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### Working Party No. 3 on Co-operation and Enforcement

#### RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- European Union --

15 June 2015

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**-- European Union --**

**1. Introduction**

1. Public enforcement is a key driver of antitrust enforcement in the European Union. Its purpose is to ensure effective deterrence by detecting infringements of the competition rules in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and imposing sanctions.

2. Private antitrust enforcement in the EU has so far been less prominent. The Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which the national courts must safeguard.<sup>1</sup> In this respect the Court of Justice of the European Union clarified that anyone who suffered harm as a result of a breach of EU competition rules has a right to claim full compensation before national courts.<sup>2</sup>

3. Private enforcement could become increasingly important as a result of recent legislative changes. Last year, the European Parliament and the Council adopted Directive 2014/104/EU (the Directive),<sup>3</sup> which is aimed at facilitating private enforcement by removing legal obstacles in the Member States, which made it difficult to bring actions for damages before the national courts. The Directive ensures claimants can claim compensation for actual loss, loss of profit and interest from the time the harm occurred until compensation is paid in full, ensures parties have easier access to evidence they need, allows claimants to rely on final decisions by a national competition authority finding an infringement and gives them more time to claim damages, encourages parties to choose consensual dispute resolution as an alternative avenue of redress etc.

4. Although they serve different purposes, public and private enforcement are complementary tools, which need to interact to ensure that competition rules are as effective as possible. The Directive regulates interaction between antitrust damages actions and public enforcement by the European Commission and national competition authorities so as to ensure coherence for instance as regards arrangements for access to documents held by competition authorities, and thus maximise the overall effectiveness of antitrust enforcement in the EU.

**1.1 *Striking the balance between public and private enforcement of EU competition rules***

5. The interaction between public and private enforcement covers a number of different topics. In this note we will focus only on the following four: access by victims of antitrust infringements to evidence in competition authorities' files, protection in national courts of confidential information obtained by competition authorities during investigations, the discovery before non-EU courts of documents from the Commission's file and the effects of competition authorities' infringement decisions before the national courts.

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<sup>1</sup> Case C- 127/73 *BRT and SABAM* ECLI:EU:C:1974:6; Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* ECLI:EU:C:2006:461;

<sup>2</sup> Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* ECLI:EU:C:2006:461;

<sup>3</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.

## 2. Access by victims of infringements of Articles 101 and 102 TFEU to evidence held by the Commission or competition authorities of Member States

6. Evidence included in the competition authority's file, in the hands of competition authority or parties to the proceedings, is a source of evidence for proving harm suffered as a result of antitrust infringements. The victims of antitrust infringements can access this evidence on the basis of a national court's disclosure order.

7. The new Directive lays down special rules on the disclosure of evidence included in a file of the Commission or a national competition authority in damages actions before national courts in the EU. The disclosure of information before national courts should not unduly affect the effectiveness of enforcement of the competition rules by the Commission and national competition authorities, in particular by interfering with pending investigations or the functioning of leniency programmes and settlement procedures. To this end, the national courts can in no circumstances order the parties to the proceedings or any third party, including the Commission, to disclose leniency statements or settlement submissions.<sup>4</sup> Where these are obtained solely through access to the file of a competition authority, their use is deemed inadmissible before the court in damages actions and the court may impose penalties if this is not observed.<sup>5</sup> Information prepared by a natural or legal person specifically for the proceedings of a competition authority (e.g. replies to requests for information) or prepared by a competition authority and sent to the parties (e.g. statement of objections), as well as withdrawn settlement submissions, cannot be disclosed until the competition authority's investigation has been closed.<sup>6</sup> Until that point, where such evidence is obtained solely through access to a competition authority's file, its use is deemed inadmissible in damages actions and the court may impose penalties if this is not observed.<sup>7</sup>

8. Evidence that exists irrespective of the competition authority's investigation (pre-existing evidence) can be disclosed at any time in the context of actions for damages.<sup>8</sup> However, the national court has to assess the proportionality of any disclosure request before ordering disclosure. Disclosure requests formulated generically for all documents in the competition authority's file or all documents submitted in the case by a party under investigation would be considered disproportionate.<sup>9</sup>

9. Under the rules governing the Commission's proceedings (Commission Regulation (EC) No 773/2004), addressees of statement of objections and complainants can obtain certain information included in a Commission's antitrust file.<sup>10</sup> However, they can use this information only for the purposes of administrative or judicial proceedings for the application of Articles 101 and 102 TFEU.<sup>11</sup> This general

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<sup>4</sup> Article 6(6) of the Directive; see also Articles 2(16) and 2(18), which define leniency statements and settlement submissions as voluntary presentations in which undertakings acknowledge their participation in a secret cartel in order to obtain immunity or reduction of fines or to settle a cartel investigation.

<sup>5</sup> Articles 7 and 8 of the Directive

<sup>6</sup> Article 6(5) of the Directive

<sup>7</sup> See note 5

<sup>8</sup> Article 6(9) of the Directive

<sup>9</sup> Article 6(4) of the Directive

<sup>10</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004, p. 18

<sup>11</sup> Ibid.

rule is further refined in respect of different categories of evidence in the Commission's file in order to implement the Directive's provisions on limits in disclosure and the use of evidence mentioned above.<sup>12</sup>

10. The right to access evidence in a Commission's file is also provided by the Transparency Regulation (Regulation (EC) No 1049/2001), which is designed to confer on the public a right of access to documents of EU institutions.<sup>13</sup> However, there are exceptions to this right of access.<sup>14</sup> In the case of Commission's antitrust proceedings, these restrictions on access have to be interpreted by taking into account specific restrictive rules governing the right of access to documents in the Commission's antitrust file, namely Regulations (EC) No 1/2003 and (EC) No 773/2004.<sup>15</sup> When dealing with a request under Regulation (EC) No 1049/2001 for access to documents in an antitrust file, the Commission may rely on a general presumption that disclosure would undermine the protection of the purpose of investigations or commercial interests of the undertakings involved and refuse access to those documents.<sup>16</sup> It is then up to the applicant to demonstrate that, for a specific document, the justification does not stand.<sup>17</sup>

11. On the basis of the general principle of loyal cooperation stemming from the Treaty on European Union (TEU), courts in the Member States, which are responsible for ensuring that EU law is applied and respected in the national legal system, can ask the Commission to transmit to them information from its files.<sup>18</sup> However, the Court of Justice of the European Union has clarified that the Commission may refuse such requests for overriding reasons relating to the protection of the Union's interests or to avoid interference with the functioning and independence of the Union.<sup>19</sup> The Commission's *Notice on Cooperation with National Courts* sets out this mechanism in more detail. Proposed amendments to the notice, in line with the Directive, clarify that disclosure should not interfere with the functioning of the Commission's leniency and settlement programmes as well as its ongoing proceedings.<sup>20</sup>

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<sup>12</sup> Proposed amendments to Commission Regulation (EC) No 773/2004 are available at [http://ec.europa.eu/competition/consultations/2014\\_regulation\\_773\\_2004/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/index_en.html)

<sup>13</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43

<sup>14</sup> Article 4 of Regulation (EC) No 1049/2001

<sup>15</sup> See Case C-365/12 *European Commission v EnBW Energie Baden-Württemberg AG*, ECLI:EU:C:2014:112

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> See Article 4(3) of the Treaty on European Union (TEU); Article 6 and 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1; case T-353/94 *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119;

<sup>19</sup> Case C-2/88 *J. J. Zwartveld and Others*, ECLI:EU:C:1990:440, paras 10 and 11; Case T-353/94, *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119; Case C-275/00 *First and Franex*, ECLI:EU:C:2002:711, para 49

<sup>20</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27. 4. 2004, p. 54. Proposed amendments to the Notice are available at [http://ec.europa.eu/competition/consultations/2014\\_regulation\\_773\\_2004/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/index_en.html)

### 3. Treatment of confidential information before the national courts

#### 3.1 Disclosure

12. In the EU, 'confidential information' is understood as encompassing business secrets and other confidential information. There is no precise definition of 'confidential information' but EU case-law<sup>21</sup> has provided a number of elements for its identification; such information is known to a limited number of people only and its disclosure is liable to cause serious harm to the person who has provided it or to third parties. 'Business secrets' concern information of which not only disclosure to the public, but also mere transmission to a person other than the one who provided the information, may seriously harm the interests of the latter.<sup>22</sup> The interests liable to be harmed by disclosure should be worthy of protection.<sup>23</sup> The information that may qualify as business secrets include for example production secrets and processes; quantities produced and sold; market shares; marketing plans; cost and methods of assessing costs and sales strategy.

13. EU officials have an obligation of professional secrecy<sup>24</sup> which has been interpreted in EU case law as expressing the principle of protecting confidentiality and business secrets in Commission's files.<sup>25</sup>

14. However, EU officials' duty to protect confidential information does not prevent them disclosing to national courts documents from the Commission's file that contain confidential information.<sup>26</sup> The Directive on antitrust damages actions ensures that national courts can also order disclosure of relevant confidential information.<sup>27</sup> Disclosure of evidence containing confidential information is often essential for a successful damages claim for example as regards quantification of harm.

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<sup>21</sup> See Cases T-353/94 *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119, T-198/03, *Bank Austria Creditanstalt AG v Commission of the European Communities*, ECLI:EU:T:2006:136 and T345/12, *Akzo Nobel NV and Others v European Commission* ECLI:EU:T:2015:50.

<sup>22</sup> See Case T-353/94 *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119 and Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 43, 45 and 57 of the EEA Agreement

<sup>23</sup> See Cases T-198/03, *Bank Austria Creditanstalt AG v Commission of the European Communities*, ECLI:EU:T:2006:136 and T345/12, *Akzo Nobel NV and Others v European Commission* ECLI:EU:T:2015:50.

<sup>24</sup> Article 339 TFEU

<sup>25</sup> See Case T-353/94 *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119.

<sup>26</sup> Case T-353/94, *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119.

<sup>27</sup> Article 5(4) of the Directive

15. In two recent opinions, the Commission confirmed that it does not oppose the disclosure of confidential information from its files in proceedings before national courts<sup>28</sup>. However, in the event of such disclosure, the national court is under the same obligation as the Commission to protect confidentiality<sup>29</sup>.

### 3.2 *Protection*

16. The Commission has to verify whether the protection of confidential information by a national court<sup>30</sup> is sufficient to comply with EU law<sup>31</sup>. The Commission will not transmit confidential information to a national court that is unable to guarantee its protection.<sup>32</sup>

17. The Commission might take a number of factors into account when determining whether the confidential information used in judicial proceedings is protected appropriately. These might include the identity and number of persons granted access to the confidential information; the form in which such access is provided (e.g. redactions, *in camera* proceedings, confidentiality rings); the purposes for which the confidential information can be used; respect of the rights of third parties; the type of sanction in the event of the system of protection not being respected etc.

18. Currently, there is significant divergence between Member States as regards: whether there is a protection of confidential information in proceedings before national courts, the level of protection and available protection mechanisms. Particularly in those countries where there is no protection of confidential information foreseen, the approach taken by national judges varies from not ordering disclosure of confidential information at all, to exactly the opposite, namely ordering disclosure without any protection, so that the confidential information gets into the public domain.

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<sup>28</sup> The Commission's opinion of 5 May 2014 in application of Article 15(1) of Regulation No. 1/2003 regarding Interchange fee litigation before the Judiciary of England and Wales: *Wm. Morrison Supermarkets plc and Others v MasterCard Incorporated and Others* (Claim Nos. 2012/699; 2012/1305-1311) available at [http://ec.europa.eu/competition/court/morrison\\_supermarkets\\_mastercard\\_opinion\\_en.pdf](http://ec.europa.eu/competition/court/morrison_supermarkets_mastercard_opinion_en.pdf); The Commission's opinion of 22 December 2014 in application of Article 15(1) of Regulation No. 1/2003 regarding litigation before the Judiciary of England and Wales: *The Secretary of State for Health and others v. Servier Laboratories Limited and others*; *The Scottish Ministers and others v. Servier Laboratories Limited and others*; and *The Welsh Ministers and others v. Servier Laboratories Limited and others* (Claims No HC11C01423; HC12E02766 and HC12B03451) available at [http://ec.europa.eu/competition/court/confidentiality\\_rings\\_final\\_opinion\\_en.pdf](http://ec.europa.eu/competition/court/confidentiality_rings_final_opinion_en.pdf);

National courts may ask the Commission to provide an opinion on the application of the EU competition rules and the Commission may also submit *amicus curiae* observations to national courts on its own initiative when the coherent application of EU competition law is at stake; see Article 15(1) and (3) of Council Regulation (EC) No 1/2003.

<sup>29</sup> See Article 4(3) TEU on the duty of sincere cooperation, Article 28 of Council Regulation (EC) No 1/2003 and Cases C-53/85 *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, ECLI:EU:C:1986:256 and T-353/94, *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119.

<sup>30</sup> See Case T-353/94 *Postbank NV v Commission of the European Communities*, ECLI:EU:T:1996:119.

<sup>31</sup> Article 339 TFEU, Article 28(2) of Council Regulation (EC) No 1/2003, Article 7 on the respect for private and family life and Article 8 on protection of personal data of the Charter of Fundamental Rights of the European Union.

<sup>32</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, p. 54, points 21-26.

19. The Directive obliges Member States to ensure that, when ordering the disclosure of confidential information for the purpose of a damages action, national courts have effective protection measures at their disposal and are able effectively to impose penalties on parties, third parties and legal representatives who fail or refuse to comply with protection obligations under a national court order.<sup>33</sup>

20. The Commission has pointed out, in the opinions mentioned above, that where disclosure is ordered, the national court should guarantee the appropriate protection of confidential information, including information originating from third parties i.e. not parties to the proceedings before the national court.<sup>34</sup>

#### **4. The discovery before non-EU courts of documents from the Commission's file**

21. The Commission and its services have intervened, formally or informally, in a number of proceedings outside the EU in which the discovery of documents stemming from its investigations was at stake.<sup>35</sup> In this context, the Commission has opposed the discovery of such documents and expressed its concerns as to the negative effects that discovery could have on its enforcement activity, in particular by undermining the effectiveness of its leniency programme.

22. In principle, the Commission opposes a discovery before non-EU courts of documents included in its file. Pursuant to the rules mentioned above, the information the Commission acquired for the enforcement of EU competition rules shall be used only for the purpose for which it was acquired.<sup>36</sup> The documents obtained in the context of proceedings before the Commission by the addressees of statement of objections or complainants should only be used for the purposes of judicial and administrative proceedings for the application of Articles 101 and 102 TFEU.<sup>37</sup> These rules stand in the way of discovery of such documents when a court is applying other rules than Articles 101 and 102 TFEU.

#### **5. Binding effect of infringement decisions of competition authorities**

23. In order to ensure that EU competition rules are applied uniformly, the national courts, when applying EU competition rules, cannot adopt decisions that would run counter to a decision already adopted by the Commission. They must also avoid adopting decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.<sup>38</sup> In this way conflicting decisions and inconsistency in the application of EU competition rules can be avoided. If in doubt as to the legality of the Commission's decision, a national court can always refer a question for a preliminary ruling to the Court of Justice of the European Union, which will decide on the compatibility of the Commission's decision with EU law.

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<sup>33</sup> Article 5(4) and 8(1)(c) of the Directive.

<sup>34</sup> See note 28.

<sup>35</sup> See, for example, re *Air Cargo Shipping Services*, M.D.L. No.1775 (E.D.N.Y), re *TFT-LCD (Flat Panel)* No. M:07-1827 (N.D.Cal.2011), re *Vitamins*, Misc.No.99-197, Docket No. 3079 (D.D.C. 20 May 2002); re *Methionine*, No. C-99-3491, MDL no. 1311 (N. D. Cal. 17 June 2002).

<sup>36</sup> Article 28(1) of Council Regulation 1/2003.

<sup>37</sup> See notes 10-12.

<sup>38</sup> See Article 16(1) of the Council Regulation (EC) No 1/2003 and Cases C-234/89 *Delimitis v Henninger Bräu* ECLI:EU:C:1991:91, para 47 and C-344/98 *Masterfoods and HB*, ECLI:EU:C:2000:689, para 51.

24. Under the Directive, a national competition authority's decision finding an infringement is also binding in damages actions brought before a national court in that authority's Member State.<sup>39</sup> The expected benefit of this is that the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court will not be relitigated in subsequent actions for damages. This should enhance legal certainty, ensure consistency in the application of EU competition rules and improve the procedural efficiency of actions for damages.

## **6. Conclusion**

25. The debate on the interaction between public and private enforcement of the EU competition rules has focused on access to evidence in competition authorities' files, protection in national courts of confidential information obtained by competition authorities during investigations and the effects of competition authorities' infringement decisions in the proceedings before the national courts. The discussion follows recent legislative changes which aim to develop private enforcement in Europe while ensuring that public enforcement continues to work well. Public and private enforcement complement each other. In the EU the interaction between them is regulated in the Directive in order to enable the antitrust enforcement as a whole to function properly.

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<sup>39</sup> Article 9 of the Directive