Submission in response to the European Commission's draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts

18 October 2019

In July 2019 the European Commission published the text of a draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts ("**Communication**"). These comments have been prepared by the Litigation Working Group of the International Bar Association ("**IBA**") Antitrust Section (Antitrust Litigation Working Group or "**ALWG**"). The ALWG welcomes the opportunity to respond to the consultation on the Communication, and is supportive of the European Commission's initiative to provide practical guidance to national courts in selecting effective protective measures for such information.

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shaping the future of the legal profession across the globe. It is the global voice of the legal profession.[1]

The IBA has over 55,000 individual lawyer members from around the world, including many from the EU. The ALWG includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, which places it in a unique position to provide international and comparative analysis in the development of competition laws and enforcement practices.

The ALWG brings together lawyers with experience of advising clients on both sides of the confidentiality issues that are articulated in the Communication. Having regard to its interest in important international legal developments in significant jurisdictions such as the EU, the ALWG respectfully submits its comments and suggestions on the Communication.

1. A balancing of interests

1.1 The Communication's stated aim is to assist national courts when faced with requests for disclosure of confidential information in proceedings for the private enforcement of EU competition law, and particularly when dealing with damages actions.[2] In seeking to achieve this, the Communication notes at the outset the competing interests national courts must aim to reconcile: on one hand, ensuring that the parties' effective access to justice or the exercise of the right to full compensation are not impeded; on the other hand, ensuring the necessary safeguards are in place to protect evidence containing confidential information.[3] The role of national courts is central to this balancing exercise: "*Through the disclosure of evidence, national courts play an essential role in remedying information asymmetries between claimants and defendants*".[4]

1.2 The competing interests that are at issue in such a balancing exercise impact both claimants and defendants. In a follow-on cartel damages claim the claimant might seek disclosure from the defendant(s) of documents showing the latter's involvement in the cartel, or documents that go to quantifying any overcharge – documents which the defendant(s) might argue contain confidential information. And the defendant(s) might seek disclosure from the claimant of documents, such as those relating to how the claimant's prices are set, that go to demonstrating pass-on – documents which the claimant might argue contain confidential information. Thus, both sides in the litigation have an interest in the availability of disclosure *and* the protection of confidential information. The Communication strikes this balance in paragraphs 19 and 21, noting that national courts must "*ensure the effective exercise of [the parties'] rights by granting access to the relevant information…while at the same time protecting the interests of the party or third party whose confidential information is subject to disclosure*", and that this information "*should be, to the extent possible, protected*".

1.3 Another fundamental consideration, which is not set out in the Communication but could usefully be, is the importance of legal advisers being able to take proper instructions from their

[1] Further information about the IBA is available at www.ibanet.org
[2] Communication, paragraph 5.
[3] Communication, paragraph 4.
[4] Communication, paragraph 1.

clients. This is an important factor to balance when considering whether, and how, to protect confidential information from disclosure. We have addressed this issue at 3.13 below.

1.4 Finally, it is right that the role of national courts in dealing with disclosure applications is highlighted, and we welcome the Communication's efforts to provide guidance and facilitate a consistent approach. However, national courts have finite resources, and many may struggle to implement some of the measures proposed. The Communication should therefore be clear that there must, in the first instance, be an expectation that the parties themselves should seek to agree disclosure/confidentiality issues, and only trouble the courts when issues cannot be resolved by consent. The Communication should also recognise that judges dealing with disclosure requests and requests for confidential treatment are likely to face additional procedural burdens, and urge the necessary resources to be made available to them for that task.

1.5 In the sections that follow we make some specific comments and, in some instances, drafting proposals with the above considerations in mind.

2. The Use of Definitions

2.1 The Communication refers in places to terms which are not always defined, and would benefit from some clarification as to what is meant by them. In particular, it refers to the concept of "control" over a document, as well as to "confidential information" – both key concepts in the Communication but neither of which is defined.

2.2 **Control over evidence**: Disclosure of evidence can be sought by parties that have control over evidence. The Communication states at paragraph 13 that "*The concept of control does not mean that the documents have to be in the physical possession of the information holder*". But other than suggesting that physical possession is not a prerequisite for "control", the Communication provides no further guidance as to what "control" may mean.[5] It would be helpful if the Communication could provide guidance as to how national courts should consider the concept of control, and/or examples as to when parties are considered would (or would not) have control over evidence. By way of example, the Civil Procedure Rules applicable in England and Wales provide that "a party has or had a document in his control if (a) it is or was in his physical possession, (b) he has or has had a right to possession of it, or (c) he has or has had a right to inspect or take copies of it."[6]

2.3 **Confidential Information**: Similarly, the Communication provides no overarching definition of "confidential information". Various approaches are presented as to how national courts should consider whether information is "confidential":

(a) at paragraph 25 the Communication states that national courts should consider national rules or relevant national case law for defining confidential information;

(b) also at paragraph 25 the Communication states that national courts can take "inspiration" from the jurisprudence of the EU courts when defining confidential information, in addition to considering national rules;

(c) at paragraph 28 the Communication states that when a national court requests documents from the Commission's file, it is required to guarantee the protection of confidential information when the Commission is of the view that the information contains confidential information – suggesting that the Commission can in these instances determine when information must be treated as confidential;

(d) reference is also made (e.g. at paragraphs 31 and 32(i)) to "sensitivity" as a factor.[7] We would caution against incorporating further concepts such as this, which themselves are likely to be highly subjective.

[5] "Control" is a relevant criterion for disclosure pursuant to Article 5(1) of the Damages Directive, but similarly is not defined therein.
[6] CPR Rule 31.8(2).
[7] The possibility of redacting sensitive passages in documents is set out in recital 18 of the Damages Directive.

2.4 In the absence of an overarching definition, it would be helpful if the Communication could provide clearer guidance as to the criteria for information to be deemed "confidential". Reference might be made in this regard to the Commission's *Informal guidance paper on confidentiality claims*, according to which, the Commission presumes that information pertaining to the parties' turnover, sales, market share data and similar information which has lost its commercial sensitivity, for example, due to the passage of time, can no longer be considered as confidential.[8]

3. Confidentiality Rings

3.1 We welcome the detailed description of the potential benefits of confidentiality rings and the practical advice for national courts in adopting these measures, and set out below some suggestions which we hope may seek to clarify the Communication further.

Confidentiality rings as an effective means for protecting confidentiality (paragraphs 37 to 42)

3.2 **Open Justice**: The Communication notes that in certain situations, confidentiality rings help strike a balance between the need for disclosure and the obligation to protect confidential information (see for example, paragraph 38). We consider that while there is often a need to seek to balance these particular interests, national courts should also give consideration to the principle of open justice as that principle may be undermined if a significant volume of evidence is placed in a confidentiality ring but that information is necessary to understand the issues to be decided in the case. That may, for example, restrict the extent to which important documentary or witness evidence can be heard in open court. Where hearings are held in open court, advocates may feel unduly restrained as to the material which they can refer to. Where witnesses or experts are giving oral evidence, an experience which is often challenging and stressful, they can and do become confused and distracted by concerns about what they can and cannot refer to. In addition, in order for the public to understand the rationale of a judgment, it is important that judges are able to explain how they assessed the evidence before them in a given case.

3.3 In order to ensure that national courts give due consideration to the issues raised above, we submit the following additional wording be considered after paragraph 42: "*In considering whether and the extent to which material should be placed in a confidentiality ring, national courts should be mindful of the importance of the principle of open justice. Where important evidence is placed in a confidentiality ring, it may limit the extent to which hearings can be accessible to the public and may unduly restrict the material that advocates can refer to (without requesting that hearings be heard in camera). In addition, these arrangements may increase the likelihood of witnesses becoming distracted or confused when giving evidence and may limit the ability of judges to provide clear reasons for their judgments in circumstances where they cannot refer to certain evidence*".

3.4 **Disputes**: Paragraph 39 of the Communication states that confidentiality rings may allow for procedural economies and efficiencies including that "*Disclosing parties will not need to engage in disputes over the confidentiality of specific items of information nor will the court need to examine these thereby reducing the uncertainty and the potential delays caused by confidentiality negotiations.*" In practice, however, even where confidentiality rings are established disputes may arise as to whether material designated as confidential is, in fact, confidential. Those disputes may be initiated by the parties or judges may raise questions about why information has been considered to be confidential, although courts may not necessarily adjudicate on what material should be designated as confidential, absent a dispute. As such, it should not be assumed that the court will <u>not</u> be required to consider confidentiality. The second sentence of paragraph 39 of the Communication could therefore be amended as follows: "*By offering an alternative means of protecting confidential information, confidentiality rings may reduce the frequency of disputes between parties over the confidentiality of specific items of information. However, the use of confidentiality rings does not prevent disputes arising between parties as to the confidentiality of information, particularly where extensive and/or unsustainable claims of confidentiality are made.*"

[8] DG Competition informal guidance paper on confidentiality claims, page 12.

3.5 **Core list of documents**: Paragraph 39 of the Communication also states that procedural economies and efficiencies may result from the use of confidentiality rings "*in particular when the number of documents requested is voluminous and the parties are able to agree on a core list of documents considered relevant for the purposes of the claim*". However, it is unusual – particularly in the context of antitrust damages claims – for there to be an agreed and limited core list of *documents* which are considered relevant for the purposes of the claim as opposed to an agreed list of issues which may assist in determining the scope of disclosure. Where documents are disclosed they are considered "relevant" to the claim to some extent. On this basis, the first sentence of paragraph 39 of the Communication could be amended to remove "*in particular when the number of documents requested is voluminous and the parties are able to agree on a core list of documents considered relevant for the purposes of the claim.*" For the same reasons we suggest that the following language is removed in the final sentence of paragraph 40: "*in particular in those cases where the parties are able to agree on a core list of documents considered relevant for the claim.*" We also suggest that paragraph 46 of the Communication is amended accordingly.

3.6 **Confidential and non-confidential versions**: The Communication makes clear that redactions and confidentiality rings, in certain proceedings, often sit side by side. This may give the impression that documents are either wholly confidential or they are not confidential at all, whereas in practice it is often the case that documents contain a mixture of confidential and non-confidential material. Where the non-confidential material is relevant, and may be referred to in open court, parties are often still required to prepare both confidential and non-confidential versions of those documents for use in the proceedings. The preparation of confidential versions, where confidential material is highlighted, is often essential for advocates and the court during public hearings because they ensure that confidential information is not inadvertently disclosed in open court.

3.7 For these reasons, an additional sentence at paragraph 39 of the Communication could be considered as follows: "*Where documents placed in a confidentiality ring contain both confidential and non-confidential information, parties may still be required to prepare confidential and non-confidential versions of those documents. For example, a highlighted confidential version of a document may be used by advocates in court to ensure that they do not inadvertently refer to confidential material. Where there is non-confidential but relevant material in a document which also contains confidential information, there is no reason why those outside the confidentiality ring should not be able to access a non-confidential version of that document.*" In addition, the following additional sentence could be added at the end of paragraph 43: "*Although, this benefit only applies where documents are placed in their entirety within a confidentiality ring. In practice only certain parts of documents may be subject to confidentiality ring arrangements*".

Organising a confidentiality ring (paragraphs 43 to 72)

3.8 **Identification of the information**: Paragraph 44 of the Communication states that the "*national court will need to identify the specific items of evidence or categories of information (e.g. list of documents) that will be included in the confidentiality ring.*" In view of the comments above regarding the resourcing issues faced by many national courts, we suggest that the role of the parties in seeking to agree these arrangements in advance of the involvement of the court be emphasised. For example, in the UK, parties typically seek to agree any such arrangements in draft prior to requesting that the court make an order to give effect to the arrangement. In addition, confidentiality ring orders may not list the specific documents or categories of documents to be included in the ring, but rather they may specify the steps that parties should take to designate evidence as confidential. Therefore we suggest that the first sentence of paragraph 44 of the Communication is amended to include the underlined language as follows: "*Any confidentiality ring arrangement, endorsed by the court, ~~The national court~~ will need to identify the specific items of evidence or categories of information (e.g. list of documents) that will be included in the confidentiality ring and/or make clear how a party can designate particular information to be subject to the confidentiality ring*".

3.9 As set out at paragraph 3.6 above, documents may contain a mixture of confidential and non-confidential information. There may also be information which is confidential to different parties contained in the same document. The Communication might address these scenarios

by proposing that national courts could consider requiring parties to highlight confidential material in confidential versions and implement a system of colour-coding (or some other system) to indicate to which party the confidential information belongs, or whether it relates to third party information. Where disputes arise as to whether information is confidential it is important that parties and the court can quickly ascertain to whom the information is confidential.

3.10 For these reasons we suggest that paragraph 44 include the following additional guidance: "*Where documents contain both confidential and non-confidential information, there may be a benefit to requiring parties to prepare confidential versions of those documents with the confidential information highlighted and non-confidential versions. This will enable parties, advocates and the court to have a clear understanding of which information is confidential and should not be referred to in open court. Furthermore, where a document contains information which is confidential to multiple parties, national courts might suggest a system of colour-coding to indicate to which party the confidential information belongs. Where documents contain non-confidential information that is relevant, parties and national courts should consider how those outside the confidentiality ring will be able to access that material.*"

3.11 **Composition of the ring**: At paragraph 47, the Communication states that "*After hearing the parties*" the court may make orders about the members of the confidentiality ring and access levels. However, frequently these issues may be capable of resolution "on the papers", i.e. without a hearing. In view of the limited resources of national courts, we suggest that the following amendment to paragraph 47 be considered: "*After considering the submissions of ~~hearing~~ the parties (either in writing or at a hearing), the court may order…*".

3.12 In addition, we suggest that where confidentiality rings are used, national courts and the parties to the litigation should be mindful that individuals who are not in the confidentiality ring may have already had access to certain documents (e.g. because they were the author of the document, or because they received a copy of the document in another context). We suggest that arrangements for protecting confidentiality should not seek to exclude individuals who have already had access to such material from being provided with access to it. For this reason we suggest that the following sentence is included after paragraph 50: "*National courts and parties should consider protecting the position of individuals not within the confidentiality ring who have already had access to such information (e.g. where they authored the document or had already received the information over which confidentiality is claimed)*".

3.13 **In-house lawyers**: The Communication states that access to the ring may need to be limited to external advisers (see paragraphs 51 to 58). We are conscious of the concerns raised by the Communication that in-house counsel may serve their companies in a variety of other functions. However, where in-house lawyers are not included in a confidentiality ring, the ability of external advisers to properly take instructions from their clients is impeded. In addition, we note that in-house counsel will often be subject to legal professional conduct rules and therefore owe duties to the court over and above duties to their employer. We would therefore caution against any presumption that in-house lawyers should be excluded from confidentiality rings; this matter is more appropriately addressed on a case-by-case basis. We suggest that the following additional language be included after paragraph 55: "*National courts may also consider that concerns about sharing commercially sensitive information with in-house counsel may be assuaged by reference to the professional standards obligations those advisers owe as part of their right to practice law. They may, for example, have duties to the court which supersede certain duties to their employers. In addition, the court may consider that appropriate written undertakings given by in-house counsel may provide additional comfort such that commercially sensitive information can be shared with them.*"

3.14 **Company representatives/employees**: Likewise, it may be difficult for external or in-house lawyers properly to give instructions without being able to discuss matters fully with company representatives/employees. Again, this matter should be considered on a case-by-case basis. At paragraph 66 the Communication states that company representatives may be subject to rather onerous requirements, for example, a national court "*may deem it appropriate to prescribe that the employee in question no longer works in the line of business concerned by the claim*". We are not aware of examples of national courts requiring this in practice, and we note that a company representative/employee may be unlikely to be willing to submit to this

requirement. Furthermore, such a requirement may conflict with EU law by imposing an unfair restraint on an employee's right to work. We suggest that if national courts are to consider such an order it is of limited and specified duration.

4. **Redactions**

4.1 **Process**: Paragraph 73 of the Communication suggests that redaction requires an "*edit of documents removing the confidential information*". A possible – albeit we assume unintended – implication is that the parties to litigation may be allowed to edit or redact original documents. To avoid such misinterpretation, we suggest that the text should be clarified, for example by adding that "*edit of copies of documents removing the confidential information*".

4.2 **Excessive redactions**: We also suggest that paragraph 76 of the Communication should clarify what is considered an "excessive redaction". Absent examples, paragraph 76 may create confusion as to what is meant by the conclusion that redacting "*entire pages or sections of documents or entire annexes may also not be acceptable for the purpose of proceedings*". Without further clarification, it could be thought that courts should reject redactions that are voluminous. As volume is not a relevant consideration in determining confidentiality, we propose that paragraph 76 of the Communication be supplemented to the following effect: "*Excessive redactions applied to entire pages or sections of documents or entire annexes may also not be acceptable for the purpose of proceedings. If the volume of confidential information would require such excessive redactions, then the national court should consider whether redaction is an appropriate measure to protect confidential information, or whether any other measure(s) should be used.*"

4.3 **Relationship with confidentiality rings**: We support the notion that various measures to protect confidentiality may be applied simultaneously, depending on the circumstances of the procedure. For example, paragraph 32 of the Communication refers to "*one or more*" effective measures that can be applied in disclosure proceedings. National courts may benefit from further guidance as to how these measures can be combined to ensure effective yet efficient protection of confidentiality. To this end, the Communication could be supplemented with an explanation as to how redactions and confidentiality rings, in certain proceedings, can sit side by side. In practice this might be appropriate where certain confidential data is not relevant to the case at all and can be redacted, while a confidentiality ring is suitable to protect relevant confidential information. Such additional guidance may be appropriate in relation to paragraph 76 of the Communication.

5. ***In Camera* Hearings**

5.1 We note the Communication's references in paragraph 101 to the principle of open justice and the importance of hearings being held in public. There are a number of practical steps which can be taken to minimise the use of in camera hearings, which are often disruptive both to the parties, to advocates, to courts and to the public.

5.2 First, matters to be dealt with *in camera* are often reserved to the end of the cross-examination of a witness or expert. The aim is to minimise disruption both to the court and to the witness and to avoid the court being repeatedly cleared of members of the public and/or those outside the confidentiality ring. Second, advocates may consider orally directing a judge/witness to a relevant document/piece of information which is confidential, without "saying out loud" the confidential information. This may not be appropriate where there is a requirement to refer to extensive confidential information, but it may serve to reduce disruption to hearings.

5.3 In this regard, we suggest the following additional paragraph be included after paragraph 104: "*National courts should be mindful of the significant disruption which can be caused by holding parts of hearings in camera. It can be distracting for parties, advocates and witnesses to have to repeatedly clear the court room. Therefore, national courts may want to suggest that advocates leave matters which relate wholly to confidential information to the end of a hearing or cross-examination session. In addition, it may be possible for advocates to orally direct a judge to a particular confidential figure or passage in a document without reading that information in open court. Such steps may reduce disruption and allow for more open proceedings to take place.*"

The ALWG hopes that these comments are helpful to the Commission in finalising the Communication, and its members look forward to the issue of the Communication, and its future use.

18 October 2019