Discovery, confidentiality and disclosure of evidence under the private enforcement of EU antitrust rules

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ABSTRACT

The approval of Regulation 1/2003 and the accompanying "*modernisation package*" of EU antitrust rules has taken antitrust into a new dimension in Europe – that of the civil process –. Some rules of this new private enforcement framework are clearly different from those of publicly enforced systems. Most noteworthy are the differences between the public bodies' powers to obtain evidence of antitrust infringements and those of the parties to civil proceedings – or the national civil courts themselves – to bring those evidences into the civil procedure.

Absent a class-action mechanism, third (affected) parties – and especially Small and Medium Enterprises (SMEs) and consumers – are not particularly well-prepared to obtaining evidence of an antitrust infringement, which can be an expensive and time-consuming effort that they may not be willing or able to make. Difficulties in proving antitrust cases may therefore freeze the anticipated growth of antitrust litigation in Europe. Consequently, fostering discovery and the exchange of information across jurisdictions may be a key element in order to develop a European-wide effective system of private enforcement of competition law.

On the other hand, an excessive promotion of such an exchange of information may pose an important threat to guarantying procedural rights, confidentiality of information, business secrets and the equality of arms between the parties of a given civil process. These principles constitute the basics of a fair procedure and one of the pillars of all European legal systems. Therefore, a balance must be struck between giving way to substantial antitrust litigation in Europe and maintaining the highest possible degree of legal certainty and protection of (procedural) rights of all the parties involved in those procedures. Excessive litigation must also be avoided. The modernisation package has clearly identified the exchange of information and its confidentiality implications, as well as excessive or unmerited litigation, as central concerns about the decentralisation process.

Rules on discovery, confidentiality and disclosure of evidence will be regulated by national civil procedural regulations to a large extent. The specific needs of antitrust litigation may, in some instances, require certain amendments of those domestic procedural regulations. Furthermore, a certain degree of harmonisation across jurisdictions is required if the private enforcement system is to grant equal rights to all European citizens. Moreover, harmonisation can deter *forum shopping* and maintain a *level playing field* across the EU.

In this paper we describe the implications of rules governing discovery, confidentiality and disclosure of evidence on the private enforcement system. We also highlight the importance of the exchange of information between competition authorities – European Commission and National Competition Authorities (NCAs) – and civil courts in fostering private enforcement of EU antitrust rules. We then turn towards the main concerns that this new approach to antitrust enforcement generates in the EU from a confidentiality and business secrets protection standpoint. We also point to the need to reach the equilibrium between fostering antitrust enforcement and avoiding excessive litigation, and insist on the objective of harmonising the existing domestic regulations of private proceedings across all Member States. We finally conclude with some general remarks on the topic.

KEYWORDS: legal procedure, confidentiality, evidence, private enforcement, competition law.

JEL CLASSIFICATION: K21 & K41.

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1. Introduction. From public prosecution to private enforcement: antitrust litigation and civil process

(a) The new paradigm

The approval of Regulation 1/2003 and the accompanying "*modernisation package*" of EU antitrust rules[2] has taken antitrust into a new dimension in Europe – that of the civil process –, what is known as the *privatization* of the enforcement of EU antitrust rules[3]. The main aim of such privatization is to establish a more efficient system of public–private enforcement[4] of competition law across the European Union[5].

The European Competition Commissioner, Ms. Neelie Kroes, has advocated for a two-fold set of advantages of this private enforcement system: "*The first advantage of private enforcement is direct justice, which allows the victims of illegal anticompetitive behaviour to be compensated for the loss they have suffered.* […] *On the other hand* […] *facilitating the bringing of such cases before national courts can considerably increase the overall enforcement of the European competition rules and thus the likelihood of competition law infringements being discovered and sanctioned*"[6].

Similarly, her predecessor, Mr. Mario Monti, sustained that "*more private enforcement of the EC competition rules in parallel to public enforcement by the Commission and the National Competition Authorities should lead to even greater compliance with EC competition rules. Greater enforcement of EC competition law would also act as a catalyst unleashing more competition across Europe, thereby helping to achieve the goals of the Lisbon agenda*"[7].

While empowering the victims of antitrust violations, fostering private enforcement will provide the Commission with greater discretion over its own priorities and case selection and will help achieve a more efficient enforcement of EU antitrust law[8]. As the European Commission (hereinafter, the "Commission") puts it, "*private litigation can in particular deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritisation needs*"[9]. This 'specialization' in the enforcement of EC antitrust rules may well increase the aggregate efficiency of the system[10 & 11].

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[2] For a complete set of regulatory references, see Annex I.

[3] From an economic perspective, private enforcement of laws has been a long-studied topic since the seminal work of STIGLER (1970) and BECKER and STIGLER (1974). Some very important works followed, such as those of LANDES and PORTER (1975), ELZINGA and BREIT (1976) or FRIEDMAN (1984). For a brief and non-exhaustive list of the main literature on the economic analysis of discovery, see Annex III.

[4] On the co-ordination of both enforcement systems in the United States, see ROSENBERG and SULLIVAN (2005). On the social efficiency effects of the double-enforcement system, see MCAFEE, MIALON and MIALON (2005).

[5] On the novelties and legal and economic rationale of the private enforcement system, see JONES, Clifford A., "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check". *World Competition*, 27 (1): 13 – 24, 2004. Of the contrary opinion is WILS, Wouter P.J., "Should Private Antitrust Enforcement Be Encouraged in Europe?". *World Competition*, 26 (3): 1 – 16, 2003. See also, DEPOORTER and PARISI (2005).

[6] SPEECH/05/613 "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", given at the Cour de Cassation, Paris (France), on the 17th October 2005.

[7] SPEECH/04/403 "Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation", given at the 8th Annual Competition Conference, Fiesole (Italy), on the 17th September 2004.

[8] OECD, *Competition Law and Policy in the European Union 2005,* p. 44. http://www.oecd.org/dataoecd/7/41/35908641.pdf.

[9] Working Paper, § I.C, par. 14, p. 8.

[10] Moreover, an increased private enforcement of antitrust rules in Europe can decrease the risk of an excessive "universalization" of the jurisdiction of other courts (*i.e.* US courts) over private antitrust enforcement in cases where a limited territorial link with such jurisdictions exist. On this phenomenon, see MEHRA (2004).

[11] One of the main risks of this double-tier system could be over-enforcement, which may have a negative impact on economic efficiency. On the issue of over-enforcement, see BIERSBACH and STEIN (2005). On the level of discovery that optimizes deterrence, see HAY (1994). The analysis of whether (in)existence of discovery rules are fit to reduce the probability of over-enforcement for potential transgressors or fall short in guaranteeing an adequate (private) enforcement level of EU antitrust rules (*i.e.* generates under-enforcement of competition laws across the EU) is an issue that deserves careful attention and clearly

However, it is important to realize that one of the implications of this change of paradigm is that some rules of this new private enforcement framework are clearly different from those of publicly enforced systems. And these differences can be very relevant to the proper development of the private enforcement system itself. In fact, in some of the most diverging aspects and in order to allow for a real development of private antitrust litigation in the EU, there is a need to bridge the gap between both enforcement systems.

The Commission has recently issued a Green Paper on Damages Actions for breach of EC Antitrust Rules[12] and a Working Paper developing its content[13], where some of the major differences between private and public systems[14] and difficulties stemming therefrom are highlighted in relation to claims for damages arising out of antitrust infringements[15].

In the Green Paper, the Commission identifies "*the main obstacles to a more efficient system of damages claims and* [sets] *out different options for further reflection and possible action to improve damages actions both for follow-on actions and for stand-alone actions*"[16]. The Working Paper further describes and analyses the abovementioned difficulties[17] and tries to set up the analytical framework for each of them, in order to help establish the appropriate policies at both the EU and Member States level[18].

As the main difficulties for an efficient development of the private enforcement of EC antitrust rules (through damages claims), the Commission identifies certain issues such as: (i) access to evidence, (ii) standards of fault, (iii) scope of damages, (iv) the use of the passing-on defence and indirect purchaser's standing, (v) protection of consumers interests, (vi) costs of actions, (vii) coordination of public and private enforcement, (viii) jurisdiction and applicable issues, and (ix) other difficulties such as expert witnessing, extension of limitation periods or causation requirements.

(b) Access to evidence by private claimants is in the core of the reform

For the purpose of this paper, most noteworthy are the difficulties linked to (a lack of) access to evidence, which mainly derive from the differences between the public bodies' powers to obtain evidence of antitrust infringements and those of the parties to civil proceedings – or the national civil courts themselves – to

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exceeds the scope of this paper. Our first impression is that the introduction of a limited court-managed discovery system could increase overall efficiency of the antitrust enforcement system in the EU.

[12] European Commission's Green Paper on Damages actions for breach of the EC antitrust rules. COM (2005) 672 final. Available at http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html. (hereinafter, "Green Paper").

[13] Commission Staff Working Paper Annex to the Green Paper on Damages actions for breach of the EC antitrust rules. SEC (2005) 1732, 19.12.2005 (for the purposes of this article, the "Working Paper"). Document available at http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html.

[14] Working Paper, § I.A, par. 3, p. 6.

[15] It is our view that the main findings in relation with damages claims are (mainly) equally applicable to other types of antitrust litigation. Moreover, it is to be expected that the larger number of antitrust claims brought forward by private (affected) parties will pursue the recovery of the damages suffered as a consequence of the alleged infringement of EU antitrust rules, either as the sole purpose of the action, or as a complement to nullity or enforcement of contract actions.

[16] Green Paper, § 1.3, p. 4. Follow-on actions are defined as those cases in which the civil action is brought after a competition authority has found an infringement, while stand-alone actions are referred to as actions which do not follow on from a prior finding by a competition authority of an infringement of competition law.

[17] In relation with the main difficulties in attaining an effective private enforcement of EC antitrust law, see JACOBS, Francis G. and DEISENHOFER, Thomas, "Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective", in EHLERMANN, Claus-Dieter, and ATANASIU, Isabela (Eds.), *European Competition Law Annual: 2001. Effective Private Enforcement of EC Antitrust Law*. Oxford – Portland Oregon, Hart Publishing, 2003, p. 187 – 227.

[18] The Commission Staff identifies issues related to (i) burden and standard of proof, (ii) collection and presentation of evidence, and (iii) evidential value of national competition authorities and national court decisions, as some of the main obstacles to actions for damages. Working Paper, § I.F, par. 33–36, p. 12–13. Some of this obstacles have also an impact on (or are aggravated by) the existence of time limitations. In this vein, "*a short limitation period could* [...] *be problematic where limitations on access to evidence are coupled with an obligation to present all evidence on filing a claim*". Working Paper, § I.F, par. 42, p. 14.

bring those evidences into the civil procedure. We will also pay special attention to the difficulties attached to the burden of proof imposed on potential claimants[19].

The Commission has highlighted the difficulties to grant adequate access to evidence as one of the main impediments against the development of an efficient private enforcement system. In this vein, the Commission considers that "*actions for damages in antitrust cases regularly require the investigation of a broad set of facts. The particular difficulty with this kind of litigation is that often the relevant evidence is not easily available and is held by the party committing the anti-competitive behaviour. Access by claimants to such evidence is the key to making damages claims effective*"[20].

Regarding the burden and standard of proof imposed on claimants in antitrust litigation, the Commission has considered that special rules can help claimants in proving damages claims, and that "*the question of the evidentiary value of NCA decisions is of particular importance*"[21]. As a specificity of antitrust litigation, the Commission has indicated that "*the evidential burden on the potential litigant is not only particularly high, the information required to successfully bring a case is also unevenly distributed*"[22]. Consequently, the Commission has made some proposals that could help lower the burden on potential claimants.

Absent an appropriate class-action mechanism[23], affected parties – and especially Small and Medium Enterprises (SMEs) and consumers – are not particularly well–prepared to obtaining evidence of an antitrust infringement, which can be an expensive and time-consuming effort that they may not be willing or able to make. Difficulties in proving antitrust cases may therefore freeze the anticipated growth of antitrust litigation in Europe.

Consequently, fostering discovery – *i.e.* a variety of devices that broadly empower a litigant to acquire information from the other party before trial or, put differently, devices by virtue of which a party can force its opponent to reveal all documents which are relevant to (its) case[24] – and steamlining the exchange of information across jurisdictions, as well as establishing special rules on evidence requirements, may be key elements in developing a European–wide effective system of private enforcement of EU competition law.

In order to do so, the Commission has centered the debate on access to evidence around three main issues: (i) introducing an obligation to turn over documents or otherwise provide access to evidence to potential claimants (*i.e.* discovery obligations); (ii) placing an obligation on the defendant to disclose documents submitted to a competition authority (disclosure obligations); and (iii) establishing special rules on burden and standard of proof (i.e. *onus probandi* and presumption specialities). We will turn to each of these important issues at a time in following sections.

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[19] The Working Paper covers access to evidence-related issues in its Section II, p. 18 – 30. This Section covers burden of proof and standard of proof as well.

[20] Green Paper, § 2.1, p. 5.

[21] Green Paper, § 2.1, p. 5.

[22] Working Paper, § I.G, par. 52, p. 17.

[23] The Commission also considers the need to set up a class action system. Green Paper, § 2.5, p. 8. "*It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. **Consideration should therefore be given to ways in which these interests can be better protected by collective actions**. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money*" (emphasis added). However, the importance and broad scope of the collective action topic far exceeds the aims and possibilities of this paper. Nevertheless, given the difficulties of establishing such class action mechanisms across the EU, we will assume that no satisfactory collective action mechanism exists.

[24] See Annex II for a more detailed discussion on the concept and scope of discovery.

(c) Potential spill-overs and negative side-effects: protection of confidentiality and excessive litigation

In opposition to the beneficial effects on fostering private enforcement, one must take into account that an excessive promotion of disclosure of information and access to evidence mechanisms, as well as an excessive reduction of standards of proof or an automatic shift on the burden of proof of antitrust infringements, may pose an important threat to guarantying procedural rights. And particularly, confidentiality of information, business secrets and the equality of arms between the parties of a given civil process – which constitute the basics of a fair procedure and one of the pillars of all European legal systems –.

On the other hand, an overly-restrictive interpretation and protection of the right to non-disclosure of confidential information and business secrets could shield infringing companies from private enforcement of EU antitrust rules.

Therefore, a balance must be struck between giving way to substantial antitrust litigation in Europe and maintaining the highest possible degree of legal certainty and protection of (procedural) rights of all the parties involved in these proceedings, without exaggerating that protection.

The modernisation package has clearly identified the exchange of information and its confidentiality implications as a central element of the decentralisation process of antitrust enforcement and has given some important guidelines in this respect. As we will see in detail, the Commission has conditioned the exchange of information with the NCAs and national courts to the safeguard of confidentiality and business secrets of the affected parties. However, the Commission may be assuming that this requirement could be difficult to comply with by some national courts, given the very characteristics of domestic civil procedure regulations. Such an assumption can diminish the effects of the privatization of antitrust enforcement.

Moreover, a second balance needs to be considered between fostering private enforcement of EU antitrust rules and avoiding excessive antitrust litigation, which could generate important negative effects. Mainly, overdeterrence of companies doing businesses in the EU and overenforcement of EU antitrust laws, which can negatively impact the efficiency of European economies.

(d) Harmonisation of Member States' Civil Procedure Regulations: creating a level playing field

The modernisation package establishes some general rules that will be applied by European Institutions and by national courts across the EU. However, discovery obligations, disclosure of evidence and preservation of confidentiality will be governed by national civil procedural regulations to a large extent[25]. The specific needs of antitrust litigation may, in some instances, require certain amendments of domestic procedural regulations[26]. Debating on such harmonisation possibilities is one of the main purposes of the Green Paper, whereby the Commission echoes the current "*total underdevelopment*" of the domestic systems for damages claims for infringements of antitrust rules in the 25 Member States[27].

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[25] Differences between procedural systems may be worth being analysed both from a legal and economic perspective. In this sense, see MILLER (1997).

[26] The Commission expressly highlighted this fact: "*The ECJ has ruled that, in the absence of Community rules on the matter, it is for the legal systems of the Member States to provide for detailed rules for bringing damages actions. As the Community courts have no jurisdiction in the matter (outside the procedure for preliminary rulings), the courts of the Member States will generally hear these cases. Significant obstacles exist in the different Member States to the effective operation of damages actions for infringement of Community antitrust law*". Green Paper, § 1.2, p. 4.

[27] Green Paper, § 1.2, p. 4. In this point, the Commission relies on the *Study on the conditions of claims for damages in case of infringement of EC antitrust rules*, prepared by Ashurst in August 2004 (hereinafter, the "Study on the conditions of claims for damages"). Available at: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html.

Moreover, a certain degree of harmonisation across jurisdictions is required if the private enforcement system is to impose the same obligations and grant equal rights to all European citizens[28]. Moreover, harmonisation can deter *forum shopping* [29] and maintain a *level playing field* [30] across the EU.

In this paper we will describe the implications of the private enforcement system on rules governing the burden of proof (*onus probandi*), discovery and fact–finding powers in the civil process (§ 2). We will also highlight the importance of disclosure obligations and the exchange of information between competition authorities and civil courts in fostering private enforcement of EU antitrust rules (§ 3). We will then turn towards the main concerns that this new approach to antitrust enforcement generates in the EU from a confidentiality and business secrets' protection standpoint (§ 4). We will also point to the need to reach the equilibrium between fostering antitrust enforcement and avoiding excessive litigation (§ 5). We will also will insist on the objective of harmonising the existing domestic regulations of private proceedings across all Member States (§ 6). We will conclude with some general remarks on the topic (§ 7).

2. *Onus probandi*, discovery and fact-finding powers in the civil process.

(a) Adversarial v. Inquisitorial models of civil procedure

Common law systems are based on an adversarial model of civil procedure, while civil law systems are based on an inquisitorial model which, however, strongly relies on the principle of contradiction (*principe de la contradiction*) [31 & 32]. Common law systems leave ample discretion to the parties to determine which facts must be taken into account by the court, as well as to bring to the process all the evidentiary materials required to substantiate their claims. And so do civil law systems where, "*within the limits set by the respective pretensions of the parties, the judge must be in a position to discover the truth without being dependent on the parties. In addition, the judge has a number of powers directly related to fact-finding, but not regarded as strictly matters of proof*"[33].

We can derive the general principle that both common law and civil law procedures gravitate to a large extent around the disputes, facts and evidences brought forward by the parties to the court, regardless of their respective underlying principles. However, there are some areas where differences between inquisitorial and adversarial systems become all the more relevant.

Rules governing reception of evidence at trials and the burden of proof of each of the parties can determine some of the main differences between adversarial and inquisitorial models. Moreover, these (different) rules can also constitute some of the main difficulties that private enforcement of EU antitrust

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[28] Some authors have maintained that harmonisation in this field has opened "*the way to procedural convergence in the European Union* […] *a way with high risks but important potential results*". KERAMEUS, Konstantinos D., "Political Integration and Procedural Convergence in the European Union". *American Journal of Comparative Law*, Vol. 45 (4), Fall 1997, p. 919–930.

[29] In this sense, some authors consider that "*as even in Europe the courts of the Member States do not apply the same substantive law, a party has the possibility of some kind of forum shopping*". GOTTWALD, Peter, "The European Law of Civil Procedure". *Ritsumeikan Law Review*, No. 22, 2005, p. 37–67.

[30] This is one of the main advantages identified by the Commission in an increased (uniform) enforcement of EC competition rules. See Working Paper, § I.B.4, par. 10, p. 7. More specifically, the Commission has indicated that "*in the European context, not only clarity is desirable, but so too is the principle of creating a level playing field of EC rights enforcement across the Member States. If a litigant in one Member State faces a better chance of his national court making him a larger damages award than the litigant in another Member State, then the substantive body of Community competition law, itself uniform across the Union, will not be enforced in a uniform way across the Community. It is essential to ensure that the rights of European citizens are subject to the same protection across the whole Community*". Working Paper, § I.G, par. 50, p. 16.

[31] On these differences, see JOLOWICZ, J. A. "Adversarial and Inquisitorial Models of Civil Procedure". *International and Comparative Law Quarterly*, Vol. 52, Num. 2, April 2003, p. 281– 295.

[32] Differences in procedural regulations lead to different degrees of procedural formalism which, in turn, determine the effectiveness of courts. See DJANKOV, LAPORTA, LOPEZ DE SILANES and SHLEIFER (2003).

[33] *Vid.* JOLOWICZ, *Op. Cit*. p. 290.

rules will have to face. In the present section, we will cover both the devices regulating reception of evidence at trials and the rules governing the burden of proof imposed on each of the parties.

(b) Accessing evidence in the civil process: discovery and judicial fact-finding powers

(i) Discovery as an effective mechanism to bring evidence to the process

Rules on reception of evidence at trials differ between common law and civil law procedures. One of the main differences lies on the mechanisms on which the parties can rely on in order to obtain evidence. To be more specific, the existence or not of a discovery obligation is one of the main differences between common law and civil law procedural systems[34]. The former provide the parties with discovery devices, while the latter lack these mechanisms.

As it has been recently pointed out, absent a discovery obligation, "*in most Member States parties are not under an obligation to produce relevant information and often will only be ordered to do so when the requesting party can identify the individual document he seeks, which in many cases will simply not be possible*"[35].

Even if (civil law) national courts are vested with fact-finding powers – always limited to the scope of facts brought forward by the parties[36] – they can only exercise them during trial (not at pre-trial phase, or only in very exceptional circumstances)[37]. Therefore, parties planning to file a claim for antitrust damages – and specially those less well-prepared, such as SMEs and consumers – will face a situation where lack of evidence may lead to *prima facie* (or on-the-spot) dismissal of their suits.

This will specially be the case of *stand-alone actions* where – absent a previous decision of a competition authority (be it the Commission or an NCA) – difficulty in providing a minimum of evidence that substantiates the initial pleading will probably impede the opening of formal proceedings (at least in those countries where a preliminary evaluation of judicial claims is mandatory). These considerations will be of less relevance – although not irrelevant – in relation with *follow-on actions*, where the existence of a previous (final and binding) decision by a competition authority may alleviate the need to provide the court with evidence at the beginning of the process (see *infra* § 2.c)[38].

Therefore, introducing discovery devices in Member States' civil procedure regulations can become an important mechanism to effectively help claimants to bring evidence to the courts which today cannot be

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[34] However, harmonisation in relation with discovery rules is seen by experts as a possible development within the EU. See KERAMEUS, *Op. Cit.* We will analyse the possible harmonisation later (§ 6) and will now turn to the need or rationale for such an amendment of the procedural regulations of most Member States.

[35] The only exceptions are the United Kingdom, Ireland and Cyprus (although a discovery-like procedure is also proposed in Sweden). See *Study on the conditions of claims for damages*, *Op. Cit*. p. 4–5, and the Annex IV to this paper.

[36] These fact finding powers, or power of national courts to order production of documents, vary widely between the Member States. See Annex IV to this paper and *Study on the conditions of claims for damages*, *Op. Cit*. p. 4. Moreover, these judicial fact-finding powers are not comparable to public competition authorities' investigative powers (be it the Commission or NCAs). Moreover, courts generally lack the resources to conduct large fact-finding efforts (even if they are empowered to do so). However, public agencies can also face some problems to gather the required information, especially in transnational cases. In this vein, although in relation with merger control, see ATWOOD, James R., "Information from Abroad: who bears the burden in an antitrust investigation?". *Antitrust Law Journal*, Vol 65, 1996-1997, p. 227–240.

[37] These difficulties in acceding to evidence of antitrust infringements have lead some authors to maintain that public enforcement is superior to private systems and that, consequently, private enforcement mechanisms should not be developed in the EU. "*Introduction of American-style discovery would probably be undesirable because of its high cost and the risk of discovery being abused to obtain competitors' business secrets*". WILS, *Op. Cit*. p. 480 (footnotes omitted).

Of a different opinion is JONES, who considers that "*It will be difficult to bring many types of private actions without this power* [right to discovery] *or a substantial equivalent because key evidence may often be solely under the control of defendants' employees.*". See JONES; *Op. Cit*. and JONES, Clifford A. "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market". *Loyola Consumer Law Review*, Vol. 16 (4), 2004, p. 409–430.

[38] On the value of evidence and information obtained in previous proceedings when exercising actions in later proceedings, see HUA and SPIER (2004).

obtained (or only with great difficulties) by them. However, it may be argued that there are important justifications for civil law systems not to include discovery devices which, it must be noted, have been strongly criticised in some common law jurisdictions. Nevertheless, we will see that there is an objective economic) justification for the introduction of such discovery rules.

(ii) An economic approach

The economic analysis of discovery rules has reached some general conclusions that can be worth examining at this point[39]. From an economic standpoint, discovery may be efficient as long as it can reduce legal costs for both parties by avoiding trials through previous settlement. Therefore, if parties can agree on a plan of discovery that will be beneficial to both of them and generate efficiencies, there shall be no impediment against the inclusion of discovery rules in those legal systems that currently lack them.

Discovery effects on settlement and trial probabilities depend on the costs imposed by discovery rules on each party. Recent studies show that a mixed system of mandatory discovery and voluntary disclosure of private information will significantly increase the probability of settlement. Moreover, economic analysis has also pointed that the involvement of the court in managing discovery – especially limiting its extension (once the main elements relevant to the case have been disclosed by and between the parties)[40] – can simultaneously increase the probability of early settlement and reduce expected litigation costs, without reducing potential injurers' incentives to take care[41].

The importance of discovery rules on facilitating settlement deserves major attention. In a private enforcement paradigm, one of the main objectives of the system must be getting the infringers to make good the damages caused to the affected parties. Such imposition of liability will restore the pre-existing patrimonial situation while establishing the adequate incentives for market players to refrain from infringing competition rules. The aggregate effect (absent over-deterrence and other considerations) will be an increase in social welfare.

Therefore, promoting settlement in private litigation shall not be deemed unnecessary or irrelevant[42], and it could by itself be considered a sufficient justification for the introduction of discovery devices in EU Member States' domestic civil procedure regulations.

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[39] On the economics underlying discovery, see MNOOKIN and WILSON (1996). See also SHEPHERD (1999) and SILVER (2002). Main studies on discovery rules' impact on settlement of civil litigation and enforcement mechanisms efficiency have been conducted by SHAVELL (1989), SOBEL (1989), COOTER and RUBINFELD (1994), MILLER (1997), SCHRAG (1998) and FARMER and PECORINO (2003). More recently SPIER (2005) summarises some of the main aspects of this literature.

[40] One of the aspects in which exclusion of the scope of discovery has been analysed is experts' work (mainly referred to financial experts). Restricting discovery on experts' work in antitrust litigation requires in-depth analysis, which exceeds the purposes and possibilities of this paper. For a discussion on the extension of discovery to experts' work, see O'HARA and MITENKO (2000) and ALLGOOD (2001). Similarly, see BARRETT (2002).

[41] The importance of the involvement of courts in managing (and limiting) discovery had already been highlighted in US case-law. "*A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect the parties and witnesses from annoyance and excessive expense* […] *The need for line drawing is particularly important in class actions where the court has supervised discovery and participated actively in the development of the case to prevent abuse. In such complex litigation, discovery must be 'carefully controlled'*"(emphasis added). *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y.1971), cited by the Federal Trade Commission Staff Paper, "Scope of Discovery". *Antitrust Law Journal*, Vol. 48, 1979, p. 1063–1083 (at p. 1078).

[42] Differently, in public enforcement systems, settlement issues (such as the offering of commitments by the investigated parties) deserve further scrutiny. In some cases, it can be in the public interest to deny the possibility of early termination of investigative procedures and to pursue a final decision by the public body or a final ruling of the competent courts, given that they can have broader deterrent consequences. However, these considerations exceed the purpose of our paper.

(iii) Scope of discovery

Once the need and opportunity for discovery rules to be included in civil process regulations has been identified, the scope of these rules becomes of capital importance. The scope of discovery has been subject to in-depth analysis in common law jurisdictions, and most remarkably in the US and in relation with antitrust enforcement.

After an important debate on the need to limit the scope of discovery[43], US' CPR rules have been narrowed down. Current CPR Rules allow for discovery of any non-privileged matter that is relevant to the *claim or defence of any party*. A scope that can, however, be extended by the court for good cause to any matter relevant to the *subject matter involved in the action* (*i.e.* CPR's previous rule)[44] –. UK and Ireland have discovery rules which allow for a similar (and maybe more restrictive) scope of discovery.

Therefore, substantial discretion is left on the courts to determine the exact scope of discovery in any given case[45]. Such discretion shall be effectively used by managing courts to correctly seize the scope of discovery to the circumstances of every given case.

A related, but different, issue is whether discovery shall be limited in order to prevent indirect adverse effects on procedural rights in criminal or administrative enforcement procedures. In this sense, it has been correctly pointed out that Member States national legal systems recognise the right of parties not to self-incriminate[46]. In this vein, forcing parties to disclose information that could expose them to criminal investigation requires a deep analysis[47].

As a general remark, procedural rules which promote the effective enforcement of competition rules before a national court (such as rules concerning permissible means of evidence or mechanisms to gather such evidence) but conflict with the defendant's basic procedural rights, must be scrutinized in detail[48]. And discovery rules can clearly be some of those rules.

At first sight, it seems that most Member States already have certain provisions that prevent civil litigation from affecting fundamental and other procedural rights. Of a special importance is the fact that, in case criminal liability could derive from the facts alleged by the claimant, some Member States' civil courts are obliged to withhold civil proceedings until a final criminal decision has been adopted. Criminal courts' decisions will then be binding to civil courts, especially as regards the facts proven to the criminal court.

In those Member States where this preference for criminal jurisdiction exists, special limits on discovery do not seem to be required in order to guarantee defendant's procedural rights from the abovementioned

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[43] See Federal Trade Commission Staff Paper, *Op. Cit.*, which identified discovery rules themselves and judicial attitudes on discovery as the main causes for the existing abuses of discovery in antitrust litigation. The Federal Trade Commission Staff Paper also comments on different alternatives to limit the scope of discovery, such as (1) adoption of an hortatory approach by the courts, (2) introducing certain "architectural" changes (time limits, limits on amount of discovery, increased use of magistrates and masters, revision of document production procedures and other), or (3) introducing substantive changes in discovery rules.

[44] For a more detailed discussion on this topic, see Annex II.

[45] General restrictions to discovery (such as a time restraints, limit of documents to be discovered, etc) were found improper, given the fact that discovery rules must apply to all civil procedures and not only to antitrust litigation. "*A final consideration regarding this kind of substantive change* [limiting the scope of discovery] *is that it would be difficult to institute for antitrust cases alone without affecting other areas of civil litigation*". Federal Trade Commission Staff Paper, *Op. Cit.*, p. 1081. Maybe this consideration could have less importance in those EU countries that currently do not allow for discovery in antitrust litigation, as these rules could potentially only be approved for the specific purpose of antitrust litigation.

[46] "[W]*ith respect to private enforcement of competition rules, there might be special procedural rules designed to prevent indirect adverse effects on procedural rights that might exist or arise in parallel or later criminal or administrative enforcement proceedings. A national system might, for example, allow a party in proceedings for damages to refuse to answer a question or produce a document that might expose that person to criminal investigations. It is likely that such special procedural rights are more important in those legal systems in which the defendant can be obliged by either the other side or the national judge to disclose information or documents against his will*". See JACOBS and DEISENHOFER, *Op. Cit*., p. 205.

[47] Such complex analysis far exceeds the possibilities of this work. We only incidentally mention this issue.

[48] See JACOBS and DEISENHOFER, *Op. Cit*., p. 219.

indirect adverse effects. On the other hand, in absence of this procedural device – if sufficiently proved – this allegation deserves adequate protection. Consequently, in those Member States where criminal sanctions can be imposed to those undertakings or persons that have infringed competition rules and where no preference towards criminal proceedings is established, special procedural rights to oppose or limit discovery may be regulated.

However, partial protection to civil defendants has already been granted by the European Court of Justice[49], that has ruled that "*the information obtained in the course of civil proceedings cannot be used by the Commission or a national authority in administrative proceedings that might result in the imposition of a penalty, or as evidence justifying the initiation of an investigation prior to such proceedings*"[50].

Nevertheless, such special rights may generate some procedural difficulties[51] and a balanced approach shall be adopted in order not to completely shield infringers from private enforcement of competition rules. In cases where criminal responsibility cannot be pursued, or where partial or redacted disclosure of evidence would be possible without (substantially) impairing defendant's rights, this balanced approach will be key to fostering enforcement.

(iv) Foreign discovery and "localization" of collection of evidence

A final point to be taken into consideration is whether the possibility to conduct discovery abroad (*i.e.* in the US)[52] and to subsequently use the proceeds of extraterritorial discovery in domestic antitrust litigation may claim for the establishment of domestic discovery rules in order to "localize" the complete proceeding and improve the ability of the deciding court to control such collection of evidence.

The Hague Evidence Convention[53] established a system whereby cooperation between signing parties' national courts allows for extraterritorial discovery. At least, in as far as a court applying a domestic discovery rule can request the assistance of foreign courts in order to gather evidence located outside its jurisdiction[54].

Nevertheless, Art. 23 of the Convention allows a contracting state to make a declaration that "*it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents*", which

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[49] Judgment of the Court of Justice of the European Communities of 10 November 1993 in case C-60/92, *Otto BV v. Postbank BV*. ECR 1993, I–3055. "[T]*he Commission – or for that matter a national authority – cannot use that information to establish an infringement of the competition rules in proceedings which may result in the imposition of penalties, or as evidence justifying the initiation of an investigation prior to such proceedings*." at § 20.

[50] See JACOBS and DEISENHOFER, *Op. Cit*., p. 222.

[51] "*Considerable problems for the effective private enforcement of the competition rules might arise where a national court refuses to take into account documents from the Commission, where the latter investigated the case on the basis of procedural rules that conflict with national principles regarding the legal privilege against self-incrimination or the lawyer-client privilege. The problems might become even more complex if litigants want to use facts that were established in decisions made by the national competition authority of another Member State*". See JACOBS and DEISENHOFER, *Op. Cit*., p. 206.

[52] More specifically, this was established in the *Vitamin Case*, opening the door to discovery conducted in the US even in cases where jurisdiction has not been clearly assigned to US courts. In this vein, see IONTCHEVA, Jenia, "Sovereignty in our terms". *The Yale Law Journal*, Vol. 110 (5), Mar 2001, p. 885–892. The author indicates that this possibility has been admitted by US courts since the Supreme Court ruling in *Société Nationale Industrielle Aerόspatiale v. United States District Court* [482 U.S. 522 (1987)]: In this case, the US' Supreme Court "*held the Hague Evidence Convention to be "optional" and established a balancing test for trial courts to follow in determining whether to use the Hague Evidence Convention or Federal Rules for obtaining evidence from abroad*" (p. 886). On the *Aerόspatiale* doctrine and its impact on the application of The Hague Evidence Convention by US courts, see NAFZIGER, James A.R., "Another Look at The Hague Evidence Convention after *Aerόspatiale*". *Texas International Law Journal,* 38 (1), Winter 2003, p. 103–117.

[53] *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* opened for signature at The Hague, 18 March 1970 (hereinafter, "The Hague Evidence Convention").

[54] On the extraterritoriality of U.S. discovery rules, SLAUGHTER, Anne-Marie and ZARING, David T., "Extraterritoriality in a Globalized World". http://ssrn.com/abstract=39380; and "Extraterritoriality and Discovery". *Current Legal Issues in International Commercial Litigation*. Abstract available at http://ssrn.com/abstract=47020. Also, Note, "Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation". *The Yale Law Journal*, Vol. 88, 1979, p. 612–628.

declaration may be modified or withdrawn at any time (ex Art. 34)[55]. Exceptions by civil law countries to Art. 23 of the Convention impose a significant constraint to the development of effective extraterritorial discoveries which, however, may somehow be implemented by resorting to alternative mechanisms of cooperation also established by the Convention[56]. Therefore, extraterritorial discovery may be gaining momentum in international (antitrust) litigation.

A different issue is whether the proceeds of foreign discovery (*i.e.* evidence gathered by a party during the discovery phase of a foreign proceeding) can be used before national courts. No Member State expressly excludes its use in trials – although some may limit that use and, nearly without exception, Member States courts' will evaluate those evidences under general rules – (see Annex IV).

It follows that a certain tension exists in some countries between the impossibility to conduct a domestic discovery process and the possibility of using the proceeds of a foreign discovery in domestic procedures. This contradiction seems to advocate for a "localization" of discovery in the EU Member States. Such "localization" would (i) increase the control of the court over the discovery process (both over its development and over the discovered materials), (ii) give the parties greater surety on the purpose of the discovery, and (iii) reduce the costs associated to the use of the proceeds of foreign discovery.

As a first preliminary conclusion, we think that discovery rules shall be adopted in all Member States, given that discovery (i) is an effective mechanism to bring evidence to the process, (ii) has economic sense, in terms of reducing total litigation costs and, therefore, increasing the efficiency of the enforcement system, (iii) its scope can successfully be limited to the extent needed to foster litigation without imposing an excessive burden (or costs) on corporate defendants, and (iv) reduces the risk of extraterritorial litigation.

(c) Onus probandi: should claimants' duty to prove their contentions be alleviated?

It is a general principle of law (both for common and civil law systems) that the burden of proof (*onus probandi*) lies on the party alleging a fact, safe in exceptional and limited circumstances, when the burden of proof is inverted or subject to presumptions[57]. This has been the approach of Regulation 1/2003 in determining that the burden of proving all elements of the claimed antitrust infringement rests on the claimant, while the burden of proving a defence or exception to an action rests on the defendant[58].

As we have already mentioned, the fact that the *onus probandi* lies on the claimant in an antitrust action is one of the impediments to the expected development of antitrust private enforcement in the EU.

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[55] As it could be the case of some European countries that after an eventual inclusion of discovery rules in their own civil procedure regulations *opted in* to the application of Art. 23 of the Hague Evidence Convention.

[56] For a detailed discussion on the topic, see WALLACE, *Op. Cit.* in footnote 24. The author concludes that "*to the extent that no international legal standards are developed to provide for a comprehensive and consistent approach to the cross-border exchange of confidential information, competition authorities will continue to have limited access to requested documents, relying on company waivers, relevant provisions of bilateral treaties, and positive comity principles, on a case by case basis*". On these international cooperation alternatives, see MELAMED, A. Douglas, "International cooperation in competition law and policy: what can be achieved at the bilateral, regional, and multilateral levels". *Journal of International Economic Law*, Vol.2 (3), Sep 1999, 423–433. Also FOX, Eleanor M., "Can we solve the antitrust problems of globalization by extraterritoriality and cooperation? Sufficiency and legitimacy". *Antitrust Bulletin*, Vol. 48 (2), Summer 2003, p. 355–376, and JENNY, Frederic, "International cooperation on competition: myth, reality and perspective". *Antitrust Bulletin*, Vol. 48 (4), Winter 2003, p. 973 – 1003.

[57] However, the required standard of proof (of the infringement, causal link with the damages, and quantum of these damages) is regulated by national laws. For an economic analysis of burden of proof, see SANCHIRICO (1997).

[58] *Vid.* article 2 R 1/2003: "*In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled*".

Therefore, it is not surprising to see that competition authorities are willing to explore ways in which this *onus* could be alleviated in order to foster private antitrust damages claims.

Three main possibilities have been suggested in relation with an eventual alleviation of the claimant's burden of proving the infringement: (i) alleviating the burden of proof in case of information asymmetry, (ii) alleviating the burden of proof in case of a prior decision of an NCA (a previous decision by the Commission is already binding on national courts by virtue of Art. 16 Regulation 1/2003), and (iii) granting evidentiary consequences of a refusal to disclose evidence by the defendant[59].

As regards alleviation of the burden of proof in case of information asymmetries between the claimant and the defendant, the introduction of discovery rules (as we have just discussed) can by itself bridge the informational gap suffered by the claimant and (re-)establish information symmetry between the parties. Therefore, there may not be a need for a further reduction of the burden of proof imposed on claimants, who will be able to gain access to the information required to sufficiently support their claims.

In relation with the alleviation of the burden of proof in case of a prior decision of an NCA, it should be noted that the evidentiary value of these decisions will vary from Member State to Member State and will, generally, be subject to the provisions of Council Regulation (EC) N° 1348/2000, of 29 May 2000, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. However, as a general principle, we think that NCAs' decisions will be positively considered as evidence by national courts in most Member States, at least as a sufficient *indicia* to allow for an in depth discovery or disclosure procedure. Therefore, in this case there may neither be a need for a further reduction of the burden of proof imposed on claimants[60].

Finally, as regards the possibility of granting evidentiary consequences of a refusal to disclose evidence by the defendant, it must be noted that this possibility already exists in certain Member States[61]. Moreover, in presence of an efficient discovery rule that allows claimants to force defendants to disclose as much information as the court considers proportionate and justified in the case at stake, inclusion of this presumption rule can be an adequate device to ensure full disclosure by the affected party. Therefore, introduction of this rule seems to be recommendable, even if discovery is facilitated to claimants.

As a second preliminary conclusion, we find that introduction of a discovery device – which could be reinforced by granting evidentiary consequences of a refusal to disclose evidence by the defendant – could limit the need to reduce the claimants' burden of proof, as it would by itself help the claimant to discharge its obligation to prove its contentions. Therefore, no additional device of alleviation of the *onus probandi* needs to be introduced, specially if there is to be an efficient (and exhaustive) mechanism of exchange of information between competition authorities (Commission and NCAs) and national courts (for which we will advocate in § 3)[62].

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[59] Green Paper, § 2.1.C, p. 6 and Working Paper, § II.B, par. 78–88, p. 25–28.

[60] A different issue is whether (foreign) NCA decisions shall be binding upon national courts. This complex issue exceeds the possibilities of this paper and deserves careful consideration.

[61] See *Study on the conditions of claims for damages*, *Op. Cit*. p. 3 and 64, and Annex IV to this paper.

[62] However, we are also aware that both discovery and an extensive device of exchange of information have some drawbacks that, further from justifying its non-adoption in most EU Member States' civil procedure regulations, advocate for the establishment of certain limits or corrections (which we will analyse in §§ 4 & 5).

3. Scope of the exchange of information between the Commission and national courts under the "*modernisation package*".

(a) Access to public authorities' files by private antitrust damages claimants

Given the superior investigative powers of administrative authorities, acceding to the evidence that they may have gotten from their investigations could be of an enormous help to private litigants[63]. It could also generate large savings of time and costs[64] and, therefore, it could significantly contribute to fostering private enforcement of EC antitrust rules.

Moreover, facilitating the access to public authorities' files could reduce the need and scope of discovery in civil proceedings. However, the exchange of information between public authorities and national courts has to be conducted within the established procedure and has to respect the limits that have been imposed under the private enforcement system.

At a national level, domestic regulations will determine whether access to NCAs' files can be the object of production orders (see Annex IV). At the community level, Regulation 1/2003 sets the general framework for the exchange of information between the European Commission and national courts for the application of Articles 81 and 82 of the EC Treaty[65]. In general, Regulation 1/2003 invests the Commission with powers to act as an *amicus curiae* before national courts and grants the latter the possibility to "*ask the Commission to transmit to them information in its possession*" [Art. 15(1) R1/2003].

This obligation of cooperation, and more specifically, the transmission of documents and other information (generally, evidence) in the possession of the Commission may become one of the main drivers of growth in antitrust litigation in the EU. Particularly, this exchange of information could constitute a very useful instrument to circumvent the difficulties faced by private antitrust litigants (see *supra* § 2).

In principle, subject to the possibilities granted by national procedural regulations (see *infra* §6), plaintiffs in antitrust cases could apply for a production order, leading the national court to ask the Commission to release relevant information regarding the case at stake. The information transmitted by the Commission may then be used by the plaintiff to build its case, with a significant saving of costs and time.

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[63] This issue has been raised by JACOBS and DEISENHOFER: "[w]*ith regard to concrete statements of facts, it might be tempting for private litigants to lodge an administrative complaint with the Commission or a national competition authority in parallel, or even prior to, court proceedings. Those authorities have considerable investigative powers and might be able to uncover the necessary evidence at no cost to the complainant. It will be important to the plaintiff, and also for the effectiveness of private enforcement in general, whether that type of evidence obtained by the Commission or the competent national competition authority may be used in civil proceedings*". See JACOBS and DEISENHOFER, *Op. Cit*., p. 195.

The use of publicly-enforced investigative systems for the benefit of private plaintiffs has also been suggested in relation with securities litigation. THOMAS, Randall S. and MARINT, Kenneth, J., "Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions". Working Paper, June 1996. http://ssrn.com/abstract=10193.

[64] On the convenience of using discovery materials developed on prior litigation – which we can assimilate for this purpose to evidence obtained by competition agencies – as a procedure for expediting complex antitrust cases, see Federal Trade Commission Staff Paper, "Previously Discovered Material". *Antitrust Law Journal*, Vol. 48, 1979, p. 1085–1097. This paper examines both access by public authorities to evidence produced in previous private cases, and access by private parties to antitrust grand jury materials.

[65] More broadly, the basic duty of loyal cooperation between Member States' and European Institutions (such as national courts and the Commission) is set by Arts. 5 and 10 of the EC Treaty. The European Court of First Instance (CFI) has specifically interpreted art. 10 of the EC Treaty in relation with this duty of loyal cooperation between the Commission and national courts in its ruling in case T-353/94 *Postbank v. Commission* [1996] ECR II-921. See also Working Paper, § II.A.4.(b), par. 75–76 and footnotes 47 & 49, p. 24–25.

(b) Limits to access to Commission's files

This approach would be consistent with the existing case-law on exchange of documents between the Commission and national courts[66]. This case-law only impedes such exchange of information in those exceptional cases where (i) denial of exchange is the only way of ensuring protection of the rights of third parties, or (ii) disclosure of that information would be capable of interfering with the functioning and independence of the Community Institutions.

This second limit has been expressly remarked by the Commission when clearly excluding all information obtained as a result of its leniency programme[67] from the information exchange system. This exclusion is made on the basis that "*the Commission may refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it.".* Therefore, the Commission will not transmit information voluntarily submitted by a leniency applicant to national courts without the consent of that applicant (par. 26 Co-operation with the courts Notice).

The Commission is currently planning to further reinforce protection of the proceeds of its leniency programme by establishing a special protective device in relation with corporate statements submitted in support of a leniency application[68]. The main purpose of the reform is to preserve the effectiveness and the incentives generated by the Commission's leniency policy and, in particular, to avoid placing leniency applicants in a "*worse position in respect of civil damage claims than cartel members that do not cooperate*"[69].

These restrictions to the exchange of information pursue the aim of fostering cartel members to 'whistle the blow' and disclose their very existence to the Commission. However, they can decrease the likelihood of successful private enforcement. Given the focus of the Commission on the fight against cartels[70], this option of public policy seems to be well-founded. Even if it may run counter an effective private enforcement of EC antitrust rules and limit the chances of recovery of damages by the affected parties.

On the other hand, in relation with the first limit to the exchange of documents between the Commission and national courts, Art. 15(1) of Regulation 1/2003 and its interpretation by the Commission – *i.e.* the Co-

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[66] In *Postbank*, the CFI drew these limits by stating that "*in certain cases, it might not be possible, even if the Commission takes all the abovementioned precautions, for the protection of third parties and of the Communities to be fully ensured. In those exceptional cases* […] *the Commission may refuse to disclose documents to national judicial authorities* […] *only where it is the only way of ensuring "protection of the rights of third parties", which in principle is a matter for the national courts, or where the disclosure of that information would be capable of interfering with the functioning and independence of the Community which, in contrast, is a matter exclusively for the Community institutions concerned* […]", at § 93 (emphasis added).

[67] The Commission's leniency programme is based on the Commission notice on immunity from fines and reduction of fines in cartel cases [OJ C 45, 19.02.2002, p. 3–5]. For a more detailed description of some aspects of the Commission's leniency policy, see Notice on the fight against cartels and applications for immunity from fines and reduction of fines in cartel cases, http://www.europa.eu.int/comm/competition/antitrust/leniency/#cartel_leniency.

[68] The Commission's leniency policy is currently under review, specifically in relation with discovery concerns. "*In implementing the current Leniency Notice, the Commission has encountered a major concern from undertakings and their legal representatives. This concerns the risk of discovery in civil damage proceedings, in particular in third country jurisdictions, of corporate statements made to the Commission in the context of its leniency programme*. […] *In order to minimize the risk of discovery of corporate statements the Commission therefore intends to add one element to the existing Notice, namely a special procedure for the protection of corporate statements made to the Commission in the context of its leniency programme*". See Draft amendment of the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases. Available at http://www.europa.eu.int/comm/competition/antitrust/legislation/leniency_en.pdf.

[69] Draft Amended 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases, at p. 2, para. 7. Available at http://www.europa.eu.int/comm/competition/antitrust/legislation/leniency2_en.pdf.

[70] See Notice on the fight against cartels and applications for immunity from fines and reduction of fines in cartel cases, *Op. Cit*.

operation with the courts Notice – may be too restrictive, in the sense that the interpretation of the case law that restricts the exchange of information which could damage third parties' rights may be excessive[71].

While it is true that the Commission shall not produce evidence in those cases where it is the only way of ensuring protection of the rights of third parties, it must be noted that "*the Commission does not, in principle, infringe Article 214 of the Treaty by failing to prohibit the disclosure to the national courts of documents containing confidential information and business secrets. The Commission contravenes its obligation to observe professional secrecy* ***only if it allows such documents to be transmitted to the national judicial authorities without taking the necessary precautions****, including where appropriate those of a procedural nature, to protect any confidential information or business secrets*"[72].

In this vein, it must be recalled that "*in offering its cooperation to the national courts, the Commission may not in any circumstances undermine the guarantees given to individuals* […] *The upholding of such guarantees requires the Commission* […] *to take all necessary precautions to ensure that* […] *protection of that information is not undermined by or during the transmission of the documents to the national courts.* […] ***it is then the responsibility of the national court to guarantee protection of the confidentiality of such information or business secrets***"[73].

Therefore, adopting a general precaution of not disclosing or transmitting any information shall far exceed the duties imposed on the Commission, while it would also fall short on guaranteeing the adequate cooperation between community institutions and national courts. It is our view that the Commission shall not, as a general approach, assume that national courts are incapable of guaranteeing the protection of the confidentiality of such information or business secrets, or of third parties' rights[74].

Moreover, the scope of such protection shall be defined in such a way that it does not impede an effective judicial protection of the affected parties[75]. Therefore, the mere fact that certain documents contain confidential information or business secrets shall not prevent the Commission from disclosing them to national courts. More precisely, the only limit to disclosure shall be protection of third parties' interests. Such protection does not strictly include the interests of the party to the proceedings to which the evidence refers, *i.e.* the defendant, whose confidentiality rights and business secrets protection must be balanced against the effective protection of claimants' right to be compensated for all suffered damages.

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[71] In the case of exchanges of information between the Commission and national courts, Regulation 1/2003 and the Co-operation with the courts Notice have adopted an apparently restrictive approach towards the supply of information which can constitute evidence in private proceedings before national courts. The fact that neither Regulation 1/2003 nor the Co-operation with the courts Notice use the word "evidence" to refer to the supply of information to national courts could be significant in this respect.

[72] *Postbank, Op. Cit.*, at § 92 (emphasis added). It is noteworthy that in the *Postbank* case the Commission was not found to have infringed its duties for the mere fact of having transmitted the confidential information to claimants and not having barred them from submitting it to the national courts but instead, the Court of First Instance found that "*the Commission failed in its obligation of professional secrecy by not giving Postbank an opportunity to state its view on the production in legal proceedings of the documents in question and* ***by failing to take any measure designed to protect the confidentiality of the information or business secrets*** *of which, for their part, the banks concerned requested protection*", § 96 (emphasis added).

[73] *Postbank, Op. Cit.*, at § 90 (emphasis added).

[74] Protecting the interests of third parties and the defendant, including confidentiality of information and protection of her business secrets, is a matter for the national courts (see *supra Postbank* at § 93, cited in footnote 66). In this regard, one must take into account that "*in most EU Member States, both in jurisdictions which provide for disclosure and in jurisdictions which obtain evidence primarily through production orders, safeguards have been built into the rules on obtaining evidence*. [Although the] *extent to which business secrets are protected from disclosure varies from Member State to Member State*". See *infra* footnote 83. Therefore, confidentiality of court records (where discovery materials shall be filed) shall be guaranteed by national courts in application of national regulations.

[75] In this sense, although referred to the right of the affected parties to submit confidential information and business secrets obtained during proceedings before the Commission to national courts, it is noteworthy that the CFI has ruled that provisions of the EC Treaty shall not be interpreted in a way that "*might compromise cooperation between the national judicial authorities and the Community institutions, as provided for by Article 5 of the Treaty, and above all detract from the right of economic agents to effective judicial protection. More specifically, in a case like this one, it would deprive certain undertakings of the protection, afforded by national courts, of the rights conferred on them by virtue of the direct effect of Articles 8*[1] *and 8*[2] *of the Treaty*". *Postbank, Op. Cit.*, § 89.

Disclosure of the infringer's confidential information or business secrets to the claimant (not to any other third parties[76]) is essential to the civil process, as the claimant will have to discharge the burden of proof of the alleged infringement and the court will have to make a decision based on such confidential information[77].

Consequently, access to such confidential information or business secrets of the defendant (under a confidential commitment by the claimant, who shall not use that information for any purpose different from the claim itself) shall not be deemed to run against the rights of third parties. Therefore, such disclosure shall be allowed if we are to build up an effective system of protection of the rights conferred by Arts. 81 and 82 of the EC Treaty to affected parties[78].

(c) A reciprocity approach shall be adopted, given the adoption certain safeguards

Apparently this may not be the approach taken by the Commission's interpretation of Regulation 1/2003 under the Co-operation with the courts notice, as the framework for the transmission of information to national courts seems to be rather limited and, for sure, more restricted than the framework established for the exchange of information between the Commission and NCAs[79].

The Notice seems to limit the scope of the exchanges to information about the proceedings, *i.e.* implicitly excluding the communication of evidence used in such proceedings. In this sense, the Co-operation with the courts Notice states that "*a national court may, e.g., ask the Commission for documents in its possession or for information of a procedural nature* ***to enable it to discover whether a certain case is pending*** *before the Commission, whether the Commission* ***has initiated a procedure or*** *whether it* ***has already taken a position****. A national court may also ask the Commission* ***when a decision is likely to be taken****, so as to be able to determine the conditions for any decision to stay proceedings or whether interim measures need to be adopted*" (par. 21; emphasis added).

Rather than as an effective mechanism provided for by Art. 15(1) of Regulation 1/2003, the Green Paper treats transmission of evidence used in proceedings before the Commission to national courts as an open question. Concretely, the Green Paper questions whether "*special rules regarding access to documents held by a competition authority are helpful for antitrust damages claims? And, how could such access be organised?*"[80]

Apparently, access for national courts to documents held by the Commission is only a possibility and, before its approval, "*the Commission would welcome feedback on (a) how national courts consider they are able to guarantee the confidentiality of business secrets or other confidential information, and (b) on*

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[76] This mechanism, in different forms and extensions, is available to civil law courts, which can impose special restrictions on the use of the information by the parties and on access by third parties to that information. Most noteworthy, "*Germany appears to be the only country which does not allow for proceedings to be in camera for reasons of protection of business secrets, nor is there a privilege on correspondence between the court and the lawyers*". See *Study on the conditions of claims for damages*, *Op. Cit*. p. 92.

[77] "*At times, discovery of confidential corporate information, such as trade secrets, is essential to the resolution of the underlying lawsuit and cannot be avoided*". CORTESE Jr., Alfred W. "Keeping your secrets secret". *Corporate Board*, Vol. 13 (75), Jul/Aug 1992, p. 4–7. The indispensability of discovering highly valued trade secrets has been extensively recognised by US courts. A paradigmatic example lies on the fact that *The Coca-Cola Company* had to disclose its secret formula in a labour dispute. Protection of this especially valuable information was granted by the deciding court through protection orders. On this particular, see BURKHOLDER, Evan A., "Confidentiality and the courts: protecting the right to privacy". *Judicature*, Vol. 76, 1992-1993, p. 311–313.

[78] In this sense, claiming an adequate compensation for damages caused by a violation of Arts. 81 and/or 82 of the EC treaty is right of the affected parties, as was expressly recognised by the Judgment of the Court of Justice of the European Communities of 20 September 2001 in case C-453/99, *Courage and Crehan*. ECR, 2001, I–6297.

[79] In the latter case, the Commission and the NCAs "*shall have the power to provide one another with and use in evidence any matter of fact or of law,* ***including confidential information***" [Art. 12(1) R1/2003; emphasis added].

[80] Green Paper, § 2.1, p. 6.

the situations in which national courts would ask the Commission for information that parties could also provide"[81].

However, as we have already mentioned, the bold assumption that Member States' national courts are not able to protect the confidentiality of the information transmitted by the Commission is too broad. A more appropriate approach towards an effective cooperation between the Commission and national courts would require a case by case analysis of any exceptional circumstances that can impede or difficult the attainment of such protection which, it must be remembered, is generally a duty of national courts[82].

Moreover, as the Commission has pointed out "*in most EU Member States, both in jurisdictions which provide for disclosure and in jurisdictions which obtain evidence primarily through production orders, safeguards have been built into the rules on obtaining evidence*. [Although the] *extent to which business secrets are protected from disclosure varies from Member State to Member State*"[83]. Therefore, it does not seem that, as a general approach, the Commission could assume that national courts will be incapable of guaranteeing the protection of third parties' interests as regards confidentiality of business secrets – which do not strictly include the defendant's, as we have just argued –.

In our opinion, as it follows from the previous considerations, a reciprocity approach shall be adopted[84], regardless of the exact wording of Regulation 1/2003 and the Cooperation with the courts Notice – which we consider to include access to documents held by the Commission by national courts [*ex* Article 15(1) R1/2003], as evidence is in and for itself *information in the possession of the Commission* –.

National courts do have a full disclosure obligation vis-à-vis the Commission and NCAs in order to allow the preparation of their observations and they must "*transmit or ensure the transmission to them of any documents necessary for the assessment of the case*" at their request [Art. 15(3) R1/2003]. Consequently, the Commission (and NCAs[85]) shall be obliged to transmit to national courts all information necessary for the assessment of the case, subject to certain limits. These limits shall be those imposed by the need to safeguard the interest of the Community and the need to guarantee the rights of the affected parties (in the abovementioned sense).

In relation to these limits, it is worth reminding that Regulation 1/2003 restricts the use by the NCAs of the information (evidence) exchanged with the Commission. NCAs shall respect the limits imposed by the following requirements: (i) specificity of the exchange (which is purpose-oriented); (ii) equivalence of effects of the exchange under European and national regulations; and (iii) equivalence of procedures and procedural rights of the parties affected by the exchange of information[86].

The use of the information transmitted by the Commission to national courts shall in all cases respect the abovementioned limits, with the adaptations required to make them fit the civil process. Particularly, the equivalence of effects can be very difficult (if not impossible) to determine, given that the award of damages compensation will be regulated by national laws that do not have an equivalent at EU level.

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[81] Green Paper, § 2.1, p. 6.

[82] This seems to be the approach of the Working Paper, § II.A.4.(b), par. 75–77.

[83] Working Paper, § II.A.1.(a), par. 57, p. 19. Emphasis added.

[84] Reciprocity of treatment in this field lies on the basis of the loyal cooperation duty imposed on the Commission and the national courts by article 10 of the EC Treaty. See supra, footnote 65.

[85] In some European countries, NCAs can be forced to produce documents at the request of national courts. See Annex IV.

[86] This is so because the information exchanged between the Commission and NCAs can exclusively be used "*in respect of the subject-matter for which it was collected by the transmitting authority*" or for the application of national competition laws not leading to different outcomes (*specificity of the exchange*). Further, the information can only be used for the imposition of sanctions "*of a similar kind*" – expressly excluding custodial sanctions – (*equivalence of effects*); and as long as "*the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority*" (*equivalence of procedures*) [*ex* Article 12(2) R1/2003].

Moreover, the specificity of the exchange (i.e. use of the exchanged information exclusively in relation with the claim for damages compensation) seems to capture the concern that the effect might be determinable ex ante by the Commission (what requires a certain equivalence in the field of competition rules but not necessarily as regards damages regulations).

Consequently, the limits to the exchange of information between the Commission and national courts shall be those imposed by the (i) specificity of the exchange (which is purpose-oriented) and (ii) the equivalence of procedures and procedural rights of the parties affected by the exchange of information.

Additionally, it is our view that the information held by the Commission to which access has been granted to national courts shall be (i) made known exclusively to the claiming party (who shall be obliged to prove a *prima facie* interest in gaining access to that information), (ii) under a confidentiality obligation[87], (iii) shall be kept secret to third parties (forming a separate court file, or a reserved part of the same, whenever national regulations allow for this special confidentiality device), (iv) shall only be used in relation with the claim the court is hearing, and (v) shall be subject to general rules regarding evaluation of evidence[88].

Should the abovementioned limits be respected – which we think can be guaranteed by nearly all Member States' civil procedure regulations – an efficient exchange of information shall be facilitated between the Commission and national courts.

(d) Exchange of information v. access to the file

The previous interpretation of Art. 15(1) of Regulation 1/2003 may seem contrary to what has been established in the Implementing Regulation and the New Notice on Access to the File in relation with the provision of documents to complainants in antitrust proceedings. Those provisions expressly deny complainants access to business secrets or other confidential information which the Commission has obtained in the course of its investigation[89].

However, account must be given to the fact that the subject-matter and scope of the Implementing Regulation (and the New Notice on Access to the File) is restricted to Chapter III of Regulation 1/2003 – *i.e.* proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty –. Therefore, they should not be applicable to the mechanisms of cooperation with the NCAs and national courts regulated in Chapter IV of Regulation 1/2003.

In this vein, we consider that provisions of Art. 8 and 16 (denying access and banning the communication of business secrets and confidential information which the Commission has obtained in the course of its investigation) of the Implementing Regulation shall in no way limit the extension of the exchange of information between the Commission and national courts ex Art. 15(1) of Regulation 1/2003, nor between the Commission and NCAs ex Art. 12(1) of Regulation 1/2003.

Nevertheless, it could somehow be argued that claimants in damages actions shall not gain access to business secrets or confidential information contained in the Commission's file. On this point, we consider that claimants in damages actions before national courts shall not automatically be treated as

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[87] This requirement is in line with the Draft amendment of the 2002 Commission Notice on Immunity from fines and reduction of fines in cartel cases (*Op. Cit*) which states that "*parties seeking access to corporate statements will be required to sign a document whereby they commit to abide by the provision of Article 15(4) of Commission Regulation (EC) No 773/2004 of 7 April 2004, stating that documents obtained through access to the file may only be used for the purposes of judicial or administrative proceedings for the application of Article 81 of the Treaty*".

[88] Specially meaning that it shall not be granted special relevance by the sole fact that it was supplied by the Commission, as the nature of those documents will not be altered by the sole fact of having been transmitted by the Commission (be the public or private documents).

[89] Vid. Art. 8(1) of the Implementation Regulation and para. 32 of the New Access Notice.

complainants before the Commission – although in some instances a person may hold both positions simultaneously –. This is so because national courts, before requesting the Commission to disclose such confidential information or business secrets, will have applied a first "*filter of active standing*" – *i.e.* no claimant unable to show *prima facie* a legitimate interest to gain access to such information will be granted a production request to the Commission by a national court –.

Moreover, the information is not made directly available to the claimant, but to the requesting national court. Then, the latter will be in charge of guaranteeing the confidentiality of the exchanged information and to monitor the use of the same by the requesting party[90]. Therefore, access to the Commission's file *via* exchange of information with the national courts – as envisaged by Art. 15(1) of Regulation 1/2003 – does not necessarily have to be equalled to access to the file by complainants in proceedings before the Commission.

All the previous considerations lead us to conclude that a reciprocity approach shall be adopted as regards the exchange of information between public authorities and national courts, which needs to be streamlined and applied in the broader possible terms (always within the established limits) in order to strengthen the private enforcement of EU antitrust rules.

4. Confidentiality implications of discovery and exchange of evidence between competition authorities and national courts.

As we have seen in the preceding sections (§§ 2 & 3), one of the main concerns that a free flow of information, documents and evidence between competition authorities and national courts raises is whether confidential information and business secrets of the parties involved – and essentially of the defendants in private antitrust claims – will be appropriately protected. The same concerns arise when one considers the possibility to establish discovery rules in the civil procedures of most EU Member States.

These confidentiality implications have always been considered as one of the main drawbacks of rules on discovery and mandatory disclosure of evidence. The Commission has taken on this point, recalling that "*an argument against extensive procedures to obtain evidence is that such measures might be abused to obtain business secrets*"[91].

These concerns are legitimate and real, given that revelation of such information could generate important commercial difficulties and inflict significant losses to the 'revealed' company. In this sense, enforcement of antitrust rules (be it public or private) cannot expose companies to unjustified public scrutiny, nor become an institutionalised instrument of corporate espionage.

On the other hand, a too broad concept of business secrets and a too large protection of companies' confidentiality could shield them against enforcement of antitrust rules. Therefore, a clear cut (restrictive)

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[90] Art. 8(2) of the Implementing Regulation restricts the use the complainant can make of that information: "*The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions*". This limit seems to also be (materially) applicable to claimants in civil proceedings.

[91] Working Paper, § II.A.1.(a), par. 57, p. 19. As we have already indicated, the Commission may consider that this argument might well be over scored as, "*in most EU Member States, both in jurisdictions which provide for disclosure and in jurisdictions which obtain evidence primarily through production orders, safeguards have been built into the rules on obtaining evidence* [maybe excluding Estonia, Spain, Italy, Cyprus, Malta, The Netherlands, Portugal and Slovakia, where the protection of business secrets is not explicitly referred to as a ground for refusal to disclose]. *The extent to which business secrets are protected from disclosure* [however] *varies from Member State to Member State*".

definition is needed of which corporate information deserves special protection and up to what extent it needs to be kept in absolute secrecy *vis-à-vis* a private claimant.

According to the established community case-law, "*business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests*"[92]. In particular, the Commission considers that some of the main "*examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy*"[93].

Moreover, other confidential information may also deserve protection. The Commission considers that "[t]*he category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers*".[94].

Therefore, nearly all information of a given undertaking can potentially be considered to constitute a business secret or other confidential information and, therefore, it could be covered by special protective devices – and fundamentally, shielded from disclosure to third parties –. However, a more restrictive approach shall be adopted in order to seize the application of this broad concept of business secrets to antitrust litigation, *i.e.* a strict evaluation is required of whether revelation of certain information can cause harm to the affected undertaking, or not[95].

There can be situations where, given the special circumstances of the case, no real or significant harm could be inflicted on the company to which the information refers – e.g. (i) where the claimant is not a competitor of the company which information is requested, special protective devices are accorded in relation with discovered materials and disclosure to third parties constitutes a crime or is somehow prosecuted, or (ii) where information has lost its confidentiality by the elapse of certain time between its production and its disclosure, etc –.

Therefore, no blank assumptions shall be made on the existence of pernicious effects of (mandatory) disclosure of information by the defendant or by the competition authority. It will be for the company requesting protection of such information to prove the existence of such damaging consequences of its revelation.

We must also consider that redacting certain parts of most potentially harmful documents can help reduce the possibility of the company suffering losses because of its revelation; while still provide a claimant with valuable evidence of the anticompetitive behaviour she pursues to prove.

In addition, not all types of harm shall merit the same protection. If the potential harm that can derive from disclosure of that confidential information or business secret is that the company can be held liable for antitrust damages, no protection shall be granted at all.

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[92] *Postbank, Op. Cit.*, at § 87.

[93] New Notice on Access to the File, *Op. Cit.*, par. 18.

[94] New Notice on Access to the File, par. 19.

[95] This seems to have been implicitly acknowledged by the CFI in its judgment in the *General Electric* case, where it stated that *"the Commission granted blanket confidentiality in relation to a number of third-party observations that were so heavily redacted as to make it virtually impossible for the applicant to scrutinise or assess the documents properly.* […] *It is highly doubtful that much of that deleted information could in fact be classified as business secrets*". Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 14 December 2005, in case T-210/01 *General Electric v Commission*, at § 637.

Therefore, for a real conflict of interest between preservation of confidentiality and business secrets to exclude disclosure of information (be it in the form of discovery or access to the file of a competition authority) the company requesting such protection shall sufficiently demonstrate the existence of (i) a plausible causal link between the revelation of those documents and the suffering of a harm, and (ii) a realistic quantification of such losses (or at least the extent to which its reputation, activities, commercial relationships, etc will be affected).

In cases where the company manages to construct a *prima facie* case for protection, the national court before which a disclosure order is filed or the competition authority to whose files access is requested will have to determine whether the confidentiality of the company's information – in terms of likelihood of a "non-merited" and significant harm being suffered – shall prevail over the claimants' interest in acceding to the information in order to build up its case, or not. In these cases, the deciding body will also have to take into account whether access to that information is indispensable, or whether there are indirect or complementary ways of proving the facts contained in such documents.

In the latter case, where indirect means of proving the infringement exist disclosure may not be granted if the court can attach evidentiary consequences to the refusal to disclose evidence by the defendant through an unjustified or overly-demanding confidentiality request (see *supra*, § 2.c).

Under these circumstances, companies will have the right incentives to exclusively claim protection of those documents that really constitute business secrets or other confidential information and, therefore, confidentiality implications of discovery and exchange of information will be right-sized. Also, the courts will be in a better position to strike the proper balance between protecting confidentiality and business secrets and guaranteeing claimants' right of access to justice and to compensation for the damages suffered as a consequence of antitrust infringements.

5. The equilibrium between fostering private enforcement of EU antitrust rules and generating excessive litigation.

The Commission has indicated that the purpose of the increase of private enforcement shall be "*to foster a competition culture, not a litigation culture*". The need to reach equilibrium between fostering private enforcement of EU antitrust rules and generating excessive litigation has been expressly acknowledged in the following terms: "*the protection of rights deriving from community competition law is important, but it is also important to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system*"[96].

Therefore, the Commission seems to be specially focused on attaining a balanced approach between facilitating private enforcement of EU antitrust rules and avoiding litigation in the case of unmeritorious or not well founded claims. In this vein, the Commission tries "*to find ways to better compensate for antitrust injuries and increase deterrence, while avoiding the situation where defendants settle simply because litigation costs are too high*"[97].

On the other hand, the efficiencies deriving from early settlement of meritorious claims – to a certain extent encouraged by the interest of the defendant on avoiding the (high) costs of litigation – also need to be taken into account. Therefore, a certain balance must be struck on this issue.

Some of the main costs of litigation (both direct and consequential) are linked to access and use of evidence. Discovery-related costs can be substantial. But costs of obtaining the required information

[96] Working Paper, § I.G, par. 47, p. 15.

[97] Working Paper, § I.B.5, par. 12, p. 8. The Commission considers that in the case of unmeritorious or not well founded claims social costs of litigation outweigh the benefits in those cases and, therefore, the bringing of such claims should not be facilitated.

before getting to trial (in case such thing is possible) can be much higher and can considerably burden potential claimants. Also, the costs of excessive disclosure of evidence (in terms of revelation of business secrets) shall be taken into account when analysing the opportunity to introduce a (special) disclosure rule in cases of antitrust litigation. On the other hand, the social costs of under-enforcing antitrust rules and under-compensation of the consequent damages must also be taken into account[98].

In a certain way, introducing a discovery rule produces a (partial) shift of the economic costs of the civil procedure from the claimant to the defendant[99]. This shift of the economic cost of litigation can facilitate access to courts by private affected parties – and especially by consumers and SMEs – while increasing the deterrent effect of the private enforcement mechanism on infringing companies[100].

Moreover, rules can be adopted as regards recovery of legal expenses by defendants in cases of clearly unmeritorious or unfounded claims. In this sense, and in order not to deter private claimants from bringing actions for antitrust damages forward, a pre-discovery device may be adopted whereby the court could make a preliminary assessment of the merits of the claim. At this point, the court would determine whether recovery of legal costs can be granted to the defendant (in light of the apparently unjustified claim by the other party) or not. In the former case, the claimant should be entitled to withdraw its claim.

Also, granting the courts substantial control of the discovery process can also limit the expenses related to discovery and avoid pernicious situations, dilatory strategies and other discovery-associated problems[101]. Similar considerations apply to the court-supervised exchange of information with competition authorities.

Therefore, introduction of a limited court-managed discovery device and a streamlined system of exchange of information between national courts and competition agencies with significant judicial control of the use of the exchanged information does not seem to produce a significant unbalance between fostering private enforcement of EU antitrust rules and avoiding excessive litigation, but the contrary.

6. Harmonisation of discovery and disclosure rules across all EU Member States.

(a) The need to harmonise Member States' civil procedure and, particularly, discovery rules

As we have already mentioned, rules on discovery, confidentiality and disclosure of evidence are regulated by national procedural regulations to a large extent. The specific needs of antitrust litigation may, in some instances, require certain amendments of those domestic procedural regulations[102]. Debating on such harmonisation possibilities is one of the main purposes of the Green Paper, where the Commission echoes the current "*total underdevelopment*" of the domestic systems for damages claims for infringements of antitrust rules in the 25 Member States. In fact, Member States' regulations are not homogeneous, although certain common patterns can be identified – mainly relating to the origin of the legal system, either on common law or civil law (see Annex IV) –.

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[98] On the level of discovery that optimizes deterrence, see HAY, *Op. Cit.* in footnote ¡Error! Marcador no definido..

[99] This shift of costs can expressly be imposed through the known as 'one-way fee shifting' rule, by virtue of which the defendant is forced to cover legal expenses of successful claimants. In this vein see WAGENER (2003) and CARREINGTON (1997).

[100] Should companies be "shielded" from antitrust enforcement because of a practical impossibility to successfully prove an action for antitrust damages, no benefit would derive from the privatization process instituted by Regulation 1/2003 and the modernisation package. On this issues, see supra, § 2.

[101] See supra, § 2 and, particularly, SCHRAG, *Op. Cit.*

[102] Some of the Member States' legal systems may not currently be adequate for private antitrust enforcement. For a detailed analysis of the German case, see BUXBAUM, Hannah L., "German legal culture and the globalization of competition law: a historical perspective on the expansion of private antitrust enforcement". *Berkeley Journal of International Law*, Vol. 23 (2), 2005, p. 101–122.

A study on the approximation of judiciary law in the EU – *i.e.* the Storme Report[103] – found that "*examination of the rules relating to disclosure or communication of documents between the parties to litigation reveals wide variations*" and concluded that these "*differences have as a consequence that litigants do not have the same opportunities throughout* [the EU] *of obtaining documents useful to them in the preparation of their cases and it also follows that the information ultimately available to the court may differ from one country to another*"[104].

More recently, the *Study on the conditions of claims for damages*[105] has concluded that "[t]*he power of national courts to order production of documents varies widely against the Member States. At one end of the scale are the UK, Ireland and Cyprus where wide (pre-trial) discovery exists (a discovery like procedure is also proposed in Sweden). Besides these countries, courts in Poland and Spain also have relatively wide powers, which allow parties to request categories of documents. However, in all other Member States parties must more or less specify the individual documents that they wish to be disclosed. The limits placed on who can be ordered vary, although some more or less limited justifications exist in most states (usually professional privilege or interests of third parties). Discovery may also be refused, generally on grounds of legal privilege or in most Member States (to a greater or lesser extent) for the protection of business secrets*".

Therefore, as we have already mentioned, a certain degree of harmonisation across jurisdictions is required if private enforcement system is to grant equal rights to all European citizens regardless of their country of residence. Affected parties in different European jurisdictions shall have equal access to a civil proceeding in order to seek compensation for the damages resulting from the (alleged) antitrust infringements. Moreover, harmonisation can deter *forum shopping* and maintain a *level playing field* across the EU[106].

(b) International and European proposals

As a general matter, harmonisation of civil procedure rules can foster economic development, increase international trade and improve the enforcement of law in a broad sense[107]. It is a difficult project that has centred important efforts at an international level. The American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) have recently adopted the *Principles of Transnational Civil Procedure*, which shall lead the efforts to come in the field of harmonisation of civil

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[103] STORME, Marcel (Dir.) *Rapprochement du droit judiciaire de l'Union européenne / Approximation of Judiciary Law in the European Union*. Kluwer and Martinus Nijhoff, 1994 (hereinafter, the "Storme Report"). Reference to discovery is made in p. 97, 128 – 135 and 173. The Storme Report proposed a draft Directive on the harmonisation of civil procedure in the EU (hereinafter, the "Draft Directive"), available at http://www.storme.be/Eu.Harmonis.Proced.art.pdf.

[104] *Storme Report*, *Op. Cit.*, p. 97.

[105] *Study on the conditions of claims for damages*. *Op. Cit.*, p. 4.

[106] Supra, footnote 30.

[107] On the economics of harmonisation and uniformity, see MILLER, *Op. Cit.*, p. 916–918. The author points out that "*economic analysis suggests at least a note of caution about the virtues of harmonisation*". The author however acknowledges that "*harmonization may have benefits that are not accounted for in a simple economic framework; for example, a harmonized European procedural code might carry symbolic overtones and might enhance social support for the project of European Union*." The author cites KERAMEUS, *Op. Cit.*, for a discussion about the proposals to harmonize procedures in the European Union.

According to Miller, some of the main benefits that harmonisation can bring forward are (i) breaking down local bar monopolies, therefore opening up international and/or cross-border legal practice abroad; (ii) reduction of information and transaction costs in transnational litigation; and (iii) generate some efficiency benefits by eliminating inefficient rules and replacing them by more efficient ones. Miller also highlights the costs of harmonisation, which mainly derive from (i) loss of human capital (as a consequence of the elimination of local bar monopolies), (ii) loss of procedural diversity and (iii) risk of new procedural rules being as inefficient (if not more) than those rules being replaced by them.

procedure rules[108]. In furtherance to the Principles, more detailed *Rules of Transnational Civil Procedure* have also been proposed[109].

As regards discovery and disclosure of evidence, the Principles establish that "[u]*pon timely request of a party, the court should order disclosure of relevant, non-privileged, and reasonably identified evidence in the possession or control of another party or, if necessary and on just terms, of a non-party. It is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure*" (p. 16.2). Moreover, a "*person who produces evidence, whether or not a party, has the right to a court order protecting against improper exposure of confidential information*" (p. 16.5). Indication is made to the obligation of the requesting party to compensate a non-party's costs of producing evidence[110]. Therefore, the possibility to conduct a limited court-managed discovery seems to be proposed as the general principle.

The Rules also refer to disclosure and exchange of evidence and regulate a limited court-managed discovery (arts. 21 and 22)[111]. Following the abovementioned Principles, "*the philosophy expressed in Rules 21 and 22 is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited.* […] *Disclosure and exchange of evidence under the civil law systems are generally more restricted* [than that proposed by the Principles and the Rules], *or nonexistent. In particular, a broader immunity is conferred against disclosure of trade and business secrets*. [The proposed Rule on exchange of evidence] *should be interpreted as striking a balance between the restrictive civil law systems and the broader systems in common-law jurisdictions*"[112].

Therefore, these recommended Rules seem to achieve the aim pursued by the Commission in the Green Paper as "*a party* [shall not be] *entitled to disclosure of information merely that 'appears reasonably calculated to lead to the discovery of admissible evidence'* […] *'Relevant' evidence is that which supports or contravenes the allegations of one of the parties. This Rule is aimed at preventing over-discovery or unjustified 'fishing expeditions'*"[113].

Harmonisation of civil procedure regulations in Europe has also centred important debate[114]. More specifically, the construction of a European unified Code of Civil Procedure has been encouraged and attempted – specially after the approval of the European Single Act, which impulsed the approximation of

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[108] These principles were elaborated jointly by ALI and UNIDROIT. The text of the Principles and the accompanying commentary were adopted by the ALI in May 2004 and by UNIDROIT in April 2004. See ALI/UNIDROIT, Draft *Principles of Transnational Civil Procedure*. 2004 Study LXXVI – Doc. 11. Available at http://www.unidroit.org. Adopted *Principles of Transnational Civil Procedure* have been published (hereinafter, the "Principles"). See *Unified Law Review*, 2004 (4), p. 758 – 808. Reference to the Principles is made by the Working Paper. However, no valuation or opinion of the same is made by the Commission Staff. See Working Paper, § II.A.1.(b), par. 61, p. 20.

[109] Rules jointly adopted by ALI and UNIDROIT, which must be interpreted in accordance with the Principles of Transnational Civil Procedure and applied with consideration of the transnational nature of the dispute. These rules can be of use as a valid indication of future developments in this field. See G. C. HAZARD, Jr., R. STÜRNER, M. TARUFFO and A. GIDI, Joint 'American Law Institute – UNIDROIT's Working Group on Principles and Rules of Transnational Civil Procedure, *Draft Rules of Transnational Civil Procedure with Comments*. 2004 Study LXXVI – Doc. 12 (hereinafter, the "Rules"). Available at http://www.unidroit.org. For an economic comment on these rules, see MILLER, *Op. Cit.* p. 918.

[110] Comment P-16C, *Principles of Transnational Civil Procedure*, *Op. Cit.* p. 790.

[111] See *Draft Rules of Transnational Civil Procedure with Comments*, *Op. Cit.*, p. 19–22.

[112] Comments R-22C and R-22E. *Draft Rules of Transnational Civil Procedure with Comments*, *Op. Cit.*, p. 21.

[113] To be read in conjunction with Principle 11.3. Comment R-22H. *Draft Rules of Transnational Civil Procedure with Comments*, *Op. Cit.*, p. 21. Therefore, the rules seem to comply with one of the main limitations imposed by the Commission in the Green Paper. *Vid.* Working Paper, § II.A.1.(b), par. 61, p. 20.

[114] VAN RHEE, C.H., "Civil Procedure: A European Ius Commune?", *European Review of Private Law*, 2000, p. 589-611; and '*Towards a Procedural Ius Commune?*', in: J. Smits, G. Lubbe (eds.), Remedies in Zuid-Afrika en Europa, Antwerpen, 2003, p. 217-232. SCHMID, Christoph U. "Legitimacy Conditions for a European Civil Code". Robert Schuman Centre for Advanced Studies, EUI Working Papers, RSC No. 2001/14. HESS, Burkhard, "The Integrating Effect of European Civil Procedure Law". *European Journal of Law Reform*, Vol. 4 (1), 2002, p. 3–17.

laws regulating civil procedure [inserting art. 95 (ex Art. 100a) of the EC Treaty] –. However, interest in these matters has not been constant over time[115].

A Working Group for the Approximation of Civil Procedural Law was set up in 1987 with the main purpose of drafting a European Code of Civil Procedure[116]. Given the difficulties in achieving the required consensus for a complete European Code of Civil Procedure[117], the proposal downsized to a more limited draft Directive on harmonisation of civil procedure regulation, published in 1994[118 & 119].

The Draft Directive contained a proposal on discovery of evidence (art. 4) in virtue of which the parties – subject to national laws and/or court orders – shall serve lists of documents on all other parties, who shall then be entitled to inspect and to take copies of those non-privileged documents. Third parties shall also produce evidences at the request of the court. It also establishes that the requesting party shall indemnify the person against whom the disclosing order is sought[120].

The main proposals in relation with unification of rules on discovery, disclosure and exchange of information point towards a limited court-managed discovery, similar to that of European common law systems such as those that currently exist in the UK or Ireland. Therefore, this seems to be the appropriate guideline to be followed by both European Institutions and Member States in building up the new framework for private antitrust enforcement in Europe[121] which, in our opinion, shall promote the inclusion of limited court-managed discovery rules.

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[115] On this topic, see KERAMEUS, *Op. Cit*.

[116] See *Storme Report*, *Op. Cit*. Some authors – more ambitious towards harmonisation at a global level – consider that the *Storme Report* falls short of unification capabilities and its "*assortment of proposals for piecemeal reform lacks cohesion and comprehensiveness*". JUENGER, Friedrich K., "Some Comments on European Procedural Harmonization". *American Journal of Comparative Law*, Vol. 45 (4), Fall 1997, p. 931–937. Juenger also doubts that "*there truly is a need for further unifying European procedural law beyond the Brussels Convention*" and that, in any case whatsoever "*the draft directive does not do much to satisfy that need*" (at p. 933). Juenger is more in favour of the adoption of transnational rules on civil procedure, such as those prepared by Professors Hazard and Taruffo [HAZARD & TARUFFO, "Transnational Rules of Civil Procedure", 30 *Cornell International Law Journal*, 493 (1997)], currently updated by Hazard, Stürner, Taruffo and Gidi. *Op. Cit.*

[117] Difficulties in this field are very similar – if not greater – than those experienced in areas of substantive law, where the *'Europeanization process'* raises important concerns and takes long periods of time to deliver significant developments. For an analysis of these difficulties in some of the main areas of private law, see JOERGES, Christian, "The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline" (2004). European University Institute (Florence), EUI Working Paper LAW No. 2004/12. Abstract available at http://ssrn.com/abstract=635387. Similarly, "On the Legitimacy of Europeanising Private Law: Considerations on a Law of Justi(ce)-fication (justum facere) for the EU Multi-level System", in HARTKAMP, A. (Ed), *Towards a European Civil Code*, The Hague, Kluwer Law International, 2004, 151–181; and "Europeanization as Process: Thoughts on the Europeanization of Private Law". *European Public Law*, 2005, 11, 62–82.

[118] See *Storme Report*, *Op. Cit.* p. 187–219. Reference to the Draft Directive is also by the Working Paper. However, no valuation or opinion of the same is made by the Commission Staff. See Working Paper, § II.A.1.(b), par. 60, p. 20.

[119] Other complementary projects followed, such as a draft Regulation concerning the substantive law aspects of private remedies before national courts in the EC, presented as a working paper in the European Competition Law Annual 2001. See EHLERMANN, Claus-Dieter, and ATANASIU, Isabela (Eds.), *European Competition Law Annual: 2001. Effective Private Enforcement of EC Antitrust Law*. Oxford – Portland Oregon, Hart Publishing, 2003.

This project has been criticised given that it "*covers a part of antitrust litigation, which concerns substantive law alone. Neither pure procedural issues, such as standing or discovery rules, nor matters positioned at the interface between substantive and procedural law, such as burden of proof, are being treated*. […] *issues* [which] *also carry a potential to significantly influence the volume of antitrust litigation and claimants' ability to pursue their claims*". EGGERS, Jan C., "Removing Obstacles to EC Antitrust Litigation – Learning a Lesson from US Law? Harmonisation Options for the Attainment of Remedies". University of Exeter – Centre for European Legal Studies, Exeter Papers in European Law No. 12.

[120] On the precedents to this proposal, see FREUDENTAHL, Mirjam, "The Future of European Civil Procedure". *Electronic Journal of Comparative Law*, Vol. 7.5, December 2003. "*The European Evidence Regulation followed* [the example of the Hague Evidence Regulation] *and introduced a restriction to the discovery rule: it excluded fishing expeditions. The request for a right to collect evidence may not be granted if it is aimed at the collection of information other than that which is needed in the proceedings. Within the European Union the possibility of a fishing expedition in a proceeding is hereby reduced.* […] *The Storme Report, too, presented a similar rule*".

[121] This co-ordination of national civil procedure regulations may be achieved by different means of which the Commission seems to have opted for a *soft law* approach, through guidelines, notices and other publications. For a discussion on the different mechanisms of harmonisation or co-ordination of national regulations, see JACOBS and DEISENHOFER, *Op. Cit*., p. 222 – 226.

7. Conclusions.

Fostering private enforcement

As we have seen, the approval of Regulation 1/2003 and the accompanying "modernisation package" of EU antitrust rules has taken enforcement of EU antitrust rules into the dimension of the civil process. Some rules of this new private enforcement framework are clearly different from those of publicly enforced systems. For the purposes of our work, most noteworthy are the differences between the public bodies' powers to obtain evidence of antitrust infringements and those of the parties to civil proceedings to bring those evidences to court. Given that difficulties in proving antitrust cases may freeze the anticipated growth of antitrust litigation in the EU, the Commission is undertaking an important effort to try to introduce some *soft law* provisions that could help develop a European-wide effective system of private enforcement of competition rules.

Introducing discovery devices in all EU Member States

One of the main features that could foster private enforcement of EU competition rules is the introduction of discovery mechanisms. At least in those Member States where potential claimants have limited, if at all, access to documents in the possession of potential defendants or third parties. This improved access to evidence would reduce the difficulties and costs that antitrust damages claimants currently face and would strengthen the privatization of the enforcement of antitrust rules across the EU.

We have proposed that discovery rules shall be adopted in all Member States, given that discovery (i) is an effective mechanism to bring evidence to the process, (ii) has economic sense, in terms of reducing total litigation costs and, therefore, increasing the efficiency of the enforcement system, (iii) its scope can successfully be limited to the extent needed to foster litigation without imposing an excessive burden (or costs) on corporate defendants, and (iv) reduces the risk of extraterritorial litigation.

Moreover, introduction of a discovery device could reduce the need to alleviate claimants' burden of proof and can be reinforced by granting evidentiary consequences to a refusal to disclose information by the defendant. Seemingly, no additional devices of alleviation of the *onus probandi* need to be introduced.

Enhancing the exchange of information between public authorities and national courts

As a key complement to the introduction of discovery rules in Member States' national civil procedure regulations, we have also suggested that an effective mechanism of exchange of information between public authorities and national courts – and most remarkably between the Commission and national courts – can also have a significant positive effect in fostering private enforcement.

Given the superior investigative powers of administrative authorities, acceding to the evidence that they have gotten from their investigations could be of an enormous help to private litigants. It can also generate large savings of time and costs. Moreover, it could reduce the need and scope of discovery in civil proceedings.

We have advocated for the Commission (and NCAs) to be obliged to transmit to the national courts all information necessary for the assessment of the case, subject to certain limits, such as (i) the specificity of the exchange (which is purpose-oriented); and (ii) the equivalence of procedures and procedural rights of the parties affected by the exchange of information.

Therefore, it is our view that the information held by the Commission to which access has been granted to national courts shall consequently be made known (i) exclusively to the claiming party (who shall be obliged to prove a *prima facie* interest in gaining access to that information), (ii) under a confidentiality obligation, (iii) shall be kept secret to third parties (forming a separate court file or a reserved part of the same whenever national regulations allow for this special confidentiality device), (iv) shall only be used in

relation with the claim the court is hearing, and (v) shall be subject to general rules regarding evaluation of evidence. Should the abovementioned limits be respected, it is our view that an efficient exchange of information shall be facilitated between the Commission and national courts.

Confidentiality concerns and protection of business secrets

We have also raised the concern that an excessive promotion of such disclosure and exchange of information may pose an important threat to guarantying procedural rights. Confidentiality of information, business secrets and the equality of arms between the parties of a given civil process constitute the basics of a fair procedure and one of the pillars of all European legal systems. Therefore, a balance must be struck between giving way to substantial antitrust litigation in Europe and maintaining the highest possible degree of legal certainty and protection of (procedural) rights of all the parties involved in those procedures.

These confidentiality concerns are legitimate and real, and the enforcement of antitrust rules (be it public or private) cannot expose companies to unjustified public scrutiny, nor become an institutionalised instrument of corporate espionage. On the other hand, a too broad concept of business secrets and a too large protection of companies' confidentiality could shield them against enforcement of antitrust rules. Therefore, we have advocated for a clear cut (restrictive) definition of which corporate information deserves special protection and up to what extent it needs to be kept in absolute secrecy.

We have concluded that the company requesting protection of business secrets or other confidential information shall sufficiently demonstrate the existence of a plausible causal link between its revelation and the suffering of a harm, as well as a realistic quantification of such losses (or at least the extent to which its reputation, activities, commercial relationships, etc will be affected).

Should companies not meet these requirements, discovery or disclosure (exchange) of information shall be allowed by competition authorities and national courts.

Striking the appropriate balance

The need to reach equilibrium between fostering private enforcement of EU antitrust rules and generating excessive litigation has also been expressly acknowledged.

The protection of rights deriving from community competition law is important, but it is also important to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system.

We have proposed that the introduction of a limited court-managed discovery device and a streamlined system of exchange of information between national courts and competition agencies with significant judicial involvement does not seem to produce a significant unbalance between fostering private enforcement of EU antitrust rules and avoiding excessive litigation, but the contrary.

Harmonising discovery and disclosure rules across the EU: establishing a level playing field

We have finally pointed that rules on discovery, confidentiality and disclosure of evidence will be regulated by national civil procedural regulations to a large extent, and that the specific needs of antitrust litigation may require certain amendments of domestic procedural regulations. Furthermore, we have concluded that a certain degree of harmonisation across jurisdictions is required if the private enforcement system is to grant equal rights to all European citizens. Moreover, it is to be noted that harmonisation can deter *forum shopping* and help create a *level playing field* across the EU.

Proposals for the establishment of uniform principles of civil procedure across the EU and foreign jurisdictions, as well as specific proposals to harmonise Member States' national regulations of civil procedure, advocate for the introduction of a limited court-managed discovery similar to that of European

common law systems. Therefore, this seems to be the appropriate guideline for both European Institutions and Member States to follow in building the new framework for private antitrust enforcement in Europe.

Final remarks

The proposed introduction of a limited court-managed discovery system across the EU can significantly foster private enforcement of EU antitrust laws. However, achieving a uniform configuration of this device in the current 25 European jurisdictions (and some more to come), as well as a uniform court application of the same can be difficult to obtain, especially in the short run.

Therefore, it is to be welcomed that the Commission has adopted a proactive policy in developing this area of procedural law of key importance for the development of an efficient system of private enforcement in the EU. As a result of the current process of public consultation on the Green Paper on Damages actions for breach of the EU antitrust rules, the Commission may include detailed recommendations in the *soft law* corpus of EU antitrust rules (or in more binding instruments of Community Law if the appropriate legal basis is found). These rules will, for sure, benefit the development of the system of private enforcement of EU competition law.

ANNEX I: REGULATORY REFERENCES

Regulation 1/2003

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 ("Regulation 1/2003") [OJ L 1, 4.1.2003, p. 1–25].

Accompanying and implementing regulations:

Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries [OJ L 68, 06.03.2004, p. 1–2].

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 ("Implementing Regulation") [OJ L 123, 27.04.2004, p. 18–24].

Co-operation Notices:

Commission Notice on cooperation within the Network of Competition Authorities (hereinafter, the "Co-operation within the Network Notice") [OJ C 101, 27.04.2004, p. 43-53].

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 ("Co-operation with the courts Notice") [OJ C 101, 27.04.2004, p. 54–64].

Other Notices:

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [OJ C 101, 27.04.2004, p. 65-77].

Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) [OJ C 101, 27.04.2004, p. 78-80].

Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [OJ C 101, 27.04.2004, pages 81-96].

Commission Notice – Guidelines on the application of Article 81(3) of the Treaty [OJ C 101, 27.04.2004, pages 97-118].

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 ("New Notice on Access to the File"). [OJ publication pending].

ANNEX II: CONCEPT OF DISCOVERY

According to the *Study on the conditions of claims for damages* (Op. Cit., p. 62) "*Discovery is taken to mean compulsory (pre-trial) disclosure of all documents relevant to a case (this is of course without prejudice to specific exceptions to the general rule that may exist in jurisdictions having discovery or to the conditions that must be fulfilled before the rule applies, for example, court authorisation). In the course of the discovery procedure, parties to litigation can demand production of and inspect any information from the other side concerning the facts in the case. This may also apply to information held by third parties although usually with more conditions being imposed on granting of such discovery. This must be distinguished from a general duty of disclosure of relevant information and from the ability of judges to order production of specific documents*".

Similarly, WALLACE, Cynthia D., "'Extraterritorial' Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment". *Journal of International Economic Law* (2002) 353 – 392. "'*Discovery' will be used to mean a category of procedural devices employed by a party to a civil action, normally prior to trial (courtroom phase), to require the adverse party to disclose information that is essential for the preparation of the requesting party's case and that the other party alone knows or possesses*".

The extension of discovery obligations may differ across common law jurisdictions. At least, different definitions of discovery are used in different jurisdictions. Under US law, discovery is wide-ranging and can potentially involve any material which is relevant to the case excepting information which is privileged or information which is the work product of the other side. Under UK law, discovery may be more limited, as a party to a claim is obliged to disclose to the other party the existence of all documents which are or have been in his or her control which are material to the issues and the proceedings; subject most importantly to legal professional privilege and privilege against self-incrimination. In Ireland discovery does exist but it is in fact more limited, as it must be necessary for disposing fairly of the matter or for saving costs. In this vein, see *Study on the conditions of claims for damages, Op. Cit.* p. 61.

In the US, under the 2000 amendment to Rule 26(b)(1), the default definition of the scope of discovery comprises "*any matter, not privileged, that is relevant to the claim or defence of any party*." However, "[f]*or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action*."

For an analysis of the current extension of (party-controlled and court-ordered) discovery and the associated practice in the United States, see ROWE, Jr., Thomas D., "A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery". *Tennessee Law Review.* http://ssrn.com/abstract=319141 and JOSEPH, Gregory P. "A preliminary analysis of the 2000 Amendments to the Federal Rules of Civil Procedure and Evidence". *The Practical Litigator,* Vol 12 (1), Jan 2001, p.7. Also BECKERMAN, John S., "Confronting Civil Discovery's Fatal Flaws". *Minnesota Law Review*, Vol. 84, Feb. 2000. http://ssrn.com/abstract=199068.

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ANNEX IV: DISCOVERY RULES UNDER NATIONAL PROCEDURAL REGULATIONS

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Austria	No.	No obligation to produce documents specifically identified by the court. Denial will however be taken into account by the court when evaluating the evidence.	Third parties can be requested to produce relevant documents specifically identified by the court; under the same rules applicable to defendants.	-	Yes, in certain proceedings	Yes. It may exclude the obligation to produce documents.	Yes, according to legal doctrine.
Belgium	No.	No obligation to produce documents specifically identified by the court, but unjustified denial can be sanctioned. Legal privilege excludes disclosure obligation. The court cannot draw any conclusions from the fact that a party does not remit evidence.	No obligation to produce documents specifically identified by the court, but unjustified denial can be sanctioned. Legal privilege excludes disclosure obligation.	-	Yes.	No.	Yes.
Cyprus	Yes. Documents not disclosed at pre-trial stage cannot be relied upon by the non-disclosing party.	Obligation to disclose all documents specifically identified by the court except those protected by legal privilege.	No specific procedure to oblige third parties to produce documents	Staff of the NCA can be examined as witnesses and can be obliged to produce documents specifically identified by the court	No.	No.	Yes, subject to general rules regarding evidence.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Czech Republic	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court except those protected by specific confidentiality duties. Unjustified denial can be sanctioned.	Obligation to disclose all documents specifically identified by the court except those protected by specific confidentiality duties. Unjustified denial can be sanctioned.	-	Yes.	Not completely, but business secrets can trigger special protection measures.	Yes, subject to cooperation agreements with foreign authorities.
Denmark	No, although there have been some jurisprudential developments in this area.	Obligation to produce documents specifically identified by the court, unless it could deny disclosure of that information when acting as a witness. Denial will be taken into account by the court as evidence against the non-disclosing party.	Obligation to produce documents specifically identified by the court, unless it could deny disclosure of that information when acting as a witness.	Generally excluded from providing information, which falls under a duty of confidentiality because of public interest.	Yes.	No.	Yes, subject to cooperation agreements with foreign authorities.
Estonia	No. There are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court except those protected by legal privilege.	Obligation to disclose all documents specifically identified by the court except those protected by legal privilege.	No obligation to produce documents which include state or business secrets or other confidential data.	Unclear.	No.	Yes.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Finland	No.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	They can be requested to issue an assessment on cases that require special expertise in competition-related matters.	No.	Not completely, but business secrets can trigger special protection measures.	No specific rules exist. It would be for the court to decide on this issue.
France	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court except those protected by legal privilege.	They can be requested to issue an assessment on cases that require special expertise in competition-related matters.	Yes.	No. Protection of business secrets is exceptional.	Yes, subject to general rules regarding evidence.
Germany	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to produce documents specifically identified by the court, unless it could deny disclosure of that information.	They can be requested to issue an assessment on cases that require special expertise in competition-related matters.	Yes.	Not completely, but the court has to balance business secrets against the claimants' interest before according disclosure.	Yes, subject to general rules regarding evidence.
Greece	No.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	-	Yes.	-	Yes, subject to general rules regarding evidence.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Hungary	No.	Obligation to disclose all documents specifically identified by the court. Denial may affect the conviction of the court regarding certain facts relevant to the case.	Obligation to disclose all documents specifically identified by the court.	-	No.	Yes. It may exclude the obligation to produce documents.	No specific rules exist. It would be for the court to decide on this issue.
Ireland	Yes.	Obligation to disclose all documents pertaining to categories identified by the party seeking discovery.	Obligation to disclose all documents pertaining to categories identified by the party seeking discovery.	Obligation to disclose all documents pertaining to categories identified by the party seeking discovery, subject to privilege.	No.	Not completely, but business secrets can trigger special protection measures.	-
Italy	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents requested by the court.	Yes.	Unclear. Disclosure of evidence cannot harm the other/third party's legitimate interests.	Yes.
Latvia	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court. Denial can be taken into account by the court as evidence against the non-disclosing party.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	Yes.	-	Yes.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Lithuania	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court.	Obligation to produce documents specifically identified by the court, unless it could deny disclosure of that information.	Obligation to grant access to the file at the request of the court.	No.	Not completely, but business secrets can trigger special protection measures.	Yes, subject to general rules regarding evidence.
Luxembourg	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	They can issue an assessment on cases that require special expertise in competition-related matters.	Yes.	-	Yes, subject to general rules regarding evidence.
Malta	No.	Obligation to disclose all documents pertaining to categories identified by the party seeking discovery. Denial can be taken into account by the court as evidence against the non-disclosing party.	Obligation to disclose all documents pertaining to categories identified by the party seeking discovery.	Obligation to grant access to the file at the request of the court.	Yes.	No.	-
Netherlands	No, although there are rules governing pre-trial hearings.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents specifically identified by the court except those protected by legal privilege.	-	Yes.	No. Parties must have the opportunity to give their statements on all materials brought forward to the judge. Dutch courts cannot guarantee confidentiality.	Yes, subject to general rules regarding evidence.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Poland	No, although there are rules governing pre-trial hearing and a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents pertaining to categories identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents pertaining to categories identified by the court, unless it could deny disclosure of that information.	-	Yes.	-	No specific rules exist. It would be for the court to decide on this issue.
Portugal	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents specifically identified by the court.	-	Yes.	No.	Yes, subject to general rules regarding evidence.
Slovak Republic	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	Obligation to grant access to the file at the request of the court.	Yes.	Yes.	Yes, subject to general rules regarding evidence.
Slovenia	No.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents specifically identified by the court.	Evidence can be requested, but production cannot be ordered.	No.	Yes.	Yes, subject to general rules regarding evidence.

Country	Does discovery exist as such?	Defendant's obligations to produce documents at requirement of the court	Third parties' obligations to produce documents at requirement of the court	Competition Authorities' obligations to produce documents at requirement of the court	Courts' empowerment to generate evidence *ex officio*	Does protection of business secrets exclude discovery?	Is evidence gathered through extraterritorial discovery acceptable?
Spain	No, although there are rules governing a procedure to secure evidence at a pre-trial stage.	Obligation to disclose all documents specifically identified by the court. Denial will be taken into account by the court.	Obligation to disclose all documents specifically identified by the court.	Obligation to grant access to the file at the request of the court, except to documents subject to confidentiality duties[122].	Yes, in exceptional circumstances, as a final measure.	No. Parties must have the opportunity to give their statements on all materials brought forward to the judge. Spanish courts cannot guarantee confidentiality.	Yes, subject to general rules regarding evidence.
Sweden	No. A proposal for an adoption of a discovery-like mechanism is in place.	Obligation to disclose all documents specifically identified by the court.	Obligation to disclose all documents specifically identified by the court.	Obligation to grant access to the file at the request of the court, event to documents subject to confidentiality duties.	No.	Not completely, but business secrets can trigger special protection measures.	-
United Kingdom	Yes.	Obligation to disclose all documents relevant to the case except those protected by legal privilege	Obligation to disclose all documents relevant to the case except those protected by legal privilege	Obligation to grant access to the file at the request of the court, subject to a public interest test	No.	Not completely, but business secrets can trigger special protection measures.	Yes, subject to general rules regarding evidence.

Source: own elaboration, based on the information detailed in ASHURST *Study on the conditions of claims for damages in case of infringement of EC competition rules*, of 31 August 2004. Full report accessible at: www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

[122] Although ASHURST's report did not mention it, this duty of all public administrations, and competition authorities as such, is expressly regulated by article 332 of the Spanish Civil Procedure Law (CPL or Ley 1/2000, de 7 enero, de Enjuiciamiento Civil).