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Summary of the discussion of the roundtable on Access to the Case File and Protection of Confidential Information

Annex to the Summary Record of the 130th Meeting of Working Party No. 3 on Co-operation and Enforcement

3 December 2019

This document is the summary of discussion of the roundtable on access to the case file and protection of confidential information held during the 130th meeting of Working Party 3.

More documentation related to this discussion can be found at https://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

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Summary of the discussion of the roundtable on Access to the Case File and Protection of Confidential Information

On 3 December 2019, Working Party No. 3 held a roundtable on access to the case file and protection of confidential information, chaired by the United States (US) Department of Justice **Assistant Attorney General Makan Delrahim**.

The **Chair** introduced the topic. He pointed out that access to the case file ensures that parties – including, in some cases, third parties – are able to examine evidence in possession of the agency pertaining to a competition proceeding. The protection of confidential information sets a limit to the right to access the case file. The fact that information is confidential means that, in principle, it will not be disclosed. Disclosure can occur in a number of circumstances, however.

The Chair then noted that the objective of the roundtable was taking stock of what jurisdictions do, identify areas of convergence and share practices that could be useful for other jurisdictions.

Two experts participated in the roundtable: **Judge Marc Jaeger**, of the General Court of the European Union (EU), and **Chief Judge Beryl Howell**, of the US District Court for the District of Columbia.

The **OECD Secretariat** briefly presented the background paper prepared for the roundtable. All jurisdictions grant access to evidence in the case file. However, there are differences on how they do this, in terms of both scope and timing. In terms of scope, some jurisdictions grant investigated parties access to virtually the whole file, whereas others only disclose specific documents (e.g. those relevant to establishing the infringement). Complainants are generally granted narrower access than investigated parties are. In some jurisdictions, the public may also be granted access to the file under general transparency rules. In terms of timing, some jurisdictions grant access to the file as of the initiation of the proceedings, while others do so following the issuance of the statements of objections or at the litigation stage.

As a rule, confidential information is not to be disclosed. However, there are some exceptions. First, investigated parties and merging parties may be granted access to confidential information in order to guarantee their rights of defence. This will often be done through specific procedures, open to a restricted set of persons. Secondly, jurisdictions may allow for disclosure of confidential information to other domestic bodies (e.g. prosecutors) or to foreign competition agencies for co-operation purposes. Most of the time, disclosure to foreign agencies occurs pursuant to a confidentiality waiver, but – more rarely – disclosure may also occur on the basis of legal provisions allowing for disclosure without prior consent. Thirdly, disclosure may happen in the context of private enforcement – this can be challenging as it may discourage potential leniency applicants to come forward, if they think that the information they provide to the agency may be disclosed.

The **Chair** presented the first speaker, Judge Jaeger, and invited him to present his insights on access to file and protection of confidential information.

Judge Jaeger focused on confidentiality and access to competition agency's files and on the publication of non-confidential decisions by the European Commission.

As regards access to file and confidentiality, the Court of Justice of the EU (CJEU) has adopted judgments regarding both access to evidence at EU level and at Member States' level.

At EU level, the CJEU takes into account the context in which access is sought. While the CJEU has made clear that the principles applicable to access to the case file in antitrust proceedings are also applicable to merger cases, it has clarified that they need to be adapted to the tight deadlines that this type of proceedings involves. A similar reasoning has been applied to settlement procedures. The CJEU has also delineated the limits of access, among others, by defining the concept of 'business secret'. In order to be considered a business secret, information must, first, be known only to a limited number of persons. In addition, its disclosure must be liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Union institutions take place as openly as possible.

At Member States level, Judge Jaeger focused on the CJEU's interventions in the context of private damages actions, where two opposing interests are at stake. On the one hand, access to the information in the case file of a competition agency is extremely relevant for plaintiffs in order to build their case and quantify their damages. On the other hand, the efficacy of leniency programmes may be at risk if access to leniency materials is granted. In particular, infringers may be reluctant to provide incriminating evidence to agencies if they risk disclosure.

Contrary to a previous ruling of the CJEU, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (Directive on Damages) was adopted and established that national courts cannot at any time order a party or a third party to disclose leniency statements or settlement submissions.

Judge Jaeger then turned to the publication of decisions. He explained that a presumption of legality applies to decisions adopted by EU institutions, and that actions for annulment have no suspensory effect. Only in exceptional cases may a judge order the suspension of an act challenged before the General Court (the first instance body of the CJEU) or prescribe interim measures.

However, in the absence of established case law as regards the protection of confidential information, the General Court has traditionally adopted a cautious approach. This approach is reflected in the *Alstom v Commission* case, in which the Court did not allow the Commission to provide a national judge with a decision, which contained potentially confidential information, even if only to be shared within a confidentiality ring. This approach has been confirmed by the Court of Justice (the second instance body of the CJEU).

In other cases, the Court of Justice has clarified that there is a rebuttable presumption of non-confidentiality for secret or confidential information that is at least five years old. In addition, the Court of Justice has held that the risk of an action for damages as an alleged harm from publication is not sufficient to justify the non-publication of the decision.

To provide sufficient time for the judge hearing the request for interim measures or an appeal against an order dismissing such a request at first instance, the judge will always

allow 'inaudita altera parte' a provisional temporary protection to examine whether or not the alleged confidential information should be protected from disclosure.

Judge Jaeger concluded by pointing out several issues. First, he emphasised the impact that EU case law had on EU legislation. A good illustration is the adoption of the Directive on Damages. Second, he stressed the challenge that time consuming confidentiality claims pose to EU and national courts. Finally, he referred to a provision in the General Court's rules of procedures. This provision establishes a derogatory regime to the adversarial principle (according to which all information and material must be fully communicated between the parties), if the disclosure of the information would harm the security of the Union. The judge pointed out that it is worth asking whether this provision – which was introduced in 2016 and has not been applied so far – could play a role as regards access to the case file.

1. Access to the case file

The **Chair** introduced the discussion on access to the case file by dividing it into the following sections: (i) access to the case file by the parties and complainants in the proceedings; (ii) access in the context of leniency and settlements; and (iii) access to the case file under public transparency rules.

1.1. Access to the case file by the parties and complainants in the proceedings

Romania pointed out that, in their jurisdiction, investigated parties have the right to access the competition agency's file following the notification of the investigation report, which is equivalent to a statement of objections. Case law has clarified that the parties do not have the right to access the file prior to that moment, given that the goal of granting access to the file is to protect the rights of the defence. Access is granted to investigated parties both in antitrust proceedings and merger cases. In merger cases this can include the seller or the target of the merger.

The right to access the case file does not cover business secrets and other confidential information, e.g. internal documents of the Romanian Competition Council and correspondence with EU competition agencies.

Canada distinguished between the extent of access granted to investigated parties during the inquiry and during the litigation stages. In Canada, there is very little access during the investigative phase. Parties under inquiry are entitled to request a statement as to the status of the investigation, but the Competition Bureau does not provide records as the investigation proceeds, unless it chooses to do so voluntarily in order to resolve the matter.

However, at the litigation stage in civil enforcement matters, parties participate in a discovery process. The Competition Bureau has a duty to disclose all documents in its possession or under its control that are relevant to the case, except for privileged documents. The Bureau must identify the documents for which privilege is claimed. After disclosing documents, the investigated party, or parties, have a right to an oral examination of a representative of the Commissioner of competition – traditionally a Bureau case officer.

On privilege, Canada's Federal Court of Appeal had in the past allowed the Commissioner to rely on a class-based Public Interest Privilege, to shield the disclosure of certain information provided by third parties. This information generally consisted in records

provided by third parties that the Commissioner did not intend to rely on in the actual trial. However, in 2018 the Federal Court of Appeal ruled that the Bureau could no longer rely on a class-based Public Interest Privilege to preclude the disclosure of third party information. Consequently, the Bureau must now justify a Public Interest Privilege on a case-by-case basis.

Slovenia noted that in their jurisdiction access to the case file is granted to the parties in the proceedings as of the moment of their formal initiation, i.e. following the issuance of the so-called 'order on the commencement of procedure'. As an exception, the agency director may decide to postpone the access until the issuance of the statement of objections, if earlier access could undermine the interests of the procedure. This is typically considered to be the case, for instance, where there are more parties involved, non-confidential versions have still not been provided, and/or the agency has not yet decided which documents are going to be used as evidence for the infringement. The decision cannot be challenged before a court.

Lithuania referred to access to the case file by complainants. In their jurisdiction, complainants are considered parties to the proceedings. The extent of access granted to complainants is similar to the one provided to investigated parties, with one exception – complainants are not granted access to leniency statements and settlement submissions. As is the case with other parties, complainants are not able to access confidential information. Access to file is granted following the issuance of the statement of objections.

Hungary noted that in their jurisdiction complainants are regarded as third parties. The Hungarian Competition Act stipulates that third parties are allowed access to the non-confidential documents contained in the file after the case has been terminated with a final decision, i.e. a decision that cannot be challenged. Third parties do not have to demonstrate any lawfully recognized interest to access the case file. Interested third parties may get access to the case file prior to the termination of the proceedings, if they can prove that the access is necessary to enforce a statutory right or meet an obligation that arises from either law or a judicial or administrative decision. The statutory right must be closely linked to the case in which the access to the file is requested. Further, all the witnesses have the right to get access to their witness statements. Access may be denied, if it would jeopardize the legitimate operation of the agency.

Access covers only non-confidential documents. In follow-on damages actions, as an exception, courts may order the disclosure of documents containing business secrets, but there are restrictions as regards leniency statements and settlement submissions.

1.2. Access in the context of leniency and settlements

The **Czech Republic** pointed out that access to leniency applications in the Czech agency's file is very limited. These types of documents enjoy the highest level of protection.

There are only two groups of parties that can obtain access to leniency applications. First, investigated parties, in order to guarantee their rights of defence. In this case, access is granted pursuant to the issuance of the statement of objections. Access is granted to all leniency materials, including pre-existing documents and corporate statements. Parties are not allowed to take notes or obtain copies from the leniency applications.

The second group are third parties for the purposes of damages claims. These parties may only gain access to pre-existing documents, i.e. they cannot access documents created solely for the purpose of a leniency application (e.g. corporate statements).

Colombia presented the case *Mineros v Sic* (2018) which dealt with the conflict between a demand by an investigated party to obtain access to evidence and the need to protect leniency documents. This case focused solely on procedural grounds – the substance of the matter is still under investigation.

The investigated company claimed that the agency breached its rights of defence by not transferring the entirety of the information contained in the leniency file to the case file. The agency considered that the company could not argue a breach of its rights of defence on the expectation that the information contained in the leniency file could constitute evidence in its favour. Moreover, the agency proved that there was no such alleged breach, given that the persons subject to investigation knew all the evidence that substantiated the decision. Further, the information requested by the company was not only not relevant for the investigation but also confidential given its nature. In addition, the agency considered that transferring the entire leniency file to the investigation case file in order to grant access to the parties under investigation would discourage future leniency applicants.

The **European Commission** explained how access to the case file is granted in the context of settlement procedures in cartel cases. When the Commission investigates a cartel case and considers that procedural efficiencies could be gained, it invites all parties concerned to engage in settlement discussions. In settlement procedures, instead of granting access to its whole case file, the Commission only provides access to the evidence used to determine the envisaged objections. Parties may, however, request access to additional documents for the purpose of enabling them to ascertain their position regarding a specific time period or any other particular aspect of the cartel. On the basis of this information, parties may then decide to introduce a settlement submission. Either side is free to withdraw from the settlement proceedings until the submission is introduced. It may happen that only some of the parties in a proceeding decide to settle. The parties that have not settled can only access settlement submissions at the premises of the Commission and cannot record the settlement statements by electronic or any other means.

1.3. Access to the case file under public transparency rules

Norway presented their Freedom of Information Act. Pursuant to this Act, the public has a right to access documents in the possession of public authorities. The purpose of the Freedom of Information Act is to facilitate an open and transparent public administration with a view to strengthening the freedom of information and expression, democratic participation, legal safeguards for individuals, confidence in public authorities, and control by the public.

However, the right to access information in possession of the competition agency under the Freedom of Information act is subject to a number of statutory exceptions. The most important exceptions are: (i) the agency's internal documents, (ii) confidential information concerning third party undertakings, and (iii) the agency's correspondence with international institutions and foreign competition agencies.

In mergers, the documents in the agency's files are accessible to the public upon request at the outset. Thus, any person may request access to such documents, including interested third parties. Where possible, the agency grants access to non-confidential versions of the documents. In antitrust cases, the Freedom of Information Act is only applicable when an investigation is closed. After that moment, any person may request access to non-confidential versions of the documents. Documents that are part of a leniency application or a settlement submission cannot be accessed even after the closure of the investigation.

South Africa presented its Promotion of Access to Information Act, which grants a general right of access to information in possession of public bodies, including the competition agency. As an exception, confidential and privileged information cannot be accessed.

South Africa noted that, following a recent amendment, the said Act cannot be used to obtain access to information, if this is sought for the purposes of civil or criminal litigation. Once litigation has commenced, information has to be sought under the litigation rules.

1.4. Comments and questions

Following the presentations by the delegations, the **Chair** opened the floor for comments and questions.

Following a question from Korea, **Judge Jaeger** pointed out that, according to the Directive on Damages mentioned in his presentation, access to leniency statements is generally not possible in the context of actions for damages. Further, pursuant to a second question from Korea, the judge indicated that in court proceedings before the CJEU, as a rule, all main parties have access to all documents in the courts file. If the information is confidential, a balance needs to be struck. Normally the notion 'confidentiality' is interpreted narrowly, and the interest in protecting the rights of defence will have priority. The court may request non-confidential versions from the party that contends that the information is confidential.

The **European Commission** pointed out that, in the administrative phase, access differs for addressees of the statement of objections and for complainants. While the parties enjoy the full rights of the defence, including the right to be heard, of which access to file is a corollary, the complainants are merely closely associated with the proceedings. In practice, this means that complainants merely obtain a non-confidential version of the statement of objections. As an exception, when the Commission intends to reject a complaint, the Commission sends the complainant an initial letter explaining why it does not intend to proceed with the case. The complainant can reply to that letter and, in that context, can ask for non-confidential versions of documents on which the Commission's letter is based.

Peru shared their thoughts on access to information relating to leniency programmes. Leniency programmes may be controversial for the public, as they can result in granting immunity to undertakings that have infringed competition law.

Peru referred to a case where a member of Congress asked the competition agency to provide the leniency case file. Given that leniency materials are confidential, the petition was denied, at least on three occasions. Eventually, the member of Congress proposed the creation of an investigative commission in Congress. This would have forced the agency to share the leniency materials, since, according to Peru's Constitution, investigative commissions may request any kind of information, including confidential information. In the end, the commission was not established. However, this situation raised some concerns – if it cannot be guaranteed that leniency materials will not be disclosed, potential applicants may be less willing to participate in the leniency programme.

The **Chair** noted that the challenge presented by Peru is faced by all democracies. Indeed, in the US, the Department of Justice may need to provide, at times, confidential briefings to the Congressional Committees of Jurisdiction, but it does not share confidential information on its criminal cases. However, the Congress could certainly pass a law requiring that such information be shared. The Chair encouraged, as the best way to

proceed, continuous dialogue and an appropriate respect by the different actors for their specific roles.

Also on access to leniency materials, **Australia** noted that in their jurisdiction there is a statutory protection for information received from immunity and leniency applicants in the course of an investigation. This protection lasts at least until the litigation stage. Then, there is a balancing test, where the court has to weigh the competing public interest of keeping the leniency information secret, and the interest of fairness to the defendant. More often than not, the court decides to release the information.

2. Protection of confidential information

For the second part of the session, the **Chair** introduced the second speaker, Chief Judge Howell, and invited her to present her insights.

Chief Judge Howell talked about the (i) US regime governing access by the public to court records and (ii) the regime governing access to evidence by parties in criminal or civil litigation.

As regards (i), American common law and the US Constitution provide the public with certain rights of access to court records and proceedings, and to court decisions. As a rule, these rights of access do not apply to discovery materials exchanged privately by the parties and not filed with the court. However, once a matter enters the court, the public may have the right to see part of the evidence. The court plays an important role in overseeing a process – which sometimes requires negotiating with the parties – about what should be sealed or kept confidential and what should be publicly available. Further, the court plays a role in deciding what information should be *ex parte*, i.e. seen by only one party and not by others.

As regards (ii), Federal Rules of Criminal Procedure and Civil Procedure govern the regime for access to evidence by parties in litigation. These rules regulate the scope and the timing of access. In civil proceedings, both parties are entitled to all information in the possession of the other party relevant to any party's claim or defense and proportional to the needs of the case, provided it is not privileged. At the start of litigation, each party is required to produce to the other side a copy or a description by category or location of all documents or electronically stored information and tangible things that the disclosing party has in its possession, custody or control that it may use to support its claims or defence. In addition, in criminal proceedings, the government has an affirmative obligation to turn over to any defendant evidence in its possession, material to preparing the defence.

The parties generally keep control of discovery materials rather than file those materials with the court. The court only gets involved when the parties cannot resolve a dispute about what evidence must be produced, and on what terms and conditions. In competition cases as well as many other types of cases, one aspect of discovery that almost immediately involves the court is the protection of confidential information. Indeed, parties may want to limit the ability of a party to distribute confidential information or records produced in discovery. Often, protective orders will detail limits on sharing. Courts have very broad discretion to fashion and issue these orders, but are required to find good cause for any limits placed on disclosure of information.

Usually umbrella protective orders – which govern all discovery in the case – are used. These orders define what confidential information is, allowing the party producing the

discovery to designate information as confidential. Any evidence marked 'confidential' may be challenged with a motion for the court to resolve whether such treatment is actually granted. Such orders are particularly useful in merger cases, due to the time constraints existing in this type of cases.

The US Federal Rules of Civil Procedure provide a non-exhaustive list of categories for which protection from disclosure can be sought, including for "a trade secret or other confidential research, development, or commercial information." F.R.C.P. 26(c)(1)(G). In asking courts to enter protective orders, parties typically negotiate the terms before submitting a stipulated protective order to the court for approval. Negotiated terms may include a definition of what information will be deemed confidential and limitations on who will be permitted access to confidential information (e.g. external counsel only).

The fact that information is treated as confidential during discovery – or even that it is subject to a protective order – does not mean that it will be sealed from public view if it is filed in court. Court case records and proceedings are presumptively public in the US. Certain records may be kept confidential when there are compelling reasons to do so, often only provisionally. Transparency is essential for accountability, public confidence and notice of the law. Parties may be instructed to file any confidential information under seal. In this case, parties may be required to file redacted versions of the sealed documents so that there is a public version available for public access.

To keep information in court records confidential, parties must ask for the information to be sealed, which requires a sealing order. Courts generally keep confidential classified national security information and trade secrets, among others. Whether matters should be sealed or unsealed depends on a balancing of the need for transparency against the need for confidentiality, and this balancing depends on the context. In general, sealing should be as limited as possible (e.g. a whole case file should not be sealed to protect the secrecy of some documents within the case file, redacted versions of sealed documents should be filed publicly when possible).

Following Chief Judge Howell's remarks, the **Chair** introduced the discussion on the protection of confidential information. He divided it into the following sections: (i) the granting of confidential treatment; (ii) mechanisms that allow for limited access to confidential information; (iii) disclosure of confidential information to other domestic or foreign agencies; and (iv) disclosure of confidential information for damages actions.

2.1. Granting confidential treatment

Latvia explained for which information access is restricted, pursuant to their Freedom of Information Law. Restricted information includes personal data, commercial secrets and the agency's internal information. Criteria on how to define commercial secrets, personal data or other confidential information are specified in special laws or regulations (e.g. Commercial Law, Personal Data Processing Law). In particular, commercial secrets can be broadly defined as data relating to an undertaking that are not generally accessible to third parties, have an actual or potential financial or non-financial value and, if disclosed, may cause losses to the merchant.

Turkey presented its Communiqué on Access to the Case File and Protection of Confidential Information. The Communiqué establishes that access to the file by parties may be fully or partially denied if the documents include business secrets or other confidential information. The notion business secrets is similar to the one in the EU. 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. Confidential treatment can be requested by undertakings with a reasoned request. Where possible, access to the document is granted by deleting the business secrets and other confidential information. The agency may disclose confidential information if this is necessary to prove an infringement. In these cases, the public and private interests are balanced.

Spain noted that their legislation has no definition of confidential information. However, the notion has been defined through the practice of the competition agency. This practice has been confirmed by the courts on numerous occasions. It consists of a three-step analysis. First, for the information to truly constitute a business secret, its disclosure must cause serious harm. The company has to provide an individualized and sufficiently motivated justification for the existence of that serious harm. Secondly, information does not constitute a business secret if it has been disclosed to third parties. Thirdly, the information may need to be disclosed despite constituting a business secret, if this is necessary to establish the facts in the proceeding, as well as to guarantee the rights of defence of the investigated parties.

Israel presented a case in which Israel's Supreme Court dealt with a matter involving a large volume of documents for which confidential treatment was requested. In 2018, the agency decided to object to a proposed merger between two Israeli banks. The merging banks appealed the agency's decision before the Competition Tribunal and requested access to the case file. All of the other banks, whose information was included in the case file, refused to allow access to their information. The Competition Tribunal was required to decide on the outline of discovery for thousands of documents and data on millions of customers.

The agency mapped the file, dividing it into different categories to enable a comprehensive view of the different types of documents contained in the case file. The agency's stance was that all documents listed in the case file and categorized, were relevant to its decision. However, in light of the desire to balance the right of the merging banks to inspect the information, alongside the protection of trade secrets of third parties, a distinction was made between relevant documents for the decision and documents needed for the legal proceeding (which are more limited, focusing on disputed issues before the Competition Tribunal).

The third parties reiterated their objection before the Competition Tribunal to the solution of an information room framework. However, the Competition Tribunal accepted the agency's mechanism. The ruling of this tribunal was appealed before the Supreme Court. Importantly, the third party's argument was based on the fact that the ruling was adopted without individual examination of each document by the Competition Tribunal.

The Supreme Court confirmed the agency's stance and the Competition Tribunal's ruling that in a case file with a considerable amount of confidential documents, the Competition Tribunal can draw a line for different categories of information without the need to rule on each individual document, thereby conducting a more efficient and timely process.

2.2. Mechanisms that allow for limited access to confidential information

The **United Kingdom** explained how confidentiality rings and data rooms are used as mechanisms for balancing legal obligations.

On the one hand, the Competition and Markets Authority (CMA) has an obligation to disclose to parties to the investigation all the evidence or documents that relate to matters that are set out in the CMA's statement of objections. On the other hand, the CMA also has an obligation to protect confidential information that relates to businesses or individuals.

The CMA considers whether confidentiality rings and data rooms are appropriate to disclose confidential information on a case-by-case basis, and has a discretion as to whether to use them.

The use of these mechanisms is considered in two broad circumstances. First, if there is a specific set of confidential data or information where access is required by advisers to prepare submissions on behalf of their client. Second, where a case file contains large quantities of material. In this case, the CMA may prepare non-confidential versions of the material it relies on in the statement of objections. Then, it will allow access to the documents through a confidentiality ring or a data room so parties identify what documents they consider relevant and non-confidential versions of these documents can be prepared.

Confidentiality rings and data rooms are both, ways for a party's advisors to inspect certain evidence to further their understanding of the CMA's case and to prepare confidential submissions on behalf of their client. It is a condition of access to a confidentiality ring or data room that advisers do not share confidential information with their client. In the case of data rooms, the CMA allows access to documents only on the CMA's premises. In the case of confidentiality rings, the CMA generally allows electronic access to information within the ring.

Business at OECD (**BIAC**) presented their views on the tools to grant access to confidential information. BIAC stressed the importance of granting access to file as a way to guarantee the rights of defence of investigated parties. In general terms, BIAC believes that tools should be used in a way that weigh in favour of granting access, both for inculpating and exculpatory material. Secondly, in applying those tools, claims of confidentiality should be critically appraised on a case-by-case and on an ongoing basis. It may be the case that information submitted by a third party quite early on in an investigation becomes less confidential or not confidential at all through the passage of time. Ideally, that critical appraisal should involve a senior official, and someone from the agency who is not part of the case team. Finally, available tools should be applied in a hierarchy that maximizes access. For instance, protective orders or confidentiality rings or data rooms that include both company representatives and external advisors should be given preference over narrower, more limited confidentiality rings, and those can be considered preferential to summaries of information or redacted documents that would ultimately withhold disclosure from the parties.

2.3. Disclosure of confidential information to other domestic or foreign agencies

Belgium presented the approach of their competition agency to disclosing confidential information to other domestic or foreign agencies. First, Belgium pointed out that the relevant regulators are deemed to have an interest to be heard in merger and infringement cases. Further, the legislation allows for co-operation agreements between the competition agency and other regulators. At present, there are such agreements with the telecom, the postal and the energy regulators. There are also ongoing discussions with the data protection agency. Co-operation agreements allow for the exchange of confidential information, with specific exceptions. Belgium also noted that this year the competition agency has received the power to enter into bilateral agreements with competition agencies

outside the European Competition Network to allow for the exchange of confidential information.

The **Russian Federation** presented its approach to sharing information with other agencies pursuant to confidentiality waivers. The Russian agency considers waivers to be an effective tool, in particular, as regards global mergers, and has accumulated significant experience.

In 2019, the head of the agency adopted guidelines on the use of confidentiality waivers when considering mergers. One of the main goals of the guidelines is to ensure a uniform application of waivers of confidentiality throughout the agency. The guidelines contain, among others, the principles followed by the agency when using these tools, and a template waiver.

Given the importance of waivers, the agency suggested to adopt model recommendations for the national competition agencies of the Commonwealth of Independent States (CIS) within the framework of the inter-governmental Council for anti-monopoly policy of CIS countries. This proposal was accepted, and the model recommendations were adopted by the heads of the CIS competition agencies.

Chinese Taipei noted that their agency might be able to exchange information under bilateral trade agreements or memoranda of understanding. However, the scope of information exchange between two competition agencies is subject to certain limits, such as the ones established in the Classified National Security Information Protection Act, the Trade Secrets Act or the Personal Data Protection Act. Chinese Taipei also noted that the agency often uses informal communication channels such as emails and phone calls to engage with foreign commutation agents in sharing empirical experience and other information. However, no confidential information is exchanged through informal co-operation.

2.4. Disclosure of confidential information for damages actions

Ireland pointed out that disclosure for damages actions is done under civil competition legislation and the EU Directive on Damages. This type of actions usually take place at the end of the procedure, once a decision on an infringement has been adopted. However, experience on access to file related damages actions is still limited.

Switzerland explained their experience as regards access to the case file – including confidential information – by public procurement agencies. In Switzerland, these agencies can access the information that is indispensable to fulfil their statutory tasks, among which, public procurement. The competition agency can only grant access to information relating to a tender issued by the requesting procurement agency, and if this information concerns bid rigging. In practice, this means that if a final decision declaring a bid rigging infringement has been adopted, agencies can access the file. The Supreme Court of Switzerland is now analysing whether agencies have this right if the decision of the competition agency is under appeal.

2.5. Comments and questions

Following the presentations by the delegations, the **Chair** opened the floor for comments and questions.

The **United States** pointed out that whenever the Department of Justice or the Federal Trade Commission file an action in a judicial or administrative court, the defendants are entitled to obtain information relevant to their defence through the discovery process. Defendants typically request access to some or all of the of the agency's investigation materials during this process. Further, in criminal cases, the Department of Justice has an obligation to produce certain materials in their possession to defendants, to enable them to prepare their defence.

As regards the protection of confidential information, in many cases, the agency and the defendants try to reach an agreement on the terms of the proposed protective orders sought from a court. However, even if the protective order is jointly proposed, it is only valid if it is accepted by the court. Courts may only grant confidential treatment if there is a good cause, e.g. information that constitutes a trade secret. In criminal cartel cases, protective orders are regularly used to limit access to Grand Jury materials, including transcripts of testimony or immunity and leniency agreements, among others. The US considers that protective orders provide an efficient way for the parties and judges to avoid document by document disputes, and also allow agencies to provide access to the contents of the case file soon after an action is filed.

Finally, **Judge Jaeger** noted that in the EU there is a regulation that grants access to all documents detained by EU institutions, organs or other bodies of the EU. The judge clarified that this general access regulation is not applicable to the CJEU. Still, when this information has been submitted to the court by other EU bodies, parties may attempt to obtain the information from the latter. This is what happened in the *Bayer v Commission* case, where the Court ordered that the Commission hand over certain documents.

The **Chair** thanked the experts and the delegates for a very fruitful discussion.