Freshfields Bruckhaus Deringer

RESPONSE BY FRESHFIELDS BRUCKHAUS DERINGER LLP TO THE EUROPEAN COMMISSION'S COMMUNICATION ON THE PROTECTION OF CONFIDENTIAL INFORMATION FOR THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW BY NATIONAL COURTS

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to respond to the European Commission's draft communication on the protection of confidential information for the private enforcement of EU competition law by national courts published on 29 July 2019 (the ***Communication***).

1.2 This response is based on our significant experience and expertise in advising clients on private enforcement actions in a number of EU jurisdictions, including England & Wales, Belgium, France, Germany, Italy, The Netherlands, and Spain.

1.3 This response is submitted on behalf of the firm and does not represent the views of any of the firm's clients, which comprise a wide range of companies that in this context may be claimants and/or defendants in all forms of private enforcement of EU competition law. Likewise, this response does not necessarily represent the personal views of any or every partner in the firm.

1.4 This response follows the structure of the Communication itself. We therefore first provide general comments on the scope and purpose of the Communication as described in Section I, followed by more specific comments on each of Sections II (disclosure of confidential information), III (specific measures for protection of confidential information), and IV (protection throughout and following the conclusion of proceedings).

2. General comments on scope and purpose of the Communication

2.1 We anticipate that the national courts of the Member States will welcome the guidance provided in the Communication for dealing with disclosure requests for confidential information in private enforcement proceedings.

2.2 As the Communication notes in Section I, it is not binding on national courts, and does not seek to provide for any measures that are not compatible with national procedural rules. Those national rules will govern the courts' approaches to disclosure of confidential information (together with the applicable EU law rules).

2.3 We are conscious that the national procedural rules and practices as to disclosure and the protection of confidential information have historically differed widely between Member States.[1] For example, in some Member

[1] See Recital 8 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 European Union Text with EEA relevance (***Damages Directive***).

States, disclosure (including of confidential information) has long been a feature of antitrust litigation and sophisticated measures have been developed by practitioners and the courts over time to protect confidential information. Conversely, other Member States have traditionally had much more limited disclosure regimes and restrictive approaches to the *inter partes* disclosure of any information in private damages actions.

2.4 It is important to ensure that the Communication expressly acknowledges these jurisdictional differences and recognises that any guidance provided must take account of these differences. It is therefore suggested that the measures put forward in the Communication should be practical and realistic in all jurisdictions, not just in those with sophisticated and established practices for dealing with confidential information.

2.5 Ensuring that the Communication acknowledges and takes into account these important differences is a thread running through this response, beginning with our comments on Section I. In particular, we consider that it may be helpful to provide more explicit guidance in Section I on two issues that are fundamental when giving guidance on disclosure of information: (i) the definition of "confidential information", and (ii) the need to balance the rights of parties who are seeking disclosure on one hand, and the parties who are subject to such requests, on the other.

Definition of confidential information

2.6 The definition of "confidential information" adopted by the Communication is fundamental to a proper understanding of the guidance in the Communication; it is the very subject matter of that guidance. However, the Communication does not define confidential information in Section I, and deliberately refrains from providing a definitive definition at all (paragraph 25).

2.7 We consider that Section I could provide some further assistance by indicating more comprehensively, even if only in general terms, what is meant by confidential information, whilst mentioning that it is in the end for the national court to determine, on a case-by-case basis, whether information can indeed be considered "confidential". For example, paragraph 7 notes that the Communication is without prejudice to the protections afforded by legal professional privilege, but ostensibly confines that to legal advice privilege (excluding litigation privilege) and does not expressly refer to leniency or settlement material in this respect (until paragraph 18). It would be of assistance for Section I to provide further guidance with regard to these protections and to note that the Communication is without prejudice to these protections.[2]

2.8 Further, the Communication does not, but we consider it should, state expressly whether its definition of confidential information is intended to include material that is protected by *Pergan*.[3] Indeed, the guidance in

[2] The Communication should also be without prejudice to Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[3] Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commission*, EU:T:2007:306.

paragraph 25 is ambiguous in this respect; *Pergan* is referred to obliquely in footnote 22 as one of the cases providing inspiration for the parameters of what constitutes confidential information, but then it is said in paragraph 25(iii) that "*the interest of a party to protect itself or its reputation against any order for damages made by a national court because of its participation in an infringement of competition law is not an interest worthy of protection*". However, *Pergan* itself notes that "*the confidentiality of [Pergan] information cannot depend on whether, and to what extent, it is of probative value for the purpose of proceedings at national level*".[4]

2.9 This ambiguity may lead to misconceptions about the protections that should properly be afforded to *Pergan* material. In short, the Communication should make clear that *Pergan* material is a kind of confidential information that should not be disclosed at all in the course of national damages actions,[5] and that it is not for national courts to determine the permissible bounds of *Pergan* redactions (cf. paragraph 84).

2.10 The Communication makes clear in paragraph 25(ii) that certain confidential information may lose its confidential nature over the passage of time. However, as noted in footnote 25, there are some instances where information will remain confidential regardless of its age, and the Communication should refer to this possibility more clearly.

2.11 Finally, it may be questioned whether it is necessary that for information to be confidential its disclosure would cause "*serious harm*" to the person who provided it or to third parties. This would appear to present too high a threshold to the protection of information than warranted.

Balancing the interests of disclosure applicants and respondents

2.12 It is important that the language in the Communication is balanced and does not overtly favour either claimants or defendants (recognising too that defendants will commonly require disclosure from claimants). Thus while the Communication rightly recognises that disclosure of evidence can "*play an essential role in remedying information asymmetries*" between claimants and defendants (paragraph 1), subject to considerations of "*necessity and proportionality*" (paragraph 4), it is equally important to emphasise that information asymmetries may be experienced by both claimants and defendants (e.g., where a defendant would need effective disclosure to present a passing on defence or in other situations where claimants have relevant information that other parties do not have).

---

[4] *Pergan*, paragraph 78. See also *Emerald Supplies* [2015] EWCA Civ 1024, paragraph 82: "*as the decision in Pergan itself makes clear, one mischief which the right of the presumption of innocence, as defined in Pergan, is designed to avoid is precisely the risk of a party referred to in such statements being subjected to private damages claims at the suit of third parties in national courts on the basis of adverse statements made by the Commission, which can never be tested or challenged and which 'cannot be regarded as established in law'. Thus the rationale underlying the presumption of innocence is that the party, who is the object of such statements by the Commission, never has to raise a defence to claims made by third parties on the basis of such unchallenged statements*".

[5] See *Emerald Supplies*, paragraph 65.

2.13 There is a risk that parties seeking disclosure of confidential information may try to rely on the Communication to impress upon national court judges how necessary or essential the information requested is to protect their rights to full compensation and access to justice, given the emphasis on these justifications in Section I as presently drafted. There is in our view insufficient emphasis on the important limiting principles of necessity and proportionality (as well as any additional requirements provided for in the relevant national law). The Communication does present this balance effectively in the later Sections, but it is not currently as clear in Section I (we also recommend that paragraph 19 refers to substantiating defences, not just claims).

2.14 To ensure that Section I reflects the balanced tone of the following Sections, we would therefore suggest that greater emphasis is given to the rights and interests of the target of a disclosure request in Section I, including emphasis on the need to ensure that any disclosure request should meet the requirement of being properly targeted, necessary, and proportionate.[6]

3. Specific comments on Section II – disclosure of evidence containing confidential information before national courts

Guidance on the disclosure process across Member States

3.1 As noted above, the courts of the Member States have differing degrees of experience in applying rules of disclosure (particularly to the extent that such rules could justifiably lead to extensive disclosure). It might, therefore, be helpful to include some guidance on the disclosure process at the start of Section II.

3.2 In particular, the Communication could note that courts can and should coordinate with the parties and give instructions for the disclosure process. As part of this process, the courts should make provisions for the disclosure of confidential information and make clear how disclosure is organised, and the courts should be available to resolve disputes between the parties about the way documents are being disclosed.

3.3 In terms of the practicalities of disclosure, the Communication could also explain that courts can order parties to make documents available in a structured way (e.g. folder structure, with an index, manual or some form of clarification) and that large and unstructured "dumps" of documents are unacceptable. This is to improve the quality and efficiency of the disclosure process, and to avoid wasted time and costs for the parties.

3.4 We also consider that the description of the "considerations for disclosure of evidence" should be softened so as not to give a misleading impression that claimants will always be entitled to disclosure from the defendants. For example, it is not clear that "access to evidence will be necessary, among others, to prove an infringement in a stand-alone action" (paragraph 10); there may be circumstances in which the claimant already has the necessary information (e.g., in cases of a statutory monopoly if dominance is clear). Moreover, given the range of different kinds of private actions that can be

[6] See recital 23 of the Damages Directive.

brought in the different Member States, it is not necessarily the case that disclosure is required at all stages of the proceedings (e.g., in a "fast track" action under English procedural rules). We therefore recommend that the language be softened and nuanced in paragraphs 9-11 (i.e. "can be" or "may be" rather than "often" or "will be").

3.5 Similarly, paragraph 13 contains broad comments about the concept of "control" over documents. We recommend that the wording in paragraph 13 is amended to take account of the fact that the civil procedural laws of Member States may differ as to "from whom" and "how" documents can be requested in proceedings and, in particular, what constitutes control over a document.

3.6 We also note, by reference to footnote 10, that it is not evident (and also not likely) that the *Skanska* case[7] implies that a broad notion of undertaking is to be applied in any and every context in "private enforcement" proceedings. The *Skanska* decision cannot mean that any entity in a group should be obliged to disclose documents regardless of (for example) the terms on which those documents are held by that entity. There is, moreover, a wide range of situations where a party may have copies of documents within its physical control that are nevertheless subject to strict conditions on use. This is very common. We therefore suggest that this reference is deleted.

Timing of the court's involvement

3.7 As a general rule, there may be efficiencies if the parties are encouraged to agree (or at least seek to narrow) issues of disclosure before recourse to the courts.

3.8 Should the court need to be involved, decisions regarding disclosure and how to protect confidential information (when it is disclosed) should ideally be taken at the start of the disclosure process, i.e. at the first relevant hearing, and in any event before the deadline for disclosure.

Breadth of requests for confidential information

3.9 As explained in Article 5 of the Damages Directive, Member State courts should require parties to substantiate why they need the requested information, in order to limit the risk of over-broad requests being made and to ensure that requests for information, that are unlikely to be of relevance to the claim, are dismissed.

3.10 The Communication should, in our view, therefore avoid suggesting that certain categories of documents are always or usually necessary to be disclosed. As currently drafted the specific mention, in paragraph 12, of "profit margins" seems to encourage claimants to request such data and, since claimants in this context are very commonly direct clients or competitors of the defendant(s), the production of such data is likely to be confidential and would directly and concretely harm the commercial interests of the party concerned. We suggest either deleting the reference to profit margins or to

[7] Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy, and Others.*

note that these may be business secrets and highly sensitive information. Disclosing this information may, in itself, generate competition concerns.

3.11 Similarly, in paragraph 17, the example of "sales data" of a product is potentially very broad and would benefit from further specification; there may be many different kinds of sales data, at different levels of granularity. It would also be helpful to include an example of a request that is too broad in that it fails to identify precisely what information is requested.

3.12 Paragraph 18 relates to the disclosure of information included in the Commission or National Competition Authority's file, including leniency information. We recommend adding a sentence to this paragraph to note that, pursuant to the Damages Directive, even pre-existing documents produced for a leniency application should only be disclosed after a proportionality test has been applied.

3.13 Finally, we note that it may be helpful for the Communication to note more expressly that there is a difference between disclosing evidence that already exists and is within a party's possession, and producing evidence, where the party has to collate information and provide it in a new form (which exceeds the scope of disclosure).

4. Specific comments on Section III – measures for protection of confidential information

Balancing confidentiality with other rights of the parties

4.1 There is a tension between some of the remarks in the Communication (e.g., that certain information cannot be disclosed to any staff of the client) and the procedural right of parties to have knowledge of and be able to comment on any evidence that is used with a view to influence a court's decision. While we appreciate that specific information should be protected from being misused, in our view, the Communication should be more explicit that this is a balancing exercise and that courts should make sure that the confidentiality of clearly relevant information does not adversely affect a party's possibilities of defence. External counsel and experts will sometimes need input from company representatives to be able to confirm or refute certain statements made by the other party and this may require the disclosure (on some level) of confidential information. Although the Communication does explain that in some cases a high-level summary could be used to substitute the disclosure of the underlying information, this could be clarified in the paragraphs which suggest that certain documents cannot be disclosed to any staff of the client. It may also be emphasised that providing non-confidential (or less confidential) summaries may be an adequate solution to bridge the tension between confidentiality and the exercise of rights of defence. In addition, the required level of detail of such non-confidential summaries can be discussed under the control of the national court, where appropriate in an *in camera* case management hearing, with external counsel only in attendance.

4.2 When considering the case-by-case assessment of what measures will be effective to protect confidentiality, reasonableness, proportionality and rights of defence are the key factors that underpin the list of considerations in

paragraph 32. The focus on reasonableness and proportionality could be made clearer, as well as a reference to the rights of defence.

4.3 It would also be helpful to clarify in paragraph 32(vi) that other expert external advisers (e.g., economists) may be a permissible class of individuals to access the confidential information (as noted later in the Communication).

Confidentiality rings

4.4 Confidentiality rings can be effective measures to protect confidential information. However, they also have the potential to add burden and cost to the conduct of proceedings, and to affect the rights of defence in so far as it becomes more difficult to verify factual information with the party one represents. The guidance given in the Communication should be careful to balance these advantages and disadvantages. In particular:

(a) In paragraph 39, the Communication implies that, where the confidentiality ring is used as a filtering mechanism, non-confidential versions of documents will have to be prepared. This could be a significant burden on the disclosing party, and we are concerned that national courts may consider it to be a rule to be followed unless the language is softened.

(b) Paragraph 44, as currently drafted, could be taken to imply that it is the role of the court to make decisions on whether each and every document disclosed should be included within the confidentiality ring. In our experience, parties generally should be able to agree or can be invited by the court to make suggestions as to what information should go into the confidentiality ring, such that courts may have to decide on disagreements only. Parties may also agree or formulate proposals as to who should be included in the confidentiality ring, who can see what information and on the logistical and practical measures to implement the confidentiality ring. We would therefore recommend clarifying that, while any order establishing a confidentiality ring will need to identify clearly the documents that fall within it, the task of identifying those documents should, in the first instance, be for the parties.

(c) In paragraphs 63-66, the Communication notes that members of a confidentially ring may be asked to submit written undertakings to the court regarding the confidential treatment of information. In our view, the Communication should also note that, where appropriate in light of national procedural law, the parties (and their external advisers) could be obliged (by the court) to make commitments of non-disclosure to each other (e.g. by means of entering into a non-disclosure agreement). Having this formalised commitment, under the control of the court who can suggest the need for a non-disclosure agreement to be signed between the parties, may be more effective in Member States where non-fulfilment of an obligation to the court of this nature may have little or no consequence.

Redactions

4.5 Redaction can be inefficient or disproportionate as a method for protecting confidential information because determining what information should be redacted and applying the redactions requires a significant effort by the parties. The extent of redactions can also be a contentious issue, which is time-consuming for the courts to consider. We therefore recommend that the Communication makes it clear that the utility of redaction as a method for protecting confidential information should be balanced against the volume of confidential documents that fall to be disclosed, and that Member State courts should consider the proportionality of conducting the redaction process against other methods of protecting the confidential information.

Experts

4.6 In our view, it could be clarified (e.g. in paragraph 96) that, where a court expert is appointed, the external advisers of the parties should always be allowed to access the confidential version of the court expert's report and all the underlying data and documents used by the court expert, provided that they are bound to keep that information confidential. This is to allow parties to comment in a meaningful way on the evidence that the court will use to make its decision.

4.7 We further note that an expert who simply summarises confidential information would be highly unusual in some Member States, and therefore unlikely to be used in practice.

5. Specific comments on Section IV – protection of the confidential information throughout and following the proceedings

In camera hearings

5.1 Courts may find it difficult to allow *in camera* hearings in view of the constitutional and democratic requirement that court proceedings must be conducted in public (i.e. be publicly accessible). Despite this possible constitutional challenge, it should in our view be made clear in the Communication that information contained in confidentially rings can only be discussed in *in camera* hearings. If that were not the case, the effect of the confidentiality ring would be lost.

Publication

5.2 Publications of decisions and rulings are often (notably in Germany) anonymised and confidential information should clearly not be mentioned therein. In the UK, the parties typically are given an embargoed version of the judgment and can mark-up any confidential information that needs to be redacted in the public version. The Communication could refer to the procedures adopted in these jurisdictions by way of examples, since Member State courts may consider the process of anonymising parts of their judgments to be burdensome, when actually the parties can assist.

Access to the court's records

5.3 In England, the parties can also make requests to the court that certain documents be marked as confidential so that non-parties cannot access them from the court file or request access to such documents. The Communication could set this out as another means of protecting the disclosure of confidential information from court records.

Freshfields Bruckhaus Deringer LLP
17 October 2019