

Discovery, confidentiality and disclosure of evidence

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Introduction

1. Antitrust litigation and civil process
2. Introduction of discovery rules
3. Streamlining the exchange of information
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Antitrust litigation and civil process

- Publicly enforced systems vs. Private enforcement: different rules
- Need to bridge the gap in certain procedural aspects
- Access to evidence by private plaintiffs is key to the efficiency of the model
- Alleviating the burden (and standard) of proof to damages claimants would also foster private enforcement

Introduction of discovery rules

- Adversarial v. Inquisitorial Models of Civil Procedure
- Discovery and judicial fact-finding powers
 - Discovery as an effective mechanism to bring evidence to the civil process
 - An economic approach / justification
 - Scope of discovery
 - Foreign discovery & localization of the process
- *Onus probandi* : shall it be alleviated?

Streamlining the exchange of information

- Access to administrative authorities' files
- Limits to access to the Commission's files
- A reciprocity approach shall be adopted... given certain safeguards are also taken into account
 - Duty to cooperate between EU and national institutions
 - Taking appropriate precautions ? denying access
- Exchange of information v. Access to file

Potential drawbacks (I): confidentiality

- Protection of business secrets and confidentiality is a legitimate concern
 - Business secrets
 - Other confidential information
- Excessive protection could 'shield' companies from private enforcement
- It is for the companies to prove the plausibility and significance of the damage
- A balance between confidentiality and claimants' right of access to justice

Potential drawbacks (II): excessive antitrust litigation

- “to foster a competition culture, not a litigation culture”
- Private litigation increases deterrence
- Enhanced access to evidence increases the chances of getting damages made good by infringing companies
- Special rules regarding discovery costs could be implemented in order to lower the burden potentially imposed on defendants

Harmonisation in the EU

- The need to harmonise civil procedure and, particularly, rules on reception of evidence at courts
- International (ALI-UNIDROIT) and European (Storme Report) proposals
- A common approach towards the inclusion of a limited court-managed discovery system in all EU Member States' civil procedure regulations

Conclusions

- Discovery rules shall be introduced, with a substantial court participation and a limited scope
- Exchange of information between competition authorities and national courts shall also be streamlined
- There is room for substantial harmonisation in this field across the EU