COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON EUROPEAN COMMISSION'S DRAFT COMMUNICATION ON THE PROTECTION OF CONFIDENTIAL INFORMATION FOR THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW BY NATIONAL COURTS

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The views stated in this submission are presented on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association

The Antitrust Law Section ("Section") of the American Bar Association ("ABA") respectfully submits these comments on the draft Communication of the European Commission ("Commission") on the protection of confidential information for the private enforcement of EU competition law by national courts ("Communication").

The Section welcomes the Commission's publication of the Communication and appreciates the opportunity to comment. Private enforcement of EU competition law in national courts is steadily growing in importance. While acknowledging the principle of national procedural autonomy recognized by the European Court of Justice in its 1976 *Rewe* judgment,[1] the Communication will help ensure the uniform application of EU law by encouraging national courts to apply equivalent standards when dealing with damages claims arising from breaches of EU competition law, and in particular with the treatment of confidential information in the context of such claims. The Section offers the following recommendations on the Communication to further clarify and expand certain aspects of the Communication in support of this important goal.

The Section notes that clear guidance is particularly important in this area because the U.S.'s long experience with litigated antitrust claims has shown the key role courts can play in balancing the need for discovery with a business' legitimate concerns with protecting confidential information. Protective orders, often negotiated initially among the parties and reviewed by the court, are common in U.S. antitrust actions, and U.S. courts have over time developed a variety of tools to craft protections appropriate for the circumstances of the particular case.[2] For example, some protective orders designate multiple levels of confidentiality,[3] and others provide for fines or specific sanctions if the protective order is violated.[4] Courts will sometimes require an attestation that the individual with access to

[1] C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188.

[2] *See, e.g.*, Reagan, Robert Thomas, Confidential Discovery: A Pocket Guide on Protective Orders, Federal Judicial Center 2012, available at fjc.gov/sites/default/files/2012/ConfidentialDisc.pdf; Federal Judicial Center Committee on Rules of Practice and Procedure, Caselaw Study of Discovery Protective Orders, July 2010, available at uscourts.gov/sites/default/files/caselaw_study_of_discovery_protective_orders_1.pdf.

[3] *See, e.g.*, Protective Order, *United States v. Microsoft Corp*., 87 F. Supp. 2d 30 (D.D.C. 2000)(Nos. 98-1232, 98-1233).

[4] *See, e.g., United States v. AB Electrolux,* 139 F. Supp. 3d 390, 393 (D.D..C. 2015).

confidential information is not involved in "competitive decision-making"[5] and assess whether a specific individual, such as an employee with particular expertise, has a need to see confidential evidence that outweighs the risk of inappropriate disclosure.[6] Regardless of specifics, U.S. courts have routinely emphasized the need for a flexible approach to protecting confidentiality.[7]

The following comments reflect the experience with and expertise in competition law in the United States and other jurisdictions, including the EU and its Member States of the members of the Section. The Section is available to provide additional comments or to engage in any further consultation with the Commission as appropriate.

RECOMMENDATIONS

I. Scope and purpose of the Communication (Section I of the Communication)

National courts are bound by national procedural rules as well as precedents in their Member State. National judges may therefore have a margin of discretion regarding the weight they give to guidance from the Commission outlining the approach that a national court should take. Therefore, a general comment on Section I of the Communication (which also affects the Communication as a whole) is that the Communication might be more influential if the Commission were to group the national rules of Member States, identify issues that national courts typically confront, and explain possible ways to deal with these issues. In doing so, it could focus more particularly on controversial topics and items and thereby improve the usefulness of the Communication for national courts. To the extent that this is not possible in the current Communication, such an exercise may be a potential follow-on project for the Commission.

II. Disclosure of evidence containing confidential information before national courts (Section II of the Communication)

Relevant considerations for disclosure of evidence (Section II.A of the Communication)

Section II of the Communication sets out some considerations relevant to the disclosure of evidence containing confidential information in private competition actions before national courts. Paras. 10-11 of the Communication mention both stand-alone and follow-on actions. The Section suggests expanding upon paras. 10-11 of the Communication to further explain the differences between stand-alone and follow-on actions, and to clarify why the two may warrant different treatment in regard to disclosure of evidence including confidential information.

[5] *F.T.C. v. Whole Foods Market, Inc.*, No. 07–1021, 2007 WL 2059741 (D.D.C. July 6, 2007).

[6] *F.T.C. v. Sysco, Inc.*, 83 F.Supp.3d 1 (D.D.C. 2015) (applying Whole Foods standard to find access to confidential information appropriate for three in-house counsel, but not for a fourth in-house counsel determined to be too closely involved in the business' decision-making).

[7] *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994); *United States v. Microsoft Corp*., 165 F.3d 952, 959 (D.C. Cir. 1999).

Similarly, the Section suggests that it may improve clarity to expand paras. 12 et seq. to provide distinct suggestions as to how to treat evidence that is held by (i) the Parties to the proceedings, (ii) third parties, and (iii) competition authorities. As now worded, the Communication sometimes contains specific guidance for certain types of parties (see, for example, paras. 16 or 18), and sometimes contains general guidance applicable to all types of parties (see, for example, paras. 12-14 or 17). The Section suggests including a distinct discussion for (i) each type of action and (ii) each type of party. This approach would clarify the guidance and make it easier to apply.

Disclosure of confidential information (Section II. B of the Communication)

Section II.B. starts with an explanation of the definition of confidential information under the Trade Secrets Directive, before explaining the concept through references to EU precedents. The Section suggests starting this section with the EU precedents mentioned in para. 25. In a second step, the Trade Secrets Directive could be mentioned along with an explanation of why the definition of confidential information in the Trade Secrets Directive might also apply to damages actions, provided that this would not render Damages Actions excessively difficult.

III. Measures for protection of confidential information (Section III of the Communication)

Confidentiality rings (Section III.B of the Communication)

Section III.B of the Communication, which provides guidance on confidentiality rings, is overall a welcome discussion. While some national courts with experience in sophisticated competition actions may already be familiar with the concepts explained in this section, those that are relatively unfamiliar with the use of confidentiality rings may appreciate the guidance.

In terms of structure, Section III.B.1 provides an introduction to confidentiality rings and how they can serve as an effective means to protect confidentiality.[8] Section III.B.2 then provides guidance on the organization of confidentiality rings, including with respect to (a) the identification of which items of evidence should be accessible to the ring; (b) the composition of the ring; (c) how differing levels of access can be established for ring members; (d) how the integrity of the ring may be protected by undertakings to the court; and (e) the logistics of setting up a ring.[9]

It is likely to be particularly helpful for national courts that are unfamiliar with confidentiality rings that the Commission has included guidance on the logistics of setting up a ring, including, for instance, explaining that data rooms may be electronic or held in a physical location (which the court may wish to ensure has adequate facilities, appropriate access hours, etc.).

While the guidance in Section III.B. is helpful overall, it could benefit from further detail regarding how the rights of the holder of confidential information can be balanced with the legitimate interests of other parties. This is explained in further detail below.

[8] EUR. COMM'N, COMMUNICATION ON THE PROTECTION OF CONFIDENTIAL INFORMATION FOR THE PRIVATE ENFORCEMENT OF EU COMPETITION LAW BY NATIONAL COURTS ¶¶ 37–42 (2019), *available at* https://ec.europa.eu/competition/consultations/2019_private_enforcement/en.pdf [hereinafter COMMUNICATION].
[9] *Id.* at ¶¶ 43–72.

Bolstering the protection for the holders of confidential information

Section III.B of the Communication predominantly seeks to protect the holder of confidential information (from members of the ring breaching confidentiality) by suggesting that such members enter into undertakings with the court in which they commit to maintain confidentiality. These undertakings would, for instance, cover such obligations as commitments not to disclose confidential information outside of the ring or use it for any purposes beyond those of the relevant proceedings.

An undertaking to the court is likely to exert a disciplining effect on ring members, as they would likely face significant consequences for any breach of confidentiality (e.g., being found to be in contempt of court). However, such an undertaking may not actually protect the holder of confidential information in the event that confidentiality is in fact breached. This is because, in the event of a breach, whether the owner of the confidential information can recover its loss would likely depend on the particularities of the relevant member state's rules. In particular, it would depend on whether a party that is harmed by the breach of such an undertaking would have a cause of action in damages (under the local regime) against the giver of the undertaking, even though the harmed party is not itself a party to the undertaking (i.e., where the undertaking is between the giver and the court).

As such, the Commission may wish to consider expanding the Communication to give guidance that, whatever confidential arrangements are put in place, the court should ensure that they enable a party that is harmed by their breach to ultimately have a cause of action to recover its loss. This might be ensured, for instance, by making the holder of the confidential information a party to the undertaking given to the court, or alternatively by requiring the relevant parties to enter into non-disclosure agreements ("**NDAs**"). As parties to private litigation sometimes lose time over negotiating confidentiality agreements, model clauses or examples might be of particular practical value.

Another way in which the Communication could be bolstered to offer further protection in the event of an actual breach is by encouraging national courts to assist with the swift recovery of any compromised documents. This might involve, for instance, the court ordering the destruction of inadvertently leaked confidential information. An example of this sort of support occurred in the context of the Commission's credit default swap cartel investigation in 2013. Specifically, after the Commission found that inadequate IT software had been used to redact confidential information, with the effect that a number of digital disclosures were compromised, the Commission immediately halted access to the file and required the parties' law firms to destroy all the DVD's that contained copies of the compromised documents.[10]

The Communication might also be expanded to encourage the courts, in the event that those who have breached confidentiality are lawyers or members of a regulated industry, to report them to their relevant bar association or regulatory oversight body.

Redactions (Section III.C of the Communication)

[10] *See* Matthew Newman & Duncan Lumsden, *EU Commission halts document access in CDS probe after 'inadvertent' data disclosure*, MLEX, Oct. 1, 2013, *available at* https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=451806&siteid=190&rdir=1.

The Commission has a stated preference for conducting its work as openly as possible, and therefore redactions should be limited to information that is covered by a duty of professional secrecy or other public policy exceptions:

(i) that it is known only to a limited number of persons;

(ii) that its disclosure is liable to cause serious harm to the person who has provided it or to third parties; and

(iii) that the interests liable to be harmed by disclosure are, objectively, worthy of protection.

These same principles were reiterated in "Guidance on the preparation of public versions of Commission Decisions adopted under Articles 7 to 10, 23 and 24 of Regulation 1/2003."[11]

Section III.C of the Communication provides that national courts "may be required" to limit redactions to "what is strictly necessary to protect the interests of the information owners."[12] While this guidance is helpful, the Commission may wish to consider changing the permissive "may be required" (which would permit confidentiality standards to vary) to the mandatory "shall be required" (which would establish that when redactions are used, they are deployed uniformly only to that information "strictly necessary to protect the interests of the information owners"). This change does not remove all discretion from national courts, which is explicitly preserved in Paragraph 73 of the Communication ("national courts may also consider ordering the disclosing party to edit the documents…").[13] Rather, the suggested change would reaffirm the Commission's previously stated preference for open and public proceedings if and when redactions are utilized.

Lastly, in order to aid the national courts, the Commission may wish to give more prominence to Paragraph 83(iii), which requires the disclosing party to "submit the reasons why the information should be treated confidentially."[14] These reasons are essential for the redaction process to work, and would enable the Commission to increase the efficiency of the process by requiring that the reasons for the redactions be submitted simultaneously with the request for redactions. Moreover, the Commission may wish to insert the word "specific" before "reasons" in Paragraph 83(iii) in order to discourage the use of boilerplate or generic reasons that may not aid the national courts in determining appropriate redactions.

Appointment of Experts (Section III.D of the Communication)

Section III.D of the Communication provides national courts with guidance with respect to how experts might be appointed to assist with the protection of confidential information, which will likely be helpful for any member state courts that may be less familiar with the use of external experts in the context of the protection of confidential information.

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[11] EUR. COMM'N, GUIDANCE ON THE PREPARATION OF PUBLIC VERSIONS OF COMMISSION DECISIONS ADOPTED UNDER ARTICLES 7 TO 10, 23 AND 24 OF REGULATION 1/2003 (2005), *available at* https://ec.europa.eu/competition/antitrust/guidance_on_preparation_of_public_versions_antitrust_04062015.pdf

[12] COMMUNICATION ¶ 75.

[13] *Id.* at ¶ 73.

[14] *Id.* at ¶ 83(iii).

In terms of structure, the section begins with an explanation of the types of reports that an expert independent of the parties may produce in order to protect confidentiality (i.e., a non-confidential report for the parties, or alternatively, a confidential report for external counsel with a non-confidential equivalent for the parties), as well as explaining when the use of experts will be most effective (e.g., where the information is very commercially sensitive, particularly quantitative, highly technical, etc.). Section D.2 then provides national courts with some practical guidance on actually instructing such experts (for instance, it explains that it would be for the court to appoint such experts and decide who will bear the costs of such appointments).[15]

Once again, it is particularly helpful that the Commission has provided some clarification of the actual process of instructing experts, including, for instance, that experts should be required to declare any conflicts and that their appropriate treatment of any confidential information may be ensured through requiring them to provide undertakings to the court to this effect.

While Section III.D of the Communication is helpful overall, it is relatively more brief than some of the other sections of the Communication and may potentially benefit from elaboration in some respects. For instance, as outlined below, it may be helpful for the Commission to expand upon how the rights of the holder of confidential information may protected and who may ultimately access the report. The Communication could also elaborate in more detail how appointed experts could use the redaction suggestions made by the parties to inform the opinion. While the final determination regarding redactions would have to be made by the court, such an opinion would save the courts from reviewing large sets of documents, reducing costly delays and allowing the court to focus on more relevant aspects of the litigation.

Lastly, while the Communication is helpful with respect to the use of independent experts to produce confidential and non-confidential summaries of confidential information, it provides only limited insight on how the parties' own experts might exchange information while limiting confidentiality risks, which is discussed below.

Bolstering the protection afforded by the expert guidance and potentially expanding the access levels it recommends

Section III.D currently seeks to discipline experts against breaching confidentiality by requiring them to enter into written undertakings with the court.[16] It also suggests that experts could agree (presumably with the court) to various obligations, such as commitments not to disclose the confidential information to anyone other than those listed by the court or not to use the confidential information for any purposes outside of those for which they have been instructed.[17]

As explained above in the section on confidentiality rings, such commitments to the court would have a disciplining effect on the expert by exposing them to the prospect of serious consequences in the event of a breach. However, the objective of the guidance is effectively to strike a balance between: (1) the parties' effective access to justice and to the evidence

[15] *Id.* at ¶¶ 91–97.
[16] *Id.* at ¶ 92.
[17] *Id.* at ¶ 93.

necessary to substantiate their cases;[18] and (2) the need to safeguard confidential information[19] and "*protect[] the interests of the party or third party whose confidential information is subject to disclosure.*"[20]

While consequences for the expert may go some way towards reducing the likelihood of a breach, it may not sufficiently protect the holder of confidential information insofar as it will have potentially suffered significant harm but have no available recompense for that loss in the event of a breach (for the reasons explained above in the confidentiality ring section). As such, it may again be beneficial for the Communication to include guidance that the holder of the confidential information should be made a party to the expert's undertaking with the court or that the expert should potentially be required to enter into NDAs with any relevant parties.

In addition, the guidance currently suggests that the expert's confidential report should only be shared with counsel, and that any non-confidential reports should be limited to counsel and the requesting party.[21] In most cases, such a limitation will be appropriate. However, the Commission might consider expanding the guidance to indicate that, in appropriate cases, the reports should also be made available to other external advisers. This is particularly important in a competition litigation context, as the complex economic models and data involved (for instance, in a pass-on analysis) will mean that the parties' economists will sometimes need to see the data/models themselves to be able to properly interpret and interrogate it.

It may also be appropriate, where a confidentiality ring is already in place for the purposes of protecting confidentiality, to allow the report to be shared with certain members of the ring. However, in considering such guidance, the Commission should consider that such an expansion should occur only in cases where there are compelling reasons for doing so. This limitation would minimize the risk that including additional recipients might dis-incentivize full and adequate disclosure in the context of the particular case.

Confidential information exchanges between experts

One important aspect of private enforcement that is not covered by the Communication is how the parties' experts may, when necessary, exchange data while limiting confidentiality risks (for instance, where the court asks the parties' experts to produce a joint report on the issues agreed between them). It might be beneficial for the Commission to expand its guidance to include this scenario. Such guidance might, for instance, suggest the use of secure electronic data rooms to prevent the unnecessary replication of excessive pages of confidential material and thereby increase the risk of inadvertent disclosure.

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The Section appreciates the Commission's consideration of these comments on the Communication, and hopes the comments are helpful.

[18] *Id.* at ¶¶ 4, 9–15.
[19] *Id.* at ¶ 4.
[20] *Id.* at ¶ 19 (emphasis added).
[21] *Id.* at ¶ 96.