

Hausfeld's Response to EC Consultation on Confidentiality

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Related Practice Areas: **Competition Disputes**

The EC has opened the floor to academics, practitioners and members of the judiciary across the EU, for views on a draft Communication on the protection of confidential information for the private enforcement of EU competition law. This is a topic of significant importance for those involved in damages claims, and particularly in a world following the implementation of the Damages Directive.

The Damages Directive sought to harmonise certain rules across Member States to remove some of the barriers faced by claimants when bringing private enforcement proceedings for competition law damages. Recognising that national courts across the EU may not have sufficient experience in dealing with confidential information – particularly in those Member States where proceedings are seldom brought (if at all) - the Commission drafted a Communication to provide practical, non-binding guidance to national courts. It caters for the various issues that may rise in handling confidential information, such as the imposition of confidentiality rings, redactions to documents and appointment of experts.

The consultation

Lawyers from the London and German offices of Hausfeld, co-authored a response to the draft Communication, providing comprehensive comment on the draft Communication offering a claimant bar perspective, by drawing upon our extensive experience of litigating competition damages claims in both countries.

Key observations on the draft Communication include:

- that national courts should proactively challenge any assertion of confidentiality over documents, and that it should not treat documents more than five years old as being confidential
- that national courts should not be overly prescriptive in terms of parties to be included in a confidentiality ring – rather, it should consider issues on a case-by-case basis
- that, in terms of redactions, it would be a better use of judicial resources to use an independent, neutral person to act as an arbitrator to decide upon proposed redactions of documents – this is supportive of the draft Communication's proposal
- that national courts should readily allow non-party access to documents given the potential of multiplicity of proceedings and the asymmetry of information between would-be claimants and defendants.

And now?

The consultation period concluded on 18 October. We, of course, hope that the revised Communication will incorporate our practical observations to ensure the Communication also considers its impact on claimants. We anticipate publication of our response on the Commission's consultation page in due course.

Hausfeld's response to the consultation.