

# HAUSFELD®

Submissions of Hausfeld & Co. LLP and Hausfeld Rechtsanwälte LLP  
following

**The European Commission's draft on:**

**“Communication on the protection of confidential information for the  
private enforcement of EU competition law by national courts”**

## A. Introduction

1. On 29 July 2019, the European Commission (the “**Commission**”) published the text of a draft Communication on the protection of confidential information for the private enforcement of EU competition law by national courts (the “**Draft Communication**”).
2. The below submissions are made by Hausfeld & Co. LLP and Hausfeld Rechtsanwälte LLP (together, “**Hausfeld**”). Hausfeld is a leading disputes only specialist law firm with eleven offices worldwide: six across Europe (Berlin, Brussels, Düsseldorf, London, Paris and Stockholm) and five throughout the US. We pioneered competition damages actions since our launch in 2009 and have managed some of the most high profile and complex cartel and abuse of dominance disputes in multiple jurisdictions, including those where we have a presence and others, such as the Netherlands and Poland. Our first-class lawyers joined from leading defence, Magic Circle or top US alumni firms, or held senior positions as in-house counsel for some of the largest firms in the world. They are market-leaders, having litigated (or are currently litigating) the Trucks cartel in France, Germany, the Netherlands and England<sup>1</sup>; the Cement cartel in Poland; Interchange Fees and the Air Cargo cartel in England and Google Android and Google Shopping in England and Germany (including in proceedings before the Court of Justice of the European Union (“**CJEU**”)) – to name but a few.
3. Our exclusively claimant-side focus gives Hausfeld a unique perspective on several of the matters addressed in the Draft Communication. The below submissions are drawn from our experience of encountering confidentiality issues in competition litigation across the European Union (“**EU**”) over the past decade, from the claimant perspective.
4. Please direct any questions regarding the below submissions to Anna Morfey of Hausfeld & Co. LLP and/or to Ann-Christin Richter of Hausfeld Rechtsanwälte LLP.

## B. Scope and purpose of the Draft Communication

5. We entirely endorse the starting point as set out in paragraph 1 of the Draft Communication, and specifically the statement confirming the essential role that disclosure plays in remedying information asymmetries between claimants and defendants. The need to consider disclosure requests alongside claims for confidential treatment of the documents of which disclosure is sought, is a matter that concerns both claimants and defendants. In a typical cartel damages claim, for example, documents relevant to the operation of the cartel and to calculating any overcharge are likely to be held by defendants: claimants might seek disclosure of them, and the defendants might make claims for confidential treatment. But documents relevant to issues of pass-on and interest are likely to reside with claimants: defendants might seek disclosure of them, and the claimants might make claims for their confidential treatment. We have experienced the balancing exercise of disclosure versus

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<sup>1</sup> References throughout to “England” should be read to mean England and Wales, and “English courts” to mean the courts of England and Wales.

protection of confidential information not as a one-sided issue, but one that all parties to litigation may encounter. That said, in cases where the defendants' conduct has been concealed (primarily in cartel damages claims), given the fundamental importance for claimants of understanding how the cartel operated and impacted them, claimants often encounter confidentiality as an obstacle early on in proceedings. Accordingly, unless the right balance is struck, many – otherwise meritorious – claims could struggle to get off the ground.

6. Mindful that the Draft Communication should therefore set the right tone, we propose that the references to “*confidential information*” in paragraphs 3 and 5 be changed to “*alleged confidential information*”. As we evidence further below, there is often a (misplaced) starting assumption that claims from one or more parties that a document is confidential are justified, whereas national courts should, in our view, consider such claims with skepticism from the very outset.

### **C. Disclosure of evidence containing confidential information**

7. We broadly agree with the balancing exercise as envisioned by the Draft Communication between confidential information, on the one hand, and disclosure of confidential information, on the other.<sup>2</sup> We note that confidentiality, in and of itself, is not an automatic bar to disclosure of documents in English proceedings and we consider that this is the right approach.
8. We fully endorse the reference in paragraph 13 of the Draft Communication to the concept of “*control*” over documents as without such principles, it would be all too easy, especially in the case of claims by and/or against corporate groups, for parties to frustrate disclosure requests. We consider that this concept should not be restricted to the corporate group scenario and that after the words “*hard drive of a defendant's subsidiary*”, the following additional example should be included “*or documents which a party has a contractual right to obtain from a third party*”. This principle is consistent with the position under English law. Inspiration might also be gained from the English Civil Procedure Rules (“**CPR**”), which provide that, “[...] a party has or had a document in his control if (a) it is or was in his physical possession, (b) he has or has had a right to possession of it, or (c) he has or has had a right to inspect or take copies of it.”<sup>3</sup>

Paragraph 16 of the Draft Communication is right to highlight the important issue of proportionality. However, we consider that there is a risk that the comment in the last sentence regarding “*broad or generalised disclosure requests*” could be misconstrued and interpreted as a requirement that specific documents are always identified in disclosure requests, whereas this would not, in our view, be either an appropriate or a necessary restriction in order to protect confidential information. By way of example, before the English courts, disclosure is often sought by claimants in relation to the documents contained in the Commission's case file to which a party has access (subject, for example, to the protection of leniency material). Whilst this could be classified as a “*broad and generalised*” request, it may also be an appropriate one, as, by definition, the claimant will likely not have seen any of the documents on the Commission's file and many of those documents, if not all of them, could be relevant to the claimant's case.

<sup>2</sup> Paragraphs 19 to 21 of the Draft Communication.

<sup>3</sup> CPR r.31.8(2) (Duty of disclosure limited to documents which are or have been in a party's control).

We therefore suggest that the Draft Communication makes clear that concerns regarding the breadth and generality of disclosure requests should be considered in light of the circumstances of the specific case, and that national courts should consider ways of protecting confidential information (such as by way of confidentiality rings and/or redactions – as further dealt with in the below submissions) as opposed to refusing the disclosure of otherwise relevant material.

9. In the following paragraphs, we explain in a little more detail how these principles are applied in practice in English litigation.
10. Litigants in England enjoy favourable rules on disclosure: both parties must give disclosure of documents that are supportive of and adverse to that party's case, as well as the other party's case, that are in that party's control.<sup>4</sup> Disclosure of documents typically takes place after the exchange of pleadings or statements of case but before witness and/or expert evidence is due to be filed. However, disclosure may also be ordered before a claim is filed in order to enable the parties to better understand their respective positions. Disclosure can also, in some circumstances, be sought from entities that are not parties to the litigation at all.
11. Crucially, the disclosure of documents in English proceedings is restricted to the purpose of the proceedings alone, meaning that a party may not seek to use documents disclosed to it for an ancillary purpose. The starting position in English law is contained in CPR r.31.22, i.e., that parties should be allowed unrestricted access to documents to be disclosed and that it is for the party seeking the imposition of any restriction to justify departing from this approach, provided that there is a real risk that the material would be used inappropriately for collateral use.
12. We note that the Draft Communication does not seek to define 'confidential information' as such, but considers that this should be determined on a case-by-case basis, and sets out (in paragraph 25) indicators of confidentiality stemming from EU jurisprudence. The indicators are a helpful guide. We would also suggest that the Draft Communication could refer to DG Competition's Guidance Paper on Confidentiality (March 2012) as a further reference source for national courts.<sup>5</sup>

Additionally, paragraph 25 of the Draft Communication picks up on two important – and often overlooked – issues which we consider are worthy of further comment, namely: (i) the impact of the passage of time on allegedly confidential material; and (ii) the whether the interests liable to be harmed by disclosure are worthy of protection.

13. In addition to the cases cited in footnote 25 (at paragraph 25(ii)) of the Draft Communication on this point, the General Court in *Pilkington Group Ltd v European Commission*<sup>6</sup> similarly held that the default position is that information which is more than five years old must be regarded historical unless the party alleging confidentiality can, exceptionally, demonstrate that the information nevertheless remains confidential:

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<sup>4</sup> CPR r.31.6 (Standard disclosure – what documents are to be disclosed) and CPR r.31.8(1) (Duty of disclosure limited to documents which are or have been in a party's control). See also footnote 3 above.

<sup>5</sup> See here: [https://ec.europa.eu/competition/antitrust/guidance\\_en.pdf](https://ec.europa.eu/competition/antitrust/guidance_en.pdf) (last accessed 18 October 2019).

*“Further, the Hearing Officer’s finding that the information concerned is historical is also correct. In particular, information which was secret and confidential but is five or more years old and must, accordingly, be regarded as historical, does not remain either secret or confidential unless, exceptionally, the party concerned demonstrates that, despite its age, that information continues to constitute an essential element of its commercial position or that of the third party concerned. [...]”*<sup>7</sup>

14. Indeed, the Competition Appeal Tribunal (the “**Tribunal**”) in the UK has also expressed concerns *vis-à-vis* the tactic of using confidentiality as a reason to add significant delay to proceedings. In the case management conference concerning an appeal to a decision of the UK Competition and Markets Authority (“**CMA**”), the President of the Tribunal warned that, in the context of the disclosure of the CMA’s decision:

*“I will just say that I will be very concerned if [it] has not been published by then, and I would hope [...] that the redactions will be very limited, the conduct here involved came to an end in 2004. I think the last relevant patent expired in January 2013; it is really hard to see that there can be any extensive confidentiality in 2016, but I just make that as a general observation because clearly we will all be looking at the Decision at the hearing of the appeals.”*<sup>8</sup>

15. Turning to the position in Germany, in a recent lawsuit, claimants in the ‘Girocard’ case were seeking document disclosure from the German Federal Cartel Office’s file. The third-party interveners – i.e., banking associations and a bank – argued for a quasi-unlimited period of protection. Even though the relevant banking system had completely changed and the documents were decades old, the banking associations sought complete protection of those documents. In Germany there is – unlike before the CJEU – no general rule on when documents lose their protection (or when this can at least be assumed). Our view is that such an approach is excessive and national courts should be strongly encouraged to consider

the age of the documents when determining whether claims for confidential treatment really are justified.

16. We strongly support the statement in paragraph 25(iii) of the Draft Communication that “*the interest of a party to protect itself or its reputation against any order for damages made by a national court because of its participation in an infringement of competition law is not an interest worthy of protection.*”. This principle has also been endorsed in the English courts on several occasions.

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<sup>6</sup> Case number T-462/12 (15 July 2015).

<sup>7</sup> *ibid* at 58.

<sup>8</sup> *Generics UK Limited v Competition and Markets Authority* (Case No. 1251/1/12/16). See page two (lines 3-8) of the transcript of the case management conference (13 May 2016), available here: [https://www.catribunal.org.uk/sites/default/files/1251-1255\\_Paroxetine\\_Transcript\\_130516.pdf](https://www.catribunal.org.uk/sites/default/files/1251-1255_Paroxetine_Transcript_130516.pdf) (last accessed 18 October 2019).

17. For this reason, however, we also have concerns with the use of the word “*sensitive*” rather than ‘confidential’ in paragraph 31 of the Draft Communication, particularly in the phrase “*redacting sensitive passages in documents*”. This gives the impression – wrongly in our view – that “*sensitive*” documents are automatically ‘confidential’. For example, documents may be “*sensitive*” because they are embarrassing – but that is not a reason to protect them from disclosure.
18. Finally, the non-exhaustive list of relevant factors to take into account, contained in paragraph 32 of the Draft Communication, when considering what measures to adopt to protect confidential material highlight precisely the types of information that should be made available to claimants, rather than that which should be withheld, for example:
- (a) “*customer names*” may need to be disclosed as part of estimating or calculating the volume of commerce, and therefore damages, for the claimant.<sup>9</sup> They may also be relevant for a claimant seeking to understand whether it was specifically targeted by anti-competitive behavior of the defendants;
  - (b) information going to “*prices, structure of costs, profit margins*” will often be relevant to calculating the overcharge<sup>10</sup>; and
  - (c) the “*volume or number of documents to be disclosed*”<sup>11</sup> should not, in our view, be a relevant factor to determining what may be confidential, as noted above.

#### **D. Confidentiality rings**

19. The Draft Communication refers in paragraph 31 to restricting the persons allowed to see the evidence as a means of protecting confidential information and this is developed further in paragraphs 37 to 72 in the description of confidentiality rings. Confidentiality rings are a commonly used mechanism in competition damages cases in England and we therefore share our experiences below on their best use (or not) when commenting on this particular section.
20. A frequent issue in relation to confidentiality rings, which the Draft Communication rightly focusses upon, is precisely *who* should be included in the confidentiality ring and whether in-house lawyers, or others within ‘the client’ (e.g., those within the relevant business), should also be included. It should not be a default position that confidentiality rings should exclude in-house lawyers. If information is unable to be shared with, for example, in-house lawyers, then external legal representatives may be unable to take proper instructions to act. As such, there should not exist a presumption in favour of excluding in-house lawyers from confidentiality rings, as appears to be the case in paragraphs 54 to 58 of the Draft Communication. In order to ensure the starting assumption is that in-house lawyers are admitted into confidentiality rings, with the exception being that they are not, then we recommend that these paragraphs are re-drafted.

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<sup>9</sup> Paragraph 32(i) of the Draft Communication. <sup>10</sup>

Paragraph 32(i) of the Draft Communication. <sup>11</sup>

Paragraph 32(ii) of the Draft Communication.

21. Parallels may be drawn to cases involving disputes regarding intellectual property, rather than infringements of competition law. In a recent judgment, the English Court of Appeal decided that:

*“[...] it is exceptional to limit access to documents in the case to external eyes only, so that no representative from the party which is subject to the restriction can see and understand those documents. An external eyes tier does not require justification for the restriction by reference to individual documents. It enables one party to decide to exclude all representatives of the opposite party from access to any document that it chooses, and places the onus on the party seeking access to apply to court to obtain it. That approach, in my judgment, is wrong in principle.”<sup>12</sup>*

This judgment speaks in favor of including non-lawyers to a confidentiality ring, placing the burden upon the disclosing party to justify their exclusion.

22. We note that the Draft Communication at paragraphs 37 to 42 reviews the benefits of using confidentiality rings as an effective measure for national courts to protect confidentiality. There are some notable drawbacks to using confidentiality rings, as further described below. In this regard, it would be prudent for the Draft Communication to set out and explain the disadvantages (as well as the advantages) of using confidentiality rings in detail, in order that national courts are able to conduct the necessary balancing exercise and make decisions on using confidentiality rings on a case-by-case basis.
23. We also note that the Draft Communication envisages that contemporaneous documents on the Commission’s file might fall to be disclosed into a confidentiality ring.<sup>13</sup> While there could be cases where this is justified, we believe those could be rare: national courts should have regard to the substance of the documents in question. We therefore see no justification for protecting documents simply because they were placed on the Commission’s file as part of an investigation.
24. As for the mechanics of confidentiality rings, we note that parties in Commission proceedings who wish to assert confidentiality over certain documents in the Commission’s possession may apply for confidentiality. Paragraph 47 of the Access to File Notice allows any such application to be challenged upon reasonable request.<sup>14</sup> We consider it important that the onus should rest on the party alleging that the document is confidential, and that parties should not unilaterally be able to assert confidentiality; thereby shifting the burden of proof onto the party seeking disclosure to argue why the document is not confidential. It is important that the Draft Communication is clear and consistent regarding on whom the burden rests to establish confidentiality: the party claiming it (as is the procedure under the Access to File Notice) or the party contesting it (as the Draft Communication appears in places to suggest: see, e.g., paragraphs 32, 39 and 46).

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<sup>12</sup> *TQ Delta LLC v Zyxel Communications UK Ltd* [2018] EWHC 1515 (Ch), at paragraph 21.

<sup>13</sup> Paragraph 45 of the Draft Communication.

25. In stark contrast to the position in England, litigants in Germany enjoy much less favorable rules on disclosure, as both parties may seek disclosure only once a substantiated claim has been raised. Accordingly, the German law of civil procedure does not contain explicit rules addressing confidentiality rings. That being said, section 89b (paragraph 7, sentence 2) of the German Act against Restraints of Competition allows German courts to “*take the measures required in the particular case to safeguard the protection of operating and business secrets and other confidential information.*” The section was introduced as part of the transposition of the Damages Directive in 2017. The German legislation decided to leave it up to the German courts to provide for adequate confidentiality measures in disclosure proceedings.
26. In assessing the necessary and required confidentiality measures, German courts may seek guidance in what is known as Düsseldorf procedure in intellectual property law, based upon section 140c (paragraph 3) German Patent Act: disclosure is permitted to a circle of informed individuals, commonly restricted to lawyers and experts involved in the case, who subsequently undertake not to reveal any confidential information to their clients. The German Supreme Court (Bundesgerichtshof) has acknowledged this practice with reference to the role of attorneys as “*independent authorities of the legal order*”.
27. The intended resemblance of section 89b (paragraph 7) German Competition Act to section 140c (paragraph 3) German Patent Act is widely regarded as an encouragement for courts and practitioners to draw from the intellectual property law provisions and create a similar practice in the field of competition law. So far, however, case law on the subject is scarce. It remains to be seen whether the principles that were developed in the field of intellectual property law can be directly transferred.
28. Finally, in Hausfeld’s experience of litigating in numerous jurisdictions across the EU, it remains the case that most claims result in out-of-court settlements before reaching trial, particularly follow-on cases which rely upon a Commission decision which establishes liability (for example, cartel infringements). In that regard, national courts should be encouraged to consider the impact of confidentiality rings on the settlement dynamic: parties who succeed in insulating their ‘damaging documents’ from public scrutiny may feel under less pressure to settle a case, which could prolong litigation that might otherwise have been resolved.

## **E. Redactions**

29. Redactions to documents should be viewed as an additional safeguard to confidentiality rings. In many cases, once an infringement has been announced by the Commission – particularly if it is by way of an infringement decision – the publication of a non-confidential version of the decision often takes years. In view of limitation concerns, particularly for claims that do not yet benefit from the application of the Damages Directive, this often creates a bar to claimants seeking damages as a result of an infringement. Furthermore, in view of the information asymmetry between the parties, claimants may ultimately seek early disclosure of the decision to which redactions would be applied.

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<sup>14</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 325, 22.12.2005, p. 7–15).

30. Whilst parties may, between them, agree upon early disclosure of a version of a decision that is non-confidential, this is often seen as an opportunity for defendants (and sometimes third parties) to impose significant delay to proceedings. For example, in a disclosure application by National Grid Electricity Transmission Plc in a damages action against members of the gas-insulated switchgear cartel<sup>15</sup>, the English High Court ordered disclosure of certain documents from the Commission's file (whilst the underlying Commission decision was under appeal to the CJEU) in its case management decision:

(a) first, the claimant sought disclosure of the responses to the Commission's Requests for Information ("RFIs") which were in control of the defendants. Although the Commission argued that national courts should balance the respective interests of the parties involved, the High Court granted this application on the basis that the responses to the RFIs would be disclosed into a confidentiality ring; and

(b) second, the claimant sought disclosure of the confidential version of the decision, as well as other documents which may have included leniency material. This resulted in the Commission writing to the High Court arguing that, pursuant to *Pfleiderer v Bundeskartellamt*<sup>16</sup>, leniency proffers should not be disclosed given their role in the EU's public enforcement regime. However, the High Court decided that the Commission should not have exclusive jurisdiction to determine the disclosure of leniency materials. As a result, the High Court conducted a balancing exercise as required by *Pfleiderer*.

31. The Draft Communication includes a number of proposals to resolve a dispute surrounding whether or not certain information is in fact 'confidential'. The suggestion at paragraph 84 of the Draft Communication, that the national court itself should decide what redactions are appropriate, is unlikely to be practical in most cases given the large volume of documents often affected, as well as limited judicial resources. We consider the idea at paragraph 90, namely that the parties use an independent, neutral person to act as an arbitrator to decide upon the application of any redactions made and provides his or her opinion to the national court, could be helpful in certain cases, and could see decisions being made by parties quickly, thereby saving costs and making better use of judicial resources.

32. However, there are several issues with the suggestion at paragraph 87 of the Draft Communication that an economic or accounting expert should review confidential material for him/herself and external counsel and produce a non-confidential summary of that information for the requesting party. Such an approach risks adding layers of interpretation and subjectivity which could, inadvertently, give the party receiving the non-confidential summary an inaccurate or incomplete picture of the evidence. We question whether the work product would ultimately be useful to the recipient(s), and would therefore recommend caution against this approach.

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<sup>15</sup> *National Grid Electricity Transmission Plc v ABB Ltd & Others* [2009] EWHC 1326 (Ch).

<sup>16</sup> *Pfleiderer AG v Bundeskartellamt* (Case C-360/09) [2011] WLR (D) 196, in which the CJEU held that, in principle, no person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages should be prevented from being granted access to documents relating to the leniency procedure involving the addressee of the decision.

33. The Draft Communication should make clear that redactions may work *in tandem with* the use of confidentiality rings: for example, it is common practice in English proceedings for documents containing highly sensitive confidential information to be partially redacted *and* placed in a confidentiality ring.

#### **F. Protection of confidential information throughout and following the proceedings**

34. The nature of competition damages, particularly infringements such as cartels which are concealed, often mean that it is difficult for would-be claimants to obtain information regarding its potential claim. It is not uncommon for multiple actions to proceed simultaneously through the courts concerning the same or similar anti-competitive conduct; examples of this in England include the interchange fee litigation against MasterCard and VISA as well as claims brought against Truck manufacturers. Accordingly, documents held by the national court regarding such claims should be made accessible to would-be claimants in the spirit of access to justice.

35. Particularly in England, judges have an overwhelming preference to avoid in-camera hearings and have exhibited a general reluctance to request non-litigants – i.e., members of the public – to be removed from the courtroom where confidential information is to be read aloud by counsel. In that regard, barristers often instruct judges to read certain paragraphs/passages so that the confidential information is not presented openly in court (or placed on the hearing transcript). As such, full or partial in-camera hearings are capable of being avoided altogether.<sup>17</sup> However, there are sometimes circumstances in which the judge will request that members of the public leave the court should a discussion as to the confidential information ensue. This was the case in the MasterCard and VISA interchange appeal proceedings before the Court of Appeal in April 2018 whereby members of the public were asked to leave the Court for approximately 15 minutes whilst the barrister for the defendants directed the Court to confidential information.<sup>18</sup> This avoided the need for the full hearing to be in-camera.

36. Furthermore, any member of the public in England (whether an individual or entity) may access, at a small fee, documents relating to the proceedings including statements of case, Orders made by the court and judgments (although the latter attracts no fee as all judgments are public). CPR r.5.4C in particular deals with third party access to English court records, although what may be ordered is ultimately subject to the court's discretion. However, where the party seeking access has established a legitimate interest and where the principle of open justice is engaged, then the court will more likely than not grant access.

37. CPR r.39.2 furthermore establishes that court hearings are to be held in public and CPR r.39.9 stipulates that hearings are recorded. As such, a member of the public may order (subject to a fee) a written transcript of the full hearing.

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<sup>17</sup> Paragraphs 101-104 of the Draft Communication.

38. The Supreme Court of the United Kingdom has recently ruled that the public should be allowed access to documents that are placed before a court and referred to during a hearing, provided that the party seeking access to the documents is able to explain why they are seeking access and how the granting of access will advance the constitutional principle of open justice. This judgment in particular requires courts to conduct a balancing exercise of the principle of open justice, the value of the information to be disclosed and the risk that disclosure may cause to the maintenance of an effective judicial process.<sup>19</sup>
39. We consider that the principles above are entirely sensible, in line with the principles of open justice espoused in paragraph 101 of the Draft Communication, which could be adopted by national courts in other member states to the extent they are not already.
40. In Germany by contrast, access to court records is virtually impossible for interested third parties or (potential) claimants in parallel civil proceedings. In the first place, pending cases and scheduled hearings are not widely advertised. Obtaining information is a burdensome exercise due to the federal organisation of the court system and laborious in the absence of sufficiently digitalised court records. For example, upcoming hearings are notified by way of a mere paper notice near the courtroom on the day of the hearing itself. Second, it is up to the court's discretion whether to grant third party access to documents in a pending case. Those aspiring to view court files must demonstrate an innate legal interest of their own.

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<sup>18</sup> As evidenced by paragraph 275 of *Sainsbury's Supermarkets Ltd & Ors v MasterCard Inc. & Ors* [2018] EWCA1536 (Civ).

<sup>19</sup> *Cape Intermediate Holdings Ltd (Appellant/Cross-Respondent) v Dring* [2019] UKSC 38; on appeal from [2018]EWCA Civ 1795.