

Use of datarooms and other competition authority practices

DEFCOMCOURT 6
Training of National Judges in EU Competition Law

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Introduction

A quote on optimism

An idea of the purpose of Competition Law

And three conclusions on damage actions

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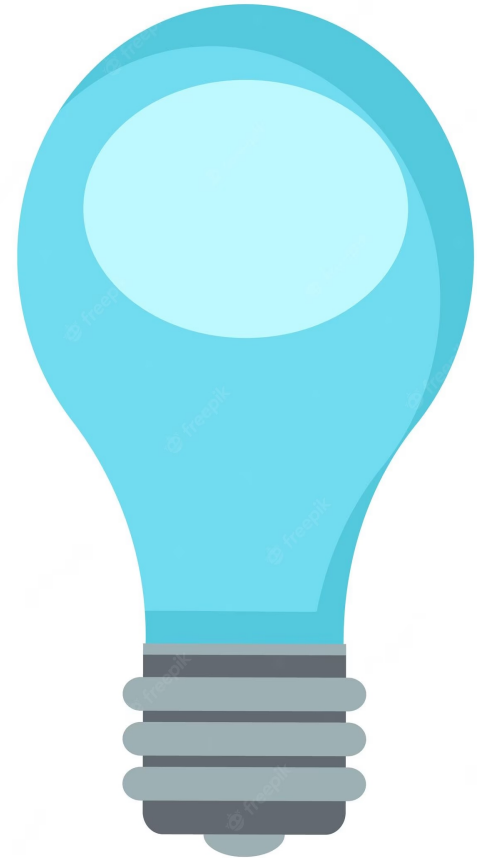
“Oh Pangloss! -You had not suspected such a fright; it seems I shall have no choice but to disavow your optimism. -What is optimism? -asked Cacambo. -What a pain! -It is to obstinately defend with vehemence that everything is right when it is wrong”.

Voltaire, Candide or optimism

A quote

An idea

The need to build a process that (i) guarantees the effectiveness of the right to full compensation, (ii) guarantees the effectiveness of the right of defense and (iii) is compatible with judicial discretion in the quantification of damages

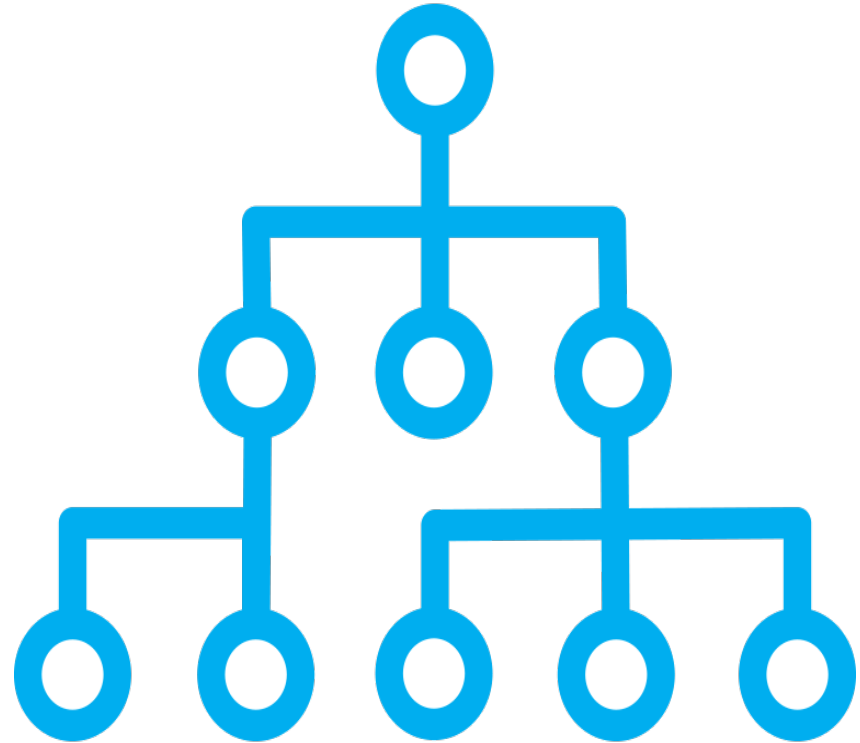


An three conclusions

The injured party is "helped" establishing non-exorbitant standards of proof

The infringer should be required to cooperate transparently with the successful outcome of the process, and should be recognized where this is the case

Judges: discretionality is not arbitrariness



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Regulatory gaps in Spanish Competition Law?

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Case management
Damage quantification





1. An incomplete system

Art. 283 bis LEC

New proposals for consumer litigation

No country for analogy

Are you sure our system is incomplete?

Common disclosure problems (i)

What is the mechanism for?

Who can use it, and is it useful for defence?

Do the application requirements change depending on who uses it?

Who can use it?

What are the limits of application in each case?

How does it relate to other procedural institutions?

Common disclosure problems (ii)

How is carried out in practice?

The silence of art. 5 DD

The discretionary scope of art. 283 bis g) LEC

"2. The court shall use the means necessary for the execution of the agreed measure and shall decide on the place and manner in which it is to be carried out. In particular, where the agreed measure consists in the examination of documents and securities, the applicant may be assisted by an expert in the matter, who shall always act at his own expense. 3. If necessary, he may, by order, order the entry and search of closed places and domiciles, and the occupation of documents and objects found therein".

New proposal for consumer litigation

Art. 18 D class actions

"Production of evidence. Member States shall ensure that, where a qualified entity has provided reasonably available evidence sufficient to support an action for representation and has indicated other evidence in the possession of the defendant or a third party, if so requested by the qualified entity, the court or administrative authority may order the defendant or third party to produce such evidence, in accordance with national procedural rules, without prejudice to applicable Union and national rules on confidentiality and proportionality. Member States shall ensure that, if so requested by the defendant, the court or administrative authority may also order the qualified entity or third party to produce relevant evidence, in accordance with national procedural law".

Introduction of disclosure, drafted art. 838 LEC

(reference to art. 283 bis LEC)

No country for analogy

- (i) 283 bis LEC
- (ii) Reasoned motivation
- (iii) Necessity
- (iv) Proportionality
- (v) Confidentiality rings
- (vi) Passing on defense
- (vii) Public files
- (viii) Bail
- (ix) Appeals

- (i) Diligencias preliminares
- (ii) Diligencias de comprobación de hechos
- (iii) Medidas cautelares
- (iv) Aseguramiento de prueba
- (v) Jurisdicción voluntaria
- (vi) LSE

Keys



Discretionary

A wide margin of decision by the judge based on criteria of necessity and proportionality

Rights

Judicial review must ensure that the general procedural principles of adversarial proceedings and equality are upheld

Extrajudiciality

There are no limits to in-court or out-of-court proceedings for logistical reasons

Are you sure our system is incomplete?

You cannot regulate the unexpected

Procedural Law can also be one of principle

No gap: our option is flexibility

The standardisation of these measures is not the job of the legislator



2. Different judges, common problems

A look at the German regulation....
and a great Portuguese resolution

The German strenght

Lack of references about the disclosure scheme (Kersting)

New sections 33-89 GWR

- (i) Discretion of the judge
- (ii) Expert design of confidentiality circles

Suspicion of judges

OLG Düsseldorf, 3 de abril de 2018, Case VI-W (Kart) 2/18, WuW, 2018, 415
LG Stuttgart, 20 de junio de 2018, Case 30 O 79/18, WuW, 2018, 655.

BGH's view on data rooms? (Otto)

The Portuguese accuracy

Sentença-Tribunal da Concorrência, Regulação e Supervisão, 6/21.6YQSTR, ref. 401497, 8th march 2023

Confidentiality is a goal, but where is the enforcement?



3. Data rooms

A small shared experience

A refractory vision

Every decision entails risk

Rome has spoken

A small shared experience (i)

AJM núm. 3 VLC, 14/6 & AAP VLC, 4/12 (1st DATA ROOM)

BCN Protocol on Trade Secrets

AJM núm. 1 Las Palmas de Gran Canaria, 9/12/19: court or data room

SJM núm. 3 VLC, 28/2/20: failure on data room

SJPI núm. 7 Vitoria-Gasteiz, 17/11/20: impact on quantification of damages

AJM núm. 3 VLC, 27/6/22: a growing experience seeking for balance
(experts and fairness)

A small shared experience (ii)

Four premises

Access serves to prepare for other proceedings/access should only be granted to the applicant and his assistants/the interests of the applicant must be protected/it is necessary to facilitate the execution of the access measure

What is confidential?

The strategic interests of the infringer

Soft Law

2015 to 2020

Data room (in camera/disclosure room)

Place/Time/Object on display/Media/Capacity/Availability/Transparency

A refractory vision (i)

A test imposed on the plaintiff

The plaintiff does not have to have access to the defendant's data

It does not fit in with the possibilities of proof in the proceedings

The offer is late and does not form part of the oral critique work

The situation of information imbalance is increased

It is a penalty imposed on the plaintiff

The lack of confidentiality of the data

The passage of time

A refractory vision (ii)

AJM núm. 3 de Barcelona, núm. 733/22, de 29/11/22, not suitable for intensive experte critique

SAP Murcia, 4ª, núm. 313/22, 24/3/22, to disregard information obtained in the course of other proceedings

Every decision entails risk (i)

European Commission

Communication 2015, Best Practices on the disclosure of information: necessity, proportionality, information leaks, logistics

Draft 2018 and Communication 2019 about pass-on

Communication 2020 about confidentiality

Data rooms as a key element of public enforcement proceedings to guarantee the contradiction and defence of the parties

Every decision entails risk (ii)

The delimitation of the data to be displayed

The limits imposed on the use of the data

The lack of judicial control in its development

The contingency in the presentation of expert reports

Their communication to other proceedings

Rome has spoken (i)



Case C-312/21, Kokott, 22/9/22:

"91. First, on the question of the extent to which access to the relevant data reduces the asymmetry of information between the parties, it is necessary to analyse in each case the specific way in which access to such data has been provided, as well as its magnitude and informative value. For example, it may be relevant whether a large amount of data has been made available to the claimant in a short period of time in formats that are difficult to access, to what extent these data are usable and the like. 92. According to the applicants, in the present case the disclosure only concerned data that had been used by the defendant to prepare its report on damages. The applicant's expert was not granted the possibility to request the disclosure of other data. Moreover, the time-limit for inspection of the data was admittedly short (the referring court refers to 'one week during working hours' and the applicants to 'five working days in the morning'). When consulting the data, it was not permitted to make copies or to use the applicants' electronic devices. Furthermore, the relevant data were not included in the file and could not be examined by the referring court itself. Finally, the applicant's expert was given a short period of between 10 and 15 days to amend his report, if necessary, on the basis of the data consulted. 93. On this basis, it is difficult to conceive that this measure could completely remedy the asymmetry of information between the parties in relation to the calculation of the injury, given the manner in which the disclosure was made alone".

Rome has spoken (ii)



Case C-312/21, CJEU:

"58. In the present case, the situation is different in that the defendant, on its own initiative, after being authorised to do so by the referring court, made available to the applicant the information on which it had relied in order to refute the latter's expert report. In that regard, it must be pointed out, first, that making that information available may contribute to the adversarial debate on both the reality and the amount of the damage and is therefore to the benefit of the parties, who can refine, amend or supplement their arguments, and of the national court, which, thanks to the expert's report and the resulting expert opinion, is in a position to provide the expert with the information necessary to enable the parties to refine, amend or supplement their arguments, thanks to the expert's report and the resulting counter-appraisal, clarified by the disclosure of the information on which it is based, he has information that makes it possible to establish the reality of the damage suffered by the plaintiff and then to determine the extent of that damage, which may save him from having to make a judicial assessment of the damage. On the other hand, making that information available, far from rendering irrelevant the request for production of evidence laid down in the first subparagraph of Article 5(1) of Directive 2014/104, may, on the contrary, guide the plaintiff and provide it with indications as to the documents or data which it might consider it essential to obtain.

Keys

To european judges:

Damages proceedings are subject to intense debate among experts

A proper damage process is built on adequate data for quantification



Data rooms serve both of these purposes



4. Say it in english

English disclosure

American discovery

UK disclosure

Standardisation: Civil Procedural Rules & Practice Direction

A goal: transaction

Documentary/electronic physical/disclosure more intensive

Duty of loyalty of the participants

Obtaining copies of documents

[2013] CAT 24, 2 October 2013, BMI Healthcare Ltd, et al. v. Competition Commission and The London Clinic

US Discovery

Standardisation: Federal Rules of Civile Procedure

A goal: transaction

Full availability on execution of the measure

Legal notion of trade secret.....

but recommendations for flexible interpretation of the notion
(Erichson)

A large blue geometric shape, resembling a triangle or a trapezoid, is positioned on the left side of the slide. It has a white diagonal line running from the top-left corner to the bottom-right corner.

5. Short steps for long distances

Case management

Damage quantification

Case Management

“84.3. El tribunal podrá acordar, de oficio o a petición de cualquiera de las partes, la convocatoria de las partes a una vista para la adopción de medidas de gestión procesal, de acuerdo con las siguientes condiciones: a) La medida únicamente se aplicará en supuestos de procesos acumulados que presenten especial complejidad para la práctica adecuada de las actuaciones de postulación, contradicción, prueba, tramitación, resolución y formulación de recursos. b) La medida se adoptará, si fuera posible, de forma previa a la contestación a la demanda, con suspensión de dicho plazo. En otro caso, la medida podrá adoptarse de manera previa o simultánea a la celebración de audiencia previa en el juicio ordinario. Para el caso del juicio verbal, podrá adoptarse de manera previa a la celebración de la vista principal. c) La vista se celebrará dentro de los diez siguientes a la fecha de la convocatoria, en la sede del juzgado o de forma telemática en horario de audiencia pública, mediante el empleo de sistemas que permitan su grabación y posterior reproducción, que podrán ser proporcionados por la oficina judicial o por cualquiera de los intervinientes, a conformidad de todos ellos. d) Durante la celebración de la vista, los representantes de las partes presentarán una alegación escrita cuyo contenido sucinto reproducirán oralmente y que contendrá propuestas motivadas respecto de la forma en que se llevarán a cabo las actuaciones sucesivas, incluidos los plazos que les afecten, especialmente en relación con la contestación a la demanda si no se hubiera producido, el establecimiento de un calendario de tramitación procesal, reglas de confidencialidad, la práctica de diligencias de acceso a fuentes de prueba que hubiera sido previamente solicitada y en coordinación con las reglas del art. 283 bis f) LEC, intervención de terceros, el anuncio de la clase de pruebas que se vayan a proponer en el momento oportuno y exijan una especial preparación de los medios técnicos a disposición del juzgado, así como cualquier otra cuestión de análoga relevancia. e) Concluida la vista, el tribunal resolverá mediante Auto en el plazo de cinco días, estableciendo instrucciones para el desarrollo del proceso. Contra dicho Auto cabrá interponer recurso de reposición”.

C-312/21, Tráficos Manuel Ferrer

Uncertainty is the rule

The evidentiary activity of the plaintiff...and of the defendant cannot be substituted...

Access to judicial estimation of damage is not possible without prior assessment of the availability and outcome of measures of access to sources of evidence



Time for optimism

Follow on actions

Private enforcement of Competition Law requires jurisprudential evolution

Complementarity

Making normal in private enforcement what is normal in public enforcement

Balance

Some specialties affect both parties and the judge

Data rooms

