

ACCESS TO EVIDENCE: THE 'DISCLOSURE SCHEME' OF THE DAMAGES DIRECTIVE

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Abstract: Like with other harms for which compensation may be sought, evidence of harmful antitrust wrongs is essential for the success of damages' claims. In the context of most antitrust infringements, the information asymmetry between the parties and the difficulties faced by claimants to access probative evidence in support of their actions is severe. In the European Union, the tools available to the parties for discovery and access to evidence in adversarial processes for antitrust damages claims are governed by national law, but the rules in force in Member States should respect the principle of effectiveness. To help filling the information vacuum of the parties, the Damages Directive introduced a novel 'disclosure scheme', designed to ease the access to evidence necessary by both parties to prove their claims or counterclaims. This chapter examines how Member States have implemented the Directive in this regard and the common problems seemingly faced by them. It also looks at the early experience of the use and functioning of the 'disclosure scheme'. In addition, alternative tools for obtaining evidence that might be used in connection with antitrust damages proceedings are also analyzed, particularly access to the files of Competition Authorities for follow-on claims.

Keywords: Evidence, Damages' claims, Discovery, Confidentiality, NCA, European Commission, private enforcement, compensation

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In compliance with ASCOLA's Transparency and Disclosure Declaration, the author discloses that he serves as academic consultant of CCS Abogados, a law firm representing the largest number of plaintiffs in claims for damages arising from the trucks' cartel in Spain and which is also involved in other ongoing private damages actions. However, the views expressed here are only his own. Comments by Miguel Sousa Ferro and Barry J. Rodger are gratefully acknowledged.

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1. Introduction

The effectiveness of legal disciplines built around rules prohibiting certain types of behavior depend heavily in increasing the probability of detecting infringements and obtaining evidence sufficient to condemn the infringers. Evidence is quintessential for the enforcement of the prohibitions of anticompetitive behavior¹, given that infringements may be both difficult to detect and to prove. Indeed, that is the justification for the existence of administrative competition authorities, as cartels and other anticompetitive infringements would remain uncovered and unprosecuted if it was not for them.²

Competition law enforcement depends on the availability of evidence of the existence and circumstances of the infringement. Evidence is crucial for the public enforcement by the administrative competition authorities, as the sanctions and other remedies provided by the Law can only be imposed if there is sufficient proof.³ For that reason, Competition Authorities (CAs) are equipped with powers and resources to find and locate proof of the infringement and its circumstances. Sanctioning decisions by administrative competition authorities follow an in-depth investigation of the actions amounting to potential infringements in which enough evidence was found. CAs are endowed with reward and leniency programs, inspection powers (dawn-raids), information request powers and, more recently, tools to collect and analyze digital evidence that enable them to obtain information and proof of the potential anticompetitive behavior.⁴ However, in terms of handling the collected evidence, apart from respecting the rules on due process in the investigation and collection of evidence, CAs not only have to protect the confidentiality of business secrets but also must respect the conditions of limited access upon which information may have been obtained (e.g., in case of leniency applications or settlement offers).

¹ Throughout this chapter references to the prohibitions of anticompetitive behavior refer to articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU consolidated version, [OJ UE C 326, 26/10/12](#)), however most of what is said extends and applies also to the same prohibitions in force in Member States' domestic competition law.

² Enforcement is driven by information about the infringement and incentives, and these are present (or not) in different ways in cartels/collusion, vertical restraints, and abuses of dominance, see Kai Hüschele & Sebastian Peyer "Public and Private Enforcement of Competition Law. A differentiated approach" [World Competition 36/4 \(2013\) 605-606](#). It's not a coincidence that many economic studies on the effectiveness antitrust enforcement consider "private information concerning the anticompetitive conduct" a pivotal element, see Jonathan A. Baker "Private Information and the Deterrent Effect of Antitrust Damage Remedies" [Journal of Law, Economics & Organization 4/2 \(1988\) 385-408](#).

³ See, for example, Andriani Kalintiri, *Evidence Standards in EU Competition Law Enforcement*, Hart 2019 and Eric Gippini and Fernando Castillo *Evidence, Proof and Judicial Review in EU Competition Law*, Elgar 2017.

⁴ See Chapter V (Powers of Investigation) of Regulation 1/2003 of 16/12/2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([OJ EU L1, 4/1/2003](#)). On the superiority of public enforcement on this regard, see Wouter J. Wils "Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future" [World Competition 40/1 \(2017\) 17](#). There has been a recent initiative to strengthen and harmonize the powers of National Competition Authorities (NCAs) see Directive 2019/1/EU of the European Parliament and of the Council of 11/12/18 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ([OJ EU L11, 14/1/19](#)).

In the past, enforcement of competition law in the EU has been tilted towards the public enforcers, which explains why courts may resort to them to access evidence that the CAs may hold,⁵ or in search for assistance in interpreting the prohibitions of anticompetitive behavior (*amicus curiae*).⁶ However transfers or communications of evidence from CAs to the national courts will have to safeguard the protection of confidential information and business secrets and it would require that the court is able to do so as well. So far, it will never include leniency statements or accepted settlement offers, unless the respective undertaking so authorizes.⁷

2. Evidence for private enforcement of competition law

Evidentiary problems are paramount for private enforcement of competition law.⁸ Access to justice by victims of anticompetitive conduct faces an important obstacle as evidence of the infringements and their effects may not be readily at hand. Access to evidence is a pre-condition for the right to compensation of victims of infringements of the prohibitions of anticompetitive behavior, the effectiveness of such right could be endangered if potential claimants were deprived of means to access evidence to support their claims.⁹

Enhancing rights to access evidence by both parties will facilitate victims of antitrust infringements suing for damages, decrease litigation costs, ensure accurate fact-finding,

⁵ Concerning the European Commission, based on the duty of loyal cooperation (article 4.3 TEU, [OJ EU C326, 26/10/12](#)) and article 15.1 of Regulation 1/2003 and ¶¶21-26 of the Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC ([OJ EU C 101, 27/4/2004](#)). See Björn Lundqvist & Helene Andersson "Access to Documents for Cartel Victims and Cartel Members- Is the System Coherent" in Maria Bergström, Marios Iacovides & Magnus Strand (ed) *Harmonising EU Competition Litigation. The New Directive and Beyond*, Hart 2016, 172-175.

Concerning court requests to NCAs, the matter is governed by domestic law, see Laurence Idot "Access to evidence and Files of Competition Authorities" in Jürgen Basedow, Stéphanie Francq & Laurence Idot (ed.) *International Antitrust Litigation*, Hart 2011, 272 and 276. See Robert Moldén "Exchange of Information and Opinions between European Competition Authorities and Courts- From a Swedish Perspective" in Basedow, Francq & Idot (ed) *International Antitrust Litigation*, 310-314 (arguing for the need to amend Regulation 1/2003 to include as part of article 15 a similar provision for NCAs).

⁶ See article 15.3 of Regulation 1/2003 and ¶¶17-19 and 27-30 of the 2004 Notice on the co-operation between the Commission and the courts of the EU Member States. Similar provisions exist in domestic procedural law of some Member States. The Damages Directive has further enabled NCAs to assist national courts in "the determination of the quantum of damages" (article 17.3).

⁷ See ¶26 of the Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC ([OJ UE C256, 5/8/15](#)). This provision is thinking on multi-agency cooperation in cases of filing multiple leniency applications (confidentiality waivers), see ICN (Cartel Working Group) [Waivers of Confidentiality in Cartel Investigations- Explanatory Note](#), 2014.

⁸ European Commission, *Green Paper: Damages for breach of the EC antitrust rules*, [COM \(2005\) 672 final](#), 19/12/2005 ("access by claimants to (...) evidence is the key to making damages claims effective" §2.1). See Rainer Kulms "Competition Law Enforcement under informational Asymmetry" [China-EU Law Journal 5: 211-212](#).

⁹ Recital 14 ("[...] strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU").

probative evidence, and damages assessment in/for sound claims (eventually also incentivizing defendants to settle before they go to trial).¹⁰

Private plaintiffs seeking remedial action for infringements of the competition prohibitions may find their evidentiary burden eased -at least in part- in follow-on actions. But that potential assistance does not exist in stand-alone actions, in which the claimant bears the burden of also proving the existence of an infringement.¹¹

In follow-on actions, the CA's decision may be binding in court¹² and that facilitates the burden of proof for claimants.¹³ However, the claimant still needs to provide evidence in support of the remedies sought.¹⁴ That is particularly the case in damages actions, in which the claimant has the burden of proving the harm suffered, its causal link with the infringement and *quantum* of the overcharge.¹⁵ Claimants may not know or lack access to the evidence needed to support their claims (e.g., management accounts, invoices, electronic datasets, sales databases and registries, details of margins and costs, business plans, market research reports, and conduct in relation to specific tenders, etc.), which is held by defendants or third parties.¹⁶ To the contrary, defendants will need to have access to internal data (accounting, sales and costs) of claimants in order to support the passing-on defense in their counterclaims if they argue that the claimants passed-on the overcharge.

¹⁰ See Florian Wagner-Von Papp "Access to Evidence and Leniency Materials" [WP Helmut Schmidt University 18/2/16, 7-11](#).

¹¹ In mixed or hybrid claims the claimant needs to prove the extension of the infringement beyond the scope of the prior public enforcement decision, see e.g., Wils [World Competition 40/1 \(2017\) 5](#). For an analysis of how an eventual surge of stand-alone claims may impact in welfare and in the overall enforcement of the antitrust infringements (including the strategies of the public enforcers), see Claudio Calcagno "Stand-alone private antitrust damages: (how) should competition authorities react?" *European Journal of Law & Economic* (2012) 34: 365-389.

¹² The temporal scope of the binding effect in follow-on actions of NCA decisions is disputed, some national courts may not recognize it in actions for years to come, when they relate to infringements which occurred prior to the transposition of article 9 of the Directive.

¹³ See article 16.1 of Regulation 1/2003 and article 9, see Miguel S. Ferro "Binding effect of public enforcement decisions" (Chapter 12) of this book.

¹⁴ Access to the file of the competition authority through any of the means provided by the law (*infra* §§3.1.3 and 4) may furnish additional evidence to the claimant to build or support her claim.

¹⁵ Although, in case of cartels claimants are further assisted by the presumption of harm (article 17.2) and by the empowering of courts "to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available" (article 17.1). Indeed, that presumption and others available in national law can be considered to serve the "role of filling the continental gaps in the field of disclosures" or "to cure the problem of access to evidence virulent in continental legal systems (without comprehensive systems of disclosure)" as it is aptly considered by Andreas Heinemann "Access to Evidence and Presumptions- Communicating Vessels in Procedural Law" in Kai Hüscherlath & Heike Schweitzer (ed) *Public and Private Enforcement of Competition Law in Europe*, ZEW-Springer 2014,167 and 189.

¹⁶ See recital 14 ("Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances").

3. The 'disclosure scheme' provided by the Antitrust Damages Directive

One of the pillars of the EU initiative to promote private enforcement of competition law tackles the information asymmetry characteristic of antitrust damages claims.¹⁷ Before the Damages Directive, the rules on access to evidence and discovery were governed by national law that should respect the principle of effectiveness.¹⁸

The Directive included a novel 'disclosure scheme', aimed at easing claimants' access to evidence in the adversarial process, forcing disclosure by the defendant or third parties of evidence needed to prove and support their damages' claim.¹⁹ It can also be used by indirect purchasers that -according to article 14- benefit from the presumption of being harmed in some circumstances, but which still need to prove and quantify the quantum of harm suffered.²⁰ In addition, the same mechanism is available to defendants, regarding any evidence required to counter the claimants' arguments, including about passing-on of the harm. In most Member States, this new 'disclosure scheme' coexists with preexisting general civil procedure rules on access to evidence.

Arguably, this is the part of the Directive harmonization that encountered greater difficulty, given the variety of situations and traditions present in national civil procedure law in Member States.²¹ There is great variety in their national rules of civil procedure in this matter and classification of them in accordance with legal families or the typical division between adversarial and inquisitorial models does not seem to be useful anymore.²²

Firstly, the new 'disclosure scheme' coexists with the pre-existing power of courts to request the European Commission (and, eventually, National CAs or Regional CAs, in accordance with national law)²³ to transmit any legal, economic or procedural information in its possession, although any transfer of evidence may still be subject to the duty of secrecy if

¹⁷ See recital 15 ("[...] as competition law litigation is characterized by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence [...]"). See also European Commission, *White Paper on Damages Actions for Breach of EC Competition Rules*, [COM\(2008\) 165 final](#) (§2.3) and *Green Paper: Damages for breach of the EC antitrust rules*, [COM\(2005\) 672 final](#) ("The particular difficulty with this kind of litigation is that often the relevant evidence is not easily available and is held by the party committing the anti-competitive behaviour", §2.1)

¹⁸ See ¶¶55 and 57 of C-526/04 *Laboratoires Boiron*, [EU:C:2006:528](#), ¶¶26 and 27 C-536/11 *Donau Chemie*, [EU:C:2013:366](#) and ¶¶23-24 C-360/09 *Pfleiderer*, [EU:C:2011:389](#).

¹⁹ Articles 5 to 8.

²⁰ See Daniel A. Crane "Optimizing Private Antitrust Enforcement" [Vanderbilt L. Rev. 63 \(2010\) 702](#) (their need of further evidence to prove their claim is only matched by their lack of knowledge about the infringing conduct upstream and their lack of sophistication, in comparison with the infringing undertakings).

²¹ ¶51 of Commission Staff Working document, *Impact Assessment Report, Damages actions for breach of the EU antitrust rules, accompanying the proposal for the Damages Directive* [COM\(2013\) 404 final](#).

²² See Joachim Zekoll "Comparative Civil Procedure" in [Mathias Reimann & Reinhard Zimmermann \(ed\) The Oxford Handbook of Comparative Law, 2nd Ed., 1308-1309](#) ("the development of procedural law governing civil litigation has resulted in the emergence of hybrid systems. There is a growing approximation driven by 'a worldwide procedural civilization which has developed independently from national preconditions'"), footnote omitted.

²³ See *supra* footnote 5.

confidential information is involved, so transmission will only proceed if protection of the confidential information by the court is ensured.²⁴

Secondly, liberal disclosure rules like the 'disclosure scheme' already existed in some Member States that, therefore, did not require to introduce many changes to implement the Directive (Cyprus, Ireland, Luxemburg, the Netherlands, Sweden, and England and Wales).²⁵ However, most Member States had pre-existing stricter and limited discovery tools, with little culture or tradition in the implementation of such a 'disclosure scheme'.²⁶

Thirdly, the 'disclosure scheme' is available both for stand-alone and follow-on claims, and for claims regarding harm caused by cartels or by any other antitrust infringements. Although the Damages Directive is geared towards follow-on claims and harm caused by cartels,²⁷ that does not mean that claims for harm caused by unlawful vertical restraints or abuse of dominance, and stand-alone claimants -which may have more need to access to evidence-, cannot avail themselves of it. Indeed, the scheme is a powerful tool to find evidence beyond public enforcement files.²⁸ While the primary objective of these rules may have been to facilitate private enforcement, many of the rules are instead aimed at protecting public enforcement and investigations by CAs.²⁹

²⁴ ¶¶21-26 of Notice on Cooperation with National Courts (concerning the file of the European Commission).

²⁵ See David Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., Elgar 2018, ¶¶4.12-4.17 and 4.31 (England and Wales, the Netherlands); Mary Catherine Lucey "Ireland" in Barry J. Rodger, Miguel S. Ferro & Francisco Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, Oxford University Press 2018, 203; Caroline Cauffman "Luxembourg" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 261; Lars Henriksson "Sweden" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 373; Barry Rodger "United Kingdom" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 390-391.

²⁶ See Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.18-4.30 and 4.32-434 (France, Germany, Finland, Lithuania, Portugal and Italy); Aleš Galič "Disclosure of Documents in Private Antitrust Enforcement Litigation" *Yearbook of Antitrust & Regulatory Studies 8/12 (2015) 99-126*. See also Michal Petr "Czech Republic" in Pisz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries*, CARS- University of Warsaw 2017, 96-97; Peter Miskolczi Bodnár "Hungary" in Pisz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries*, 146-147; Valentinas Mikėlėnas and Rasa Zaščiuirinskaitė "Lithuania" in Pisz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries*, 204-205; Ondrej Blažo "Slovakia" in Pisz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries*, 257 and Ana Vlahek & Klemen Podobnik "Slovenia" in Pisz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries*, 285.

²⁷ See Barry J. Rodger, Miguel S. Ferro & Francisco Marcos "Promotion and Harmonization of Antitrust Damages Claims by Directive 2014/104/EU?" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 48-49.

²⁸ But see Vlatka Butorac "Access to Documents in Antitrust Litigation-EU and Croatian Perspective" *Yearbook of Antitrust and Regulatory Studies 8/12 (2015) 146, 149 and 158-158*, who suggests that the new disclosure rules will not be of use in follow-on actions to European Commission cartel decisions (that rely almost always -as everywhere else by the way- in leniency) but only in follow-on actions to NCA decisions.

²⁹ See Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 40-44 and Ruth Flaherty "International Competition Law: The Antitrust Damages Directive Feb 2016" *Legal Issues Journal 5/1 (2017) 27*.

Fourthly, as most Member States implemented the disclosure scheme by “*literally or almost literally*” copying the provisions of the Directive,³⁰ transposition seems to have ignored the subtleties of national rules governing the courts and parties’ conduct in the adversarial process. Given the disparities existing in their disclosure rules and experiences, the impact of these new provisions has been far from uniform, although some of the doubts and uncertainties that had already been raised in the implementation and in the early experience in its application are common (*infra* §§3.2 and 3.3). This will probably imply that there is still ample room for forum-shopping.³¹

3.1. The Directive’s rules on the ‘disclosure scheme’

The Damages Directive introduces a 'disclosure scheme', empowering courts to adopt disclosure orders upon request by claimants or defendants.³² This form of evidence production involves a high degree of judicial management,³³ in marked contrast with discovery in the U.S., which is mainly driven and managed voluntarily by the parties.³⁴

Disclosure of evidence under the novel 'disclosure scheme' can be ordered by the court to either party in the process, and to third parties, including public authorities and particularly CAs. The Directive clarifies that evidence includes “*all types of means of proof that could be declared as admissible before courts, i.e. documents and all other objects containing information, regardless of the medium in which the information is stored*”³⁵. One of the problems in the interpretation of these rules is that they use the terms ‘evidence’, ‘type or means of proof’, ‘document’ and ‘object containing information’ in “*an interchangeable and inconsistent manner*”.³⁶

³⁰ Staff Working Document on the implementation of Directive 2014/104/EU, [SWD\(2020\) 338 final](#), 14/12/20 6.

³¹ See Rodger, Ferro & Marcos in *The EU Antitrust Damages Directive. Transposition in the Member States*, 50-51 and Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.55.

³² The 'disclosure scheme' in the Damages Directive follows the model priorly introduced in articles 6 to 9 of the Directive 2004/48/EC of the European Parliament and of the Council of 29/4/2004 on the enforcement of intellectual property rights. Together they introduce some sort of sectoral harmonization of procedural rules linked to the effective enforcement of EU law based on domestic procedure, see Burkhard Hess “Procedural Harmonisation in a European Context” in X.E. Kramer & C. H. Van Rhee (ed) *Civil Litigation in a Globalising World*, TMC Asser-Springer 2012, 164-165.

³³ See Natalya Mosunova “Disclosure of Evidence in Cartel Litigations in the EU: Is Balance of Victims’ Rights and Public Interests Possible?” [BRICS Law Journal 2/1\(2015\) 133](#) (“*Although the conditions to be fulfilled to obtain a disclosure order vary widely across Member States, a need to apply for a court order certainly does not facilitate disclosure process*”); Inese Druvieta, Jūlija Jerņeva & Aravamudhan Ulaganathan Ravindran “Disclosure of Evidence in Central and Eastern European Countries in Light of the Implementation of the Damages Directive” [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 200](#) (“*the adversarial model exhibits the shortcomings of disclosure of evidence in a pronounced manner*”).

³⁴ See Mosunova [BRICS Law Journal 2/1\(2015\) 129-135](#) (for a comparison between them and for an explanation of different legal tradition as foundation of differences, including class actions). Still “*broadly speaking, the Damages Directive introduces, at an EU-wide level, a system similar to discovery as known in the common law*”, Philip Bentley & David Henry “Antitrust Damages Actions: Obtaining Probative Evidence in the Hands of Another Party” *World Competition* 37/3 (2014) 284.

³⁵ Article 2.13.

³⁶ See ¶¶33 and 77-79 of AG Spuznar C-163/21 ([EU:C:2022:286](#)), this being very relevant concerning the scope of disclosure order (see *infra* §3.3.1).

The principles of necessity and proportionality form the backbone of these rules.

The *necessity principle* pegs the 'disclosure scheme' by connecting the motion for disclosure of evidence to indicia of a competition infringement that may have caused harm. Disclosure requests should only be granted for potential meritorious claims (and defenses). Unless there is a well-founded and serious suspicion of a harmful infringement of the prohibitions of anticompetitive conduct, the defendant should not be burdened with a duty to collect or disclose the evidence requested.³⁷ Meeting the requirement of necessity may be more difficult in stand-alone than in follow-on claims. In the former, the motion needs to provide initial evidence of the existence of an infringement, which should be clear in follow-on claims. Evidence requested must be needed by the requesting party to prove its claim.

The *proportionality principle* guides the amount of evidence to be disclosed and the forms of access. It sets the scope of the disclosure order, considering the costs of disclosure, and the legitimate interests of all parties and third parties concerned.³⁸ The disclosure order should not go beyond what is necessary to protect the interests of the persons concerned.³⁹ However, "*the interest of undertakings to avoid damages actions following an infringement of the competition rules does not constitute an interest that warrants protection*".⁴⁰ This implies that the defendant will be forced to share information that runs against its interests. Likewise, the claimant will have to disclose -if requested- evidence about the potential passing-on, that will diminish the amount of its claim. This is an explicit rejection of the principle of "*nemo contra se edere tenetur*".⁴¹

To meet the requirements of the principles of necessity and proportionality, motions for disclosure must be based "*on a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claims for damages*"⁴². They must identify the items of evidence or relevant "categories of evidence" to be disclosed as precisely and narrowly as possible.⁴³ The petitioner should identify the evidential items requested and the inferences that the applicant expects to extract from them. Therefore, unsupported, or unspecified requests for information will not be admitted.

³⁷ Recital 16 ("*...only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant*").

³⁸ Article 5.3.

³⁹ See ¶87 of T-462/12 *Pilkington Group Ltd v. European Commission* ([EU:T:2015:508](#)).

⁴⁰ Article 5.5.

⁴¹ See Galič [Yearbook of Antitrust & Regulatory Studies 8/12 \(2015\) 102 and 106](#). In some civil law jurisdictions there may be an incorrect understanding of the duties of the parties in the adversarial proceedings based on an unjustified extension of the principle against self-incrimination, see László Bánk Varga, Bálint Gábor Kovács, Angéla Gábris & Blanka Szupera "Disclosure rules of the Antitrust Damages Directive: finding the balance between public and private enforcement" [ERA Forum 20 \(2019\) 142 and 141](#).

⁴² Article 5.1.

⁴³ Article 5.2. For most Member States the possibility of requesting access to 'categories of evidence' broadens the scope of the discovery available before the Damages Directive. However, the category needs to be identified by the requesting party as narrowly and precisely possible, through reference to common features of the items requested (e.g., nature, purpose, content, date of preparation). See recital 16. See also Vlatka Butorac Malnar "Croatia" in Piszcz (ed) [Implementation of the EU Damages Directive in Central and Eastern European Countries](#), 75-76.

3.1.1. Disclosure hearing and order

Disclosure orders will only be adopted after applicants and those from whom disclosure would be ordered are heard.⁴⁴ The Directive indicates several considerations governing the court's decision: (a) the available facts and evidence supporting the request; (b) the scope and cost of disclosure; and (c) the protection of confidential information. In particular, the court should consider the interests of third parties who may be subject to the search for information. Communications between a lawyer and his client with the purpose of giving or receiving legal advice should be given full protection (legal professional privilege).⁴⁵

In ordering disclosure, the court should mandate how access to evidence takes place. In many cases, this would occur through the delivery of the specified pieces of evidence (either as a hard copy or in electronic data storage units, such as USB sticks or DVDs, or even by email), but the court can order limited forms of access to confidential items. Courts are empowered “*to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages*”.⁴⁶ Therefore, the disclosure order may need to consider the protection of privacy interests, confidential information, and business secrets. When access to confidential items is granted, proper arrangements should be made to protect such information (e.g., redacted documents, examination of the requested evidence in the court’s premises *in camera* or through a ‘data room’).⁴⁷

3.1.2. Penalties

The Directive introduces a regime of penalties to ensure the effectiveness of the ‘disclosure scheme’. National courts should be empowered to impose dissuasive and proportionate penalties on anyone who fails to comply with a disclosure order; who destroys relevant evidence; who fails to comply with the obligations imposed by the national court to protect confidential information; or who breaches the limits for the use of evidence.⁴⁸

⁴⁴ Article 5.7.

⁴⁵ Article 5.6. This has not led to any implementing provision by most Member States, which may become a controversial issue in some cases given the different scope of protection of legal privilege in EU and national law, mainly regarding communications with in-house lawyers (see C-155/79 *AM&S v. Commission*, [EU:C:1982:157](#)), see Druviete, Jerņeva & Ravindran [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 208-209](#); Valeria Falce “Private Enforcement and Legal Privilege versus Convergency” [Market & Competition Law Rev. 4/1 \(2020\) 69-86](#); Idot “Access to evidence and Files of Competition Authorities” in Basedow, Francq & Idot (ed.) *International Antitrust Litigation*, 278. See also Andreas Ruster & Sebastian von Massow “In for a Penny, in for a Pound? Legal Professional Privilege as a Shield Against Disclosure in Private Antitrust Litigation in Europe” *Journal of Competition Law & Practice* 11/1-2 (2020) 22-34 and Wouter J. Wils “Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure” [World Competition 42/1 \(2019\) 41](#).

⁴⁶ Article 5.4.

⁴⁷ See recital 18. See *infra* §§3.2.5 and 3.3.5.

⁴⁸ Article 8.1. See recital 33 (“*The fact that a claim for damages is initiated, or that an investigation by a competition authority is started, entails a risk that persons concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. In so far as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective penalty, and can help avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential information and for the*”).

In order to avoid "strategic refusals" to disclose by either party (e.g., if the requested party preferred to pay a fine to preclude access to relevant evidence), Member States were instructed by the Directive to include the possibility of drawing adverse inferences from the behavior of a party to the damages proceedings (*omnia praesumuntur contra spoliatores*): "such as presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility to order the payment of costs".⁴⁹

3.1.3. Access to the file of Competition Authorities (CAs)

Given their expertise and advantages in the enforcement of antitrust rules, CAs collect and gather a great amount of evidence of antitrust infringements. For that reason, potential victims of infringements tend to have an interest in filing disclosure motions in court for the CA to give access to relevant items of evidence,⁵⁰ or motions for the defendants to give access to such items included in a CA file. This will occur mainly in follow-on or hybrid claims, but also in stand-alone claims, as the files of CAs may contain evidence of businesses and market behavior that did not lead, or was unconnected to, a declaration of infringement (e.g., merger filings and merger proceedings,⁵¹ state aid cases).

The Directive's rules on access are common to any disclosure request and order,⁵² but there are specific rules concerning access to the files of CAs.⁵³ Contrary to the rest of the Directive⁵⁴, the rules on access to evidence included in the file of a CA in articles 6 and 7 are aimed at exhaustive harmonization.⁵⁵ As an extension and additional safeguard of the well-

abusive use of information obtained through disclosure. Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages").

⁴⁹ Article 8.2.

⁵⁰ See Wouter J. Wils "The Relationship between Public Antitrust Enforcement and Private Actions for Damages" [World Competition 32/1 \(2009\) 17](#) ("[e]ven if claimants need not prove anymore the existence of the antitrust violation, they may want to look in the public enforcement file for information that could be used for proving the extent of the harm suffered, and the causal link between the violation and the harm. Even if the investigation by the competition authority may not have focused on these issues, the public enforcement file may contain useful information", footnote omitted).

⁵¹ See *OdC v Sport TV* (7074/15.8T8LSB).

⁵² See the reference to disclosure orders addressed to public authorities and the European Commission in recital 15 ("National courts should also be able to order that evidence be disclosed by third parties, including public authorities. Where a national court wishes to order disclosure of evidence by the Commission, the principle in Article 4(3) TEU 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 apply. Where national courts order public authorities to disclose evidence, the principles of legal and administrative cooperation under Union or national law apply").

⁵³ Article 6. See *supra* §3.1 and ¶49 of AG Spuznar C-163/21 ([EU:C:2022:286](#)).

⁵⁴ See article 5.8 ("Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence"). Indeed, the Directive assumes the existence of "marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law" (recital 7) and "differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law" (recital 8) but it only aims to approximate national rules to "increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages" and "help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases" (recital 9).

⁵⁵ See ¶¶89 and 99 of AG Spuznar, C- 57/21 *Regionet/CD* ([UE:C:2022:363](#)).

known principle of consistency in the enforcement of articles 101 and 102 TFEU,⁵⁶ the Directive pursues a "*common approach across the Union on the disclosure of evidence that is included in the file of a competition authority*".⁵⁷

The need to protect the investigations of CAs in enforcing the prohibitions of anti-competitive behavior stands out as an objective of the Directive's rules governing access to their files.⁵⁸ Limitations introduced in these rules (*infra* §§3.1.3.1 and 3.1.3.2) are connected to those faced by alternative means to access the file (*infra* §§4.1 and 4.2).⁵⁹

Firstly, a greater burden of justification is imposed on the request for access.⁶⁰ As information regarding the infringement will already be present in the decision of the CA, the applicant should explain what items of the file are requested and for what purpose.⁶¹ The evidence sought needs to be "relevant" for some probative purpose that the applicant should identify in its request (i.e., how it supports, contradicts or weakens the contentions of fact in question).⁶²

Secondly, the request cannot be too broad or disproportionate. The specific items of evidence sought should be identified as much as possible. It would not be proportionate to request access to the whole file or to make a general request of unspecified items of evidence (e.g., all the documents submitted by the defendant in the investigation proceedings).⁶³

⁵⁶ See Adriana Almășan & Peter Whelan (ed) *The Consistent Application of EU Competition Law Substantive and Procedural Challenges*, Springer, 2017.

⁵⁷ Recital 21. See also recital 34.

⁵⁸ It is repeated several times in the Directive starting in recital 6 ("*It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities*"), recital 21 ("*Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority*") and recital 24 ("*This Directive does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements and settlement submissions*").

⁵⁹ See Anca D. Chirita "The Disclosure of Evidence under the 'Antitrust Damages' Directive 2014/104/EU" in Tomljenović, Bodiřoga-Vukobrat, Butorac Malnar, Kunda (ed) *EU Competition and State Aid Rules*, Springer 2018, 163.

⁶⁰ See, referring to article 5.1 of Directive, Ian Stewart Forrester "The role of the CJEU in interpreting Directive 2014/104/EU on antitrust damages actions" [ERA Forum 18 \(2017\) 73](#) ("*Under the new Directive, where a document is not "blacklisted", its release can be considered where a claimant can present 'a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages'. This may be a standard which the Court will be asked to interpret in due course*") footnote omitted.

⁶¹ If the evidence sought is included in a non-infringement file of the CA (e.g., merger review or any other action), the party requesting access needs to meet the burden of necessity as if it was a stand-alone claim.

⁶² See article 16 of [American Law Institute/Unidroit principles and rules of transnational civil procedure of 2004](#), P16-A.

⁶³ The Directive expressly spells out the limits of wide disclosure requests of the case file of the CA referring to "fishing expeditions", neither a request of access to all the file of the case (recital 22) nor generic requests of documents are deemed admissible (recital 23). Recital 22 is a codification of ¶106 of CJEU's judgment C-264/12P *EnBW* ([EU:C:2014:112](#)). Naturally, these limits are connected to the ones set to the right to public access to information in accordance with the principle of transparency (see recital 20 and *infra* §4).

Thirdly, the rules introduce a subsidiarity rule. Disclosure orders should only be addressed to CAs if the requested evidence cannot be obtained from other sources.⁶⁴ Requests concerning evidence included in a CA file, must reasonably justify their necessity and proportionality (article 6.4.a). As evidence in the file of the CAs has been mainly provided by the parties in their investigations, or the parties have had access to them in the exercise of their rights of defense, they can be obtained directly from them, without imposing a burden on CAs. However, given that the decision of the CA may even pinpoint the individual pieces of evidence in the file it is unclear if the subsidiarity principle could be interpreted in the sense that disclosure orders to the CA should only proceed as a "last resort" and thus, access to their file only be requested after trying before elsewhere. It is unclear how this rule will work in practice, given the lack of experience in many Member States on *inter partes* disclosure requests.⁶⁵ For that reason, it seems that if the request is found to be necessary and proportional, an outright rejection of access to the file in those circumstances would unreasonably delay the victim's right to compensation, making it less effective.

Fourthly, the evidence produced in fulfilment of a disclosure order of documents included in a CA file can only be used by the natural or legal person that was granted access to it, and by his/her successors, including acquirers of their claims, for the purposes of an action for damages to which it is a party.⁶⁶ Furthermore, "*evidence obtained from a competition authority cannot be made the object of trade*".⁶⁷ This provision seems aimed at preventing the surge of a "market for evidence", in which items of CA files are circulated without control among potential claimants, although it is unclear why the sharing of non-confidential information would merit protection.

Fifthly, and not least, prior to adopting the decision on access to documents in CA files, the court should consider the views of the authority regarding "*the need to safeguard the effectiveness of public enforcement of competition law*".⁶⁸ In adopting its decision, the court should consider the hypothetical recommendations of non-disclosure by the CA and balance them against the principle of effectiveness.⁶⁹

As a whole, the implications of these requirements are that disclosure should not:

(a) have a negative impact on the way in which undertakings cooperate with the CAs.⁷⁰ However, this may, to some extent, be wishful thinking. It seems obvious that the disclosure of evidence in CA files will be perceived by infringing undertakings as detrimental to their interest. Public enforcement by CAs only tackles the public interest side of conducts infringing the prohibitions of anticompetitive conducts. If they caused harm to private interests, infringers

⁶⁴ Article 6.10 and recital 29 ("*when that evidence cannot reasonably be obtained from another party or from a third party*").

⁶⁵ See ¶76 of T-677/13, *Axa Versicherung AG v. Commission* ([EU:T:2015:473](#)); ¶132 of C-365/12P, *Commission v. EnBW* ([EU:C:2014:112](#)) and ¶32 of C-536/11, *BWB v. Donau Chemie* ([EU:C:2013:366](#)).

⁶⁶ Recital 31.

⁶⁷ Recital 32.

⁶⁸ Article 6.4.c).

⁶⁹ See Chirita in Tomljenović, Bodiroga-Vukobrat, Butorac Malnar, Kunda (ed) *EU Competition and State Aid Rules*, 156.

⁷⁰ Recital 23 ("*The requirement of proportionality should be carefully assessed when disclosure [...] risks having a negative effect on the way in which undertakings cooperate with the competition authorities*").

should not be relieved of bearing the consequences of their actions. Infringing undertakings need to be aware of the potential consequences of all their actions, including their cooperation with public enforcers, and the rules protecting access to evidence in the file of the CA should not be interpreted extensively. Hence the important reminder in the Directive: "*an interest in avoiding actions for damages cannot justify this protection*".⁷¹ Indeed, undertakings should have in mind - both before they commit an infringement and when they strategically plan their way out of it - the full consequences of their action both in terms of public sanctions and private compensation.⁷²

(b) interfere with ongoing investigations of infringement by CAs.⁷³ The limitations introduced in this regard seem reasonable to protect the public enforcement of the prohibitions. However, as we will see below, it should only imply a ban of the disclosure of limited pieces of evidence (*infra* §3.1.4.1) or a temporal limitation of the disclosure of other items, until the investigation is closed, and a decision is adopted by the CA (*infra* §3.1.4.2). Nevertheless, early experiences in applying this rule suggest this is a potential area of controversy (*infra* §3.3.2).

3.1.4. Taxonomy of evidence in the file of the CA

The Directive classifies the evidence in a CA file in three categories, with different rules for disclosure of each of them. Access is precluded to evidence in which undertakings voluntarily acknowledge the participation in the infringement (a 'blacklist', which will never be disclosed, *infra* §3.1.4.1) and is delayed for other information prepared or presented for the investigation proceedings of the CA (a 'grey list', which will be disclosed only after the proceedings are closed, *infra* §3.1.4.2). In addition, disclosure should never be granted to internal CA documents or correspondence among CAs.⁷⁴

To ensure strict compliance with the disclosure limitations on evidence in the file of the CA for those who may have access to it, either as parties in the proceedings before the CA, from an insider or even through hacking, the Directive deems inadmissible for use in damages proceedings before national courts the evidence included in the 'black list' and 'grey list'.⁷⁵

⁷¹ Article 5.5.

⁷² See, e.g., ¶¶125 and 148 of T-344/08 *EnBW v. Commission* ([EU:T:2012:242](#)); ¶¶69-70 of T-437/08 *Hydrogene Peroxide v. Commission* ([EU:T:2011:752](#)). See also Pieter T. M. Desmet & Franziska Weber "Infringers' willingness to pay compensation versus fines" [European Journal of Law & Economics 53/1 \(2022\) 63-80](#).

⁷³ See Recital 23 ("*The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file [...]*") and Recital 25 ("*An exemption should apply in respect of any disclosure that, if granted, would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law*").

⁷⁴ Recital 21 and article 6.3. See also articles 11.4 and 27/2 of Regulation 1/2003. In order to safeguard the independence of the CAs and its staff and preserve them from external pressures, see ¶¶70-76 of T-516/11 *MasterCard v. Commission* ([EU:T:2014:759](#)); ¶¶69 and 70 of C-615/13P *Client Earth, Pesticide Action Network Europe v. EFSA* ([EU:C:2015:489](#)) and ¶100 of T-623/13 *Unión de Almacenistas de Hierros de España v. Commission* ([EU:T:2015:268](#)). Again, this is unavoidably connected with the doctrine that can be extracted from EU case law on the right of public access to information (examined *infra* §4.1), although the protection envisaged in the Damages Directive is both broader.

⁷⁵ Article 7.1 and 7.2. After the Directive was adopted, Regulation 773/2004/CE was amended to make that clear (new article 16a introduced by Regulation 2015/1348/EU of 3/8/15, [OJ L 208, 5/8/2015](#)). Eventually, this includes also complainants and third parties in the public investigations (see *infra* §4.2).

3.1.4.1 A 'blacklist': absolute protection

Leniency statements and settlement submissions are included in a 'blacklist' of evidence to which access is absolutely forbidden.⁷⁶ This blanket prohibition of disclosure contradicts the earlier CJEU case law on this matter, which left the courts the power to order disclosure of those documents after weighing the relevant interests involved, on the basis a case by case assessment.⁷⁷ Before the Directive was adopted, access to the leniency statements and settlement had been possible in some Member States when the courts had broad powers to order disclosure of evidence without exception in the domestic rules of civil procedure.⁷⁸

The question arises whether the Directive's absolute ban is valid under EU Law. If the CJEU interpreted EU primary law as precluding absolute bans, can EU secondary law impose an absolute ban without contradicting primary law and being invalid? What if, e.g., a CA decision defines the precise scope of the infringement by referring to a leniency statement? Wouldn't the absolute ban deprive injured parties of the right to understand what the infringement was and whether they had a right to damages?

The blanket/absolute prohibition of disclosure does not cover pre-existing information, which existed irrespective of the investigation proceedings before the competition authority.⁷⁹

In my opinion, the relevance of access to leniency statements and settlement submissions in the context of damages claims should not be overestimated, as it is unlikely that those statements or submissions include information on the effects of the infringement (i.e., any potential harm) or its causality: they generally will include little information valuable in constructing the damages claim.⁸⁰ Part of such overestimating comes from the Directive itself (e.g., recital 26 refers to "*self-incrimination*" but, unless the statement by the applicant referred

⁷⁶ Article 6.6.

⁷⁷ See C-360/09 *Pfleiderer AG v. Bundeskartellamt* ([EU:C:2011:389](#)) and C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG* ([EU:C:2013:366](#)). See Gianni De Stefano "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario" *Global Competition Litigation Rev.* 3/2012: 101-106; Caterina Migani "Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement" *Global Antitrust Rev.* (2014) 98-99; Sebastian Peyer "Access to competition authorities' files in private antitrust litigation" *Journal of Antitrust Enforcement* 3 (2015) 82; S. Nandini Pahari "Private enforcement of EU Competition Law: An Imperative with differing consequences" *Global Antitrust Rev.* 2017: 29-30. See also Thomas Thiede "Private Enforcement of Anti-trust Damages in Europe. A Germanic Perspective on Directive 2014/104/EU" *Elte Law Journal* 2015/1:159 ("Predictably, some Member States object that Art 6 para 6 DADA conflicts with Art 101 TFEU; in the light of the (alleged) conflict of this ban on the disclosure of leniency statements and settlement submissions with primary law, there is even open support for an action for annulment before the CJEU under Art 263 TFEU", footnote omitted).

⁷⁸ See Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council 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, [COM\(2013\) 404](#), 11/6/13, §3.2 ("each national court decides on an ad hoc basis and according to the applicable national rules whether or not to grant access to leniency-related information"). Cfr., e.g., ¶34 of *National Grid v. ABB* [2012] [EWHC 869 \(Ch\)](#) and [B-4 Kart 5/11 \(OWi\)](#) (roasted coffee, OLG Düsseldorf 22/8/12).

⁷⁹ Cfr. recitals 26 and 28.

⁸⁰ See Xavier Groussot & Justin Pierce "Transparency and Liability in Leniency Programmes: A Question of Balancing" in Maria Bersgröm, Marios Iacovides & Magnus Strand (ed) *Harmonising EU Competition Litigation*, 144 ("leniency applications hardly ever mention the causation or the extent of the price increase resulting from the cartel").

also to the effects of the infringing conduct, it is unlikely that it could have any additional value for the damages claim).⁸¹ The discussion could be different if a CA decision were to define the scope of the infringement itself by referring to blacklisted documents.⁸²

To be sure that the 'blacklist' does not extend further than to the items mentioned, restricting access to evidence that may be needed by the claimant to prepare his action, upon his reasoned request, the national court is empowered to scrutinize the requested evidence in camera, to assess whether the items are indeed "leniency statements" or "settlement submissions". If the court deems this is not the case, it may order their disclosure at any time (article 6.9), or (if they are grey-listed documents) after the CA has closed its proceedings (article 6.5).

3.1.4.2. A 'grey list': temporary protection

The Directive introduces a 'grey list' of items of evidence that may only be disclosed after the CA has closed its proceedings.⁸³ It includes information prepared by parties specifically for the proceedings before the CA,⁸⁴ information drawn up by the CA and sent to the parties during its proceedings (e.g., the Statement of Objections/SO, the Letter of Facts), and withdrawn settlement submissions. Arguably, it also includes proposals concerning the closing of the investigation through a commitment decision following article 9 of Regulation 1/2003.⁸⁵

The disparity on the classification of "settlement submissions" and "settlement submissions that have been withdrawn" for purposes of disclosure (the first in the 'blacklist' and the second in the 'grey list') posed a challenge to the Commission. It risked discouraging undertakings from offering settlements (for fear that claimants would have access to withdrawn

⁸¹ See also, e.g., Claudia Massa "The disclosure of leniency Statements and other Evidence under directive 2014/104/EU: an Undue Prominence of Public Enforcement?" *Markets & Competition Law Rev.* 2/1 (2018) 150 and 166 ("in fact, not having the possibility to have access to leniency statements or settlement submissions in stand-alone actions, it is highly difficult to prove that they suffered harm"); Migani *Global Antitrust Rev.* 2014:97 ("access to self-incriminating leniency corporate statements would be a powerful tool for victims to overcome such asymmetry and thus to bring follow-on actions") and 110 ("Self-incriminating statements provided by infringers in the context of the leniency mechanisms would in no doubt be key for claimants"); Butorac *Yearbook of Antitrust and Regulatory Studies* 8/12 (2015) 148 ("general rules on disclosure, as liberal and permissive as they may be, cannot sufficiently compensate for the lack of access to leniency documents in cartel cases [...] there is not much hope for private litigants to obtain evidence to support their claims (following a EC cartel decision) within the framework of the new Damages Directive").

⁸² In some countries, there is a *ratione temporis* problem here. For example, in Portugal the Competition Act protected all documents subjected under leniency, even pre-existing ones, and this was only changed with the transposition of the Directive. Leniency beneficiaries claim that those documents should still benefit from that protection but given that this is a procedural rule in accordance to article 22.2 of the Directive it would be applicable presently. Moreover, it could also well be that the principle of effectiveness already made those national rules unlawful before (see C-360/09 *Pfleiderer AG* (EU:C:2011:389) and C-536/11 *Donau Chemie AG* (EU:C:2013:366)).

⁸³ Article 6.5 and recital 25.

⁸⁴ It will not be enough if the information was only prepared by the undertakings and never submitted to the CA, as that's the only way that information will be part of the file of the CA, see the discussion regarding the Czech transposition of the Directive on this point by Druviete, Jerņeva & Ulaganathan *Yearbook of Antitrust & Regulatory Studies* 10/5 (2017) 214.

⁸⁵ See Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.117-118.

submissions). The Commission has addressed this in a subsequent soft-law document (an amendment to the Commission Notice on the conduct of settlement procedures)⁸⁶, attempting to ensure that, in practice, all settlement offers are absolutely protected, but this arguably deprives the 'grey list' provision of its effect utile.⁸⁷

Access to some of this information may be relevant for potential claimants. For example, information contained in the SO and addressee's replies to the SO could contain valuable evidence regarding the infringement and its effects (harm), and the participation of different infringers.⁸⁸

3.1.4.3. A 'whitelist': non-specific protection

Evidence in a CA file that does not fall within the two previous categories falls within a 'whitelist', which can be disclosed at any time.⁸⁹ It includes any pre-existing evidence (e.g., contracts, minutes of meetings, correspondence, electronic messages, and recordings connected to the anticompetitive conduct) which "*exists independently of the proceedings of a competition authority*".⁹⁰

Courts may still refuse to grant access if "*the interest of effective public enforcement of competition law*" so requires (recital 22). In my opinion, this possibility should be interpreted restrictively. It should be used only if disclosure will seriously undermine the CA strategy or the integrity of its investigation and only if the CA has provided a sound and plausible justification for non-disclosure (e.g., if too early in the investigation the evidence is disclosed, and this undermining ongoing enquiries by the CA, including unannounced inspections-and unraveling of the infringements committed).

⁸⁶ ¶22 introduced by Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation 1/2003 in cartel cases ([OJ UE C256, 8/5/15](#)): "*Settlement submissions cannot be withdrawn unilaterally by the parties which have provided them*".

⁸⁷ This is incompatible with the Directive, as it leaves no room for part of the 'grey list' provision to ever be applied without any legal justification, see Rodger, Ferro & Marcos "Transposition: Key Issues and Controversies" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 452.

⁸⁸ See Lundqvist & Andersson "Access to Documents for Cartel Victims and Cartel Members- Is the System Coherent" in Bergström, Iacovides & Strand (ed) *Harmonising EU Competition Litigation. The New Directive and Beyond*, 180.

⁸⁹ Article 6.9.

⁹⁰ Recital 28. Although it is considered controversial if it includes contemporary documents which were presented together with the leniency application or leniency submission (Forrester [ERA Forum 18 \(2017\) 73](#); Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.122-4.126), a strict and narrow interpretation of the disclosure prohibition would deem them disclosable (see ¶47 of AG Mazák C-360/09, *Pfleiderer AG v. Bundeskartellamt*, [EU:C:2010:782](#), '*aside from such self-incriminating statements, alleged injured parties [...] should have access to all other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure*') Moreover, in connection with what it was said before (supra footnotes 79 and 80 and referring text), it's unlikely their disclosure could be of much value, as they might be difficult to understand or interpret without the rest of the documents submitted to the CA, see Varga, Kovács, Gábri & Szupera [ERA Forum 20 \(2019\) 153](#); Butorac [Yearbook of Antitrust and Regulatory Studies 8/12 \(2015\) 147](#).

3.2. Implementation of the Directive's rules on access to evidence

Before examining the early experience in the use and functioning of the 'disclosure scheme' to date (*infra* §3.3), it is worth looking briefly at several contentious issues raised by the implementation of the Directive's rules in the national law of Member States.

3.2.1. Insertion of the 'disclosure scheme' in the national legal culture

Most Member States face a cultural challenge in making the 'disclosure scheme' available and effective. Their rules of civil procedure and the practice and experience are not acquainted with this form of discovery and production of evidence.⁹¹ Neither lawyers, nor judges, are attuned to the functioning of the novel 'disclosure scheme' provided for antitrust damages claims.⁹²

For the 'disclosure scheme' to be effective, it will be necessary to overcome the traditional legal instincts of the judiciary, who may be too conservative in interpreting the new rules.⁹³ Strictly following the general principles of civil procedure could make it difficult for courts to accept the idea that a party must be able to be granted access to information which it is only superficially able to identify and which it cannot *a priori* be sure if it contains relevant information.⁹⁴ In some Member States, requiring that evidence should be identified "as

⁹¹ See Anneli Howard "Disclosure of Infringement Decisions in Competition Damages Proceedings: How The UK Courts Are Leading The Way Ahead Of The Damages Directive" *Journal of European Competition Law & Practice* 6/4 (2015) 259 ("In some Member States, judges will be culturally reluctant to permit disclosure and may pay close scrutiny to the proportionality of requests"); Migani [Global Antitrust Rev. 2014:107](#) and Mosunova [BRICS Law Journal 2/1\(2015\) 135](#) ("no necessary system elements for implementation"). The introduction of the new rules may not be enough, it's needed to "change the attitude of the courts and the authority, mere reference to the right of the court to give access to sensitive documents is insufficient" as "there are jurisdictions that must iron out defunct and disruptive practices" [Druviete, Jerņeva & Ravindran [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 203 and 220](#)]. See also Miguel S. Ferro "The reality of access in antitrust private enforcement: Overview of 3 years' experience in Portugal" [Revista de Concorrência & Regulação 46-47 \(2021\) 67](#) ("no law, no matter how well written, can survive interpretation and application by an unwilling court, in particular where appeal and supervision mechanisms are absent or do not function adequately. The Portuguese legal system seemingly has no solution or effective remedy if a court simply does not decide an access request or does not rule on an appeal of its rejection of an access request").

⁹² Changing the rules alone may not be enough, given the importance of culture and the roles of the parties, judges, phases, and other elements of the procedure, see *mutatis mutandi* Stephen N. Subrin "Discovery in Global Perspective: Are We Nuts?" [Depaul Law Review 52 \(2002\) 312](#) ("The rules and the culture are interrelated in complex ways that would be very difficult to disentangle...").

⁹³ See Barry J. Rodger, Miguel S. Ferro & Francisco Marcos "A panacea for competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States" [Maastricht Journal of European and Comparative Law 26/4 \(2019\) 487-488](#); Galič [Yearbook of Antitrust & Regulatory Studies 8/12 \(2015\) 124](#) ("It is not realistic to expect that the new harmonized disclosure system can be properly and effectively applied by judges, who in all other cases perceive the scope and the purpose of disclosure in an entirely different manner and still adhere to the perception that a party cannot be required to disclose evidence which harms them" footnote omitted).

⁹⁴ For that reason, for example, in Latvia "in case the court is not able to assess for itself whether access to certain evidence is crucial for the case of the claimant, it can request for the Competition Council to issue an independent opinion and evaluate the relevance of specific evidence for the case" [Druviete, Jerņeva & Ravindran [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 203](#)]. A more extreme solution, that goes well beyond the Directive, was introduced in Slovakia envisaging "a conditional right to demand disclosure of evidence for the defendant, who must produce facts and evidence which enable a prima facie conclusion that the damages claim is not substantiated" (*id.*, 206).

precisely and as narrowly” as possible, and supported by available facts and evidence, can lead courts to be unreasonably demanding when assessing the justification of the request for access.⁹⁵ That applies equally to the possibility of accessing categories of documents, or the need for parties to have access to certain confidential information (and that proportional solutions for such access must and can be found). In some cases, an asymmetric burden may be imposed on parties, e.g. if claims of confidentiality or of negative impact on the parties’ interests are readily accepted, without verification.

If the requirements imposed on the access request are too high and impossible to meet, the right of access to evidence is deprived of its effectiveness.⁹⁶ Those jurisdictions with more experience in discovery provide a roadmap of the approach that should be followed in balancing claimants’ effective right to access evidence, and the prevention of “fishing expeditions”.⁹⁷ In that regard, the court decision on disclosure should make an overall assessment of necessity and proportionality, considering also the interests of swift management of the case, its contribution in clarifying the dispute and the prevention of an “unfair result of the proceedings”.⁹⁸

3.2.2. Territorial scope of the 'disclosure scheme'

Few Member States have introduced specific provisions regarding the territorial scope of the 'disclosure scheme'.⁹⁹ The assumption is that the general rules concerning powers of courts to order access to evidence held in a territory other than that of the court before which it is summonsed apply in this case (i.e., foreign parties or authorities).

Apart from classic instruments of international cooperation and mutual assistance between courts, a national court within the EU could issue an order to produce evidence located in another jurisdiction.¹⁰⁰ The situation is more complex if the evidence requested is in a non-

⁹⁵ On the risk of such a restrictive approach unless reliance is made in CJEU case law, see Helene Andersson "The Quest of Evidence- Still an Uphill battle for Cartel Victims" in Magnus Strand, Vladimir Bastidas & Marios C. Iacovides (ed) *EU competition litigation: transposition and first experiences of the new regime*, Hart 2019, 139. Interestingly, but referring to Directive 2004/48/EC (IPR), "During the evaluation it has been reported that in some Member States the process of specifying the evidence laying in the control of the opposing party can be very burdensome for the applicant and thus in practice significantly limit the possibility to obtain such evidence. It was reported that applicants are in some cases requested to specify the exact nature, location, reference numbers or contents of the requested documents, even if such information is obviously difficult, if not impossible to obtain for an external person who has not necessarily seen the documents requested" (Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and the Council on the enforcement of Intellectual property rights, [COM \(2017\) 708 final](#), 29/11/17, 12).

⁹⁶ See *supra* footnote 18 and referring test.

⁹⁷ Paradoxically, some of the bad reputation of the so called “fishing expeditions” as a product of U.S. discovery, many not be justified, see Subrin [Depaul Law Rev. 52 \(2002\) 307-308](#).

⁹⁸ See Lucey in Rodger, Ferro & Marcos, *The EU Antitrust Damages Directive. Transposition in the Member States*, 200-203.

⁹⁹ See, for example, Caroline Cauffman "Belgium" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 71-72.

¹⁰⁰ See recital 17 pointing to Regulation 1206/2001/EC of 28/5/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ([OJ EU L174 of 27/6/2001](#)). See also Idot "Access to evidence and Files of Competition Authorities" in Basedow, Francq & Idot (ed.) *International Antitrust Litigation*, 264-267 and Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.35-4.47.

EU country. Such cases may be tackled through cooperation with foreign courts and/or governments, in accordance with comity and the available international instruments for cooperation in civil matters.¹⁰¹

A related issue concerns whether the rules on protection of access to evidence in the file of CAs extend to a non-EU CA. Access in those cases will be governed by the law of the respective jurisdictions and, seemingly, the request will go through the channels of cooperation among courts and countries set in international treaties.

3.2.3. Pre-trial evidence disclosure

The Directive's 'disclosure scheme' seems to be conceived for damages actions, when the court is already seized of a claim for damages.¹⁰² Some Member States decided to introduce pre-litigation discovery (i.e., actions to request access before an application for damages or other remedy is filed in court, to identify the existence of a right to damages or to obtain evidence needed to prove it).¹⁰³ Naturally, the requirements of necessity and proportionality governing standard disclosure should apply as well to pre-trial disclosure.¹⁰⁴

This possibility fits well with the purpose and rules of the Directive, and could arguably even be required by the principle of effectiveness.¹⁰⁵ Although it's not so clear from the text of

¹⁰¹ See Idot in Basedow, Francq & Idot (ed.) *International Antitrust Litigation*, 280-287 (referring to the Hague Convention on the taking of evidence abroad in civil and commercial matters of 18/3/1970 and any available Bilateral Mutual Assistance treaties). On the recourse to U.S. Courts in search of evidence for foreign proceedings, see Kulms *China-EU Law Journal* 5: 216-218; Mosunova *BRICS Law Journal* 2/1(2015) 145-148 and Maurice Stucke "Discovery in a Global Economy" in Basedow, Francq & Idot (ed.) *International Antitrust Litigation*, 315-325.

¹⁰² See Andersson "The Quest of Evidence- Still an Uphill battle for Cartel Victims" in Strand, Bastidas & C. Iacovides (ed) *EU competition litigation: transposition and first experiences of the new regime*, 135 and 138.

¹⁰³ Latvia and Estonia introduced pre-trial procedures and mechanisms for pre-trial taking and protection of evidence, see Druvieta, Jerņeva & Ravindran *Yearbook of Antitrust & Regulatory Studies* 10/5 (2017) 201-202. In Ireland and in England and Wales, these mechanisms are a commonly used tool in litigation, under the general civil rules of procedure (see Barry J. Rodger "Competition Law Private Enforcement in the UK Courts: Case-Law Developments 2013–2016" *Global Competition Litigation Review* 3/2017:132). In Germany, under pre-existing general rules no such mechanism appeared to be available. An autonomous action for disclosure of evidence is now possible, for the purpose of assessing the right to bring an antitrust damages action, and its initiation leads to the suspension of the limitation period (see Christian Kersting "Germany" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 144). In Spain, although the general rules of civil procedure already provided for pre-trial motions to disclose and protect evidence, they seemed to be ineffective in this context (see Francisco Marcos "Spain" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 348). For the new Portuguese rules and their first uses see Ferro *Revista de Concorrência & Regulação* 46-47 (2021) 45-46 and 62-63.

¹⁰⁴ See *supra* §3.1 and Barry J. Rodger "Competition Law Litigation in the UK Courts: A study of all cases 2005–2008. Part II" *Global Competition Litigation Review* 3/2009: 144 [referring to ¶38 of Hutchinson 3G UK Ltd [2008] EWHC 55 (Comm): " ... it is inappropriate for any application to obtain pre-action disclosure of documents which would not in due course be subject to standard disclosure by simply calling for classes or categories of documents in which some documents would be disclosable . . . the need for a highly focused application"].

¹⁰⁵ See recently, ¶43 of AG Spuznar C-163/21 (EU:C:2022:286): "even assuming that Directive 2014/104 covers only requests for the disclosure of evidence made in the context of an action for damages, it is possible to take the view that, where a claim for damages must be brought, subject to penalties, within a short period of making a request for the disclosure of evidence in the context of which the plausibility of the claim for damages was supported, or possibly, within a short time after that request has been received, the request for the disclosure of

article 1.2 (subject matter and scope of the Directive), there are several other provisions referring indirectly to motions filed in preparation for a damages claim.¹⁰⁶ Enabling parties to have access to relevant evidence on the alleged harmful infringement will facilitate them to assess in a realistic manner the strength and weaknesses of their claims at an early stage of the case and deter frivolous litigation, preventing ambush strategies by the parties and encouraging settlements.

Moreover, in many Member States, evidence on the facts supporting the claim should be presented when the action is filed and cannot be added at a later stage. Often, pre-filing discovery may be crucial to meet the burden of allegation (which, unlike the burden of proof, cannot be rectified after discovery during the action for damages), with national courts frequently being quite demanding about the degree of specification of the facts which must be alleged.¹⁰⁷ For that reason, pre-trial discovery may be essential for the success of the case, particularly when access would come too late if granted only after the procedure has started.

3.2.4. Costs of Disclosure

In parallel with Directive's silence on the issues of costs and funding,¹⁰⁸ there is no explicit rule concerning costs of disclosure (the assessment of these costs by the court is necessarily included in the general evaluation of proportionality, when deciding whether and how to grant access).¹⁰⁹ The lack of further guidance and limits in this regard in the Directive may add a further burden on the claimant, as the 'disclosure scheme' may be conceived as an autonomous procedure, with its own costs, potentially to be supported by the requesting party. Such costs may be significant.

Some Member States have introduced special rules to address this issue. In Germany, the person required to disclose evidence can demand from the requesting party reimbursement of all reasonable expenses.¹¹⁰ In Spain, applicants will generally be required to post a bond or pledge to guarantee the payment of the expenses arising from the disclosure, and as security to compensate for any injury provoked in case of misuse of the evidence.¹¹¹ Although it may be reasonable to make the requesting party pay these expenses (particularly if that party is ultimately defeated in the proceedings), if the amounts imposed are unreasonable or disproportional to the claim, victims would be deterred from using the disclosure scheme and

evidence is being made in the context of an action for damages and/or is conditionally commencing such an action".

¹⁰⁶ Article 6(4)b and recitals 22 and 27

¹⁰⁷ CEPS/ER/LUISS, [Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios: Report for the European Commission](#), Contract DG COMP/2006/A3/012, 21/12/2007, 348 ("fact-pleading requirements are generally much stricter in civil law jurisdictions").

¹⁰⁸ Rodger, Ferro & Marcos, *The EU Antitrust Damages Directive. Transposition in the Member States*, 46 and Flaherty [Legal Issues Journal 5/1 \(2017\) 35-36](#).

¹⁰⁹ See Wagner-Von Papp "Access to Evidence and Leniency Materials" [WP Helmut Schmidt University 18/2/16, 45-46](#).

¹¹⁰ See Kersting "Germany" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 145.

¹¹¹ See Marcos "Spain" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 350.

could be prevented from having access to evidence needed to substantiate their claim for damages.¹¹²

3.2.5. Protection of confidentiality

Disclosure may be limited in cases when evidence sought includes confidential information.¹¹³ Confidential information includes business and commercial secrets and other sensitive data which, if disclosed, would harm the affected party. However, the Directive makes clear that such evidence "*should in principle, be available in actions for damages*", if such confidential information is protected appropriately.¹¹⁴ The importance of access to such evidence has been stressed by the CJEU, which has ruled that protective measures adopted "*should, nevertheless, not impede the exercise of the right to compensation*".¹¹⁵

Still, in practice, it may be unclear what can be considered confidential and the proper treatment it should receive to guarantee limited access ensuring adequate protection to the interests affected.¹¹⁶ To provide guidance to national courts on these issues, the European Commission adopted in 2020 a Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law.¹¹⁷

Following the case law of the EU Courts, in order to be deemed confidential, information needs to meet three cumulative conditions: "(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*

¹¹² See *infra* §3.3.6. Regarding the same issue in access to evidence in accordance to Directive 2004/48/EC (article 9.6), see Communication from the Commission to the Institutions on Guidance on certain aspects of Directive 2004/48/EC, [COM\(2017\) 708 final](#), 29/11/17, 15 ("*When determining what security or equivalent assurance is to be deemed adequate in a given case, account should be taken, inter alia, of the economic capacity of the applicant and the potential effects for the effectiveness of the measures applied for, in particular for SMEs*"). In the same vein, but related to the costs of the main damages proceedings, there is a pending preliminary ruling on litigation expenses and funding preliminary ruling lodged on 19/5/21 ([ES:JMV:2021:681A](#)) by Juzgado de lo Mercantil 3 of Valencia (. Pastor, [Tráficos Manuel Ferrer, S.L. et al v Daimler AG, C-312/21](#)) in which the Court is asked to rule on the compatibility with the right to full compensation of a person harmed by anti-competitive conduct -as referred to in Article 101 TFEU and in accordance with the case-law interpreting it- of the Spanish national rule on civil procedure governing legal costs (article 394.2 of Spanish Civil Procedure Act) pursuant to which an injured party will bear part of the costs of the damages proceedings if his damages claim is only partially accepted (i.e., not to the full amount claimed).

¹¹³ Article 5.4

¹¹⁴ Recital 18.

¹¹⁵ See also ¶89-91 of T-345/12, *AKZO v. Commission* ([EU:T:2015:50](#)) and ¶¶106-108 and 131-132 of C-362/12P *EnBW v. Commission* ([EU:C:2014:112](#)).

¹¹⁶ See, e.g., Anton Petrov "Bulgaria" in Anna Piszcz (ed) [Implementation of the EU Damages Directive in Central and Eastern European Countries](#), 45; Evelin Pärn-Lee "Estonia" in Piszcz (ed) [Implementation of the EU Damages Directive in Central and Eastern European Countries](#), 120; Julija Jerneva & Inese Druviete "Latvia" in Piszcz (ed) [Implementation of the EU Damages Directive in Central and Eastern European Countries](#), 170.

¹¹⁷ Communication from the Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law ([OJ EU C242 of 22/7/20](#)). In contrast with the Directive, the Communication covers any civil proceedings before national courts relating to the application of Articles 101 and 102 of the TFEU (¶1), and not only damages claims (i.e., injunctions, declaratory actions, restitution claims).

are, objectively, worthy of protection.”¹¹⁸ If one of these conditions is missing, information cannot be considered confidential. That will occur, for example, if it loses the condition of being relatively 'private' knowledge, or if it has “*lost its commercial importance due to the passage of time*”.¹¹⁹ According to EU caselaw, information older than 5 years should be presumed no longer to be relevant.¹²⁰

Private information of commercial, financial, or strategic value is, in principle, confidential. It applies, for instance, to internal business plans, forward looking information, commercially sensitive information concerning an ongoing or future business relationship and to business secrets.¹²¹ EU caselaw and the decisional practice of the Commission and many NCAs, can be useful to national courts in deciding what should be deemed confidential evidence.¹²² However, the fact that a CA qualified certain information as confidential (or accepted undertakings' claims of confidentiality) is not binding on courts in follow-on claims and does not dispense the need to prove and assess that confidentiality.

In adopting their decision on disclosing and protecting confidential evidence, national courts need to properly weigh whether the evidence is worthy of protection. Naturally, evidence cannot be deemed confidential for the mere fact that the requested party affirms it, a justification needs to be provided: the party claiming confidentiality should clearly show which is the injury that would be caused by disclosure of each specific document.¹²³ Courts may be required to assess the content of the documents, to confirm such allegations. Overprotection of evidence that does not deserve the treatment of confidentiality may jeopardize the effectiveness of the right to damages.

After assessing the necessity and proportionality of the disclosure, courts may specify forms of restricted access. Some Member States have introduced a list of measures to enable

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

¹¹⁹ *Id.*, ¶24.

¹²⁰ See ¶¶84-86 of T-341/12 *Evonik Degussa v. Commission* ([EU:T:2015:51](#)) and ¶59 of C-362/12P *EnBW v. Commission* ([EU:C:2014:112](#)).

¹²¹ *Id.* ¶22 and 24.

¹²² See, for example, regarding the preparation of public versions of Commission Decisions (¶¶9-14 of the [Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003](#), 4/6/15, detailing what can and cannot be claimed to be confidential) or regarding the protection of confidentiality when granting access to confidential information on the file of the Commission ([Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation](#), 2/6/15). See Chirita in Tomljenović, Bodiroga-Vukobrat, Butorac & Kunda (ed) *EU Competition and State Aid Rules*, 160-161.

¹²³ See, for example, T-465/12 *AGC Glass Europe SA et al.* ([EU:T:2015:505](#)) in which the infringers had claimed confidentiality of information on customer names, descriptions of the products concerned and any information that could enable an individual customer to be identified (Category I information). The General Court ratified the decision of the Commission (and of the Hearing Officer acting in accordance to Article 8.1 of Decision 2011/695 of the President of the European Commission of 13/11/11 on the function and terms of reference of the hearing officer in certain competition proceedings, [OJEU L275, 20/10/11](#)) was not confidential because “*given the specific characteristics of the carglass market, the Category I information, consisting in customer names and descriptions of the products concerned, was by its very nature known outside the applicants, second, that it was historical, and, third, that it referred to the very essence of the infringement, and, moreover, the interests of the persons harmed required its disclosure*” (¶12).

limited access to confidential information: limits to lawful use of information, redacted versions of sensitive parts, non-confidential summaries, conducting hearings *in camera*, data-rooms, confidentiality circles, etc.¹²⁴ The availability of these measures is relevant for the assessment of proportionality, as their use may imply an absence of injury to relevant interests of the holder of the documents (e.g., limited access to a confidential document which cannot be reproduced and can only be used in that action for damages, subject to fines, may make it difficult to identify an injury which cannot be merely theoretical).

Most national courts lack prior experience in handling these issues, and likewise so do the professionals that have to comply with the conditions eventually set by courts. As it will be seen later, this area has proved to be one of the battlegrounds among parties in some Member States (see *infra* §3.3.6).

The choice of protective measures depends on the characteristics of each case, on what is provided in the national rules, and on the resources available and the context of each request for disclosure of evidence.¹²⁵

The 2020 Communication on the protection of confidential information describes some practical features of some common measures of protection available in several jurisdictions (redactions, confidentiality rings, and appointment of experts), its advantages and disadvantages.¹²⁶ Protection of confidential information should also be ensured during the proceedings,¹²⁷ and once they are closed. Thus, adequate precautions need to be taken to avoid that the final decision issued by the court includes any confidential information or that such information is accessible to the public in the court record.¹²⁸

The Commission and most NCAs have extensive experience in the use of confidentiality protection measures. Courts may find in such experience guidance for access and protection of confidential evidence in private damages proceedings. It should be borne in mind, however, that the rules and principles thereto extracted are designed for/in a different context (public

¹²⁴ Many of those means of protection were mentioned in recital 18 of the Directive ("*National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in 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 or otherwise non-confidential form*") and from there they've been transplanted into the national implementation measures, despite many Member States lack any prior tradition in their usage.

¹²⁵ ¶¶31 and 35 of the Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law. The selection of the most appropriate measure should take into account several issues: the type of information to be disclosed, its value, and the number of parties in the proceedings and the relationships between them (including third parties); the extent of the disclosure request; the risks of inadvertent disclosures; the administrative burdens and costs for the parties and for the judicial system (including the delay in the proceedings); and the power of the national court to sanction refusals to comply or breaches of disclosure orders (*Id.*, ¶¶32-34).

¹²⁶ *Id.*, ¶¶36-97.

¹²⁷ The Commission suggest that national courts may resort to *in camera hearings* "*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 [...] 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*" (¶99 of the Communication on the protection of confidential information).

¹²⁸ *Id.*, ¶¶100 and 105.

enforcement investigations), where the rights and interests at stake may differ. Any "transplant" to the adversarial process may require adaptation to the specific rules and context. Finally, one should consider the "scarce resources of national courts" as "it is a harsh reality that national courts often may lack the human and financial resources, the infrastructure and even appropriate legal basis to implement some of these measures"¹²⁹.

3.2.6. Access to CA files

Given that the Directive imposes full harmonization in this regard, there should be no relevant variation in the implementation of the rules on access to evidence in CA files. All Member States have transposed these rules into national law. As for the right of the CA to be heard before access to the file is ordered, most Member States have introduced mechanisms by which courts will notify the NCA or European Commission of a request for access to documents included in its files and invite it to submit comments.

Disclosure of evidence in the 'grey list' is subject to a temporal limitation, and this has led some Member States to introduce a provision enabling the court to suspend the civil proceedings until the CA has closed the file.¹³⁰ These timing issues may be further complicated in cases where the decision of the CA is appealed, and there is a risk of the case being reopened by the CA, or in cases in which there subsequent investigations of related infringements are initiated (*infra* §3.3.2).

3.2.7. Penalties for infringements of disclosure scheme

Most Member States have introduced specific sanctions for infringements of disclosure orders, including periodic penalties and adverse inferences *contra spoliatorem*, adding to the pre-existing sanctions provided in general procedural and criminal law. Therefore, the new penalty regime generally coexists with any general rules on disclosure, including the characterization of disobedience of a court disclosure order as contempt. Given that there is a huge variation in the sanctions provided, and in some Member States there is a large span in the amount of the fine that could be imposed, it is doubtful if they respect the principle of proportionality or -in some cases- even if they will really serve the deterrent function they should have.¹³¹

3.2.8. Appeals against court decisions on the 'disclosure scheme'

The Damages Directive did not include any provision dealing with the right of appeal of decisions adopted by national courts in reply to requests for access to evidence.¹³² The silence of the Directive in this regard may be justified in the idea that such court decisions should be

¹²⁹ Konstantina Strouvali & Efstathia Pantopoulou "Balancing Disclosure and the Protection of Confidential Information in Private Enforcement Proceedings: The Commission's Communication to National Courts" [Journal of European Competition Law & Practice 12/5 \(2021\) 398](#).

¹³⁰ See Susanna Lopopolo "Italy" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 217 and Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶4.181.

¹³¹ Ranging from €251 to €1.000.0000, and including imprisonment for up to 6 months, see Rodger, Ferro & Marcos *The EU Antitrust Damages Directive. Transposition in the Member States*, 453-454; Druvieta, Jerņeva & Ulaganathan [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 214](#).

¹³² Recital 19.

adopted in an expeditious manner, but that probably ignored the contentious nature of these requests through which the parties may obtain essential evidence to support their main claims in the proceedings.

Some Member States extended the treatment afforded to any legal court orders adopted by courts under general rules,¹³³ while others introduced a specific right of appeal.¹³⁴ In practice, this may probably has entailed a transformation of the underlying idea of the 'disclosure scheme' as an ancillary tool in the whole system of damages claims, with the risk of dragging out the final solution of the compensatory claim. If the length and delay of standard appeals spreads to motions requests for disclosure, they lose their attractiveness as a way of obtaining evidence, and without access to evidence, the effectiveness of compensation will be undermined.

3.3. Early experience on the new 'disclosure scheme'

Undoubtedly, the transitory regime of the Damages Directive is one of the most controversial issues raised by the Directive.¹³⁵ The rules governing the 'disclosure scheme' should be considered non-substantive (procedural) provisions and, therefore, they are deemed to be applicable to any motions for disclosure of evidence regarding antitrust infringements committed before the deadline for the transposition in national law (article 22.2).¹³⁶ In general, that has made the 'disclosure scheme' readily available for the parties from the moment the provisions were adopted and thus they have been used by parties in procedures that were ongoing at that date and in those started afterwards (prominently in the trucks' cartel damages litigation).¹³⁷ It is impossible here to keep track exhaustively of the developments in all Member States, but several common issues can be identified.

3.3.1. Scope and limits of the disclosure order

The breadth of the evidence ordered to be disclosed and of the obligations arising from the court order may be unclear for the addressee. Is it the mere search, selection, collection, and exhibition of the pre-existing pieces of evidence requested or can the court instruct the requested party to further produce or organize the requested evidence?

¹³³ See Lucey "Ireland" in Roger, Ferro & Marcos, *The EU Antitrust Damages Directive. Transposition in the Member States*, 202.

¹³⁴ See Muriel Chagny "France" in Roger, Ferro & Marcos, *The EU Antitrust Damages Directive. Transposition in the Member States*, 120; Kersting "Germany" in Roger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 144; Maciej Bernatt & Maciej Gac "Poland" in Roger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 295 and Marcos "Spain" in Roger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 350.

¹³⁵ See Phillip Kirst "Laws applicable *ratione temporis* and limitation of actions" (chapter 5) of this book.

¹³⁶ Article 22.2. See also ¶¶30-36 of AG Spuznar C-57/21 *Regionet/CD* ([UE:C:2022:363](#)); ¶¶52-58 of AG Szpunar C-161/21 *PACCAR* ([EU:C:2022:286](#)), and ¶¶37 and 52 of AG Rantos C-267/20 *Volvo*. However, in Germany it has been doubtful if the disclosure rules were applicable to claims arising before 26/12/14, see Janick Otto, Patrick Hauser & Simon Vande Walle, "Germany and the Netherlands" (chapter 17) of this book, B.II.3(a). Likewise, in Portugal, the Lisbon District court has held the new rules are not applicable in *OdC v Sport TV* (7074/15.8T8LSB).

¹³⁷ Follow-on actions to the European Commission Decisions of 19/7/16 ([AT.39824 Trucks](#)) and 27/9/17 ([AT.39824 Trucks](#)), the later has been appealed by Scania to the General Court (which confirmed it in T-799/17, [EU:T:2022:48](#)).

The issue has been raised by a request for a preliminary ruling in the context of a motion for disclosure against one of the truck manufacturers (DAF Trucks) in support of a claim for damages caused by the truck manufacturers' cartel.¹³⁸

Among the grounds for refusal of the access request was the need for some of the evidence to be created *ex novo*, which was deemed to impose an excessive burden on them, going beyond what apparently is foreseen in the rules governing the 'disclosure scheme'. The following question was referred to the CJEU:

Must Article 5(1) of 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 EU be interpreted as meaning that the disclosure of relevant evidence refers exclusively to existing documents in the control of the defendant or a third party or, in contrast, can Article 5(1) also include the disclosure of documents that must be created ex novo by the party to whom the request for information is made by compiling or classifying information, knowledge or data held by it?

Given that article 5.1 of the Damages Directive literally refers only to the disclosure evidence which lies "in the control" of the requested party, it is unclear if disclosure order may or should require undertaking a reasonable search to organize and classify the items requested which, at the end, may amount to creating an *ad hoc* new piece of evidence.¹³⁹

Recently, in his opinion on this case, delivered on 7/4/22, AG Maciej Spuznar ([C-162/21 PACCAR](#)) has clarified that national courts may order any of the parties or third parties also to disclose certain key evidence in their possession, even without knowing which documents include it or if there is a single document containing the required data. In particular, he concluded that to comply with the order and to ensure that essential information is disclosed, parties may be required to create *ex novo* documents (selecting, compiling or classifying information) subject to the principle of proportionality.¹⁴⁰ In this particular case, given the breadth and specific features of the cartel and the evidence requested by the claimants, it would be far simpler and less costly for the truck manufacturers to compile that information about

¹³⁸ [C-163/21 PACCAR](#) (DAF Trucks), lodged by Court Decree of Juzgado Mercantil 7 of Barcelona of 21/2/20 (R. N. García Orejudo, *AD et al v. DAF Trucks N.V. et al.*, [ES:JMB:2020:333A](#)). In their petition, forty-five potential claimants requested access to three sets of evidence needed to quantify the harm caused by the cartel: (1) List of models of medium and heavy trucks manufactured and marketed by DAF from 1990 to 2008 classified per categories; (2) Gross prices or transfer prices to wholesalers of those models; and (3) Total Delivery Cost per model (including a description of the costs incurred in each phase of production). With these three datasets the requesting party expected to be able to understand the evolution and formation of trucks' prices and find out/quantify the potential overcharge caused by the cartel.

¹³⁹ Interpreting the same rule in Directive 2004/48/EC (IPR), the Commission has considered, that there could be "grounds to an obligation on a party to carry out a diligent search for the evidence within its organisation (including separate legal entities which it controls), provided that the applicant has adequately substantiated and specified the request for the evidence concerned, the obligation does not go beyond what is proportionate and is not unnecessarily costly, and safeguards against abuse are provided for where necessary" (*Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and the Council on the enforcement of Intellectual property rights*, [COM\(2017\) 708 final](#), 29/11/17, 13).

¹⁴⁰ ¶101 of AG Spuznar C-162/21 PACCAR ([EU:C:2022:286](#)).

their own business, than for the uninformed claimant to search for it in thousands of disclosed documents, which may not be sufficient or useful.¹⁴¹

3.3.2. Interaction with public enforcement

Some issues were left unsolved in the Directive regarding the interaction between public enforcement and disclosure requests.

As was anticipated in the transposition by some Member States, one of the most troublesome issues has to do with the timing of the disclosure, for ‘grey list’ and ‘whitelist’ documents. For example, disclosure of evidence in the ‘grey list’ seemingly should be possible once the file is closed and a decision is adopted by the CA,¹⁴² even if the decision is appealed.¹⁴³ But in the event that the evidence in the file of the CA is disclosed and the file is reopened, some argue this could negatively affect the public enforcement proceedings and, therefore, that disclosure should be delayed until the decision of the CA is final.¹⁴⁴ Moreover, although the information in the ‘whitelist’ may be disclosed at any time, even when the investigation proceedings before the CA are still in progress, it could still be argued that it might have a negative impact on the public investigation if it is disclosed.

The Czech Supreme Court (Nejvyšší soud) has requested a CJEU preliminary ruling on the interpretation of rules related to evidence disclosure by the CA, involving a damages' claim when the public enforcement investigation is still underway. Regionet filed a damages' claim against the state-owned railway company České Dráhy (CD) for an abuse of dominance before the Prague municipal court (Městský soud v Praze) on 11/10/17, requesting disclosure of documents and accounting of CD's commercial division. The court partially granted the request on 14/3/18 (including documents held by the Ministry of Transport and others drawn up by CD for the purpose of proceedings before the Úřad pro ochranu hospodářské soutěže/Office for the Protection of Competition/ÚOHS),¹⁴⁵ while rejecting disclosure of the accounts of CD's commercial segment and minutes of meetings of CD's management board.

¹⁴¹ AG Spuznar also took the opportunity to rule on the availability of the ‘disclosure scheme’ for pre-trial discovery (*supra* §3.2.3), considering the Damages Directive applicable as pre-filing disclosure may sometimes be needed to file a claim for damages (*ibid.*, ¶50), as long the damages' claim was filed shortly after the motion was granted or the court accepted it (*ibid.*, ¶¶43 and 51).

¹⁴² Cfr. ¶119 of T-344/88 *EnBW v. Commission* (EU:T:2012:242) and ¶99 of C-365/12P, *Commission v. EnBW* (EU:C:2014:112). See also ¶71-72 of T-534/11 *Schenker AG v Commission* (EU:T:2014:854).

¹⁴³ See Peyer *Journal of Antitrust Enforcement* 3 (2015) 83 (“It should be noted that the temporary protection does not include potential appeal proceedings”). But the issue is far from settled, as there may be parties not appealing the CA decision, see Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.133-4.134.

¹⁴⁴ See Massa *Markets & Competition Law Rev.* 2/1 (2018) 156 (“it seems credible that a temporary exemption from disclosure should be considered to apply throughout the entire appeal procedures until the competition authority's decision has become final”).

¹⁴⁵ The ÚOHS opposed the disclosure of those documents drawn up and presented for the purpose of pending investigation, which could only be disclosed once it was concluded by the ÚOHS, and it also opposed the release of other documents that if disclosed would reduce the effectiveness of the enforcement policy of competition law.

The proceedings before the ÚOHS were suspended on 14/11/14 as the same matter was the subject of an investigation by the European Commission to assess a suspected predatory conduct of CD against article 102 TFEU.¹⁴⁶

However, upon receiving a letter from the European Commission requesting that the said court follow the principle of proportionality to the disclosure of evidence, the Prague municipal court, on 19/12/18, ruled that the main proceedings concerning damages should be suspended until the conclusion of the case by the European Commission.¹⁴⁷

On 1/2/21, the Czech Supreme Court requested the CJEU to clarify if the ongoing investigation by the European Commission and the related suspension of the damages proceedings prevents a court from imposing an obligation to disclose evidence under Article 5.1 of the Damages Directive.¹⁴⁸ Moreover, an evaluation is sought on whether the protection given by article 6.5.a) of the Damages Directive to "*information prepared for proceedings before the national competition authority*" includes all the information submitted, despite it potentially not having been specifically prepared to that end.¹⁴⁹ Further, it is uncertain if the suspension of the proceedings before the NCA due to the initiation of an investigation on the same matter by the European Commission can lead to the conclusion that the NCA proceedings are finalized, thus allowing an order for disclosure.¹⁵⁰ Finally, the Czech Supreme Court asks the CJEU to rule on the extent of the protection of confidential information to be disclosed in accordance with article 5.4 of the Directive, when it is in the interest of the obliged party (the defendant or a third party) to prevent the applicant from having access to such evidence. While some of these questions have a clear and straightforward answer that can be extracted from CJEU case law or from the text of the Directive itself, the mere request of a preliminary ruling on them clearly reflects the difficulties faced by courts in many Member States in dealing with the 'disclosure scheme' within the framework of their national rules and culture (*supra* §3.2.1). AG Maciej Spuznar issued his Opinion to the Court last 5/5/22 ([C- 57/21 Regionet/CD](#)).

It seems that the last question of the Czech Supreme Court on the extent of the protection of evidence containing confidential information can be perfectly addressed by the power of the court to set adequate protective measures.¹⁵¹ Likewise, it seems that the temporal protection granted to evidence placed in the 'grey list' should be interpreted in a restrictive manner only

¹⁴⁶ Initially, it was an *ex officio* administrative investigation started in 2012 by the ÚOHS, but the investigation by the ÚOHS was suspended in late 2014 when the European Commission initiated its investigation ([AT.40156 Czech Rail](#)).

¹⁴⁷ This ruling was later upheld by the Prague High Court (*Vrchní soud v Praze*) on 29/11/19, but the appeal court placed the requested evidence in custody with the court and decided that it would be made available to the parties because of their request and under the writ of the court with measures to ensure protection of the disclosed evidence.

¹⁴⁸ [C-57/21 Regiojet v. České Dráhy](#), question 1 (¶¶11-19). Question 1 is connected to question 4 of the preliminary ruling, in which the Nejvyšší soud inquires the CJEU to rule if the national court can ask the obliged party to submit evidence allegedly covered by the temporal protection given by article 6.5.a) of the Directive in order to assess that the aforesaid evidence contains only "*information prepared specifically for those proceedings*" in a way extending the special regime for leniency statements and settlement submissions contemplated in article 6.7 of the Directive (¶¶40-45).

¹⁴⁹ *Id.*, ¶¶20-35 (question 2).

¹⁵⁰ *Id.*, ¶¶36-39 (question 3).

¹⁵¹ See ¶¶118-21 of AG Spuznar *C- 57/21 Regionet/CD* ([UE:C:2022:363](#)).

covering documents prepared *specifically* for the investigations by the competition authority, and that cannot be interpreted broadly to cover any other documents, otherwise article 6.9 will be rendered moot.¹⁵²

More problematic is the question concerning whether the verification mechanism provided by article 6.7 of the Directive for 'blacklist' documents may also apply to 'grey list' documents. This could arguably run against the exhaustive harmonization sought by article 6 of the Directive,¹⁵³ but it seems reasonable to consider that enabling the court to use article 6.7 by analogy would allow it to verify the veracity of the assertion that the requested evidence falls within the 'grey list', thus promoting the balance envisaged by the Directive between the right of access to evidence and the protection of the effectiveness of CA public investigations.¹⁵⁴

Finally, the most complex issues have to do with the suspension of the proceedings before the NCA and the initiation of an investigation on the same conduct by the European Commission, on which the Directive is silent. However, it seems the answer to these two questions is somehow connected, and it is probably safe to conclude that, if the NCA investigation is suspended, for whatever reason, disclosure should not be ordered; similarly such suspension of cannot be deemed a decision by the NCA for the purpose of lifting the temporal protection set by article 6.5.a) (as the investigation continues before the European Commission).¹⁵⁵

3.3.3. Motions for disclosure filed by claimants

In many Member States claimants have made use of the novel 'disclosure scheme' as the basis to file requests to have access to information and data on the functioning of the trucks' cartel. Given the obscurity of the two Commission decisions on the operation and possible effects on the market of the truck manufacturers' cartel, and in view of the wide scope of the collusive conduct -geographically (33 countries), temporally (>14 years) and materially (more than 5,000 truck models, excluding extras)-, truck purchasers have requested the production of evidence on the various models of cartelized goods, namely their gross prices and production costs, in order to support their claims and be able to quantify the overcharge caused by the cartel.

In France, claimants filed a pre-filing motion to disclose the list of gross prices for trucks manufactured by Renault in France from 1997-2013 and their costs and margins. Petitioners also requested access to evidence included in the 'grey list' of the Commission file.¹⁵⁶ The

¹⁵² Id., ¶¶83-91 (arriving to the same answer in an elaborated argumentation based in the exhaustive harmonization sought by article 6 of the Damages Directive).

¹⁵³ Id., ¶99.

¹⁵⁴ Id., ¶¶15-117.

¹⁵⁵ Id., ¶75, although affirming instead that disclosure could be ordered (¶60), as the disclosure order cannot be deemed a court decision in violation of article 16.1 of Regulation 1/2003, but understandingly it could only include evidence in the whitelist (id. ¶45). See also, England and Wales High Court (Chancery Division), *Infederation Ltd v Google Inc & Ors* [2013] EWHC 2295 (Ch) (26/7/13).

¹⁵⁶ The motion sought access to the SO sent by the European Commission and supporting evidence, documents communicated in the framework of leniency proceedings regarding gross prices and gross price increases, discounts agreed among cartelists and costs linked to EURO 3,4 and 5 standards which were passed on to customers, and also the confidential versions of exhibits referred in the Commission Decision of 19/7/16 on

motion was considered “legitimate” by the Court of Appeals of Paris,¹⁵⁷ which ordered Renault to disclose some of the items requested by the claimants.¹⁵⁸ This order was quashed by the *Cour de Cassation*.¹⁵⁹ It did not contest the legitimacy of disclosure, but questioned its proportionality and the need to adopt measures to protect confidentiality. Although the case was sent back to the Court of Appeals, the motion remains undecided, as other truck manufacturers -which were not initially sued- also joined the proceedings, further delaying any disclosure.¹⁶⁰

In Germany, a motion for disclosure by a potential victim of the trucks’ cartel was rejected, as it was deemed not to request evidence on the facts of the case, but on the sale contracts of the cartelized goods that the requesting party had lost, and which would precisely be the proof of the claimant's standing, needed for the motion to be granted.¹⁶¹ German courts have also refused to order defendants to disclose the confidential version of the Commission Decision of 19/7/16 (AT39824-Trucks).¹⁶²

In Spain, given the absence of a proper system for collectivization of claims, motions for disclosure by claimants have proliferated. Similar claims (in many cases identical) have been filed in the commercial courts throughout Spain, seeking disclosure of the lists of trucks sold by the cartelists during long periods of time (before and after the infringement period), their gross prices, and the manufacturing costs. Allegedly, all this data can be useful for the calculation of the overcharge provoked by the cartel. Most of these motions have been granted,

harmonized prices, increases agreed to by manufacturers, exchanges of information and meetings among the cartelists. See Rafael Amaro "France" in Rafael Amaro (ed) *Private Enforcement of Competition law in Europe. Directive 2014/104/EU and beyond*, Bruyillant 2021, 393-396 and Thomas Rouhette & Claire Massiera "Investigative measures: domestic and international legal aspects" in Amaro (ed) *Private Enforcement of Competition law in Europe. Directive 2014/104/EU and beyond*, 208-211.

¹⁵⁷ Confirming Ordonnance of Tribunal de Commerce du Lyon, 26/12/18 ([n° 2018R1240](#)). In another case, the same court had rejected a motion for the appointment by the court of an expert appraisal of the damages, see Ordonnance of Tribunal de Commerce de Lyon of 29/10/19, *Transports Petitdidier et Fils SAS et Entreprise G Corre SARL v. Renault Trucks SAS et DAF NV* ([n° 2019R761](#)) sanctioning the petitioners to pay €7.000 to Renault and €7.000 to DAF and to pay the cost of the proceedings.

¹⁵⁸ See Judgment of Court d’Appel du Paris (pôle 1, ch. 8) of 25/10/19, *Sté Eiffage Infrastructures v. Sté Renault Trucks* ([n° 19/05356](#)).

¹⁵⁹ See Judgment of Cour de Cassation of 8/7/20 (n°19-25065, [FR:CCASS:2020:CO00440](#)).

¹⁶⁰ Most of the evidence in the Commission file (excluding leniency documents), see Judgment of Cour d’Appel du Paris (pôle 1, ch. 8) of 15/10/21 ([n° 21/10523](#)). Another recent decision quashed a prior disclosure order by the Tribunal de Commerce du Paris to Daimler AG of several excerpts of the confidential version of the Decision of the Commission together with some parts of the file in the AT39824/Trucks case and the average sales prices of medium and heavy trucks charged by Daimler in France and in the rest of the Member States, for each of the seven models equivalent to those acquired by the claimant every year from 1995-2010 (Ordonnance of the Tribunal de commerce du Paris of 27/1/21, N° 2020000195) considering that disclosure of these parts of the Commission files would interfere with the objective of its investigations and leniency applications limiting disclosure to the evidence requested regarding the trucks' sale prices in France. See Judgment of Court d’Appel du Paris (pôle 1, ch. 3) of 20/4/22, *SAS Labatut Location de véhicules industriels v. Daimler AG* ([n° 21/06313](#)).

¹⁶¹ See LG Munich I 27/3/20, [37 O 18471/18](#). The damages claim was later rejected, in part for lack of standing (see LG Munich I 19/2/21, [37 O 10526/17](#)).

¹⁶² See LG Stuttgart 20/6/18, [30 O 79/18](#) (DE:LGSTUTT:2018:0620.30O79.18.00); OLG Düsseldorf 3/4/18 VI-W (Kart) 2/18 (DE:OLGD:2018:0403.VI.W.KART2.18.00), OLG Düsseldorf 7/5/18 VI-W (kart) 2/18 (DE:OLGD:2018:0507.VI.W. KART2.18.00).

both by first instance and appeal courts. Spanish courts have, however, rejected motions for disclosure in which the petition was for the defendant itself to calculate the amount of the overcharge,¹⁶³ or to provide the claimants with the documents or proofs of their standing (bills/receipts)¹⁶⁴. They have also generally rejected the request for defendants to disclose the confidential version of the Decision of 19/7/16.

In the United Kingdom, the Competition Appeals Tribunal (CAT) and the High Court have ruled on several disclosure motions in the several proceedings filed against the truck manufacturers. Early on, before the Damages Directive was implemented in the UK, the High Court ordered the disclosure of a confidential version of the Decision and the disclosure in a "confidentiality ring" of the documents in the Commission file that had been sent to DAF, excluding some documents.¹⁶⁵ Subsequently, once the Directive was in force, similar disclosure motions filed by claimants in four other proceedings which are being heard jointly, have been granted.¹⁶⁶

3.3.4. Motions for disclosure filed by defendants

As noted above, the 'disclosure scheme' is also available for defendants. They too may need to have access to information in possession of the claimants, to make their counterclaims. The Damages Directive provides for disclosure needed to support a passing-on defense (e.g., allowing the defendant to calculate the potential passing-on rate and supply reduction effects).¹⁶⁷

In the trucks' cartel damages litigation in Portugal defendants have filed motions for the plaintiffs to disclose information needed to calculate the passing-on, which have led to diverging outcomes.¹⁶⁸

In Spain, the flexibility followed by courts in granting claimants' petitions inspired the defendants early on to file motions for disclosure of evidence to further prove passing-on. The requests usually involved different types of evidence. The first one relates to the re-sale of the cartelized goods by claimants, to assess a potential passing-on in the second-hand market. The second one refers to the economic features and performance of the claimants' business, to assess a potential passing-on to the claimants' customers. The rulings of the Spanish courts have not been homogeneous in deciding whether to grant these petitions. A common argument is that disclosure is not necessary given that the defendants' counterclaim argues that no harm was

¹⁶³ See Orders of Juzgado Mercantil 3 de Madrid (J. Montull) of 21/5/18 (*Safetykleen España SA v. Mercedes Benz-España SA*, [ES:JMM:2018:63A](#)) and of 9/7/18 (*Safetykleen Portugal-Solventes e Gestao do Residuos SA v. DAF Vehículos Industriales SAU*, [ES:JMM:2018:99A](#)); Order of Juzgado Mercantil 3 de Valencia (E. Pastor) of 7/12/18 (*Safetykleen España SA v. Volvo Auto Sweden*, [ES:JMV:2018:148A](#)).

¹⁶⁴ See Orders of Audiencia de Barcelona (sec. 15) of 25/9/20 (JF Garnica, [ES:APB:2020:7895A](#)), of 7/10/20 (JM^a Fernández, [ES:APB:2020:8713A](#)) and of 4/11/21 (JF Garnica, [ES:APB:2021:10344A](#)).

¹⁶⁵ See ¶8 of *Suez Groupe SAS v. Fiat Chrysler Automobiles NV* [2018] EWHC 1994 (Ch) (J. Roth) that refers to the order of the High Court of 18/12/16, *Royal Mail Group v. DAF* (J. Rose) excluding documents related to products other than trucks; created before 17/1/97 or 18/1/11 exclusive and other than documents created for the purposes of the OFT or Commission investigation (18% of the documents in the file, ¶40).

¹⁶⁶ Id. ¶¶44 and 45 (considering that they should all be decided in a consistent manner).

¹⁶⁷ See Antonio Robles "Indirect Purchasers and Passing-On" (Chapter 10) of this book.

¹⁶⁸ See Miguel S. Ferro "The reality of access in antitrust private enforcement: Overview of 3 years' experience in Portugal" *Revista de Concorrência & Regulação* 46-47 (2021) 64-65.

caused by the cartel. Most courts considered that, absent any potential harm (according to defendants), there is no room for quantifying a potential passing-on (i.e., they rejected the relevance of the subsidiary pass-on argument). Moreover, particularly regarding access to financial information of the claimants' business during a long period of time (during and beyond the infringement), the request was often considered disproportionate. Given that the trucks cartel took place a long time ago, one of the problems that disclosure faces is that SMEs may not keep that information (and indeed they are not required to keep it more than 6 years).

In addition, defendants have also used the 'disclosure scheme' as a means of access to the data and methods used in claimants' expert reports for quantifying the overcharge. This has raised several issues and led to disparate rulings of Spanish courts in this regard. Firstly, given that the experts are formally independent from the claimants, disclosure orders should be addressed to them.¹⁶⁹ Secondly, in my opinion 'disclosure scheme' is not devised for this purpose. The data and methods supporting the plaintiffs' expert report should be made available when the report is presented in court and, if that is not the case, that should be considered in the court's critical assessment. Most courts have rejected the motions for disclosure filed by defendants with this purpose,¹⁷⁰ but some have accepted it.¹⁷¹

3.3.5. Protection of confidentiality: 'data rooms'

Given the vast use of the 'disclosure scheme' in the Spanish litigation on the trucks' cartel damages, it is unsurprising that motions for disclosure had to confront petitions to protect confidential evidence from being disclosed. This has raised several important issues. Overall, how courts have dealt with confidentiality pleas and protective measures reflects the difficulties of accommodating the 'disclosure scheme' in the traditional culture and civil procedure rules.

Firstly, courts have needed to establish whether the evidence to be disclosed was confidential. In general, courts have been permissive and expansive in their qualification of evidence as confidential, with little or no reasoning. This has occurred in several petitions to disclose the models of medium and heavy trucks manufactured and their list prices and production costs from 1990 to 2018.¹⁷² Arguably, most of this could be considered "*past information*", as it refers to aged quantitative data.

Secondly, in terms of how to ensure confidentiality, given the lack of experience and the underdevelopment of Spanish civil procedure in this regard,¹⁷³ some courts have looked at the practice used by CAs to grant access to confidential information in their investigations through

¹⁶⁹ Also in Portugal, see Ferro *Revista de Concorrência & Regulação* 46-47 (2021) 65.

¹⁷⁰ See, e.g. Order of Juzgado Mercantil 5 de Madrid of 12/12/21 (M. Guillamón, [ES:JMM:2021:4380A](#)) and Order of Juzgado Mercantil 12 de Barcelona of 16/12/21 (M^a I. López, [ES:JMB:2021:4572A](#)).

¹⁷¹ Starting with Juzgado mercantil 3 de Valencia order of 14/16/19 (E. Pastor, [ES:JMV:2019:48A](#)).

¹⁷² See, for example -accepting it without any analysis- that the list of medium and heavy trucks manufactured by MAN Truck & Bus Deutschland GmbH from 1/1/1990 to 30/6/2018 and their list prices "*contains confidential information*" (§5 of Order of Audiencia de Zaragoza 5 of 13/5/21 (J.C. Fernández Llorente, [ES:APZ:2021:657A](#)), although it rejected the defendant petition of access to such evidence in a "data room" as the court considered enough protection was achieved through the duty of confidentiality of the lawyers and experts involved in the proceedings, but imposing a pledge of €50.000 (§6).

¹⁷³ In Germany, courts have discussed some of these measures (appointment of an expert to determine the level of protection or conducting *in camera* proceedings), see A.II.3(c) Hauser and Vande Walle, "Germany and the Netherlands".

'data rooms'.¹⁷⁴ Although alternative and less costly forms of protection are available, resorting to them has become a simple way for opting to the most complex protective measure.

'Data rooms' are "*a form of restricted disclosure by which material is disclosed to a limited number of specified advisers for a limited period of time in a secure room [...] subject to a number of restrictions and safeguards designed to prevent confidential information being disclosed beyond [the data room]*"¹⁷⁵. Although the Commission mentions this as one of the protective measures available in the 2020 Communication for the protection of confidential information,¹⁷⁶ its use in this context is controversial. They have only been used as protective measures by a few first instance courts in Spain, and their use has never received the blessing of court of appeals.¹⁷⁷

In practice, at least in Spain, the experience in replicating 'data rooms' in the adversarial process has proven problematic. There are no specific rules on how, when and where these 'data rooms' should be conducted, and it's unclear if they could ever be organized once the prehearing phase is concluded.¹⁷⁸ Several commercial courts have left it to the parties to organize the 'data room',¹⁷⁹ with minor judicial oversight, which has led parties to contest what happened during the running of the 'data room'. In addition, the organization and running of 'data rooms' is costly, both in terms of time and resources, and this may prove to be an unsurmountable obstacle to claimants to ensure access to evidence needed in support of their claims. Naturally, it will also be a drag of resources for defendants, but generally they are better prepared and economically capable of dealing with it.

3.3.6. The 'disclosure scheme' as an obstacle to antitrust damages litigation?

Although the 'disclosure scheme' is a mechanism provided to facilitate potential antitrust damages claims, given the limited practice that lawyers and courts have in the use of this discovery tool, early experience with its functioning shows that it may become a new and unexpected battlefield for parties. One risks introducing additional costs and delays, without

¹⁷⁴ See Gonenc Gurkaynak, Kansu Aydogan & Yesim Yargici "Data Room Practices in Competition Law: Right to Access to File and the Right to Defense in Cartel Cases" in Gönenç Gürkaynak (dir) *The Academic Book of ELIG, Attorneys-at-law in honor of the 20th Anniversary of Competition Law Practice in Turkey*, 2018, 313-338.

¹⁷⁵ See Wouter J. Wils & Henry Abbott "Access to the File in Competition Proceedings Before the European Commission" *World Competition* 42/3 (2019) 291.

¹⁷⁶ The Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (OJ EU C242 of 22/7/20) refers to "disclosure rooms" when analyzing "confidentiality rings" (see footnotes 49, 54 and 64) but always looking at the experience of the Commission with their use on administrative investigations.

¹⁷⁷ See, e.g., judgments of Audiencia de Valencia 9 (P. Martorell) of 17/11/20 (ES:APV:2020:4230), of 20/4/21 (ES:APV:2021:1209) and of 22/2/22 (ES:APV:2022:394) and ¶5 of Order of Audiencia de Zaragoza 5 of 13/5/21 (ES:APZ:2021:657A): "we do not accept the respondent's proposal that access to information should be through a data a room. Nor do we consider that the circumstances in which the Commission has made use of this system (for example, preliminary investigations regarding the data collection practices of Google and Facebook and the way in which Facebook's marketplace competes with the classified advertising services of other operators) can be extrapolated to the case before us."

¹⁷⁸ ¶4.2.1 of Judgment of Audiencia de Valencia 9 of 17/11/20 (P. Martorell, ES:APV:2020:4230).

¹⁷⁹ In contrast with other jurisdictions with more experience on voluntary discovery between the parties (U.S.), where there is a long tradition of confidentiality protection arrangements commonly agreed by the parties, see Howard M. Erichson "Court-ordered confidentiality in disclosure" *Chicago-Kent Law Review* 81 (2006) 357-374.

improving the amount of evidence before the court or the probability of amicable solution of the dispute.

In those Member States without appropriate tools for the collectivization of claims, the proliferation of motions for disclosure /orders could artificially burden both claimants and defendants. That would explain the limited use so far in many Member States and the existing evidence of parties refraining from using it.¹⁸⁰

From the claimants' perspective, it implies further cost and delays for their claims to proceed in court. From the defendants' perspective, it also entails additional costs, but the typical asymmetry of power and resources of the parties in these proceedings makes them better prepared to handle it, benefiting from economies of scale, and gaining more from dragging out procedures.¹⁸¹ The mechanics of the 'disclosure scheme' can easily be steered by defendants as a 'sword' or as a 'shield' against unpracticed claimants.

Another relevant issue to have in mind in the assessment of the pros and cons of the 'disclosure scheme' is timing.¹⁸² The disclosure scheme is devised to operate expeditiously and swiftly within the main damages' proceedings (or briefly before commencing that action), as an ancillary tool. But the reality, in some Member States, is that it becomes an additional case on the court docket, subject to the same delays.¹⁸³ The discovery process can be long and tenuous, especially if the courts take a rigid approach to the matter and the counterparty uses all possible tools to demur it.¹⁸⁴

In sum, the lack of experience in most Member States has led to profuse strategic behavior in court, mainly by defendants, to quash and delay any potential damages claims through all possible means.

Given the experience of other jurisdictions with potential abuses of discovery, it probably should have been expected that the disclosure rules introduced by the Directive would create an additional battleground. Apparently, the requirements introduced enough controls for that to be avoided, but in its early use, so far, its effectiveness is questionable. Although the 'disclosure scheme' operates under the writ of the court and must meet a relevant fact-pleading threshold, the lack of experience by courts and lawyers has frequently led to excesses.

For inexperienced, wary plaintiffs who venture into the realm of discovery, they may find themselves lost in an intractable rigmarole, that does not ease at all the proof of harm and the quantification of the overcharge. In complex cartels, like the trucks' cartel, motions for disclosure can become a labyrinth without exit. In the future, this could lead many plaintiffs to

¹⁸⁰ See Otto, Hauser & Vande Walle, "Germany and the Netherlands", B.II.4.

¹⁸¹ See Juan Delgado "Antitrust damages actions in the EU: the way forward" [Global Competition Review 14/2 \(2021\) 82-83](#).

¹⁸² See *supra* §3.2.5.

¹⁸³ For example, in France, it has taken 2 years for the disclosure motion by Labatut to be decided (*supra* footnote 158), and the one by Eiffage is still pending after more than 4 years (*supra* footnotes 154-158).

¹⁸⁴ The Spanish practice is also illustrative of long delays in these petitions to be decided, see, e.g., the rejection of the plaintiff motion for disclosure on 19/9/20 by juzgado mercantil 1 de Zaragoza (J.P. Rincón); finally approved by Order of Audiencia de Zaragoza 5 of 13/5/21 (J.C. Fernández Llorente, [ES:APZ:2021:657A](#)), with a Clarification Order on 9/9/21 ([ES:APZ:2021:1508AA](#)) more than a year after the initial motion, and this is only the beginning of the disclosure.

refrain from resorting to it in similar cases.¹⁸⁵ But, without discovery, will they be able to meet their burden of proof?

In my view, the largest risk, however, comes from the potential abuses of the disclosure scheme by defendants, which may use it strategically as a tool to delay and impede the continuation of the main proceedings.¹⁸⁶ *"If the defendant is allowed access, without sufficient limitations, to sources of evidence in the possession of the injured party, there is a risk that the asymmetries and imbalances that have occurred in the market as a result of the infringer's actions may be transferred to the judicial proceedings, causing these proceedings to end up being particularly complex, lasting longer than is reasonable or subjecting the injured party to a series of procedural obligations that make it very difficult to effectively protect his rights".*¹⁸⁷

4. Other forms of access to evidence

The Directive's 'disclosure scheme' does not prevent claimants from seeking to obtain the necessary evidence by other means provided by the law.¹⁸⁸

Independently from the adversarial process, concerning evidence that may be in possession of public institutions, several rules recognize the right to access to such information. Given that CAs may collect and record evidence on potential antitrust infringements, direct requests to them without court involvement may constitute a way for claimants to obtain evidence about the harmful infringement to be used in preparing their claims.

This final section of the Chapter surveys the alternatives provided based on the principle of transparency and public access to information (*infra* §4.1) and through the potential access to the CA file (*infra* §4.2).

In general, these forms of access to evidence will be triggered by a decision of a CA, in which an antitrust infringement is declared (i.e., claims will be filed as follow-on actions).¹⁸⁹ Final decisions of CAs closing investigations for antitrust infringements are public.¹⁹⁰ However, the publication may be delayed, and the published version may be severely censored

¹⁸⁵ ¶25 of *Suez Groupe SAS v Fiat Chrysler Automobiles NV* [[\[2018\] EWHC 1994 \(Ch\) \(Roth, J.\)](#)]: "It was not intended that it should usher in disclosure battles as a tactical game to be engaged in at interim stages of litigation, so as to prevent the effective pursuit of damages claims".

¹⁸⁶ See Gary Myers "Litigation as a predatory practice" [Kentucky Law Journal 80 \(1992\) 597](#) ("litigation may allow the dominant firm to impose asymmetrical costs on the entrant through the effective use of burdensome discovery requests")

¹⁸⁷ Order of Juzgado mercantil 11 de Barcelona (J. M^a Fernández Seijo) de 20/1/22, [ES:JMB:2022:105A](#) (§3 *in fine*).

¹⁸⁸ See article 6.2 of Damages Directive ("This Article is without prejudice to the rules and practices on public access to documents under Regulation (EC) n° 1049/2001") and recital 20.

¹⁸⁹ However, in theory, nothing excludes that information about potential harmful infringements that give way to damages' claims be in the files of other proceedings by the European Commission (e.g., mergers, state aid) or public authorities of the Member States (i.e., non-infringement proceedings), but most of the same rules governing the right of access will apply.

¹⁹⁰ For the Commission see Article 30 of Regulation 1/2003 and Wouter J. Wils "Publication of Antitrust Decisions of the European Commission" [Concurrences 4/2020: 93-108](#). Similar rules govern the publication of decisions by NCAs, although there may be national nuances in the publication process that would need to be considered, see Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶5.129-5.132.

to protect confidential information.¹⁹¹ When the investigation of the CA was started by a leniency application, that should not be an obstacle to the publication of the decision.¹⁹² However, there has been substantial litigation before the EU Courts on whether the non-confidential versions of the decision to be published by the Commission may contain information obtained from a leniency application.¹⁹³

CAs have a duty to respect professional secrecy of the information they obtained in their investigations. This applies both to the European Commission¹⁹⁴ and to NCAs.¹⁹⁵ Of course, the professional duty of confidentiality of the CAs does not mean that they should not give access in those circumstances set by the law (*infra* §§4.1 and 4.2).

4.1. Transparency and the right to public access to information

The principle of transparency governs the actions of public institutions both at EU and national level.¹⁹⁶ It is one of the pillars of modern democratic States, strengthening the legitimacy of public institutions by allowing citizens to oversee the lawfulness of the exercise

¹⁹¹ OECD *Access to the case file and protection of confidential information*, [DAF/COMP/WP3\(2019\)6](#), 15/10/19, ¶33. For that reason, EU Courts have ruled that even before they are finally released to the public, potential claimants may be sent a non-confidential version of the decision which no longer is subject to the requests for confidentiality, see ¶137 of T-534/11 *Schenker* ([EU:T:2014:854](#)): "There was therefore nothing to prevent the Commission from communicating to the applicant the part of the non-confidential version of the airfreight decision which was not the subject-matter of any requests for confidentiality".

¹⁹² See recital 26 *in fine* ("limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with the applicable Union or national law. In order to ensure that that exemption does not unduly interfere with injured parties' rights to compensation, it should be limited to those voluntary and self-incriminating leniency statements and settlement submissions").

¹⁹³ E.g., regarding the publication of Decision of the Commission of 3/5/2006 ([COMP/F/38.620 Hydrogen Peroxide and Perborate](#)), see ¶¶87 and 96-98 of C-162/15P, *Evonik Degussa GmbH v. Commission* ([EU:C:2017:205](#)), ¶¶64, 89, 108, 116 of T-345/12, *Azko Nobel NV v. Commission* ([EU:T:2015:50](#)) and T-404/04, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* ([EU:T:2007:306](#)). As Advocate General M. Spuznar argued in its opinion in C-162/15P (¶20) "the fact that the leniency statements are afforded full protection does not mean that the same level of protection must be afforded to the factual information concerning the infringement contained in those statements when the Commission's decisions are published" ([EU:C:2016:587](#)). Regarding the publication of Decision of the Commission of 11/6/2002 ([COMP/36.571/D-1-Austrian banks Lombard Club](#)), see T-198/03, *Bank Austria Creditanstalt v. Commission* ([EU:T:2006:136](#)); regarding the publication of Decision of the Commission of 9/11/10 ([Comp/39258-AirFreight](#)) see T-534/11, *Shenker AG v. Commission* ([EU:T:2014:854](#)) and *England & Wales Court of Appeal 14/10/15, Air Canada & Ors v. Emerald Supplies Limited & Ors [2015] EWCA Civ 1024*; regarding the publication of Decision of 12/11/2008 ([COMP/39.125 Car glass](#)) see C-517/15, *AGC Glass Europe et al. v Commission* ([EU:C:2017:598](#)). See also Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶5.97-5.113.

¹⁹⁴ See article 339 TFEU and article 28 (*Professional Secrecy*) of Regulation 1/2003.

¹⁹⁵ See article 31.2 of ECN+ Directive ("Member States shall ensure that national competition authorities, their officials, staff and other persons working under the supervision of those authorities, do not disclose information that was acquired on the basis of the powers referred to in this Directive and that is of the kind covered by the obligation of professional secrecy, except where such disclosure is allowed under national law").

¹⁹⁶ See article 15.3 TFEU and Regulation EC 1049/2001 of 30/5/2001, regarding public access to European Parliament, Council and Commission documents ([OJ UE L145 of 31/5/2001](#)). At national level, it may even have constitutional foundation, see Hermann-Josef Blanke & Ricardo Perlingeiro "Essentials of the Right of Access to Public Information: An Introduction" in Hermann-Josef Blanke & Ricardo Perlingeiro (ed) *The Right of access to Public Information. An International Comparative Legal Survey*, Springer 2018, 6-8.

of public powers and increasing their participation in public matters. It also facilitates the exercise and protection of fundamental rights. The principle of transparency embeds the right of access of the public to documents held by EU and Member State public institutions, either produced or received by them.

In particular, the right of public access to documents held by EU institutions is a manifestation of the principle of transparency,¹⁹⁷ which includes the right of access to the documents held by the European Commission (including those in the file of investigation proceedings for antitrust infringements).¹⁹⁸

However, the right to access is not absolute and there are exceptions.¹⁹⁹ Among those are the protection of commercial interest of natural and legal persons, court proceedings and legal advice as well as protecting the purposes of inspections, investigations, and audits (article 4.2 of Regulation 1049/2001) and the institution's decision-making process (article 4.3 of Regulation 1049/2001). Still, these exceptions can be overridden if there is public interest in disclosure.

EU Courts have considered that applications for disclosure by victims of antitrust infringements to obtain information needed to seek compensation for the harm suffered do not carry an overriding public interest.²⁰⁰ In general, regarding access to documents in the investigation file of the European Commission, EU Courts have ruled that the Commission benefits from a general presumption against disclosure of documents in the administrative file of the case.²⁰¹ EU Courts have considered that the disclosure to third parties of documents gathered by the Commission in its investigation procedures would undermine, in principle, both the protection of their purpose and the protection of the commercial interests of the undertakings

¹⁹⁷ Indeed, although the purpose of this legislation "was to create a more transparent public administration, not to facilitate discovery of documents in civil litigation [...] given the absence of any formal system of discovery in the Member States with a civil law tradition, litigants have been experimenting with using the legislation on public access to documents in order to obtain evidence to assist them in private antitrust damages claims" (Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶4.67).

¹⁹⁸ Although this is a general right that covers all the activities of the European institutions (including the European Commission), a substantial share of the requests received by the Commission refer to antitrust cases (report on application of regulation) see Report from the Commission on the application in 2020 of Regulation (EC) n° 1049/2001, [COM\(2021\) 459 final](#), 9/8/21 (6,2% initial applications, but 15,2% confirmatory applications). The number of antitrust related requests peaked in 2017, when they were highest proportion of both initial and confirmatory requests, see Report from the Commission on the application in 2020 of Regulation (EC) n° 1049/2001, [COM\(2018\) 663 final](#), 3/10/18 (9,1% and 20,1%, respectively).

¹⁹⁹ Articles 15.4 TFEU and 4 of Regulation 1049/2001. See Leonor Rossy & Patricia Vinagre e Silva *Public Access to Documents in the EU*, Hart 2017, 38-39.

²⁰⁰ See ¶55 of T-168/17 *CBA Spielapparate-und Restaurantbetriebs GmbH v. Commission* ([EU:T:2020:20](#)) and ¶108 of C-362/12P *EnBW v. Commission* ([EU:C:2014:112](#)).

²⁰¹ See ¶93 of C-362/12P *EnBW* ("the Commission is entitled to presume, without carrying out a specific, individual examination of each of the documents in a file relating to a proceeding under Article 81 EC, that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding") The same presumption has been considered to hold regarding access to information on the file of merger control proceedings (¶123 of C-404/10P *Commission v. Editions Odile Jacob*, [EU:C:2012:393](#); ¶64 of C-477/10P *Commission v. Agrofert Holding*, [EU:C:2012:394](#)) and State aid proceedings (¶61 of C-139/07 *Commission v. Technische Glaswerke Ilmenau*, [EU:C:2010:376](#)). See Peyer [Journal of Antitrust Enforcement 3 \(2015\) 61-64](#).

involved in such a procedure.²⁰² Indeed, the reach of the presumption is such that the Commission is relieved of the need to carry out an individual assessment of the evidence requested (as mandated by article 4.6 of Regulation 1049/2021), with the possibility of using a general reasoning for rejecting the disclosure of a category of documents.²⁰³ However, the Commission needs to explain how access would undermine, actually and specifically, the interests protected by articles 4.2 and 4.3 of Regulation 1049/2021.²⁰⁴

Nevertheless, although the bottom line is a general presumption that justifies the refusal to disclose documents in the case file relating to proceedings under article 101 and 102 TFEU, access should be granted if the requesting party demonstrates that there are overriding public reasons to justify the disclosure of certain documents (e.g., if there were no other means to obtain that evidence).²⁰⁵

On the other hand, similar rules on transparency and the right of public access to information held by CAs exist in the domestic legal systems of Member States. Potential damages' claimants may try to use them to obtain evidence that could be useful for building or supporting their claim. However, as with EU rules, national rules also contemplate exceptions to disclosure if it would jeopardize the activities and functions of CAs or if confidential information is involved.²⁰⁶

4.2. Access to the file of the CAs in public enforcement proceedings

The right to consult the file in an antitrust investigation, based on due process and the rights of defense, must be distinguished from the right of access to public information.²⁰⁷ In drawing the framework of the alternative paths to obtain evidence in the file of the European Commission, the CJEU has stressed that it cannot be that the right of access to public information has a larger scope or extent than the right of the parties in an antitrust investigation to consult the file.²⁰⁸ In addition, evidence obtained in exercise of the right to public information enters the public domain,²⁰⁹ whilst access to the CA file in public enforcement proceedings will generally be limited and occur only in certain conditions.

²⁰² ¶57 of T-534/11 *Schenker AG v Commission* ([EU:T:2014:854](#)); ¶37-39 of T-677/13 *AXA Versicherung AG v Commission* ([EU:T:2015:473](#)).

²⁰³ ¶¶95 and 101 of C-362/12P *EnBW v Commission*.

²⁰⁴ *Id.*, ¶64.

²⁰⁵ *Id.*, ¶107 ("must establish that it is necessary for that person to be granted access to documents in the Commission's file, in order to enable the latter to weigh up, on a case-by-case basis, the respective interests in favour of disclosure of such documents and in favour of the protection of those documents, taking into account all the relevant factors in the case"); ¶59 of T-677/13, *Axa Versicherung v. Commission* ([EU:T:2015:473](#)), and ¶62 of T-210/15, *Deutsche Telekom v. Commission* ([EU:T:2017:224](#)).

²⁰⁶ See Butorac Malnar *Yearbook of Antitrust and Regulatory Studies* 8/12 (2015) 153-154 (Croatia)

²⁰⁷ Blanke & Perlingeiro in *The Right of access to Public Information. An International Comparative Legal Survey*, 29-30.

²⁰⁸ See ¶¶ 88-89 of C-362/12P, *EnBW*; ¶29 of T-198/03, *Bank Austria Credinstalt* and ¶67 T-345/12, *Azko*. See Wouter J. Wils & Henry Abbott "Access to the File in Competition Proceedings Before the European Commission" *World Competition* 42/3 (2019) 265-266.

²⁰⁹ ¶47 of T-64/12, *Henkel v. Commission* ([EU:T:2013:116](#)), without it being possible to introduce limitations in its subsequent use, see ¶62 of T-447/11, *Catinis v. Commission* ([EU:T:2014:267](#)) and ¶128 of T-221/08, *Strack v. Commission* ([EU:T:2016:242](#)).

Access to the file in antitrust investigations of the European Commission protects the interest of the investigated parties, ensuring that they are conducted respecting the rule of law, with fairness and safeguarding their rights of defense. Consultation of the file by investigated parties will need to balance the protection of confidential information,²¹⁰ ensuring that, when access is granted, adequate protective measures are in place.²¹¹ Other interested parties in the investigation (including complainants)²¹² may also be granted the right to consult the file and to receive a non-confidential version of the SO.²¹³

In addition, national law may also grant limited access to the file of the NCA to third parties, excluding confidential information.²¹⁴ In many cases, it is understood that all parties in the investigation before the CA are subject to a duty of secrecy, but in some Member States the right of access to the CA's file is more open to third parties if they show their legitimate interest in the investigation, as compared to proceedings before the European Commission.²¹⁵

It is possible for potential damages claimants to be parties in the investigations before CAs (or in the appeals of their decisions) if they show a legitimate interest. This could provide them with the right to consult the investigation file.²¹⁶ However, rules governing public

²¹⁰ ¶¶43-47 of OECD *Access to the case file and protection of confidential information*, [DAF/COMP/WP3\(2019\)6](#), 15/10/19.

²¹¹ *Id.*, ¶¶80-81.

²¹² In antitrust investigations by the European Commission, complainants that have shown a legitimate interest (because her economic interest is harmed or likely to be harmed as a result of the alleged antitrust enforcement) are awarded a procedural position in accordance to Regulation 1/2003 (article 7.2), they will be granted access to a non-confidential version of SO if it is issued on a matter covered by the complaint (article 6.1 of Regulation 773/2004). Complainants' right to receive a non-confidential version of the SO does not exist in cartel cases closed by settlement (the complainant is only informed in writing of the nature and subject matter of the procedure (article 6.1 of Regulation 773/2004). This right is limited in the cases in which complaints are rejected, article 8 of Regulation 773/2004), see e.g., ¶¶30-40 of T-699/14, *Topps Europe v. Commission* ([EU:T:2017:2](#)). See Wils & Abbott [World Competition 42/3 \(2019\) 264-265](#).

²¹³ ¶¶29-32 of 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/139/2004 ([OJEU C 325 of 22/12/2005](#)). The Hearing Officer may decide that interested third parties may have a right to be heard (article 5 of Decision 2011/695, recital 32 and article 27.3 of Regulation 1/2003) if they hold an interest could be either harmed or benefit from the alleged infringement (it needs to be specifically related to the facts not abstract, see e.g., ¶6 of Final Report of the Hearing Officer AT.40208, International Skating Union's Eligibility Rules ([OJEU C 148 of 27/4/18](#)). DGCOM has a wide discretion as to how it provides the written information on the nature and subject matter of the procedure. It may do so in the form of a summary document prepared specifically for this purpose (article 13.1 of Regulation 773/2004). If a statement of objections has been sent, it may also do so by providing the interested third person with a non-confidential version of the SO (see e.g., ¶107 of T-213/01 and T-214/01, *Österreichische Postsparkasse et al. v. Commission*, [EU:T:2006:151](#)).

²¹⁴ See Gianni De Stefano "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario" [Global Competition Litigation Review 3/2012: 97](#).

²¹⁵ See, e.g., Lopopolo "Italy" in Rodger, Ferro & Marcos (ed) *The EU Antitrust Damages Directive. Transposition in the Member States*, 217 (including the use in connected judicial claims proceedings), Ashton *Competition Damages Actions in the EU. Law and Practice*, 2nd Ed., ¶¶4.157-159 (Finland, Lithuania and the Netherlands).

²¹⁶ See Butorac Malnar [Yearbook of Antitrust and Regulatory Studies 8/12 \(2015\) 151](#) (Croatia); Druvieta, Jerņeva & Ulaganathan Ravindran [Yearbook of Antitrust & Regulatory Studies 10/5 \(2017\) 211](#) (Czech Republic); Anna Gulińska "Collecting Evidence Through Access to Competition Authorities' Files-Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?" [Yearbook of Antitrust & Regulatory Studies 8/12 \(2015\) 174-175](#) (Poland); Agislaos Karpetas "Practical Private Enforcement: Perspectives from Greece and the

enforcement proceedings (and judicial review) will normally limit the potential uses of the information accessed to its use in public enforcement proceedings or in judicial review²¹⁷, without being able to use it for a private claim in court. In practice, this entails that, although parties in the investigations before the Commission may look at the documents in the file and acquire knowledge of facts that could be relevant for a potential claim for damages, they may not be able to transfer such evidence in the foregoing civil action in court.

However, national courts can always request the European Commission or CAs for information in their possession regarding the identification of antitrust infringements,²¹⁸ if they deem access to such materials is necessary to assess the parties' pleas. They will decide under what conditions they may release to the parties all or some of the information received from the CAs.

5. Conclusion

The compensation of victims of antitrust wrongs will be a chimera if claimants are not provided with appropriate tools to access evidence to assess whether they have a right to damages and to prove their claim. Adequate access to evidence at a reasonable cost is needed to incentivize victims to pursue their claims, otherwise they may be discouraged to confront large and well-off corporations. Despite the potential merits of their claims, access to justice will be denied if claimants cannot obtain evidence to prove and quantify the harm caused by antitrust infringements.

At first sight, obtaining evidence from the CA file would facilitate follow-on claimants in proving their case, but the rules on transparency and the right of access to the file have proven too restrictive for that purpose. Good intentions inspire the 'disclosure scheme' included in the Damages Directive, but early experience shows that the introduction of this mechanism in many Member States brings considerable uncertainty, delays, and costs, and, therefore, more disadvantages than advantages. Claimants requesting access to evidence -or as addressees of the motions filed by defendants- often face corporate litigants, frequent and repeated users of the court system, that enjoy economies of scale in litigation and may make strategic use of the 'disclosure scheme' as an additional way to impede and delay compensation. Moreover, the over-extension of the assumed confidentiality of the evidence requested introduces further delays and expenses as protective measures may be costly.

As it has happened with other provisions in the Directive, the 'disclosure scheme' has brought to the foreground the discussion on the crucial role of access to evidence in antitrust damages claims. And although the Directive has somewhat aligned the rules on the matter in Member States, it has not led to a harmonized solution.

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²¹⁷ See article 8.2 of Regulation 773/2004 and ¶¶48-49 of Notice on the rules for access to the Commission file.

²¹⁸ See *supra* footnote 5.

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