Reply to European Commission Targeted Consultation on a draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

1. Introduction

The Commission intends to adopt a "Communication on the protection of confidential information for the private enforcement of EU competition law by national courts".

Access to documents and information is a crucial component for the effectiveness of the right to damages deriving directly from Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Such a Communication would be a welcomed contribution to the assessment by national courts of the best way to ensure that effectiveness. While non-binding, it could prove a source of inspiration for national courts seeking to ensure compliance with their obligations under EU Law, and to arrive at a proportional and optimized solution within the framework of applicable EU and national rules.

This reply to the Commission's Consultation is submitted by Miguel Sousa Ferro, Professor at the University of Lisbon Law School, and José Sá Reis, Professor at the University of Porto Law School. Both are partners at Sousa Ferro & Associados, a Lisbon-based boutique law-firm specialized in competition law and EU law.

2. Scope and purpose of the Communication

2.1. Access to non-confidential documents and information

The draft Communication, starting with its title, reveals a central focus which unnecessarily restricts the usefulness of the Communication for national courts and its impact on the promotion of private enforcement in the European Union.

Much like the Damages Directive itself, this draft Communication focuses excessively on issues which are of particular concern to the European Commission, in its role as public enforcer. At the same time, it sidesteps issues which are just as, or even more, important to ensure the effectiveness of the rights deriving from Articles 101 and 102 TFEU, and which the Commission, as guardian of the Treaties, is also required to ensure and promote.

Persons who were injured (or were potentially injured) by an infringement of Competition Law will often need to have access to documents and information which are not confidential, but are not publicly available and are not available to it. Non-confidential is not the same as public. And it will often be the case that the third party holding non-confidential documents will be unwilling to cooperate in providing access to such documents and information, as to do so would run counter to its own interests. This is obviously the case when an injured person asks an infringing undertaking for access to non-confidential documents in its possession. After the Damages Directive and its transpositions, some competition authorities may also argue that

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

they needn't provide access to these documents, because other persons are reasonably capable of providing them (and it may be up to the courts to decide on such access requests).

This problem is prevalent in the case of stand-alone claims. But it is also frequent in the case of follow-on claims, where injured parties may seek to have access, e.g. to non-confidential:

a) public enforcement decisions (non-confidential versions often take a long time to be published; some NCAs do not publish all decisions, or do not publish decisions which are still being appealed);
b) documents in the public enforcement file needed to understand the scope or other characteristics of the identified infringement and/or the products/services and persons affected by it (some decisions are drafted in such a way that it is impossible, without the analysis of supporting documentation, to fully grasp the infringement in question); and
c) documents/information in possession of authorities, infringers or third parties, required to adequately prove damages and to quantify them.

The Commission would be wrong to assume – as it seems to do in this draft Communication – that, because they are non-confidential, access to such documents and information is straightforward.

Reality is likely to be quite different. When disclosure is sought from infringers, it is expectable that the qualification of documents or information as confidential will, as a rule, be disputed. The draft Communication does address this issue of qualification. This is not, *stricto sensu*, an issue of knowing how national courts should protect confidential information, but of how to determine which information is confidential and merits protection, and which is not and does not.

Infringers who are asked to provide access to documents may fail to respond altogether. Third parties may also be unwilling to cooperate, just because they prefer not to get involved. They may also wish to avoid being perceived as assisting a claim against one of its clients or customers.

In a myriad of scenarios, it is likely that a person seeking access to non-confidential documents or information will need to resort to the courts to obtain an order for disclosure. Very often, such access will be indispensable even to determine the existence of the right to damages. This problem is made more significant due to the legal uncertainty still prevailing about the moment from which the limitation period begins to run. Some national courts may not instinctively be sensitive to the issue that the publication of a decision affirming the existence of an infringement may not, by itself, allow an injured person to understand what the infringement was, exactly, and whether or not it was affected by that infringement.

The Communication could play a decisive role in the promotion of antitrust private enforcement by framing access to evidence in this broader context, and raising awareness about the issues which may arise in the context of requests for access to non-confidential documents and information.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Furthermore, national courts could also benefit from suggestions of best practices about how to handle the fact that requests for information may have to be carried out in two phases, within the same proceedings. It is expectable that, initially, the plaintiff will seek access to non-confidential information (even though this, in itself, may sometimes raise disputes about the confidential nature of the information in question). As a rule, only once such information is obtained will the plaintiff be in a position to identify some or all of the confidential information which it needs to have access to in order to assess or prove the existence of a right to damages.

Recommendation #1: change Communication title to "Communication on access to information for the private enforcement of EU competition law by national courts"

Recommendation #2: broaden the scope of Communication to include access to non-confidential documents and information, which is often decisive for the success and effectiveness of private enforcement actions

Recommendation #3: point out to national courts that access requests may often have to be managed in two consecutive phases: a 1st phase where access is provided to non-confidential information, and a 2nd phase where access is provided to confidential information (identified following analysis of the documents obtained in the 1st phase)

2.2. Competition Law

The draft Communication purports to relate to access to information for the "private enforcement of EU competition law by national courts". In reality, its scope is narrower than that. The draft only tackles the private enforcement of Articles 101 and 102 TFEU.

This is overly restrictive and unnecessarily ignores the possibility of private enforcement of EU State aid law (already a reality with a significant number of precedents) and of EU merger control law before the courts of the Member States.

While some issues are specific to antitrust (especially those relating to the protection of the leniency policy), most problems associated to access to evidence, and to the protection of confidential information in particular, arise, just the same, in the other two branches of competition law.

It is true that the Damages Directive only refers to Articles 101 and 102 TFEU. But there is no reason why this Communication should limit itself to the scope of the practices encompassed by the Damages Directive. Indeed, it already clearly sets out its ambition to have a broader scope and usefulness for national courts, when it stresses (in para 2) that private enforcement actions are not limited to actions for damages.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

If the purpose of the Communication is to assist national courts when tackling private enforcement of EU competition law, and to promote this private contribution to the protection of competition policy in the EU, it is a simple matter to add a reference to the fact that this Communication also applies, *mutatis mutandis*, to private enforcement cases based on infringements of EU State aid and merger control rules.

Recommendation #4: clarify that the Communication also applies,* mutatis mutandis*, to private enforcement actions relating to infringements of EU State aid and merger control rules

2.3. Range of private enforcement actions

The draft Communication helpfully describes, in para 2, the main forms which the private enforcement of Competition Law can take. In this sense, it steps away from the narrow scope of the Damages Directive (see also para 9).

However, the following paragraphs immediately – and unjustifiably – restrict the scope of the Communication to damages actions.

The final sentence of para 3 is superfluous and misleading. There is nothing specific to damages actions which renders the disclosure of confidential information more necessary in these than in other types of private enforcement actions.

Para 4 shouldn't start with the words "In damages actions…". Even if much of this paragraph is inspired in, or even taken from, the Damages Directive, its content applies equally to all types of private enforcement actions. It should instead read "In private enforcement actions…". Or, at least, adopt a phrasing such as the one used in para 5 ("in proceedings for the private enforcement of EU competition law, and in particular when dealing with damages actions").

This Communication is an important opportunity for the Commission to stress that the same difficulties which arise in access to documents and information in damages actions also arise in other types of private enforcement actions. The Damages Directive only created obligations for the Member State to create a special access regime for damages actions. With few exceptions (see, e.g., the Portuguese transposition), most Member States limited the new regime to these actions. Accordingly, in the majority of MS, declaratory and injunctive private enforcement actions may continue to face the same obstacles in having access to evidence as before the Damages Directive, as they do not benefit from the new special rules which were deemed fundamental to protect the effectiveness of the right to damages deriving from Articles 101 and 102 TFEU. Logic dictates that adaptations to existing national rules on access and disclosure may also be necessary to ensure the effectiveness of Articles 101 and 102 TFEU, and of rights deriving from them, when parties seek declaratory or injunctive relief. In this sense, the fact that the Damages Directive is narrower in scope does not mean that there aren't

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

broader implications for the procedural law of Member States for all types of actions for the private enforcement of EU competition law, which could and should be reflected in this Communication.

Recommendation #5: revise the Communication so that it refers harmoniously to all types of private enforcement actions, identified in para 2, instead of limiting some of it to damages actions

Recommendation #6: remind national courts that the principle of effectiveness may also require adaptations to national procedural law when existing rules on access make it impossible or excessively difficult to exercise rights deriving directly from Articles 101 and 102 TFEU in declaratory and injunctive actions

2.4. Stand-alone, follow-on and mixed actions

The draft Communication rightly takes into account that access to information and documents may be needed to assess, and to prove, the existence of a right to damages in follow-on and in stand-alone actions.

Unfortunately, it wrongly seems to assume, at least in paras 10 and 11 (but see para 12), that access to evidence will not be required to prove the infringement in follow-on actions. This idea probably rests on the fact that an infringement already declared by a Commission or NCA decision is deemed to be irrefutably proven, under the Damages Directive and its transposition. But this assumption is wrong for various reasons:

a) first, the irrefutable presumption only applies to decisions of the European Commission and of the respective State's own NCA. With very few exceptions among the MS (most notably, Germany), plaintiffs in follow-on actions based on decisions adopted by NCAs of other Member States will still have the burden of proof of the infringement, and to do so will surely require access to evidence;
b) second, not all NCAs publish all of their decisions (the non-confidential version thereof), forcing plaintiffs to seek access to them. The European Commission and an NCA may also take a long time to publish a non-confidential version of a decision, and an injured party may be faced with uncertainty regarding the limitation period and the rules applicable thereto (particularly in relation to infringements prior to the entry into force of the transposition of the Damages Directive) which require it to try to assess the existence of its right to damages, by requesting access to the non-confidential version of the decision, rather than waiting passively for it to be published;
c) third, while this shouldn't happen, the fact is that experience shows that the precise nature of the infringement and its scope may, sometimes not be perceptible from the non-confidential version of the public enforcement decision, in which case injured

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

parties, in order to properly delineate the infringement declared by the competition authority, will need to request access to components of the decision which were deemed confidential, or to documents in the case-file which the decision refers to when describing the infringement (without reproducing the indispensable part of their content).

The draft Communication should also not assume that actions for damages are necessarily either stand-alone or follow-on. Precedents show that a large percentage of damages actions include elements which are follow-on, but then also argue additional infringements which go beyond the scope of the infringement declared by the competition authority, in a material, subjective and/or temporal sense. This is so because competition authorities are often conservative in delineating the scope of the infringement, not having the incentive to necessarily encompass all the components of an infringement as an injured party would have, since its damages will be dependent on that scope. In other words, a large percentage of damages actions are actually mixed actions. Accordingly, it is more appropriate to refer to follow-on and stand-alone "claims", rather than "actions", as both types of "claims" are often found within the same action.

Recommendation #7: revise paras 10 and 11 to express that access to evidence (including decisions and documents referred to therein) may be necessary to prove an infringement, regardless of whether the action is stand-alone or follow-on. Keep this issue in mind throughout the Communication.

Recommendation #8: keep in mind that, very often, actions do not fall neatly into a categorization of stand-alone or follow-on, mixing both elements (mixed actions). Refer, preferably, to stand-alone and follow-on "claims", rather than "actions".

3. Adaptation of national rules to ensure compliance with principle of effectiveness

The draft Communication occasionally seems to forget that EU Law requires national procedural rules to ensure the effectiveness of the rights deriving directly from EU competition law, Articles 101 and 102 TFEU, and that this may require disapplying national rules and providing for rights and mechanisms which are not foreseen in the national law.

Thus, when discussing protective measures which may be adopted to protect confidential information, para 5 states: *"Such measures may be used to the extent that they are available under and compatible with national procedural rules"*. This is inaccurate. Protective measures must be used by national courts, even if they are not compatible with national procedural rules,

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

if and to the extent that they are required to protect confidential information and to ensure compliance with the principle of proportionality and other obligations deriving from EU Law. National courts must also take into account their obligation to interpret national law, insofar as possible, in accordance with the Damages Directive. And because the right to damages deriving from Articles 101 and 102 has horizontal direct effect, they must also use the protection measures required to comply with the above-mentioned principles, even if the Directive was not adequately transposed and if national law explicitly rules out the use of such measures.

As an example, if national law absolutely prevents national courts from allowing claimants to access confidential information needed to assess or prove their right to damages (even through their external counsel and economists and/or in a data room with strict confidentiality obligations), and allows only a review of that information by the court itself, or by a court appointed expert, this may not be sufficient to ensure the effectiveness of the right to damages. The national court would thus be required, by EU Law, to use protective measures which are not foreseen or even allowed by national law, but which are needed to ensure the effectiveness of the right to damages and to proportionately protect the rights of the owners of the confidential information.

Recommendation #9: Revise para 5 to state that protective measures must be used to the extent that they are required by EU Law, and ensure that the need to adapt national procedural rules to ensure compliance with EU Law is expressed harmoniously throughout the Communication

4. Control over evidence and notion of undertaking

In para 13, the draft Communication rightly points out that evidence held by a defendant's subsidiary should be deemed to be under the control of that defendant (the parent company). This is an important clarification, which we believe should be further emphasized and justified.

A person wishing to access documents relating, e.g., to an undertaking's activities, its internal organization and its participation in an infringement, may not necessarily be aware of which subsidiary within the group (the economic unit) holds those documents. Furthermore, if it were possible for a parent company to successfully argue that it doesn't have a document, simply by redistributing those documents within the group and placing them in the care of a subsidiary, the effectiveness of the right of access would clearly be at risk.

In its current drafting, it is not entirely clear why national courts are required by EU Law to arrive at the result expressed in para 13. Footnote 10 mentions the concept of undertaking in EU competition law and the *Skanska* judgment. This needs to be further explained.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

National courts may tend to interpret access rules, and specifically who is required to provide access, by resorting exclusively to the national legal order. It would be important for the Communication to stress that Article 5(1) of the Damages Directive requires Member States to entitle national courts to order defendants or third parties to disclose relevant evidence which lies within their "control". This is a concept of EU Law, which is to be clarified by the CJEU. Even though the CJEU has not yet been called on to clarify this concept, in the sense of Article 5(1), it is safe to assume, based on the Court's approach in *Skanska*, that the Court will consider that the clarifications of the concept of "control" provided by case-law relating to public enforcement of Articles 101/102 TFEU will also be applicable in the context of the private enforcement of the same provisions. This interpretation is all the more expectable because, just as in *Skanska*, to interpret the concept otherwise could easily lead to an infringement of the principle of effectiveness.

Thus, national courts are required to interpret their national rules, including the rule(s) which transposed Article 5(1) of the Damages Directive, to the extent possible, in accordance with the obligations deriving from that provision of the Directive. Unless national rules unquestionably do not allow for the interpretation that parent companies may be required to produce documents held by its subsidiaries, national courts are required by EU Law to interpret those national rules as allowing national courts to impose on parent companies such requirement. However, even if national rules do not allow for this interpretation, those rules may, nonetheless, have to be adapted to ensure compliance with the principle of effectiveness.

The Communication could also take the opportunity to point out that the concept of undertaking in EU competition law may have other consequences in the context of requests of access to documents. As an example, if an action is filed only against a subsidiary, and it proves necessary to obtain a document held by its parent company, it is unclear whether the subsidiary should also be deemed to have control over those documents, as it is a part of the same economic unit as the parent company. If the plaintiff asks the disclosure order to be addressed to the parent company, it is not clear whether the national court is allowed, under EU Law, to treat the parent company as a third person. If it were to do so, this could have unreasonable consequences, namely when applying the proportionality test, which is supposed to be more demanding for disclosure orders addressed to third persons, as opposed to defendant undertakings.

Recommendation #10: Further clarify why national courts must be able, under EU Law, to require disclosure by parent companies of evidence held by its subsidiaries

Recommendation #11: Reflect on additional implications for requests of access to documents of competition law's concept of undertaking

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

5. Access to documents held by the European Commission and NCAs

5.1. Introduction

National courts faced with private enforcement actions will need to be well aware of the possibilities open to plaintiffs and defendants to obtain certain evidence in various sources. This will, potentially, be extremely relevant, not just to assess requests for disclosure orders, but also when courts are called on to decide if a litigant has made all reasonable efforts to have access to information and documents necessary to prove the infringement, causality, damages and quantification thereof. Understanding the options a party had will often be crucial to decide if the litigant has met its burden of proof.

Furthermore, more detailed clarifications should be provided concerning the restrictions which result from EU Law to access to black-listed and grey-listed documents, held by the European Commission and NCAs.

5.2. An Institution averse to granting access

Unfortunately, persons (potentially) injured by antitrust practices investigated by the European Commission have reasons not to view this EU Institution as a viable and cooperative partner in obtaining access to evidence necessary to assess, or to prove, the existence of a right to damages.

Judicial precedents paint a portrait of an Institution which frequently does its utmost to refuse access to documents, even by misrepresenting facts. The following are examples of factual arguments put forward by the Commission, deemed to be untrue by the Court:

(i) that the applicant hadn't requested access to specific information/documents (Case T-109/05, paras 53-63; Case T-344/08, paras 32-37);
(ii) that the applicant had requested access to information, rather than documents (Case T-109/05, para 129);
(iii) that the applicant no longer had an interest in appealing the decision to refuse access (Case T-109/05, paras 53-63; Case T-437/08, paras 19-23);
(iv) that the action was inadmissible because the request for access had been *"initiated by the applicant's lawyer in his own name and on his own behalf, not by the applicant itself"* (Case T-109/05, paras 64-75).

Furthermore, the Commission has also often put forward legal interpretations which, manifestly, were overly restrictive, as subsequently determined by the Court. It argued, *inter alia*:

(i) that access should be refused to any document in an antitrust case file which could provide evidence to be used against cartel participants in a damages action, i.e. that the interest in avoiding successful damages actions is covered by the protection of business secrets (T-437/08);

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

(ii) that any document provided by a MS should be automatically protected from disclosure if the MS so requests it, even if the MS provides no reasons for the non-disclosure, i.e. that MS have an absolute right of veto over disclosure (Case T-109/05);

(iii) that the statement of contents of the case file is not a "document" to which access can be requested, or that access to it should always be refused because it was drawn up solely to allow undertakings to exercise their rights of defense (Case T-437/08);

(iv) that access to a statement of contents should be refused under the business secrets exceptions if it lists documents which are protected by that exception (Case T-437/08).

We invite the European Commission to, in the future, reconsider its historical stand on these matters, and to adopt a more moderate and cooperative approach, in line with its role as a guardian of the Treaties and with the understanding that private enforcement can contribute to the promotion of EU competition policy, without endangering tools which are essential to its success (such as the leniency policy).

Recommendation #12: Adopt a moderate and cooperative approach towards facilitating access to the Commission file to (potentially) injured parties, setting aside overly restrictive interpretations adopted in the past, and reflect this change of message in the Communication

5.3. Relation with Regulation (EC) 1049/2001, case-law and principle of effectiveness

The draft Communication mentions Regulation (EC) 1049/2001 only once, in para 7. And it does so merely to state that the Communication *"does not cover and is without prejudice to the rules and practices on public access to documents held by the European institutions under Regulation (EC) No 1049/2001"*. This is insufficient and entirely unhelpful.

Footnote 5 adds that *"this Regulation* [(EC) 1049/2001] *does not cater for the specific needs of claimants of damages due to EU competition law violations. Instead, those claimants can fully rely on the national rules transposing Articles 5 and 6 of the Damages Directive"*. This sentence makes matters worse, as it seems aimed at giving the impression that Regulation (EC) 1049/2001 does not apply to access to documents held by the European Commission relating to antitrust proceedings, in manifest contradiction with the case-law of the CJEU.

It is settled case-law that the right of access to documents held by EU Institutions is based on Article 15(3) TFEU, according to conditions set out in Regulation (EC) 1049/2001, and this Regulation also applies to documents held by DG Competition:

> *"Article 255(1) and (2) EC provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, are to have a*

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

> *right of access to the documents of the institutions of the European Union, subject to the principles and conditions defined in accordance with the procedure laid down in Article 251 EC"* (Case C-365/12 P, para 61).
>
> *"The purpose of Regulation 1049/2001* (…) *is to give the public a right of access to the institutions' documents which is as wide as possible. The regulation applies to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union"* (Cases T-109/05, para 121; T-437/08, para 32; T-344/08, para 39; C-365/12 P, paras 61 and 82).

The case-law also makes it clear that access is *"subject to certain limitations based on grounds of public or private interest"* (Cases T-437/08, para 33; T-344/08, para 39; C-365/12 P, paras 61 and 85), and that it must be refused *"where its disclosure would undermine the protection of one of the interests protected by"* Article 4 of Regulation 1049/2001 (Case T-437/08, para 34). One such exception, provided for in Article 4(2)(§1) of Regulation 1049/2001, is that *"the institutions are to refuse access to a document where disclosure would undermine protection of the commercial interests of a specific natural or legal person, unless there is an overriding public interest in disclosure"*.

It is settled case-law that antitrust private enforcement is (also) in the public interest. On the other hand, an undertaking's interest in preventing private damages actions is not a legitimate interest which may be used to restrict the right of access to documents under Regulation 1049/2001 and, specifically, it is not covered by Article 4(2)(§1) (Case T-437/08, paras 29-31 and 46-47).

The exceptions foreseen in Article 4 of Regulation 1049/2001 should *"be interpreted and applied strictly so as not to frustrate application of the general principle of giving the public the widest possible access to documents held by the institutions"* (Cases T-109/05, para 123; T-437/08, paras 36, 63 and 71; T-344/08, paras 41 and 54).

As a rule, if the Commission wishes to invoke such an exception to access, it must provide *"explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article"* (Cases T-344/08, para 40; T-437/08, para 35; C-365/12 P, para 64).

However, this duty of reasoning is softened by the possibility of providing reasons by categories of documents, by the possibility of invoking excessive workload, and, significantly, by being able to rely on certain general presumptions:

> *"it is open to the EU institution concerned to base its decisions* [on exceptions to the right of access] (…) *on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature"* (Cases C-365/12 P, para 65; T-109/05, para 131).

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Specifically, in this regard, the CJEU overruled the GCEU, seeing competition law as a *lex specialis* when it comes to limiting the general rights of access provided under Regulation (EC) 1049/2001 (Case C-365/12 P, paras 82-89 and 92). In this light, the Court has clarified that, when it comes to requests for access to documents in competition law case-files:

> *"the Commission is entitled to presume that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings involved in those proceedings as well as the protection of the purpose of investigations relating to such proceedings within the meaning of* [Article 4(2)(§1) and (§3) of Regulation 1049/2001]*"* (Case C-365/12 P, paras 80-81).

The Commission may rely on this presumption, *"without carrying out a specific, individual examination of each of the documents in a file relating to a proceeding under* [Article 101 TFEU]*"* (Case C-365/12 P, para 93).

Furthermore, as long as antitrust investigations proceedings are not definitively closed (including while an appeal is pending), there is *"a general presumption that any obligation placed on that institution to disclose, during those proceedings, opinions within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 would seriously undermine that institution's decision-making process"* (Case C-365/12 P, paras 114 and 119).

However, these presumptions are refutable. It is possible for an access applicant to demonstrate *"that a specific document disclosure of which has been requested is not covered by that presumption, or that there is an overriding public interest in disclosure of the document"*, by providing *"evidence* (…) *capable of rebutting the general presumptions"* (Case C-365/12 P, paras 100, 116-117 and 127-128). Such a possibility must not be interpreted in such a way that it becomes a *probatio diabolica*.

Ultimately, the case-law on access to evidence held by the Commission has been harmonized with the case-law on access to evidence held by NCAs, when the CJEU has clarified that an injured party needs to show that *"disclosure would have enabled it to obtain the evidence needed to establish its claim for damages as it had no other way of obtaining that evidence"* (Case C-365/12 P, para 132).

This judgment has tilted the case-law to the recognition that the legal basis for the right of access to documents held by the European Commission is not only Regulation (EC) 1049/2001. As the Court itself has recognized, EU Competition Law is a *lex specialis* that may derogate from this Regulation. If this is true to limit rights of access, it must also be true to expand rights of access. Just like Articles 101 and 102 TFEU, together with the principle of effectiveness, require NCAs to provide access to injured parties to documents which are needed to establish claims for damages, and which they could not otherwise obtain, the same also applies to documents held by the European Commission.

Recommendation #13: Clarify that Regulation (EC) 1049/2001 applies to access to documents held by the European Commission in the context of antitrust proceedings, and refer to the clarifying case-law

5.4. Access to Commission / NCA files after the Damages Directive

As the draft Communication points out in footnote 11, Article 6(10) of the Damages Directive states that national courts should only *"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"*. This rule embodies a reasonable principle of good administration. Public authorities should not be required to dedicate their scarce resources to providing documents which can be reasonably provided by other persons, in particular those directly involved in the litigation in question (e.g., the defendants).

However, both Article 6(10) itself and the interpretation of it carried out by the European Commission raise problems and may be counter to EU Law.

Firstly, as for Article 6(10) itself, it must be kept in mind that secondary EU Law (e.g., a Directive) cannot violate EU primary law (e.g., Articles 101 and 102 TFEU, interpreted by the case-law in light of general principles of EU Law). Thus, if the Directive were to have introduced an absolute prohibition of access to documents held by the Commission or by an NCA, this would have manifestly been an infringement of the rights deriving from Articles 101 and 102 TFEU and the principle of effectiveness, as it could, subject to a case-by-case assessment, render the exercise, e.g., of the right to damages impossible or manifestly impossible.

We believe that, equally, the Directive cannot lawfully impose an absolute preference for access to documents before any "third party" over the agencies responsible for antitrust public enforcement. This must be subject to a case-by-case assessment, because it can lead to situations where the Directive would lead to an infringement of the principle of proportionality, a general principle of EU Law under which the rights of access to documents deriving from Articles 101 and 102 TFEU must also be interpreted. The Directive itself requires national courts to take into account *"the legitimate interests of* (…) *third parties"* when assessing *"whether any disclosure requested by a party is proportionate"* (Article 5(3); see also recital 16). Accordingly, in a hypothetical scenario where neither party to the litigation holds the document in question, and this document is held by a competition authority and by other third parties, it may be far less burdensome for the competition authority to track down and provide this document than for other third parties to do so. National courts must be free to assess the specificities of each case individually, and to arrive at the solution which complies with EU Law in its entirety, including the principles of effectiveness and of proportionality.

From a broader perspective, the provision in question of the Directive also seems difficult to justify, from the perspective of the principle of equality, and under the Constitutional principles

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

of the various MS. Why should competition authorities deserve this special protection over other public authorities? Why would a sectoral regulator not also be entitled to this status of subsidiary provider of evidence in antitrust proceedings?

Secondly, the Damages Directive uses an indeterminate concept to protect competition authorities from orders for disclosure. Under the Directive, competition authorities may be required by national courts to produce evidence if no other person *"is reasonably able to provide that evidence"*. Until this concept is clarified by the CJEU, it is up to the national courts to interpret it, in light of a systematic approach to the Directive and of general principles of EU Law.

The draft Communication has provided on example of such a situation, in para 14, but it has been overly restrictive, and it would be useful to provide additional clarifications to national courts about such situations. The example of the final sentence of para 14 should be revised to state clearly that this "would", rather than "could", be the case if the party who holds the document cannot find it.

More importantly, the single example provided makes it sound like the test of "reasonability" should be reduced to cases of "impossibility", which is an overly restrictive interpretation of a set of rules which exists to safeguard the effectiveness of the right to damages. It is up to national courts to decide what constitutes "reasonable inability to provide", in light of the specific circumstances of each case. Both the general principles of EU Law and a systematic interpretation of the Directive indicate that this test of "reasonability" should include a component of assessment of proportionality. It may very well be that, in a given case, a national court may conclude that it would be unreasonable to require an ensemble of third parties to provide dispersed documents which they will find it difficult to identify, and will have to dedicate ample human resources and time to track down, whereas such documents are already gathered in a single file of the competition authority (e.g., in a different case, to which the parties did not have access), and which this authority can provide with minimal effort and resources.

Thirdly, if parties to a proceeding or third parties refuse to provide documents also held by a competition authority, a national court may also, under certain circumstances, decide to qualify this as a situation where no other person is reasonably capable of providing the document. Indeed, the solutions provided by the Directive and by national law for such situations – particularly, sanctions and reversal of burden of proof – may not appropriately remedy the need for the requested documents. Thus, for example, if a document held by a third party (and by a competition authority) is necessary to prove an infringement, and that third-party refuses to provide it, the reversal of the burden of proof doesn't work. If the national court does not require the competition authority to provide that document, the plaintiff will be prevented from proving the infringement. In another example, if a document held by a party or third party (and by a competition authority) is needed to quantify damages, if the court does not require the competition authority to provide it after other persons fail to, the plaintiff will be unable to

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

properly quantify the damages, and this may not be properly remedied by the obligation to estimate the damages, since the estimate can underestimate the real amount of damage.

Fourthly, the Communication must make it clear that it is up to national courts to interpret the respective transposition of the Damages Directive (to the extent possible, in accordance with the Damages Directive), namely when determining who *"is reasonably able to provide"* the requested evidence. As discussed in the following section, if the European Commission or an NCA believe a disclosure order addressed to them by a national court infringes the Damages Directive and/or its respective transposition, the only option opened to it so as not to comply with the disclosure order is to appeal that judicial order before the competent court.

Fifthly, the Communication should stress that the Directive was not meant to exclude the applicability of European and national rules relating to access to documents held by administrative authorities. Indeed, Article 6(2) of the Directive explicitly states that Article 6 is *"is without prejudice to the rules* (…) *on public access to documents under Regulation (EC) No 1049/2001"* (see also recital 20). The same must also be true of national rules on access to documents held by public authorities. Whereas such pre-existing rules can obviously not lead to a refusal of the protection required by the Damages Directive's black and grey list, the Directive was not meant to interfere, and cannot be interpreted as interfering, with Member States' constitutional and administrative options concerning transparency and right of access to documents held by public authorities. To the extent that such rules do not render unattainable the objectives envisaged by the Directive, Member States remain free to regulate access to administrative documents as they see fit, and their general national rules on access to documents held by public authorities continue to apply.

Sixthly, the references found in the Directive to "practices" on access to documents (e.g., in Article 6(2) and (3)) cannot be understood as preserving the legality of pre-existing practices of competition authorities which contradict the Directive's rules on access to documents, or which would make it impossible or excessively difficult to exercise the right to damages deriving from Articles 101 and 102 TFEU. The reference to "practices" in these provisions is an abnormality which the Court will have to clarify. However, it could, clearly, not have been the legislator's intention to provide for rights and obligations in what concerns access to document, and then to say that such rules and obligations do not apply whenever there is a contradictory pre-existing practice.

Recommendation #14: the Communication should clarify that, when no party can reasonably produce a requested document, national courts must assess, in each specific case, which third party is less burdened by an obligation to produce a document (principle of proportionality), and to order disclosure by that person, even if it is a competition authority

Recommendation #15: the Communication should not reduce the test of "reasonableness" to one of "impossibility", and it should recognize that

national courts may interpret "reasonableness" in light of the proportionality of the respective burden imposed on different persons

Recommendation #16: the Communication should leave room for the possibility that a refusal by a party or third party to provide a document also held by a competition authority could be deemed a situation where no other person can reasonably provide the document, leading to a disclosure order addressed to the competition authority

Recommendation #17: the Communication should stress that it is up to national courts to determine who is reasonably able to provide the requested evidence, and that competition authorities must respect this assessment (notwithstanding their right of appeal)

Recommendation #18: the Communication should stress that the Directive was not meant to derogate from European and national rules relating to access to documents held by administrative authorities

Recommendation #19: the Communication should clarify what is meant by the references to "practices" in Article 6(2) and (3) of the Directive, stressing that this expression cannot lead to the legalization of pre-existing practices which infringe the rights of access under the Directive or the principle of effectiveness

5.5. Disclosure orders addressed by national courts to Commission / NCAs

At various moments, the draft Communication seems to rest on the assumption, or at least suggest the possibility, that the European Commission and national competition authorities may refuse to comply with an order for disclosure of documents addressed to them by a national court. In para 26, for example, it mentions a *"request of documents from the Commission's file"*. A national court does not "request" documents, it orders their disclosure.

This is a crucial issue which should be clarified in the Communication. As it stands, the Communication seems to signal a possible challenge to the rule of law in the European Union, suggesting that an administrative authority may have some margin of discretion when deciding to comply or not to comply with a judicial order of a court of a Member State. Particularly worrying are paras 28-29, where the draft Communication states that, before transmitting the information "requested" by a national court, the Commission *"will ask the national court whether it can guarantee the protection of confidential information and will consider the measures put in place by the national court to this end"*. It then adds: *"If the Commission considers that the rights of natural and legal persons to protect confidentiality can be appropriately safeguarded by the national court, it will transmit the requested information to the national court"*. It is inappropriate for the European Commission to ask the national court to comply with an obligation it has under EU Law, and to delay compliance with a court order

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

while it waits for the court's reply to that question. What is to prevent all other persons (including defendants) from doing the same? More importantly, these paragraphs seem to suggest that the Commission intends to exercise a degree of control over the measures put in place by the national court to protect confidentiality, and that it believes it has the right to just refuse to comply with the disclosure order.

This is a very worrying signal. The Communication must rest soundly on the premise that it is not up to the European Commission or to national competition authorities to assess whether an order from a Member State court complies with EU and national law, and whether confidentiality is sufficiently protected. The Commission should use the Communication to commit to complying with disclosure orders from national courts. The only option open to the European Commission and to national competition authorities, if they believe a national court has illegally addressed a disclosure order to it, is to appeal the order in question before the competent courts. The Communication should make it clear that this is the only mechanism available in such circumstances. To do otherwise would be to endanger the rule of law. These paragraphs must be rewritten to make it clear that the Commission intends to carry out the assessment it mentions so that it may decide whether to appeal the disclosure order (not so that it may decide whether to comply with it).

It should be kept in mind that, in accordance with Article 5(7) of the Damages Directive (and its transpositions), neither the Commission nor an NCA may be required by a national court to disclose documents in its possession without first being heard by the court. The competition authorities will, thus, have the opportunity to put forward all legal and factual arguments against a disclosure order, if they so wish, which the national court will weigh before arriving at its decision.

Furthermore, in the context of an appeal against a disclosure order from a national court, the appeal court may decide – or indeed (in the last instance) be legally required to submit a referral to the CJEU, leaving it up to the European Court to clarify the extent of the Commission's duty of disclosure.

It should also be kept in mind that, ultimately, if the national courts of a Member State force the European Commission to hand over confidential documents in circumstances that violate EU Law, the Commission itself has the power to initiate infringement proceedings against that Member State.

For many national courts, it may not be obvious that the European Commission has an obligation to cooperate with national courts in the enforcement of Articles 101 and 102 TFEU and that this means, *inter alia*, that it has an obligation to disclose (within legal limits) documents needed to decide the case before the national court. The draft Communication is almost entirely silent in this regard, missing out on an important chance to elucidate national courts in this regard. The basis for this clarification is already present in footnote 11, which refers to the principle of sincere cooperation between the Union and the Member States, to Article 15(1) of Regulation (EC) 1/2003, and to Case 2/88 Zwartveld EU:C:1990:315. But it should be further developed, with the implications of these obligations actually spelled out.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

It is particularly surprising that the Commission chose to refer only to the Zwartveld judgment (relating to the Protocol on Privileges and Immunities), whereas there are other judgments of the CJEU which specifically relate to national courts' power to order disclosure of documents held by the European Commission relating to antitrust proceedings. It would certainly be useful for national courts to find in this Communication examples of case-law which has already clarified obligation in the specific context of the private enforcement of competition law.

Thus, for example, in the context of private enforcement of Article 101 TFEU, the Court stated: *"it is always open to a national court, within the limits of the applicable national procedural rules and subject to Article 214 of the Treaty, to seek information from the Commission on the state of any procedure which the Commission may have set in motion and as to the likelihood of its giving an official ruling on the agreement in issue pursuant to Regulation No 17. Under the same conditions, the national court may contact the Commission where the concrete application of Article 85(1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it. Under Article 5 of the Treaty, the Commission is bound by a duty of sincere cooperation with the judicial authorities of the Member State, who are responsible for ensuring that Community law is applied and respected in the national legal system"* (Case C-234/89 Delimitis EU:C:1991:91, para 52).

It could further be highlighted that the same cooperation obligations are present in other areas of EU Competition Law – see, e.g., for State aid rules, Case C-284/12 Deutsche Lufthansa EU:C:2013:755, para 44.

It would also be useful for the European Commission to mention precedents in which it has already complied with disclosure orders from national courts, since these are particularly difficult to identify, as they typically do not lead to cases before the CJEU.

Building on such precedents, and in the spirit of cooperation with national courts, the Communication should also provide instructions (suggestions of best practices) to national courts about how best to contact and to notify the European Commission in what concerns requests for disclosure of documents (and for the exercise of the right of prior hearing), how to identify the documents and information in question in a way which diminishes the burden upon the Commission and reduces the need for back and forth communications between the EU Institution and the national court, which would be detrimental both to the management of the Commission's resource and to the efficiency and speediness of the procedure before the national court.

Recommendation #20: the Communication should not use the term "requests", and it should clarify that the Commission and NCAs are required to comply with orders for disclosure received from Member State courts, notwithstanding their right to appeal such orders before the competent courts

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Recommendation #21: the Communication should further specify the obligations of cooperation between the European Commission and national courts, in what concerns access to documents needed for the enforcement of Articles 101 and 102 TFEU

Recommendation #22: the Communication should provide guidelines and best practices for notifications by national courts to the European Commission concerning disclosure of documents

5.6. Black and grey-listed documents

The draft Communication erroneously indicates, in para 18, that *"settlements submissions can never be disclosed"*. Settlement submissions are only black-listed documents if they were not withdrawn (Article 6(6)(b) of the Damages Directive). As the Communication rightly points out later, settlement submissions that have been withdrawn may be accessed after the investigation has been closed (Article 6(5)(c) of the Directive).

This is a very sensitive topic, which the Communication should be clearer about. Indeed, already in the 2015 revised version of Regulation 773/2004 (see Article 16a(1) and (2)), and in the 2015 revised version of the Communication on cooperation between the Commission and courts of EU Member States (see para 26-A), the European Commission has made it sound like it will never grant access to any leniency statements. This is, seemingly, an attempt to interpret these provisions of the Damages Directive in such a way that radically changes the letter and spirit of the Directive, by attempting to arrive at a practical result where there will never be "withdrawn" settlement submissions which could be disclosed (prior to the Directive, a settlement proposal which was not concluded was deemed to be withdrawn). The same approach has already been put forward in some Member States. It must be emphasized that any attempt to afford black-listed protection to settlement submissions which were withdrawn, e.g. simply by using another term to refer to the process which led to them being removed from consideration, has no support in the Directive.

The Directive's main *ratio legis* for black-list protection of settlement submissions is the same as that for the protection for leniency statements. These are declarations which include self-incriminatory statements. However, a settlement submission is a proposal put forward by the undertaking in question: it proposes to admit (or not to dispute) the practice of certain facts in exchange for a reduction of the fine. If such a proposal is not accepted by the authority, and a settlement on that basis is not reached, the settlement submission includes no self-incriminatory confession of any fact, since the condition to which such confession was subject did not come to pass. It should also be kept in mind that, in some Member States, settlements do not require a confession of the infringement, merely a commitment not to appeal the decision. Accordingly, only those settlement submissions which led to an actual settlement including an admission of the infringement deserve black-list protection. It is for this reason that the

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Directive distinguished withdrawn and non-withdrawn settlement submissions (without taking into account that, in some MS, settlements do not involve a confession).

The other reason for this protection of settlements is the need to protect the effectiveness of public enforcement. The EU legislator considered this and deemed that the Directive's solution was a sufficient compromise in this regard.

Access to grey listed documents will raise procedural concerns for national courts. While it is not up to the European Commission to limit how national courts deal with requests for disclosure documents which are grey-listed, prior to the conclusion of the public enforcement investigation, the Communication should suggest best practices in this regard. It is also in the Commission's interest to suggest to national courts how best to interact with its own services when requesting access to grey-listed documents.

We believe the principle of sincere cooperation should allow a national court to order disclosure of a grey-listed document by a party or by a competition authority, subject to the condition that the investigation be concluded, the obligation to disclose being suspended until the condition is verified. Procedurally, this would allow the national court to decide at the same time all the requests of access to evidence, and save the court (and the access-requesting party) from having to monitor the investigation, to see when it is concluded (which may not necessarily be publicised), and only after to issue a disclosure order.

It would also be useful, in this context, for the European Commission to remind national courts that they may request information from the Commission about the estimated timeframe for the conclusion of the public enforcement investigation, so that they can take this information into account in the management of the private enforcement case.

The Damages Directive's attempt to grant absolute protection to black-listed documents explicitly contradicts the case-law of the CJEU. In particular, in C-536/11 *Donau Chemie* EU:C:2013:366, the CJEU ruled that *"European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved"*.

As noted by the Court, this is a requirement which is rooted in the Treaty, interpreted in light of general principles of EU Law. Secondary EU Law may not legitimately restrict a right which derives directly from primary EU Law. Just like the Damages Directive could not lawfully deny the right to damages to certain persons who have a right to damages under Articles 101 and 102 TFEU, it can also not lawfully refuse such persons the right of access to evidence indispensable to prove the existence of that right.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Thus, if access to a leniency statement is the only way for a person to prove the existence of an infringement, or even to assess whether it was affected by that infringement (e.g., a decision may include a confidential quote from a leniency statement in the crucial part of the description of the infringement identified by the competition authority), or if such proof/assessment would otherwise be excessively difficult, Article 6(6) of the Damages Directive and its national transpositions must be set aside, as they would impose a solution which would deprive the right to damages of its effectiveness, as already clarified by the case-law.

Recommendation #23: Para 18 of the Communication should be revised to clarify that only settlement submissions which led to a settlement are granted black-list protection

Recommendation #24: the Communication should suggest best practices for national courts to deal with requests for disclosure of grey-listed documents prior to the conclusion of the public enforcement investigation, and stress that national courts may request information from the Commission about the estimated timeframe for the conclusion of the investigation

Recommendation #25: the Communication should leave open the possibility that, despite Article 6(6) of the Damages Directive, the CJEU may hold that Donau Chemie continues to be good law (and also applies at the EU level), insofar as the Directive cannot render it impossible or excessively difficult to exercise the right of damages deriving from primary EU Law

6. Access to documents held by the CJEU

In most, if not all, Member States, it is possible (even if subject to certain requirements and limitations) to have access to documents included in another court's case files. It is not a well-known fact, beyond the world of EU Law practitioners, that, namely because of the wording of Article 15(§6) TFEU, proceedings before the CJEU (i.e., in the exercise of judicial, rather than administrative, functions) are wholly confidential, and that it is not possible to have access to case files of the CJEU, regardless of whether they are pending (unless you show an interest and are allowed to intervene in the respective case, and even then with access restricted to non-confidential information) or closed.[1]

[1] See, in this regard, ROSSI, L. & VINAGRE E SILVA, P., *Public access to documents in the EU*, Hart, 2017, pp. 78 and 86-87.

Accordingly, the Communication should elucidate national courts about this specificity of the EU legal order, excluding the possibility that they may erroneously suppose that a party could have requested the CJEU for access to a file, or that the Court itself may direct a request of access to documents to the CJEU.

Recommendation #26: the Communication should clarify the special rules of the EU legal order which prohibit access to documents held by the CJEU

7. Pre-trial discovery

Although the Damages Directive has focused exclusively on access to the relevant documents and information *"for substantiating the respective claims"* (draft Communication, para 19), it is evident that access to non-confidential and confidential documents and information will be necessary, not just to prove the existence of a right to damages, but also to assess whether such a right exists at all.

In other words, although the Damages Directive has, on the surface of it, focused on disclosure mechanisms following the filing of an action for damages, it is beyond dispute that the right to damages deriving from Articles 101 and 102 TFEU would be deprived of its effectiveness if potentially injured parties were not able to have access to documents and information needed to assess whether an infringement occurred and whether that infringement affected them, causing them damage which they are entitled to be compensated for. Potentially injured parties cannot be required to file an action for damages in order to have access to the evidence which they require to determine if they have a right to damages.

This means that, even though the Damages Directive is arguably silent on the matter (although recital 27 does mention the need to provide injured parties access to evidence needed *"in order to prepare their actions for damages"*), the principle of effectiveness will, subject to a case-by-case assessment, require national courts to order disclosure of documents and evidence needed to assess the existence of a right to damages under Articles 101 and 102 TFEU. This right, and the respective procedural mechanisms, are present in the legal orders of various Member States, but most have little culture and experience with pre-trial disclosure, making a clarification of this issue in the Communication particularly important.

At least one Member State interpreted the Damages Directive and the principle of effectiveness as requiring a pre-trial discovery mechanism and included special provisions in this regard in its transposition of the Damages Directive (see Article 13 of Portuguese Law 23/2018).

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Recommendation #27: the Communication should clarify that the effectiveness of the right to damages deriving from Articles 101 and 102 TFEU may require, subject to case-by-case assessment, the use (and, if need be, creation by the national court) of pre-trial discovery mechanisms, to allow the potentially injured party to assess whether an infringement occurred and whether it has a right to damages

8. Access to categories of evidence and to information

One of the greatest challenges to parties seeking to have access to documents in private enforcement actions will be to overcome the national law, case-law and judicial culture of various Member States where it is largely believed and practiced that disclosure may only be provided to documents that have been specifically identified. Whereas the Damages Directive has explicitly required Member States to ensure that national courts can order disclosure of *"relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification"* (Article 5(2); see also recital 16), requests for access to categories of evidence may still reasonably be expected to face resistance in some national courts.

It would, thus, be important for the Communication to provide further guidance on this topic (see para 17). Specific examples could be provided of when requests of access to categories could be justified, and of how the respective disclosure orders could be phrased. This guidance would be important to help national courts identify where the boundary lies between an unreasonable "fishing expedition", and a legitimate request of access to documents made in the context of ignorance and uncertainty about what information is to be found where. It must be made clear that ignorance which is unavoidable cannot be an obstacle to having access to documents needed for to ensure the effectiveness of the right to damages, subject to the limits of proportionality and abuse of procedure.

As an example, a party who suspects that it is the victim of a discriminatory abuse may not know exactly if discrimination is occurring, and which of its competitors are being favoured and how, so it will need to have access to contracts and invoices between the dominant undertaking and other customers on the relevant market, during the relevant period. It may also need to have access to credit notes, and to invoices from the customers to the dominant undertaking, to make sure the discrimination is not being disguised in other exchanges. If this information is relatively recent, so that it still merits qualification as confidential and protection, such access would of course have to be limited to external counsel or to a similar measure of protection.

In another example, if a party wishes to confirm whether it was one of the undertakings encompassed in the subjective scope of a cartel, and this information is not apparent from the

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

public enforcement decision which identified the cartel, which merely refers generically to a group of emails exchanged between the cartel members over a certain period, this party will need to request access to the emails exchanged between the cartel members over that period in order to determine whether it is affected by the cartel.

Another issue which is likely to raise doubts before national courts is whether courts can only require the disclosure of existing "documents", or whether they can require the disclosure of "information". Admittedly, preference should be given to the disclosure of existing documents. However, depending on a case-by-case assessment, it may be that the solution most in accordance with the principles of effectiveness and proportionality, the solution which will impose the least burden on both the requesting party and the addressee of the disclosure order, will be requiring the provision of certain information, rather than of a specific document. In such a scenario, the national court not only can, but indeed should, require the production of the information, when this is in the interest of justice and efficiency and protects the best interests of all those concerned (with the exception of the interest of a defendant in not having a successful damages claim against it, which does not merit protection). One possible compromise solution is to allow the requiring party to request the production of existing documents which include certain information, even though it is unable to identify the specific document in question.

As an example, if an injured party wants to have access to the evolution of prices of the product in question, over the period in question, to a certain group of clients, it is likely that this party will be unaware of which specific documents held by the defendant include such information. If it is required to request specific documents, it has two options: (a) request all invoices relating to that product and that group of clients, during that time, and calculate the evolution itself; or (b) request access to any existing document which summarizes this information. The injured party may also wish to ask for (b) and, subsidiarily, for (a).

But the national court may also decide that certain information may be very quickly, and without significant burden, gathered and provided by the person who holds it, even if it is not already gathered in an existing document. In such situations, requiring disclosure of a very large group of individual documents places an unnecessary burden on the person ordered to disclose the documents. It will place an unnecessary burden on the person requesting access (who will then have to process all that information which could have immediately been provided in its summarized form by its holder). And it will unnecessarily delay the court proceedings. *In extremis*, depending on the amount of individual documents and the time available to process them, such a solution could even deprive the injured party of an effective right to damages.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Recommendation #28: the Communication should provide specific examples and practical guidance on when requests of access to categories are justified, and of how the respective disclosure orders could be phrased

Recommendation #29: the Communication should clarify that national courts may choose – and may indeed be required – to order disclosure of documents which have not been specifically identified, but only by reference to the information they contain, or even of information which can effortlessly be gathered and provided by its holder

9. What constitutes confidential information

9.1. The objective nature of confidentiality

Para 24 of the draft Communication should be revised, as in its current phrasing it could be interpreted as suggesting that the confidentiality of information is a subjective concept. Similar ideas are present elsewhere in the draft Communication – see, e.g., para 32(v)'s reference to content *"which may be confidential towards the requesting party or other parties to the proceedings"*.

The test for the confidentiality of information is, and must be, wholly objective. The identity of the persons who request access to the information in question in no way affects the sensitive nature of that information. The identity of the persons requesting access could impact the willingness of the person holding the sensitive information to provide such access, but this must be understood as the potential exercise of the right to lift the confidentiality of a given information, for a specific purpose, and not as an option which changes the underlying confidential nature of that information. Other than that, the only conceivable justification for certain information not to be deemed confidential vis-à-vis one person, but to be confidential vis-à-vis another, is for the first to be part of the same economic unit as the owner of the confidential information.

Recommendation #30: the Communication should make it clear that the confidential nature of information is determined on the basis of an objective assessment, and that it does not vary depending on the identity of the person seeking access, even though that identity may influence the information owner's willingness to lift the confidentiality for a given purpose

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

9.2. National law and limits imposed by EU Law

Para 25 of the draft Communication seems to suggest that national courts' decisions on whether certain information merits protection should be based on national law and case-law, even if *"inspiration can be taken from the jurisprudence of the EU courts"*. This approach fails to tackle the need to ensure the effectiveness of the right of access to documents, deriving from the EU Treaty and general principles of EU Law, and also from the Damages Directive.

The Communication should remind national courts that, while they will naturally rely on national law and case-law when dealing with requests of access to documents, whenever rights deriving from EU Competition Law are being exercised, they are limited by the principle of effectiveness and by the need to interpret national rules in accordance (to the extent possible) with the Damages Directive.

If national law is so broad in considering information to be confidential that it renders the exercise of the right to damages impossible or excessively difficult (especially in conjugation with other procedural rules, and the interpretation thereof, concerning whether and how access to confidential documents is provided), such national rules must be set aside in favour of a solution which complies with the principle of effectiveness.

Recommendation #31: the Communication (e.g., in para 25) should clarify that national courts may not rely exclusively on national law and case-law to determine the confidentiality of information, and that this classification must take into account the need to ensure effectiveness of the right to damages deriving from Articles 101 and 102 TFEU, and the need to interpret national law in accordance with the Damages Directive

9.3. Case-by-case assessment of confidentiality and refutable presumptions

Contrary to what is suggested in para 24 of the draft Communication (*"might be assessed on a case-by-case basis"*), whether information should be deemed confidential is always, necessarily, assessed on a case-by-case basis. As the CJEU's judgments (e.g., *Pfleiderer* and *Donau Chemie*) have made clear, a blanket prohibition of access to a type of document or information, without allowing for a case-by-case assessment in light of the need to ensure the effectiveness of the right to damages, is incompatible with EU Law. This does not preclude the use of general presumptions concerning the confidential or non-confidential nature of information, as long as such presumptions are refutable.

One obvious example of a presumption which national courts can rely on is that information which is older than 5 years will, typically, not be sensitive enough to merit protection (see below).

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Recommendation #32: the Communication should be revised to take into account that any assessment of confidentiality must be made on a case-by-case basis, and that general presumptions in this regard may be used, as long as they are refutable

9.4. Classification as confidential in public enforcement proceedings

Some national courts may have the tendency to consider that information which has been deemed confidential during the public enforcement proceedings should continue to be treated as confidential. The Communication should clarify that it is always a task strictly reserved to the national court to assess whether a given document, or information included in it, should be treated as confidential. It cannot be presumed that such information is indeed confidential, just because it was treated as such during the public enforcement proceedings. Indeed, as a rule, most competition authorities are unwilling to spend scarce resources arguing with companies about the confidential/non-confidential categorization of every single piece of information in the file, as such categorization has no impact on those proceedings. All undertakings who are also defendants in those proceedings have a right of access to that information, even if limited by certain protections of confidentiality.

In other words, the fact that, in the public enforcement proceedings, a competition authority decided not to dispute an undertaking's assertion that certain information was confidential does not necessarily indicate that the competition authority agreed with that assertion. Furthermore, even if the competition authority analysed in detail, and arrived at a firm conclusion about, the confidential nature of certain information, this is merely the opinion of the competition authority, which is in no way binding on the national court deciding the private enforcement action. The national court must still carry out its own case-by-case assessment of whether the information in question merits protection.

This is all the more so because the sensitivity and worthiness of protection of information changes in time. Just because certain information may have merited protection when it was surrendered to, or obtained by, the competition authority, doesn't mean that it still merits protection, years later, during private enforcement proceedings.

Recommendation #33: the Communication should clarify that the categorization of information as confidential in the public enforcement proceedings is not binding on the national court, which is required to carry out its own case-by-case assessment of whether the information in question merits protection, in light of present circumstances

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

9.5. Confidentiality and age

One of the most important presumptions which will ease the tasks of national courts called on to assess whether certain information should be deemed confidential is the presumption connected to the age of the information.

As the draft Communication rightly points out in para 25(ii) and footnote 25, the CJEU has already clarified that information may be (refutably) presumed to no longer be commercially sensitive, and instead should be treated as historical and non-confidential, once five years have elapsed since the facts it relates to. Aside from the case-law mentioned already in the draft Communication, a reference should be added to Cases T-109/05 and T-444/05 Navigazione Libera del Golfo v Commission EU:T:2011:235 (e.g., paras 114, 139 and 149-150), and to Case T-344/08 EnBW v Commission EU:T:2012:242 (e.g. paras 131 and 137-143).

The Communication should give greater emphasis to this crucial clarification from the case-law. It is one which is likely to have a very large practical impact and to render the processing of access requests by national courts much easier. Indeed, at least for follow-on actions, the vast majority of information which injured parties require access to is more than 5 years old. National courts should find clearer guidance, in this Communication, about the fact that they should presume this information to be historical and non-confidential. While it is still possible to prove that the information is still commercially sensitive, there must be exceptional circumstances justifying why information which is older than 5 years could still be relevant to the determination of commercial strategy on the market, or to otherwise merit protection.

The person seeking confidential status to be granted to historical documents must identify the exceptional circumstances which mean that disclosure of these documents would still be harmful to its (or a third party's) interests, beyond the interest not to lose a private enforcement action, which of course does not merit protection.

Recommendation #34: the Communication should put greater emphasis on the fact that, and quote the case-law clarifications according to which, it may be (refutably) presumed that information which was commercially sensitive, but is in the meantime more than 5 years old, is historical and no longer merits protection

9.6. Legal professional privilege

The draft Communication mentions legal professional privilege in paras 7 and 27, saying simply that nothing in it should be interpreted as allowing disclosure of evidence protected under this privilege, and that professional privilege must be protected. This is manifestly insufficient and unhelpful for national courts.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

Several Member States award legal professional privilege a much broader scope than that which is recognized under EU Competition Law, affording protection also to in-house counsel (registered with the respective Bar Association). National courts are very likely to be confronted with challenges to the disclosure, for example, of communications between undertakings' management and its in-house counsels, which wouldn't be protected in Commission investigations applying Articles 101 and 102 TFEU.

While this issue has not yet been clarified by the CJEU, the Communication should, at the very least, stress that the protection of legal professional privilege (or any other professional privilege) by national law, beyond the scope of protection which is also recognized by EU Law, may not render the exercise of the right to damages (or other rights deriving from Articles 101 and 102 TFEU) impossible or excessively difficult. Thus, the principle of effectiveness may, on a case by case assessment, require access to exchanges with in-house counsel, and the disapplication of national rules preventing such access.

Recommendation #35: the Communication should stress that the protection of legal privilege (or any other form of professional privilege) beyond the scope of protection recognized by EU Law may not infringe the principle of effectiveness

10. Assessing proportionality when deciding on access to confidential information

When it comes to access to documents, one of the greatest challenges the Damages Directive and the effectiveness of the right to damages deriving from Articles 101 and 102 TFEU face, is how to overcome a judicial culture in a great number of Member States which is adverse to disclosure. It would be unrealistic not to expect the default position of many national courts to be to outright refuse access to confidential information. The Communication needs to combat this tendency. It also needs to combat the tendency of courts to provide for compromise solutions which do not adequately ensure the effectiveness of the right to damages. Thus, for example, a national court may be inclined to allow access only by a court appointed expert, even though such solution will not allow the injured party to have access to the documents and to make its own assessment of which information is relevant. Considering the extreme specificity of competition law infringements, of the respective quantification of damages, and of the specialization required to properly assess it, experience shows that the pool of "experts" to which national courts have access often are not capable of ensuring compliance with the principle of effectiveness.

The Communication should emphasize that caution must be used, not just to protect confidentiality, but also to protect the effectiveness of the right to damages. When in doubt about whether a more restrictive access solution will adequately ensure the effectiveness of a

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

party's right to damages, the national court should opt for a less restrictive access solution (e.g., data rooms or confidentiality rings), which still adequately protects the confidentiality of the information in question.

Unfortunately, the draft Communication is entirely silent on the responsibility of national courts, and of their respective Member State, for decisions concerning access to documents. The Communication should point out that Member States are required by EU Law to ensure the effectiveness of the right to damages, and that refusals to provide access to requested evidence which was indispensable to assess the existence of, or to prove, the right to damage may constitute a tort, leading to the liability of the Member States for the damage thus caused to the injured person.

If, for example, an injured party requests access to evidence it needs to prove an infringement of Articles 101 or 102 TFEU, and the national court refuses that access (e.g., deeming it unnecessary), or if it provides access in a way which does not allow the injured party to actually have access to the necessary information, the national court has infringed its obligations under EU Law and made it impossible for that party to exercise its right to damages. Upon losing the action for damages for failure to meet its burden of proof relating to the facts in question in that request of access to documents, the injured party may then file an action for damages against the respective Member State, invoking its liability for an infringement of EU Law.

This creates a very special duty of care upon national courts. A national court may find itself in an unwanted situation, and lead to the liability of its Member State, if it deems certain information not be required to prove a certain fact, and then concludes, at a later stage of the proceedings, that the fact in question was not proven (even though the party produced all the available non-confidential information relating to that fact). Once again, it is best to err on the side of caution, and allow access to the evidence, with due measures of protection of confidentiality, than to refuse access based on an assessment made by the national court, at an early stage of the proceedings, when the national court may not be in a position to assess which evidence is and is not needed to prove the fact in question.

Recommendation #36: the Communication should further emphasize that national courts deciding access requests must find the optimized compromise between ensuring the protection of confidential information and the effectiveness of the right to damages, and that when in doubt about whether a more restrictive access solution would adequately ensure the latter, they should allow a less restrictive access solution which still adequately protects confidentiality

Recommendation #37: the Communication should point out that national courts must be particularly careful not to incur in a tort which would lead to the liability of their Member State, by refusing access to information which is necessary for the effective exercise of the right to damages. As

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

national courts will often not be in a position to assess whether certain evidence will be needed or not to prove a certain fact, when deciding on a request of access to evidence, they should err on the side of caution and provide access (with appropriate confidentiality-protection measures), rather than refuse access to necessary information and later deem the fact not to have been proven.

11. Reasoning of access requests and of confidentiality

The draft Communication is unhelpfully (nearly) silent on the fundamental issues of the duties to justify requests of access to evidence, and to justify requests that information be treated as confidential. These issues are crucial to the success of the private enforcement of EU competition law and should be tackled.

The Damages Directive states that access requests should include *"a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages"*, and be *"circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification"* (Article 5(1) and (2); see also recital 16).

Because these rules will be applied in various Member States whose courts do not have a culture or tradition of disclosure, additional clarifications are needed on the reasonability of requirements to justify a request of access to evidence. National courts must keep in mind the profound asymmetry of information concerning which information is found in which documents. Requiring an injured party to identify a specific document and, furthermore, to justify why it believes that this specific document includes the relevant information, may quickly descend into a *probatio diabolica* that renders it impossible to exercise the right to damages.

As an example, if a party is seeking evidence that it was included in the scope of an infringement which, according to the public enforcement decision, only affected certain clients, decided on a case by case basis by exchanges between the cartel members, its only option is to request access to the emails between, and/or meeting and telephone call notes of, the cartel members during the relevant period. It has no way of knowing which of the emails mentions it, and it can't even be entirely sure that it is mentioned. The only justification it can provide for its belief that the documents do include relevant information is that the public enforcement decision said that affected clients with certain characteristics were decided on between the cartel members through such communications, and that it was a client with such characteristics. To require a greater degree of specification or of justification would make it impossible for it to have access to the evidence it needs to confirm and prove that it was affected by the cartel.

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

At the very least, it must be stressed that the assessment of this reasonability is limited by EU Law, to the extent that it cannot deprive the right of damages of its effectiveness.

The Communication should also further emphasize that requests to treat certain documents or information as confidential also need to be duly reasoned. Notwithstanding the obligation upon the national court to, of its own initiative, protect the rights of third parties, it is up to the person claiming that a certain document, or a part of a document, or certain information should be deemed confidential to provide arguments to satisfy the national court that this is so. Failure to meet the burden of proof of the confidential nature of the information in question must be solved by the national court by deeming that information not to be confidential.

That being said, the national court may deem that it would be too burdensome, not just for the parties, but also for the court itself, to carry out an item by item assessment and control of confidentiality (often not just document by document, but for each piece of information within each document). In this case, the national court may choose to accept a more generic reasoning from the holder of the document for the need to protect certain documents as confidential, while providing for access to the entirety of those documents through data rooms or confidentiality rings. This would err on the side of caution and appropriately protect the two conflicting interests.

Recommendation #38: the Communication should provide additional guidance on how to assess the reasonability of the reasoning of requests of access to evidence, and stress that EU Law requires national courts to interpret this test in a way that ensures the effectiveness of the right to damages and avoids the imposition of a probatio diabolica

Recommendation #39: the Communication should emphasize that parties claiming confidentiality of documents (or parts thereof) and information must duly reason those claims and have the respective burden of proof

Recommendation #40: the Communication could point out that national courts may wish to arrive at compromise solutions that avoid the court and the parties having to expend disproportionate amounts of time and resources controlling the confidentiality of specific items, by accepting requested classifications as confidential while providing access to those documents through data rooms and confidentiality rings

12. Measures for protection of confidential information

Para 28 states that the *"national court should provide the person whose confidential information is subject to disclosure with the necessary guarantees for the protection of this*

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

information". As the footnote to this sentence reveals, this is a statement based exclusively on interpretations of the law by the European Commission. This is a dangerous statement, which should be removed from the Communication.

First, it seems to suggest that the national court ordering disclosure of documents must include specific information in the disclosure order about how the information in question will be protected. In some cases, it may be legitimate, and even advisable, for the court to determine this only after receiving the documents (e.g., so it can assess their nature and volume).

Second, it also seems to suggest that addressees of orders for disclosure have a right to refuse to comply with the order if they believe that appropriate guarantees have not been provided. In a context where EU Law is trying to introduce a culture of disclosure and access which is largely novel in the majority of Member States, this is wholly unproductive. The Communication should be carefully revised to make sure that it is always clear about the fact that the only option available to an addressee of a disclosure order, who believes such order to be unlawful, is to challenge that disclosure order before the competent appeal court.

Para 32 lists several factors to be considered when deciding on measures to protect confidentiality. We suggest that an additional factor be added: the nature of the requesting party. Although partly overlapping with the factor "relationship between the parties", there is an autonomous content to this factor which would merit a special reference. While some degree of protection may still be warranted, a request of access by a Public Prosecutor, by a public authority or by a consumer protection association will expectably raise fewer concerns, and the national court may, in principle, have a greater degree of confidence in the good faith of the requesting entity.

Clause (vi) of para 32 and para 53 mention restricting disclosure to external legal representatives only. But they do so in a way that may leave doubts as to whether it is possible to provide access to external counsel and consultants while imposing a prohibition for these persons to share the accessed information with their clients. This is not intuitive in some Member States who lack a culture of disclosure. Indeed, precedents show that some defendants protest the idea of giving access to external counsel to documents while forbidding them from sharing it with their clients. It has been argued that it is unrealistic to believe this won't happen. Precedents also show that some courts of some Member States will also tend to assume that it is not possible to order a lawyer not to share information with his/her client. The Communication should address these fears, which are based on the assumption of illegal behaviour by external counsel and/or on a limited view of the obligations which can be imposed to achieve a proportional solution when providing access to confidential information. It has also been argued that such a solution may be contrary to national law. Para 53 may be read as allowing for this interpretation when it refers to national procedural rules. Para 65 mentions that there are jurisdictions where *"external legal counsels are bound, pursuant to deontological bar rules or other rules, to share the information with their clients"*, but then doesn't make it clear that EU Law would trump such requirements of national law. It should be made clearer that national courts are required to consider all measures which allow the optimized solution

Rua Castilho 32, 4
1250-070 Lisboa
info@sousaferro.pt
(351)211308960
www.sousaferro.pt

in light of the principles of effectiveness and proportionality, and that EU Law limits national law accordingly.

Recommendation #41: Para 28, and the Communication as a whole, should be revised to make it clear that the only option available to an addressee of a disclosure order, who believes such order to be unlawful, is to challenge it before the competent appeal court

Recommendation #42: A new factor should be added to para 32, to suggest that national courts take into account the nature of the requesting party when deciding on adequate protective measures (e.g., Public Prosecutor, public authority, consumer protection association)

Recommendation #43: the Communication should be clearer about the merits and possibility of limiting access to confidential information to external counsel, that this may be accompanied by the prohibition to share information with clients, and that EU Law limits the options of national law in this regard to the extent that such a protection measure is required by the principles of effectiveness and proportionality

Miguel Sousa Ferro

Professor at the
University of Lisbon Law School

Partner at Sousa Ferro & Associados

miguel.ferro@sousaferro.pt

José Sá Reis

Professor at the
University of Porto Law School

Partner at Sousa Ferro & Associados

jose.sa.reis@sousaferro.pt