2006:136, paragraph 71; judgment of the General Court of 8 November 2011, *Idromacchine* v *Commission*, Case T-88/09, EU:T:2011:641, paragraph 45; judgment of the General Court of 28 January 2015, *Akzo Nobel and Others* v *Commission*, Case T-345/12, EU:T:2015:50, paragraph 65; and judgment of the Court of Justice of 14 March 2017, *Evonik Degussa* v *Commission*, Case C-162/15 P, EU:C:2017:205, paragraph 107.

([22]) See, for instance, Order of the General Court of 19 June 1996, *NMH Stahlwerke* v *Commission*, Joined Cases T-134/94, etc., EU:T:1996:85, paragraph 40; Order of the General Court of 29 May 1997, *British Steel* v *Commission*, Case T-89/96, EU:T:1997:77, paragraph 29; Order of the General Court of 15 June 2006, *Deutsche Telekom* v *Commission*, Case T-271/03, EU:T:2006:163, paragraphs 64 and 65; and Order of the General Court of 2 March 2010, *Telefónica* v *Commission*, Case T-336/07, EU:T:2008:299, paragraphs 39, 63 and 64; See also, Access to File Notice, paragraph 23.

([23]) This is also relevant concerning the protection of third parties from the risk of retaliation by a competitor or trading partner that can exercise significant commercial or economic pressure on them. See, for example, judgment of the Court of Justice of 6 April 1995, *BPB Industries and British Gypsum* v *Commission*, Case C-310/93, EU:C:1995:101, paragraphs 26 and 27.

information is. Commercially sensitive information concerning an ongoing or future business relationship, internal business plans and other forward looking commercial information could often qualify (at least partially) as confidential information. However, such information may lose its confidential nature when it has '*lost its commercial importance due to the passage of time*' ([24]).

23. In relation to the third condition, the interest of a party to protect itself or its reputation against any order for damages made by a national court because of its participation in an infringement of competition law is not an interest worthy of protection ([25]).

24. Finally, trade secrets as defined in the Trade Secrets Directive are to be considered confidential information ([26]).

C. **Cooperation between the Commission and national courts in the context of disclosure of evidence**

25. In civil proceedings for the application of Articles 101 and 102 TFEU, a national court may request the Commission under Article 15(1) of Council Regulation (EC) No 1/2003 ([27]) for an opinion on questions concerning the application of EU competition law, or to transmit any legal, economic or procedural information in its possession in line with the principle of loyal cooperation of Article 4(3) of the Treaty on European Union ([28]).

26. Under the Damages Directive, the national court may order, for example, the disclosure of documents from the Commission's file, if no other (third) party can reasonably provide them ([29]). In this regard, it is important to recall that, as set out above, the Commission will not transmit black listed documents or, if its proceedings are not closed, grey listed documents (see paragraph 15 above) ([30]).

27. Moreover, the Commission's assistance to national courts must not undermine the guarantees that natural and legal persons have following the principle of professional secrecy pursuant to Article 339 TFEU and Article 28 of Regulation (EC) No 1/2003 ([31]).

([24]) Information that was confidential but dates from five years or more ago, must be considered historical, unless exceptionally the applicant shows that it still constitutes an essential element of its commercial position or that of a third party; see in this respect *Evonik Degussa* v *Commission*, cited above, paragraph 64; *Baumeister*, cited above, paragraph 54; and judgment of the General Court of 15 July 2015, *Pilkington Group Ltd* v *Commission*, Case T-462/12, EU:T:2015:508, paragraph 58. See also, Access to File Notice, paragraph 23.

([25]) Judgment of the General Court of 15 December 2011, *CDC Hydrogene Peroxide* v *Commission*, Case T-437/08, EU:T:2011:752, paragraph 49 *('[…] the interest of a company which took part in a cartel in avoiding such actions […] does not constitute an interest deserving of protection, having regard, in particular, to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraphs 24 and 26, and Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraphs 59 and 61)')*. Similarly, Article 5(5) of the Damages Directive states that the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

([26]) See Article 2(1) of the Trade Secrets Directive for the definition of trade secret that must be read in conjunction with Article 3(2) of the same directive.

([27]) OJ L 1, 4.1.2003, p. 1.

([28]) Article 15(1) of Regulation (EC) No 1/2003; Notice on Cooperation with National Courts, paragraphs 21, 27 and 29; *Postbank*, cited above, paragraph 65; see, also, Order of the Court of Justice of 13 July 1990, *Imm Zwartveld*, Case C-2/88, EU:C:1990:315, paragraphs 21-22. It should be noted that where the coherent application of Article 101 or Article 102 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States, and for that purpose it may request the relevant court of the Member State to transmit or ensure the transmission to it of any documents necessary for the assessment of the case, see Article 15(3) of Regulation (EC) No 1/2003.

([29]) See Article 6(10) of the Damages Directive.

([30]) See Article 16a(2) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty as amended (OJ L 123, 27.4.2004, p. 18). See, also, Notice on Cooperation with National Courts, paragraph 26, for refusal to transmit information due to overriding reasons relating to the need to safeguard the interests of the Union or to avoid any interference with its functioning and independence.

([31]) *Postbank*, cited above, paragraph 90. See, also, Article 7 of the Charter of Fundamental Rights of the European Union, cited above.

28. When the Commission considers that information requested by the national court may be confidential in the case pending before it, it will ask the national court whether it can and will guarantee the protection of confidential information before transmitting it ([32]). The national court should then effectively guarantee the appropriate protection of confidential information that belongs to legal or natural persons from whom the Commission had obtained the information ([33]).

29. If the national court offers a guarantee that it will protect the confidential information, the Commission will transmit the information requested. The national court may then disclose the information in national proceedings by applying the measures to protect the confidentiality of information communicated to the Commission and taking into account any observations provided on this matter by the Commission.

III. MEASURES FOR PROTECTION OF CONFIDENTIAL INFORMATION

A. Introduction

30. When evidence that contains confidential information is disclosed, measures should be introduced to protect such information. By way of example, the Damages Directive refers to a few measures such as the possibility of redacting documents, conducting hearings *in camera*, restricting the persons allowed to see the evidence and instructing experts to produce summaries of the information in an aggregated form or otherwise non-confidential form ([34]).

31. Naturally, the choice of measure used to protect confidential information when ordering disclosure will depend on the specific national procedural rules including to what extent certain measures are at all available. National courts may also request that the parties seek an agreement on the measures to protect confidential information.

32. National courts shall decide upon the most effective measure or a combination of measures to protect confidentiality on a case-by-case basis. The choice may depend on several factors, such as, inter alia:

(i) the nature and commercial/financial/strategic value of the information subject to disclosure (e.g. customer names, prices, structure of costs, margins, etc.) and whether for the purpose of the exercise of the rights of the party requesting disclosure, access to such information can be given in an aggregated or anonymised form or not;

(ii) the extent of the requested disclosure (i.e. volume or number of documents to be disclosed);

(iii) the number of parties concerned by the litigation and disclosure. Certain measures for the protection of confidentiality might be more effective than others, depending on whether there is more than one party requesting disclosure and/or disclosing party;

(iv) the relationship between the parties (for example, whether the disclosing party is a direct competitor of the party seeking disclosure ([35]), whether the parties have an ongoing supply relationship, etc.);

([32]) Notice on Cooperation with National Courts, paragraph 25.

([33]) See paragraph 12 of Commission Opinion of 22 December 2014 following a request under Article 15(1) of 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, *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

([34]) See recital 18 of the Damages Directive.

([35]) For example, if the parties are direct competitors, the measure chosen must ensure that the way in which the information is disclosed will not enable the parties to collude or give a competitive advantage to the party requesting disclosure.

(v) whether the information to be disclosed originates from third parties. The rights of third parties to the civil proceedings in the protection of their confidential information must also be considered ([36]). The disclosing party may have in its possession third party documents that are confidential towards the party requesting disclosure or towards other parties to the proceedings ([37]).

(vi) the circle of individuals allowed to access the information (i.e. whether disclosure should be granted only to external representatives or whether the party requesting disclosure (i.e. company representatives) would also be allowed to access the information);

(vii) the risk of inadvertent disclosure;

(viii) the ability of the court to protect confidential information throughout the civil proceedings and even after the proceedings are closed; national courts may conclude that, in order to effectively protect confidential information, a single measure will not suffice and other measures may need to be adopted throughout the proceedings; and

(ix) any other constraints or administrative burdens ([38]) associated with the disclosure such as increased costs or additional administrative steps for the national judicial system ([39]), costs for the parties, potential delays to the proceedings, etc.

33. In order to avoid that parties use confidential documents outside the proceedings in which they have been disclosed, it is important that national courts are able to impose deterrent penalties for non-compliance with obligations to protect confidential information ([40]). The choice of the most effective measure(s) to protect confidential information may depend on the existence of and ability to impose and enforce sanctions for failure or refusal to comply with such measure(s). For damages actions, under Article 8 of the Damages Directive, national courts must be able to impose penalties effectively on parties, third parties and their legal counsel in the event of their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information ([41]).

34. The precise nature and scope of the sanctions will depend on the national rules. Pursuant to the Damages Directive, sanctions for, inter alia, the failure to comply with a disclosure order or with the obligations imposed by a national court order protecting confidential information shall include the possibility to draw adverse inferences, and the possibility to order the payment of costs ([42]). External legal counsels or experts may also be subject to disciplinary sanctions by their professional associations (e.g. suspension, fines, etc.).

35. In conclusion, the choice of measure(s) to protect confidential information may require a comprehensive evaluation of multiple factors. To assist national courts in this assessment, this Communication provides an overview of the most common measures that – subject to their availability under Member States' procedural rules – may be used to protect confidential information, and of relevant considerations as regards their effectiveness.

([36]) See, in particular, Article 5(7) of the Damages Directive ('*Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure* […]').

([37]) The disclosing party may not necessarily be the party from which the information originates. For example, a party may have accessed information from third parties during the administrative proceedings before the Commission or a national competition authority. Having had access to the information does not entitle this party to disclose further the confidential information of a third party. For example, in relation to non-confidential versions of documents regarding a data collection process that was prepared specifically for access to the file purposes, see Commission Opinion of 29 October 2015, in application of Article 15(1) of 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, *Sainsbury's Supermarkets Ltd* v *Mastercard Incorporated and Others,* (C(2015) 7682 final), paragraph 23, where the Commission stated that, for the purposes of the Commission's investigation, it had been unnecessary to take a position as to whether the information was confidential vis-à-vis other parties, but that third parties who provided the information might object to sharing the information with the claimant. The opinion concluded that '[…], *the fact that Mastercard might be satisfied with particular arrangements made, such as a confidentiality ring, would not necessarily satisfy third parties who submitted the information*.' The Opinion is available at http://ec.europa.eu/competition/court/sainsbury_opinion_en.pdf

([38]) See paragraphs 6 and 10 above.

([39]) The protection of confidential information in the context of disclosure requests may require changes to the usual functioning of the court's logistic or even telematics procedures, or putting in place *ad hoc* procedures on a case-by-case basis within the boundaries of the applicable national procedural laws.

([40]) See, for example, Article 16 of the Trade Secrets Directive that provides for the possibility of imposing sanctions on any person who fails or refuses to comply with measures ordered to preserve the confidentiality of trade secrets in the course of legal proceedings.

([41]) See, also, recital 33 of the Damages Directive. The recourse to sanctions is of the essence considering that in most cases national courts might be unable to exercise real time supervision of the parties' compliance with the rules of the disclosure order, notably in the case of a confidentiality ring.

([42]) Article 8(2) of the Damages Directive.

B. **Redaction**

36. National courts may consider ordering the disclosing party to edit copies of documents by removing the confidential information. This procedure is known as redaction.

37. Redaction may involve the replacement of each piece of confidential information with anonymised data or aggregate figures, the substitution of deleted paragraphs by informative or meaningful non-confidential summaries or even the entire blacking-out of parts of the documents containing the confidential information.

38. Disclosing parties shall be required to limit redaction to what is strictly necessary to protect the interests of those from whom the information originates (e.g. third parties). Limited redaction of certain confidential information may suffice to protect all confidential information in one or a number of documents. For example, depending on the circumstances of the case, redacting customers' names while leaving un-redacted the respective quantities of product supplied to them may be sufficient to protect confidentiality ([43]).

39. Redaction of confidential information without replacing the information by a non-confidential text may not strike the right balance between the right of a party to protect its confidential information and the right of the party requesting access to the evidence to substantiate its claim or defence. Redactions applied to entire pages or sections of documents or entire annexes may be considered excessive and may not be acceptable for the purpose of the proceedings.

B.1. ***Redaction as an effective means for protecting confidentiality***

40. Redaction may be an effective measure to protect confidential information when, despite the replacement of the confidential information with non-confidential text, the documents and information disclosed remain meaningful and suitable for the exercise of the rights of the party requesting disclosure.

41. Hence, the measure of redaction may be especially effective where the confidential information concerns market data or figures (e.g. turnover, profits, market shares, etc.) which can be substituted with representative ranges, or where qualitative data can be meaningfully summarised.

42. Redaction may also be an effective measure to protect confidential information when the volume of confidential information subject to disclosure is limited. If a very large number of documents needs to be redacted, other measures to protect confidential information (e.g. confidentiality ring, etc.), may, depending on the circumstances of the case, be considered to be more appropriate, taking into account the time, cost and resources necessary to prepare non-confidential versions.

43. Finally, redaction of third party confidential information may also be a useful measure where the disclosing party has in its possession information from third parties that may not be confidential to this party, but that may be confidential *vis-à-vis* the party requesting disclosure ([44]). For example, this could be the case if the requesting party who would receive access to the information and the third party are competitors. In such cases, the disclosing party may need to seek the view of the third party on what information is confidential or otherwise obtain the third party's agreement to a proposal for redaction.

44. However, national courts may find that redaction is a less efficient measure in those cases where the request includes a large number of third party documents because the process of liaising with third parties in this respect might add complexity to the task.

([43]) Accessibility to information on volumes supplied may be essential to quantify the harm suffered on the lower level of the supply chain (i.e. by indirect customers).

([44]) This can occur because the third party documents do not include confidential information *vis-à-vis* the disclosing party or because the disclosing party already had access to a non-confidential version of the documents, in which information regarded as confidential *vis-à-vis* the disclosing party had been previously redacted.

B.2. ***Redacting confidential information***

45. Depending on the different procedural rules, national courts may be more or less actively involved in the process of redaction. National courts may oversee and control the redaction process and be the interlocutor for the parties and third parties. Alternatively, parties may be primarily responsible for producing non-confidential versions and/or obtaining third parties' agreement to the proposals for redaction where applicable.

46. In any case, to steer the process of preparing non-confidential versions, national courts may find it useful to issue general guidance to parties and/or case-specific guidance for the proceedings pending before it, if this is possible under national procedural rules. Such guidance may be valuable to set out the procedure that courts may expect parties to follow when preparing non-confidential versions.

47. For an efficient handling of the applications for redaction, national courts may request parties ([45]):

(i) to mark all the confidential information in the original confidential documents in square brackets and highlighted in a way that remains legible before taking a decision on what should be redacted ([46]);

(ii) to draft a list of all the information proposed to be redacted (each word, data, paragraph and/or section to be redacted);

(iii) for each proposed redaction, to submit the specific reasons why the information should be treated confidentially;

(iv) to substitute the redacted information with an informative and meaningful non-confidential summary of the redacted information ([47]). Simple indications such as 'business secret', 'confidential' or 'confidential information' are generally insufficient. When redacting quantitative data (e.g. sales, turnover, profits, market shares, prices, etc.) meaningful ranges or aggregate figures may be used. For example, for sales and/or turnover data, ranges wider than 20 % of the precise figure may not be meaningful; in the same vein, depending on the circumstances of the case pending before the court, for market shares, ranges wider than 5 % may not be meaningful ([48]);

(v) to submit non-confidential versions of the documents concerned which mirror the structure and format of the confidential versions. In particular, the information in the original document such as titles or headings, page numbers and paragraph listings shall remain unmodified so that the person reading the document is able to understand the extent of the redactions and the impact of the redactions on the ability to understand the information once disclosed;

(vi) to ensure that the non-confidential versions submitted are technically reliable and that the information redacted cannot be retrieved by any means including the use of forensic tools.

48. Once the parties submit their respective applications for redaction or agree on a proposal for redaction, it will be for the national court to decide whether the proposed redactions are acceptable.

49. Once redacted, the non-confidential versions of the original documents may be used throughout the civil proceedings and no further protection may be required.

([45]) For inspiration, see Access to File Notice, paragraphs 35-38; Guidance on confidentiality claims during Commission antitrust procedures, paragraphs 18 to 26, available at https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf, and DG Competition informal guidance paper on confidentiality claims, available at https://ec.europa.eu/competition/antitrust/guidance_en.pdf

([46]) For example, a colour coding system could be used to indicate to which party the confidential information belongs or whether it relates to third party information.

([47]) See, for example, Article 103(3) of the Rules of Procedure of the General Court.

([48]) For ranges on sales, turnover data and market shares, see paragraph 22 of the Guidance on confidentiality claims during Commission antitrust procedures, available at https://ec.europa.eu/competition/antitrust/business_secrets_en.pdf

C. **Confidentiality rings**

50. A confidentiality ring is a disclosure measure whereby the disclosing party makes specified categories of information, including confidential information, available only to defined categories of individuals ([49]).

C.1. ***Confidentiality rings as an effective means for protecting confidentiality***

51. Confidentiality rings can be an effective measure for national courts to protect confidentiality in a variety of circumstances.

52. First, confidentiality rings can be effective to ensure disclosure of quantitative data (e.g. revenues, prices, margins, etc.) ([50]) or very strategic commercial information that, while relevant for the claim of the party, are very difficult to summarise in a meaningful way ([51]) or cannot be disclosed without risking being excessively redacted ([52]), and thus without losing evidentiary value.

53. Second, confidentiality rings may allow for procedural economies and cost efficiencies, in particular when the number of documents requested is voluminous and all the documents are placed entirely in the ring (i.e. in their original version without redaction). In practice, parties may not agree to disclose unredacted versions of certain documents in the confidentiality ring and may still be required to prepare confidential and non-confidential versions of some documents. Nevertheless, even in such cases, confidentiality rings may reduce the need for confidentiality discussions between parties and thereby potential delays.

54. Third, confidentiality rings can be organised electronically (e.g. e-disclosure). Therefore, confidentiality rings do not necessarily require the physical handing out of the information or the physical presence of the members of the ring in a particular location.

55. Confidentiality rings may help to strike a balance between the need for disclosure and the obligation to protect confidential information ([53]). By disclosing documents in a confidentiality ring, relevant confidential information is effectively disclosed but the potential harm caused by the disclosure is controlled or minimised by allowing access to a limited circle of individuals depending on the different circumstances of the case (e.g. nature of the documents, relationship of the parties, composition of the ring, third party documents, etc.).

([49]) Depending on the jurisdiction, this disclosure measure is also referred to as confidentiality clubs or data rooms. This type of measure can also be used in administrative proceedings. For Commission procedures, 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), paragraphs 96 and 97; for data rooms, see 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, available at http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf For confidentiality rings, see Guidance on the use of confidentiality rings in Commission proceedings, available at http://ec.europa.eu/competition/antitrust/conf_rings.pdf

([50]) See, Passing-on Guidelines, cited above, paragraph 43.

([51]) See, for example, OECD report of 5 October 2011 on Procedural fairness: transparency issues in civil and administrative enforcement proceedings, p. 12, available at www.oecd.org/competition/mergers/48825133.pdf; see also, Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020, 6-8 June 2018, OECD Conference Centre, pp. 4-5, available at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En

([52]) For example, in relation to data collected by external contractors from the participants in a Commission's survey, in its Opinion in *Sainsbury's Supermarkets Ltd* v *MasterCard Incorporated and Others*, cited above, paragraph 21, the Commission concluded that the information could not be anonymised in a way that fully respected the data providers' legitimate interest in the protection of their confidential information.

([53]) See in this respect the disclosure into a confidentiality ring ordered by the General Court in its judgment of 14 March 2014, *Cementos Portland Valderrivas, SA* v *Commission*, Case T-296/11, EU:T:2014:121 paragraph 24: '[…] *with a view to reconciling the adversarial principle and the characteristics of the preliminary investigation stage of the procedure, when the undertaking concerned has neither the right to be informed of the essential evidence on which the Commission relies, nor a right of access to the file, the order of 14 May 2013 limited inspection of the information supplied by the Commission to the applicant's lawyers and made such inspection conditional upon them giving an undertaking of confidentiality.*'

56. However, in considering whether and to what extent evidence should be placed in a confidentiality ring, national courts may attach importance to the fact that information placed in a confidentiality ring may limit the extent to which it may be accessible and/or used in subsequent stages of the procedure (e.g. hearings, publication, etc.). National courts may also consider relevant whether non-confidential versions of documents would still be required and, if so, the amount of documents that would in any event need to be redacted.

C.2. ***Organising a confidentiality ring***

57. If a national court considers that a confidentiality ring is an effective measure of disclosure in a given case, it may, by way of a court order, decide on a number of relevant aspects, such as (a) the information that is to be placed in the confidentiality ring; (b) the composition of the confidentiality ring; (c) the confidentiality undertakings that are to be made by the parties; and (d) the logistical organisation of the confidentiality ring. Some aspects may already be established by national procedural rules or general guidance issued by the national court ([54]).

a. *Identifying the information accessible in the confidentiality ring*

58. Any confidentiality ring ordered by a national court will typically identify the categories of information or specific items of evidence that should be included in the confidentiality ring. In practice, parties may agree or be invited by the court to agree on the documents or information that should be included in the confidentiality ring before the court issues its order.

b. *Composition of the confidentiality ring*

59. After considering the submissions of the parties, either in writing or at an oral hearing, or upon agreement of the parties, the court may order who will be members of the confidentiality ring as well as the members' access rights ([55]).

60. The members of the confidentiality ring may be those individuals who will have the right to review documents in the confidentiality ring. The decision on the composition of the confidentiality ring will depend on the circumstances of the case, in particular the nature of the information concerned by the disclosure request.

61. The members of the confidentiality ring may range from external advisers of the parties (e.g. external legal counsel or other advisers) to in-house legal counsel and/or other company representatives. Depending on the national rules and the specific circumstances of the case, confidentiality rings may be composed of external advisers only or of a combination of external and internal advisers.

External advisers

62. External advisers may include legal counsel and other advisers or experts such as accountants, economists, financial advisors or auditors, depending on the needs of the case at hand.

63. Subject to the relationship between the requesting and the disclosing parties, and the information to be disclosed, the court may consider necessary to limit access to the confidentiality ring to advisers that are not involved in the decision-making processes of the companies they represent ([56]). This is often the case for external advisers.

([54]) For an example of measures of organisation of procedure, see the Practice Rules for the Implementation of the Rules of Procedure of the General Court adopted by the General Court, and in particular Section VI dealing with confidentiality (OJ L 152, 18.6.2015, p. 1). For example, for the confidentiality ring rules and data room rules used for the purpose of Commission administrative procedures, see Section 4.3 of the Best Practices on the disclosure of information in data room proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation, cited above; Annex A to the Best Practices, the Standard data room rules (for the disclosure of confidential information on external advisor only basis), available at https://ec.europa.eu/competition/antitrust/data_room_rules_en.pdf; and the Guidance on the use of confidentiality rings and in particular, Section 5, on the negotiated disclosure agreement, cited above.

([55]) The decision of the composition of the confidentiality ring may also define the maximum number of members per party.

([56]) See recital 18 of the Damages Directive (*'restricting the persons allowed to see the evidence'*).

64. As opposed to external advisers, in-house legal counsel or company representatives may serve the company in a variety of corporate functions and may often be involved, directly or indirectly, in the strategic decision-making of the company. Therefore, in certain circumstances, there may be a risk that the in-house legal counsel's commercial or strategic advice to the company management is influenced by access to certain confidential information in the confidentiality ring. This might be the case, for example, where the parties to the civil proceedings are actual or potential competitors and access to commercially sensitive or strategic information may give them an unwarranted competitive advantage; where the parties are in a supply relationship; or where the information to be disclosed includes agreements that are still in force.

65. In deciding whether to limit access to external advisers only, national courts may deem the nature of the information relevant, as well as whether such restricted access allows the parties to effectively exercise their rights in judicial proceedings as recognised under EU ([57]) and national law.

In-house legal counsel and/or other company representatives

66. There may be circumstances where the national court may deem it appropriate for in-house legal counsel and/or company representatives (e.g. managers or other staff ([58])) to access confidentiality rings. Access by in-house legal counsel and/or company representatives may be assessed on a case-by-case basis and may depend on the closeness of the individuals suggested by the parties to the business, area of activity or operational business concerned by the request, or other factual circumstances.

67. Such access may be granted when (all or part of) the confidential information in question is regarded as less commercially sensitive or where disclosure to company employees may not be liable to cause harm due to, for example, the relationship between the parties.

68. Access to certain information by in-house legal counsel and/or other company representatives may also be granted upon a reasoned request by the parties ([59]), typically when the external legal counsel that had access to the information consider that they cannot adequately represent their client's interests without certain information being disclosed to their client. This is the case, for instance, where the external legal counsel is unable to judge the accuracy or the relevance of the information for the party's claim or where the information is very technical or product-/service-specific and requires sector or industry knowledge to make a relevance assessment ([60]).

69. Furthermore, in the legal orders of some Member States, it may be possible in specific situations to seek the national court's consent to share specific items of information with in-house legal counsel or with company representatives without allowing the individuals to become members of the confidentiality ring.

Access rights

70. Where the confidentiality ring is composed of a combination of external advisers and in-house legal counsel and/or company representatives, it is possible that all members of the ring have access to all the information disclosed in the ring or that different access rights are granted.

71. It is also possible that confidentiality rings are organised with two access levels: an inner ring level composed by external legal counsel and/or other external advisers who have the right to access the most sensitive information; and an outer ring level composed of in-house legal counsel and/or company representatives who have the right to access the remaining confidential information.

([57]) See, for example, Article 9(2) of the Trade Secrets Directive..

([58]) E.g. individuals employed by the requesting party through labour contracts or other type of service or contractual agreements.

([59]) See, for inspiration, Access to File Notice, cited above, paragraph 47.

([60]) In litigation regarding the disclosure of trade secrets, Article 9(2) of the Trade Secrets Directive prescribes that the restricted circle of persons entitled to access the evidence shall be composed of at least one natural person from each of the parties. This requirement is limited to (alleged) trade secrets.

72. Upon a justified request of the disclosing party, the court may – depending on national procedures – impose also specific restrictions in relation to the access of certain members of the confidentiality ring to specific documents.

73. It may be possible that access to the confidentiality rings is also given to administrative and/or support personnel (including, for example, external electronic disclosure or litigation support providers of electronic technical services) under the supervision of the other persons identified in the ring and under the same confidentiality obligations.

74. Finally, once the court has taken a decision on the composition of the confidentiality ring, it may be appropriate to identify each individual member by name, role or function and relation to the parties ([61]). The court may also identify the personnel of the court that shall be present or can access the ring alongside the parties or at any other time in case of confidentiality rings at a physical location.

c. *Written undertakings of the members of the confidentiality ring*

75. The court may request that the members of the confidentiality ring submit written undertakings to the court. Those undertakings would concern their obligations regarding accessing the confidentiality ring and in particular, the confidential treatment of certain information included in the confidentiality ring ([62]).

76. Such undertakings may concern, inter alia, the duty not to disclose the confidential information to any person different from those listed by the court as confidentiality ring members, without the express consent of the court; the obligation to use the confidential information only for the purpose of the civil proceedings in which the disclosure order was issued; the obligation to ensure adequate custody of the information; the obligation to adopt any measure necessary in the circumstances to prevent unauthorised access; the obligation not to copy, print, download, otherwise replicate, transmit or communicate the documents accessed; the obligation to return or destroy any copies of documents containing confidential information; the obligation to make the documents unavailable to the identified persons from any computer or devices after a specific date, etc.

77. In cases where the court allows access to the confidentiality ring by external advisers only, it may impose on them the obligation not to disclose the confidential information to their clients. This may be of significant relevance in those jurisdictions in which external legal counsel are bound, pursuant to deontological bar rules or other rules, to share the information with their clients ([63]). For this purpose, should the parties agree to such restrictions for the purpose of the confidentiality ring, they may need to expressly release the external legal counsel that are members of the confidentiality ring (and possibly their law firm) from the obligation to disclose to them information included in the confidentiality ring ([64]).

78. In addition, where in-house legal counsel or company representatives participate in a confidentiality ring, they may be subject to additional requirements. For example, the national court may deem it appropriate to prescribe that, for a limited period, the employee in question does not work in the line of business concerned by the claim.

d. *Logistical organisation of a confidentiality ring*

79. Confidentiality rings may require national courts to decide on various organisational, infrastructure and logistical measures.

([61]) See Commission Opinion in *Servier,* cited above, paragraph. 22.

([62]) For example, in its administrative procedures, the Commission uses a standard non-disclosure agreement, which is available at https://ec.europa.eu/competition/antitrust/nda_en.pdf

([63]) This is a departure from the usual practice in which a party's external legal counsel discloses to his/her client information and pleadings received from other parties in the proceeding and discusses them freely with his/her client.

([64]) In its administrative practice, the Commission may also seek a waiver of the lawyer-client disclosure duty; see, for instance the Guidance on the use of confidentiality rings, cited above, paragraph 13 and Best Practices on the disclosure of information in data rooms, cited above, paragraph 23.

80. First, confidentiality rings may involve the physical or the electronic disclosure of confidential information. Physical disclosure may be organised at the court premises with court personnel in control of the disclosure or by the parties at their premises with no involvement of the court. Physical disclosure may involve handing over paper copies of documents but also the disclosure of evidence by means of a CD, DVD or a USB key in a physical location, in court premises or at parties' premises.

81. If the disclosure of the information into the confidentiality ring occurs at the court's premises, the court may need to ensure that the facilities for accessing the information are adequate, unless the persons accessing the confidentiality ring are allowed to bring their own equipment.

82. Disclosure of information in a confidentiality ring may occur also by electronic means. In such case, the information is uploaded and stored in an electronic location (e.g. cloud), and access to the information is protected by adequate encryption.

83. Second, the court may determine the duration of the accessibility to the confidentiality ring.

84. Third, the court may furthermore decide on the hours of availability of the disclosure rooms (e.g. during business hours only), whether court personnel must be present in the disclosure rooms, whether notes or files can be brought into the rooms, etc.

85. Finally, to ensure that confidential information disclosed in a confidentiality ring is protected throughout the proceedings, national courts may request that parties submit both a confidential and a non-confidential version of their pleadings (the latter, for instance, only including quantitative data in an aggregated or anonymised form), that confidential information is only referred to in a confidential annex, or that other measures are taken to protect the confidential nature of the information. For more detail in this respect, please refer to Section IV below.

D. **Appointment of experts**

86. In some jurisdictions, national courts may decide to appoint a third party individual with expertise in a specific field (e.g. accounting, finance, competition law, audit, etc.) to access certain confidential information concerned by a disclosure request. The role of such court appointed expert may be different from party appointed experts, who are frequently used in some jurisdictions to support a party's claim or defence.

87. If national procedural rules allow it, the expert's assignment may for example be to draft a meaningful non-confidential summary of the information to be made available to the party requesting disclosure. Alternatively, and depending on the national procedural rules applicable, the expert may be asked to draft a confidential report that may be made available only to the external legal counsel and/or other external advisers of the party requesting disclosure, while a non-confidential version of the report may be made available to the requesting party itself.

D.1. ***Appointing experts as an effective means for protecting confidentiality***

88. First, the appointment of experts may prove to be an effective measure where the information to be disclosed is commercially very sensitive, and quantitative or technical in nature (e.g. information included in commercial or accounting books, customer data, manufacturing processes, etc.). In such cases, the experts may summarise and/or aggregate confidential information with a view to making it accessible to the party requesting disclosure.

89. Second, the appointment of experts may also be effective where one party requests further access to confidential documents containing underlying data, for example, to evaluate the robustness of methodologies used to assess the extent of damages, overcharges passed on, etc.

90. Third, in cases where a large number of the documents to be disclosed concerns third party confidential information, courts may consider it more effective to appoint an expert to access the information and give his or her opinion as to the confidential nature of the information, than to engage in discussions with parties about the scope of redaction or to set up a confidentiality ring.

D.2. ***Instructing experts***

91. The national court may appoint and instruct the appointed experts. Depending on the different procedural rules, national courts may be able to appoint third party independent experts from a list of 'court approved' experts, from a list of experts proposed by the parties, etc. Pursuant to national procedural rules, when appointing an expert, the national court may also need to decide who will bear the expert costs.

92. Once the expert is appointed, national courts may request the expert to submit written undertakings regarding the confidential treatment of any information accessed.

93. As in the case of the members of a confidentiality ring, experts may be required to agree not to disclose confidential information to any person other than those listed by the court or without the express consent of the court; to use the confidential information only for the purpose of the civil proceedings in which the disclosure order was issued; to ensure adequate custody of the information; to adopt any measure necessary in the circumstances to prevent unauthorised access and to return or destroy any copies of documents containing confidential information, etc. These undertakings may also provide for penalties in case of breach of the duty of confidentiality.

94. Experts may be required to declare any conflicts of interests that may prevent them from carrying out their task.

95. Furthermore, the court may instruct the expert on the type of report to be produced and on whether both a confidential and a non-confidential version of the report may be needed.

96. Whenever a confidential version of the expert report is produced, the court may decide that the report is shared only with the external advisers of the parties, while the parties may receive access only to a non-confidential version of the report. If the national court restricts access to the confidential version of the report prepared by an expert only to a party's external adviser, the external adviser will not be allowed to share the confidential information contained therein with his or her client ([65]). If the court decides that the underlying data used by the independent expert may also be disclosed to the external adviser, separate confidentiality arrangements may be necessary.

97. If in-house legal counsel and/or company representatives are allowed to access a confidential version of the expert's report, the court may request that they also submit written undertakings regarding the confidential treatment of the information to which they have access.

IV. PROTECTION OF THE CONFIDENTIAL INFORMATION THROUGHOUT AND FOLLOWING THE PROCEEDINGS

98. When disclosure of confidential information has taken place, national courts may consider how that information can be used throughout and after the proceedings ([66]). For example, if the parties' external or internal advisers use information accessed in a confidentiality ring or included in a confidential expert report in their pleadings, national courts may ask them to refer only to such information in confidential annexes to be submitted alongside the main pleadings ([67]).

99. If parties' external legal counsel or witnesses wish to refer to confidential information during the court's hearing or when an expert is heard on such evidence, national courts may organise *in camera* (i.e. closed) hearings, if possible under the applicable procedural rules. Alternatively, it may be possible for the parties' advisers to direct the judge orally to such information without disclosing it in open court.

100. The need to protect confidential information may also arise later, for example, at the time of the adoption, notification or publication of the judgment, during appeal proceedings or in the case of requests for access to court's records.

([65]) As in the case of confidentiality rings for external legal counsel, clients may need to release the external advisers from any obligation to disclose to them the confidential information included in the report. See paragraph 77 above.

([66]) The protection of confidential information is a general principle of EU law. See footnote 18 above.

([67]) The non-confidential versions of the pleadings must allow the other parties to understand the arguments and the evidence being referred to so that they can discuss the case with their legal representatives and instruct them accordingly.

A. *In camera* hearings

101. Pursuant to the principle of open justice, civil proceedings are generally public in nature ([68]) and national courts may weigh the interest to the protection of confidential information against the need to limit the interference with the principle of open justice.

102. Subject to national rules, courts may decide to exclude references to confidential information at public hearings, or to hold *in camera* those parts of the hearings where confidential information might be discussed. In the second case, national courts would have to decide who would be allowed to attend the closed session. This decision may depend on how and to whom the confidential information was disclosed (e.g. to the parties' external advisers, to an expert, to the parties' company representatives, etc.).

103. During *in camera* (parts of) hearings, generally only those external advisers and/or internal legal counsel or other company representatives who were granted access to the confidential documents in the confidentiality ring and (if applicable) the expert who accessed the information would be permitted to participate.

104. Hearings *in camera* may be an effective means to cross-examine parties or witnesses on confidential evidence disclosed through a confidentiality ring or to hear an expert on the confidential evidence included in his or her report.

B. Notification to the parties and publication

105. The court may have to consider how to protect the confidential information in the version of the judgment to be notified to the parties, without prejudice to the right of appeal of the parties.

106. In addition, if decisions or judgments are published, national courts may have to protect confidential information. To protect confidential information of the parties or third parties, when rendering the judgment and ordering its publication, national courts may consider to anonymise any information that could identify the source of the information/or to redact from the publicly available version of the ruling those parts referring to confidential information ([69]). In this process, the court may ask the parties' assistance in identifying information that should not be disclosed to the wider public (e.g. by requesting a mark-up version) ([70]).

C. Access to court records

107. National courts may need to protect confidential information in relation to requests for access to the court's records (either the confidential version of the judgment or the entire file), if such requests can be made under national procedural rules.

108. Depending on the national rules, courts may decide to restrict access to the court's records either with regard to part of the file (e.g. to refuse access to documents disclosed in a confidentiality ring, expert reports, minutes of *in camera* hearings, confidential version of pleadings, etc.) or with regard to the entirety of the file.

([68]) See Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, cited above. Exceptions to this principle may relate in some Member States to the maintenance of public order, the protection of fundamental rights or other overarching objectives.

([69]) See, also, Article 9.2(c) of the Trade Secrets Directive.

([70]) As a source of inspiration on how to carry out this process, see Guidance on the preparation of public versions of Commission Decisions, available at https://ec.europa.eu/competition/antitrust/guidance_on_preparation_of_public_versions_antitrust_04062015.pdf

109. In that respect, national courts may consider, inter alia, asking parties to indicate which documents are confidential so that they are not accessible to non-parties to the proceedings, or requesting non-confidential versions of the documents concerned for the court's records. For example, if a significant number of confidential documents were disclosed in the proceedings and measures such as confidentiality rings were used to protect confidentiality, the court may also consider registering into the court's records only non-confidential versions of pleadings, minutes of *in camera* hearings ([71]) or expert reports. The court may also consider sealing the court's file from access, partially or entirely, for a specific period.

110. When deciding whether to restrict, partially or entirely, access, the courts may need to evaluate, inter alia, who is requesting access to the court's file. For example, courts may need to take into account that persons requesting access may operate in the same market or business activity as the parties involved in the civil proceedings (e.g. competitors of the parties, business partners, etc.) and may have a special interest in getting access to the court's file after the proceedings are closed.

([71]) If confidential information was referred to during the *in camera* hearing and read into the record, this measure may be necessary. However, if possible under applicable national rules, the court may decide that some information is referred to *in camera* without reading it on the record. In that situation, it may be unnecessary to prepare non-confidential versions of the minutes of *in camera* hearings.

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Euro exchange rates [1]

21 July 2020

(2020/C 242/02)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,1443	CAD	Canadian dollar	1,5399
JPY	Japanese yen	122,70	HKD	Hong Kong dollar	8,8704
DKK	Danish krone	7,4449	NZD	New Zealand dollar	1,7305
GBP	Pound sterling	0,90055	SGD	Singapore dollar	1,5891
SEK	Swedish krona	10,2390	KRW	South Korean won	1 367,96
CHF	Swiss franc	1,0740	ZAR	South African rand	18,8806
ISK	Iceland króna	159,30	CNY	Chinese yuan renminbi	7,9982
NOK	Norwegian krone	10,4933	HRK	Croatian kuna	7,5300
BGN	Bulgarian lev	1,9558	IDR	Indonesian rupiah	16 830,00
CZK	Czech koruna	26,429	MYR	Malaysian ringgit	4,8764
HUF	Hungarian forint	350,64	PHP	Philippine peso	56,455
PLN	Polish zloty	4,4362	RUB	Russian rouble	81,0833
RON	Romanian leu	4,8392	THB	Thai baht	36,194
TRY	Turkish lira	7,8369	BRL	Brazilian real	6,0416
AUD	Australian dollar	1,6154	MXN	Mexican peso	25,5910
			INR	Indian rupee	85,3805

[1] *Source*: reference exchange rate published by the ECB.

V

(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION POLICY

EUROPEAN COMMISSION

Prior notification of a concentration

(Case M.9903 – SoftBank Group/Mizuho Financial Group/One Tap Buy)

Candidate case for simplified procedure

(Text with EEA relevance)

(2020/C 242/03)

1. On 14 July 2020, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ([1]).

This notification concerns the following undertakings:

— SoftBank Corp. ('SoftBank') (Japan), a subsidiary of SoftBank Group Corp.,

— Mizuho Securities Co., Ltd. ('Mizuho') (Japan), a subsidiary of Mizuho Financial Group,

— One Tap Buy Co., Ltd. ('OTB') (Japan), solely controlled by SoftBank.

SoftBank and Mizuho acquire within the meaning of Article 3(1)(b) and 3(4) of the Merger Regulation joint control of OTB.

The concentration is accomplished by way of purchase of shares.

2. The business activities of the undertakings concerned are:

— SoftBank is a subsidiary of SoftBank Group Corp., which is involved in advanced telecommunications, internet services, Internet of Things, robotics and clean energy technology providers,

— Mizuho is a subsidiary of Mizuho Financial Group Inc., which offers financial and strategic services, including banking, securities, trust and asset management, credit card, private banking and venture capital,

— OTB provides a mobile trading brokerage application that allows investors residing in Japan to trade securities (US-listed shares and Japanese exchange-traded funds) on the go.

3. On preliminary examination, the Commission finds that the notified transaction could fall within the scope of the Merger Regulation. However, the final decision on this point is reserved.

Pursuant to the Commission Notice on a simplified procedure for treatment of certain concentrations under the Council Regulation (EC) No 139/2004 ([2]) it should be noted that this case is a candidate for treatment under the procedure set out in the Notice.

([1]) OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation').
([2]) OJ C 366, 14.12.2013, p. 5.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. The following reference should always be specified:

M.9903 – SoftBank Group/Mizuho Financial Group/One Tap Buy

Observations can be sent to the Commission by email, by fax, or by post. Please use the contact details below:

Email: COMP-MERGER-REGISTRY@ec.europa.eu

Fax +32 22964301

Postal address:

European Commission
Directorate-General for Competition
Merger Registry
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

OTHER ACTS

EUROPEAN COMMISSION

Notice of a request concerning the applicability of Article 34 of Directive 2014/25/EU –End of the suspension and extension of the period for adoption of implementing acts

(2020/C 242/04)

On 19 September 2019 the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council ([1]).

This request, made by Slovenske železnice – Freight Transport d.o.o., concerns railway freight services. The relevant notices was published on page number 10 of OJ C 53 of 17 February 2020.

On 16 December 2019 the Commission asked the national authorities to provide additional information by 6 January 2020 at the latest. As announced in the notice that was published on page number 2 of OJ C 211 of 25 June 2020, the final deadline was prolonged by 22 working days after the receipt of the complete and correct information. Complete and correct information was received on 25 May 2020.

Pursuant to the fourth subparagraph of paragraph 1 to Annex IV of Directive 2014/25/EU, the deadline may be extended by the Commission with the agreement of those having made the request for exemption concerned. Given the current context and the effects of the COVID-19 pandemics, and with the agreement of Slovenske železnice – Freight Transport d.o.o, the period available to the Commission for deciding on this request is hereby extended until 24 July 2020.

([1]) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement procedures by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

Notice of request concerning the applicability of Article 34 of Directive 2014/25/EU

Request made by a contracting entity – Extension of the period for adoption of implementing acts

(2020/C 242/05)

On 3 December 2019 the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council ([1]).

This request is made by ENEL Green Power and concerns activities relating to the generation and wholesale of electricity from renewable sources in Italy. The relevant notice was published on page 45 of OJ C 196 of 11 June 2020. The prolonged deadline was 15 July 2020.

Pursuant to the fourth subparagraph of paragraph 1 to Annex IV of Directive 2014/25/EU, the deadline may be extended by the Commission with the agreement of those having made the request for exemption concerned. Given the current context and the effects of the COVID-19 pandemics, and with the agreement of ENEL Green Power, the period available to the Commission for deciding on this request is hereby extended until 31 July 2020.

([1]) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

Notice of request concerning the applicability of Article 34 of Directive 2014/25/EU

Request made by a contracting entity – Extension of the period for adoption of implementing acts

(2020/C 242/06)

On 8 April 2019 the Commission received a request pursuant to Article 35 of Directive 2014/25/EU of the European Parliament and of the Council [1].

This request, made by Lietuvos energija UAB, concerns production and wholesale of electricity in Lithuania. The relevant notices were published on page 28 of OJ C 316 of 20 September 2019 and on page 9 of OJ C 53 of 17 February 2020 and on page 27 of OJ C 202 of 16 June 2020. The prolonged deadline was 10 July 2020.

Pursuant to the fourth subparagraph of paragraph 1 to Annex IV of Directive 2014/25/EU, the deadline may be extended by the Commission with the agreement of those having made the request for exemption concerned. Given the current context and the effects of the COVID-19 pandemics, and with the agreement of Lietuvos energija UAB (now Ignitis), the period available to the Commission for deciding on this request is hereby extended until 31 July 2020.

[1] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

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