

# Disclosure of evidence ("grey", "black" and "white list")

16 June 2016, Brussels

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# The Directive principles

- The Directive on antitrust damages actions introduced a sliding scale of pan-European protection from disclosure in national courts for different categories of evidence:
  - Absolute protection from disclosure is granted for **immunity and leniency statements** and settlement submissions (the “**black list**”).
  - Temporary protection can be granted while an investigation is still ongoing (the “**grey list**”). This covers:
    - » information prepared by a person specifically for the proceedings (such as replies to requests for information);
    - » information drawn up by the authority and sent to the parties (such as statements of objections); and,
    - » settlement submissions that have been withdrawn.
  - No protection is afforded to other pre-existing documents, including documents submitted as annexes to a leniency statement (the “**white list**”).

- The Directive aims to reconcile the disclosure of evidence in the regulator's file with the incentives that underpin the success of leniency programs, by limiting the risk that certain documents produced by a leniency (or settlement) applicant are later used against him/her in a private damages action.
- EU national courts are able to order a defendant or third party (including public authorities) to disclose relevant evidence in its control, provided that:
  - » the claim for damages is plausible;
  - » the evidence is relevant for substantiating the claim;
  - » the categories of evidence to be disclosed are defined as precisely and narrowly as possible; and,
  - » the scope of the disclosure is proportionate.

- EU national courts are also empowered to order disclosure of evidence containing confidential information, **subject to safeguards effectively protecting business secrets**
  - This includes:
    - i. redacting sensitive passages in documents;
    - ii. conducting hearings *in camera*;
    - iii. restricting the persons allowed to see the evidence; and
    - iv. instructing experts to produce summaries of the information in an aggregated, non-confidential form.
  
- EU national courts are able to impose **effective, proportionate and dissuasive penalties** on parties for
  - i. their failure or refusal to comply with a disclosure order (or an order to protect confidential information);
  - ii. their destruction of evidence; and
  - iii. their breach of the limits on the use of evidence.

- Claimants are able to use the Commission's file index, including references to submitted leniency documents, to substantiate disclosure requests in damages actions before national courts.
  - » Includes references to submitted leniency documents, statements and papers/analysis filed.
  
- The EU Commission may increasingly seek to make more detailed information available in the public version of its decisions (including information based on leniency applications), either immediately or through re-issuance of the decision after a period of time.
  - » Civil claimants' interactions with agency
    - > Claimants increasingly seek non-confidential copy of decision through court proceeding
    - > Impact on publication timeline
    - > Relevance of pending appeal procedures

The protection of the black category is not absolute as "*National courts should themselves be able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements and settlement submissions laid down in this Directive*" (Recital 27 of the Directive). This exception may pose risks with regard to the protection of these documents.

Nothing prevents voluntary evidence disclosure by leniency applicants and other defendants after the completion of the Competition Authority's investigation, if they wish to do so in the context of the settlement discussions with private claimants.