

Confidentiality Claims in Closed Investigation Files

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Protecting the crown jewels or too late to save an already tarnished reputation?

On 22 July 2020, the Commission adopted a Communication on the protection of confidential information for the private enforcement of EU competition law by national courts,[1] designed to help national courts when they deal with requests for the disclosure of evidence in private enforcement actions by identifying measures to protect confidential information. Whilst the protection of business secrets and other confidential information is enshrined in Article 339 TFEU and is also a general principle of EU law, the Communication confirms that just because information is of a confidential nature, this will not constitute a bar to its disclosure in national proceedings. A recent Perspectives describes the most common measures available. In this blog we focus on confidential information.

What constitutes confidential information?

Whilst the Commission's guidance is obviously welcome to facilitate disclosure in the Member States' national courts, one key question remains: what constitutes confidential information? In that context, the Communication does not define a strict set of criteria but refers to the cumulative conditions set by EU courts: information that is known to a limited number of persons, the disclosure of which could significantly harm the person who provided it or third parties, and whose interests are, objectively, worthy of protection.

Central to many proceedings, disclosure of documents from the competition authority's investigation file is a highly disputed topic in the national courts, often due to the confidential (or not) nature of the information concerned. Many documents on the Commission's file will often relate to practices of several years or even decades ago: in such circumstances – setting aside leniency and settlement materials which are themselves subject to an absolute protection against disclosure - can they genuinely be considered confidential?

The Member States' different approaches highlight real inconsistencies in the identification and treatment of confidential information. The debates surrounding access to the Commission investigation file in the Trucks Cartel[2] in several proceedings across Europe exemplify this: the Paris Court of Appeal[3] refused disclosure of certain documents from the Commission's file on the basis these contained confidential information; other documents, not raising confidentiality issues, having been disclosed, whilst, at approximately the same time, the English Courts ordered disclosure of all relevant documents from the Commission's file into a confidentiality ring.[4]

Confidentiality ring as a protective tool

Disclosure of documents emanating from the Commission's file is routinely ordered in the English Courts, in compliance with the transposed Damages Directive. Confidentiality concerns which arise on the part of defendants are dealt with via a confidentiality ring. This approach was endorsed by Mr Justice Roth in his judgment dated 16 July 2018, also in relation to the Trucks cartel:

"[a]s regard sub paragraph (c) [of Article 5(3) of the Damages Directive], the protection of confidential information is ensured by the confidentiality ring, to which I have referred, and does not give rise to any concerns on the part of these defendants."[5]

Confidentiality rings are established by a court order and pursuant to which confidential information will only be disclosed to named individuals (usually external legal representatives and experts) who have given appropriate protective undertakings.

However, despite the fact that disclosure of documents on the Commission's file is usually, in the UK, first ordered within a confidentiality ring, this categorisation may not always be completely justified – but it is only once claimants have had sight of the documents that they can properly assess whether that is the case. The fact that the same issues arise in respect of the same set of documents in courts across the EU adds further complexity: for example, in the context of the Trucks litigation, the French court decisions that certain documents of the Commission's File did not raise any confidentiality concern – so can documents not be confidential in France but confidential in England?

In practice, we therefore see documents re-designated from confidential to non-confidential after a period of time, on the basis that defendants cannot reasonably sustain that documents dating back several years or decades relating to their illegal interactions with other cartelists, truly contain information which can be asserted to be confidential.

The English courts are also of course alert to the fact that defendants may assert confidentiality claims which may be unfounded and incompatible with the principle of open justice. For example, the Competition Appeal Tribunal Guide to Proceedings 2015 states:

"the question of confidentiality will be considered by the Tribunal not only with regard to their own interests but also with regard to the wider public interest, given that Tribunal hearings should normally be held in public, and rulings and judgments are to be publicly available. The Tribunal will therefore be alert to reject excessive claims to confidentiality, even if they are agreed between the parties."[6]

In that context, during the pre-trial review hearing that took place remotely on 29 and 30 July 2020 in the claims brought by National Grid Electricity Transmission and Scottish Power against suppliers of high voltage power cables,[7] the defendants in that litigation indicated that they were in the process of reviewing their own assertions of confidentiality made in relation to documents on the Commission's file and that certain documents would be re-designated ahead of trial due to start on 2 November 2020.

Conclusion

The numerous claims stemming from the Trucks cartel ably demonstrate the divergence in approach to documents on the Commission's file which are claimed to be confidential between the French and English courts. In this context, it is hoped that the Commission's guidance will provide a helpful basis upon which national courts might adjust their approach to ensure that the asymmetry of information between the parties is reduced and prevent cartelists from making what are ultimately unsustainable confidentiality claims that unnecessarily complicate and frustrate the litigation rather than facilitating resolution of the claims.

Hausfeld teams are acting on behalf of several claimants in the Trucks and Power Cables Cartels.

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