

What is confidential?

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Evidence Access

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Confidential information

- Confidentiality means the limitation of access to one information by law, administrative decision or agreement.
- An information can be declared confidential for various reasons as the protection of the privacy – including health - , the commercial or communication secret, but also banking and professional reserved information or as in our case the protection of leniency programs.
- All administrative agencies and courts are subject to legal rules in order to preserve the confidentiality.
- To preserve confidentiality, ensuring that information is accessible only to those authorized to have access is need to implement information security controls.
- ISO/IEC 27002, is an information security standard published by the International Organization for Standardization (ISO), provides best practice recommendations on information security controls, which can be useful for national courts.

Sources on confidentiality in EU Law.

- Article 339 TFEU.
- Art. 6 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1) ('Damages Directive').
- Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law, of 20th July 2020 (2020/C 242/01).

Who declare the confidentiality

- The law: as in our case article 6 Damages Directive protecting leniency programs.
- Agencies: owner of a confidential information can apply for the declaration of confidentiality by the Commission or NCAs protecting commercial secrets.
- Courts: in case of anew assessment of confidentiality in revision cases of Commission and NCAs decisions and in private enforcement actions.

Disambiguation

- Confidentiality of leniency statements is independent of the commercial confidentiality of the information included in it.
- The protection attributed to documents under the grey and black lists in the Damages Directive can be performed regardless of the fact whether such documents contain confidential information or not.
 - Judgment of the Court of Justice of 12 January 2023 *RegioJet* (Case C-57/21).
- What means the scission between legal concession of confidentiality and confidential commercial information.
- Absolute confidentiality is only justified by the protection of the leniency program, what put questions about the compatibility of that solution with the effectiveness principle.

In front of whom will be declared the confidentiality by Commission or NCAs?

- In front of the parts of the administrative procedure.
- In front of third parties as the actor of a private suit.
- In front of NCAs
 - Problems with loyal cooperation principle: Regulation 1/2003.
- In front of the Court:
 - Dutie to stablish safe conditions to maintain the confidentiality of the information.
 - Dutie of confidentiality of the court judges and clerks.

Court anew assessment of confidentiality

- Depending on the circumstances, national courts may need to assess the confidentiality of information anew in the context of private enforcement actions, even if it had been established in the context of the public enforcement of EU competition law. For instance:
 - parties to administrative proceedings may have made confidentiality claims *vis-à-vis* other parties to the administrative proceedings, but may need to make different claims *vis-à-vis* the parties requesting disclosure before the national court in civil proceedings.
 - third parties from whom the Commission or a national competition authority might have obtained information during the administrative proceedings.
 - due to the passage of time between different proceedings, it may be also relevant that information is assessed anew as to whether or not it has lost its confidential nature.

The protection of leniency programmes in the Directive 2014/104/EU

- The objective pursued by the leniency programmes is create a climate of uncertainty within cartels in order to encourage the reporting of them to the Commission.
 - Judgment of 20 January 2016, *DHL Express (Italy) and DHL Global Forwarding (Italy)*, C-428/14, EU:C:2016:27, paragraph 82 and the case-law cited.
- Because that Commission's tends to overprotect this instrument in the Damages Directive, with preferene to ex officio investigations and in harm of private enforcement.
- That implies prioritize public enforcement over private one, but ECJ has not established any 'de jure hierarchy' between public and private enforcement of the competition rules (Opinion of the Advocate General Mazák in case *Pfleiderer*.
 - Judgment of the Court (Grand Chamber) of 14 June 2011. *Pfleiderer AG v Bundeskartellamt*. Case C-360/09).
- A way to implement this overprotection politic are the limitations to evidence access in Commission's file imposed by the Damages Directive.
- I want remark that as pointed out in the FIDE report of 2016: 'In follow-on actions, the first place to look for information about the infringer's conduct is, of course, the competition authority's file, and it is noticeable that, instead of organising access to that file, the Union legislator rather dissuades it.'

Directive's limitation of evidence Access in Commission's file

- The directive distinguish three categories of confidential documents:
 - White, grey and black lists.
 - As the disclosure facilitates the effectiveness of competition law enforcement, the European Justice Court is generally favorable to the classification of documents in the white one.
 - All limits to disclosure must themselves be proportionate, too – articles 5 (3) and 6 (4) Damages Directive -, as they limit the effectiveness of private enforcement and therefore the effect utile of Art. 101 TFEU.

White list

- All evidence that is not on the grey or black list.
- Article 5 Damages Directive is a procedural provision in the meaning of Art. 22 (2) of the Directive , Judgment of the Court (Second Chamber) of 10 November 2022. *Paccar* (Case C-163/21) 33- 35, quoting *Volvo/DAF* case (C-267/20).
- Judges are able to order the disclosure of evidence on the white list, at any time, insofar as such disclosure is necessary and proportionate and the documents are relevant, in accordance with Article 5 of the Directive and the applicable national procedural law.
 - For instance, evidence provided in support of a leniency application would be available under the Directive, such as minutes of meetings, written contracts and email correspondence.
- Disclosure of information or documents which do not yet exist and must be produced by the defendant in cartel damages proceedings ex-novo is not per se precluded by the Directive (*Paccar*).
- To prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, MS procedural laws shall include deterrent penalties, as the possibility for the court to deduce adverse inferences that has special effectiveness.
- In case of simultaneous public and private enforcement disclosure remains possible but it will be subject to a strict proportionality review under Article 5 (3) Damages Directive. (*RegioJet*).
- The question of the appreciation of the proportionality compete fully to the national judge.
- The meaning and scope of Article 5(3) are not directly interpreted by the Court.
- The criteria to be applied under the proportionality test remain partly unclear *Paccar* and *RegioJet*.

Proportionality

- Following *RegioJet* findings, the national court should take into account:
 - the extent and cost of the disclosure of evidence,
 - the relevance of the evidence whose disclosure has been sought for substantiating the merits of the claim for damages,
 - whether the request for the disclosure of evidence in the competition authority's file has been set out in specific terms as regards the nature, purpose or contents of the documents.
- Following *Paccar* findings proportionality test shall be performed by the referring court.
- *Paccar* also include other relevant findings in relation with the balancing the legitimate interests of the parties and third parties – article 5 (3)-.
 - In relation with the proportionality of costs paragraph 53 said that the absence of proportionality “presupposes, implicitly but necessarily, that the cost of disclosing evidence may, where appropriate, significantly exceed that corresponding to the mere transmission of physical media, in particular documents, in the control of the defendant”.

Grey list

- Grey list documents (article 6 (5) of the Damages Directive). If the Commission or a national competition authority has not yet closed its proceedings.
 - The national court cannot order the disclosure of:
 - information that was prepared by a natural or legal person specifically for the proceedings of a competition authority.
 - For instance replies to request for information of 'the competition authority', as well as 'witness statements', should be 'disclosable in actions for damages only after the competition authority has closed its proceedings (Recital 23).
 - A leniency application may contain information about meetings and dates of meetings, which could, for example, enable claimants to examine market changes during the relevant time period, help them to quantify the losses suffered and thus link the claimant to the cartel. Information on these lists is thus likely to give claimants a picture of the nature and workings of the cartel.
 - information that the competition authority has drawn up and sent to the parties in the course of its proceedings.
 - settlement submissions that have been withdrawn.
 - They can only be disclosed after a competition authority, by adopting a decision or otherwise, has closed its proceedings.
- Grey list justification relies on the need to protect the investigative procedure of the competition authority, because disclosure of these documents could reveal investigative strategies and how strong a case the authority actually has.

Grey list 2. Content

- Grey list refers only to
 - Documents that were not pre-existing to the investigation.
 - Prepared specifically for the purposes of public enforcement proceedings.
- Not to all documents that were submitted to an authority, therefore, all documents that were submitted to the authority but were not prepared explicitly for it are on the white list.
- Strict interpretation:
 - articles 5(8) and 6(5)(a) and (9) of the Damages Directive, systematically interpreted with its Recitals 25 and 28 leads to a strict interpretation of documents “prepared” for an authority’s investigation.
 - otherwise, access to documents whilst ongoing public enforcement would be nearly impossible because any relevant document would most likely be part also of the authority’s file.
 - the strict interpretation as emphasized by the Court is the only solution, which gives effect to the Directive and allows for a balanced system of disclosure.
 - that is confirmed by Article 6(9) and Recital 28 thereto which clarifies that pre-existing information forms part of the white list.

Grey list 3 EU and National Law

- the classification under the grey list is determined exclusively by EU law and cannot be extended by national law.
- national law can allow further reaching disclosure than foreseen by the Directive but they must not go below the standard set forth by Articles 5 and 6 of the Damages Directive.
- national court can order – if provided for by national procedural law – the documents to be put in sequestration without access by the parties until the court approved that the documents form part of the white list (*RegioJet*).

Black list documents

- Black list documents (article 6 (6) of the Damages Directive).
 - Documents that can never be disclosed:
 - leniency statements
 - an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge that undertaking or natural person of a cartel and describing its role therein. which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information.
 - The protection of leniency statements extends to verbatim quotations in other documents (Recital 26 of the Damages Directive).
 - The black list only includes information that could not have been obtained elsewhere from any other source than the leniency applicant itself, delivered for the purpose of collaborating with the competition authority.
 - The absolute ban only applies to the 'leniency statement', that is the presentation voluntarily drawn up specifically for submission to the competition authority, thereby excluding any pre-existing evidence submitted together with and/or referred to in that statement, as well as statements of objections, witness statements and replies to requests for information on the grey list.
 - Such an understanding prevents a situation whereby leniency applicants can circumvent the rules and create a 'safe haven' for themselves by submitting all sensitive information that may be relevant for claimants in actions for damages in a leniency application, thereby avoiding any undue exposure to different types of liability.
 - leniency statements on the black list are protected at all times only for the purpose of actions for damages, but not in relation of other actions as injunctions or terminations of contracts.
 - settlements submissions

Black list 2

- Any categorization of norms on the black list by national law cannot be further reaching than the one foreseen by the Damages Directive, following the reasoning of *RegioJet*.
- The rules on non-disclosure and use for the purpose of a damages claim apply irrespective of the outcome of the leniency application, which means that, if the applicant withdraws its application or leniency is denied, this does not annul the requirement for absolute confidentiality.

Black list 2 Procedural issues ex article 6(7) Damages Directive

- a claimant may present a reasoned request that a national court access the evidence referred to leniency statements and settlement submissions for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2 that contain both definitions and check for circumventions of the rules.
- in that assessment, national courts may request assistance only from the competent competition authority.
- the authors of the evidence in question may also have the possibility to be heard.
- in no case shall the national court permit other parties or third parties access to that evidence.
- leniency statement obtained by natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.

Protection of the confidentiality after disclosure

- Damage Directive impose Member States to regulate penalties for.
 - non-compliance with obligations to protect confidential information
 - the abusive use of information obtained through disclosure, in particular in actions for damages.

Last resort Commission's disclosure and procedure to request the evidence to the Commission.

- Article 6(10) of the Damages Directive specifically provides that disclosure from a competition authority is only a measure of last resort:
 - 'Member States shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence'.
- National courts may order any of the parties (defendant and/or claimant) or third parties to disclose information that lies in their control, that can be declared confidential by the Commission or the CNAs, as information concerning customer-specific prices, revenues or other data such as the pricing behaviour of the purchasers.
- National court may address to the Commission or CNAs an order for disclosure to them
 - if the parties or any other third party could not produce the evidence sought and
 - the request for disclosure concerns a document in the file of the Commission or a national competition authority.
- Commission will ask the national court whether it can and will guarantee the protection of confidential information before transmitting it.
 - Notice on Cooperation with National Courts and Communication at 28.
- The national court should then effectively guarantee the appropriate protection of confidential information that belongs to legal or natural persons from whom the Commission had obtained the information.
 - Notice on Cooperation with National Courts and Communication at 28.
- If the national court offers a guarantee that it will protect the confidential information, the Commission will transmit the information requested.
 - Communication at 28.
- The national court may then disclose the information in national proceedings by applying the measures to protect the confidentiality of information communicated to the Commission and taking into account any observations provided on this matter by the Commission.
 - Communication at 28.