Research and
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RESEARCH NOTE

Methods of management of confidential data in the context of national judicial proceedings

General note

Subject: Examination of the methods of management and of the requests for treatment of confidential data contained in documents in the court file in the context of national proceedings

Request: […]

October 2018

[…]

SUMMARY

INTRODUCTION

1. The objective of this research note is to set out the methods of management of confidential data in the context of national judicial proceedings. [1] In particular, it examines the processing of requests for confidential treatment whether in relation to certain evidence or to documents contained in the court file. This analysis covers the law of six Member States only, namely **English**, **French**, **German, Italian**, **Polish** and **Swedish** law.

2. Since the scope of this study is potentially very broad, the research was focused on national proceedings similar to those typically brought before the General Court and, therefore, on administrative and civil disputes in which the parties claim protection of private interests relating, inter alia, to professional business secrecy, the safeguarding of trade and industrial secrets, and to personal and medical confidentiality. [2] The scope of the study is limited to the methods used by the higher courts of the Member States for managing requests for confidential treatment. In the same vein, this note covers the methods of management of such requests that apply not only between the main parties, but also vis-à-vis interveners.

3. At the outset, it should be noted that the principle *audi alteram partem*, the

[1] For the purposes of this note, the expression 'confidential data' has the normal meaning of the term as used in the context of requests for confidential treatment before the General Court. It should not be understood as a synonym for 'personal data'.

[2] Accordingly, this note does not extend to criminal proceedings. Moreover, it does not set out the management methods used in national proceedings pertaining to Government secrecy, the protection of State security or the protection of the State's conduct of international relations (that is to say circumstances similar to the situations referred to in Articles 104 and 105 of the Rules of Procedure of the General Court of 1 September 2016 (OJ 2015 L 105, p. 1, as amended)).

principle that court hearings should be open to the public and that of equality of arms are transversal, so that any restriction of those principles with a view to protecting confidential data is applied by national courts only exceptionally and subject to restrictive conditions. On the basis of those principles, a national court may include in its decision the evidence produced or relied on by the parties only if they have been in a position to exchange arguments. Although that guiding principle is common to **all the Member States** covered by this note, it should nevertheless be pointed out that the procedures for claiming confidential treatment and the methods used to that end vary greatly. [3]

4. Moreover, in **each Member State**, the procedure for requests for confidential treatment derives from a variety of legal instruments, including legislation in a number of fields. Although the legal bases for the procedures detailed below are to be found in the Code of Civil Procedure and the Code of Administrative Procedure in **almost all Member States**, data confidentiality as between parties to a dispute is also provided for by the Commercial Code (**France**), constitutional case-law (**Germany**, **Italy** and the **United Kingdom**), fundamental laws forming part of the Constitution (**Sweden**), the law on the judicial system (**Germany**), laws on trade secrets (**France**, **Italy**, **Sweden** and the **United Kingdom**), laws on unfair competition and the protection of competition (**Poland** and **Sweden**), general legislation on data protection (**Italy)** and practice directions to parties before the courts (the **United Kingdom**). Indeed, in none of the legal systems under consideration is there a systematic and codified approach to the processing of requests for confidential treatment in relations between parties to a dispute.

[3] In some legal systems, the main measure for protecting confidentiality is the provision that the hearing is to be held *in camera* (**France**, **Poland** and **Sweden**), while in others a range of measures is available, depending on the particular features of the case in question (**Italy** and the **United Kingdom**).

5. Accordingly, a distinction should be drawn between the various ways of managing confidentiality, namely, on the one hand, protecting court proceedings from disclosure to third parties (external confidentiality) and, on the other hand, restricting the transmission of information between the parties to the proceedings (internal confidentiality). However, it is not always easy to draw a clear conclusion as regards the confidentiality thus recognised in the various legal systems under consideration. Many exceptions exist, albeit sometimes only on a very limited basis. In some Member States, the management methods available for processing requests for confidential treatment are so uncommon that the only one available to a court is usually for the proceedings to be conducted *in camera*. Other legal systems allow restrictions on the transmission of confidential data between the parties to a dispute. Notably, the **Swedish** fundamental law (referred to in paragraph 4 above) requires maximum transparency in court proceedings both between the parties and as regards the public. In the light of those specific features, this note explicitly refers to the context within which each national court processes requests for confidential treatment. As is apparent from the following analysis, the management methods used by a national court do not normally draw a distinction between main parties and interveners in terms of access to confidential data.

6. Below, we will examine the concept of 'confidential' data (Part I), the procedural and substantive requirements for making a request for confidential treatment (Part II), the procedure laid down for such requests (Part III), and, finally, the methods adopted by national courts to safeguard data confidentiality (Part IV).

I. THE CONCEPT OF CONFIDENTIAL DATA

7. The concept of what constitutes confidential data, from the point of view of the content of such data, is largely uniform from one legal system to another. As noted in the study on trade secrets and other confidential data, prepared for the European Commission, [4] it should be pointed out that, although the concept of 'confidential' data is used in many legislative provisions and regulations as well as in the case-law, it was not possible to identify an overall definition in the six Member States.

8. However, **all the legal systems** make provision to protect the confidentiality of two data categories: commercial/industrial secrets and personal secrecy. There are some (limited) cases in which data are regarded by their very nature – or by law – as secret, [5] but for the vast majority of data that may be secret or confidential in nature, it is for the applicant to prove it. In that case, both civil and administrative courts must strike a balance between, on the one hand, the interest for which confidentiality is claimed and, on the other, the interest in the public administration of justice while observing the principle of equality of arms.

9. As regards commercial/industrial secrets, including, of course, trade secrets,

[4] 'Study on Trade Secrets and Confidential Business Information in the Internal Market', April 2013, (MARKT/2011/128/D), available at http://ec.europa.eu/DocsRoom/documents/27703. According to that study, prepared before the entry into force of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1), most of the legal systems have no definition of trade secrets (which are generally recognised as confidential data in the Member States of the European Union).

[5] For example, this is the situation in **German** administrative law for cases concerning, on the one hand, respect for private life and privacy and, on the other, industrial and trade secrets, in accordance with the respective orders of the Federal Constitutional Court and the Federal Administrative Court. Moreover, *in camera* proceedings are provided for by law for disputes concerning Federal Network Agency cases. In **Italy**, trade secrets are, by legislative decree, granted protection to preserve their confidentiality during legal proceedings. **Swedish** administrative law orders the confidentiality of data compiled on behalf of a public authority in the context of litigation conducted by a public undertaking. That protection is granted because of the likelihood that the position of a party to the proceedings will deteriorate in the event of disclosure of the data concerned.

national courts acknowledge the confidentiality of technical and commercial know-how. A common thread running through **all the legal systems** is the finding that those data are not public knowledge and that the holder of such data seeks to limit their dissemination in order to protect a legitimate interest. [6] In some of the systems under consideration, commercial practice in the sector is expressly taken into account by the courts (**Germany**, **Italy** and the **United Kingdom**). In others, possible harm caused to the owner by disclosure of the information is a key requirement for the granting of confidential treatment (**Italy**, **Sweden** and the **United Kingdom**).

10. Moreover, **English** law treats as confidential data that is shared in the context of relations and situations giving rise to a relationship of trust. An objective criterion is applied by the courts to determine whether that relationship must reasonably be perceived as giving rise to a duty of confidentiality ('the reasonable man test').

11. As far as personal secrecy is concerned, data relating to a person's private life [7] are recognised as being confidential in **all Member States**, in particular data relating to the family sphere, state of health (medical confidentiality), intimate personal life or religious affiliation. In **all the legal systems**, such confidentiality

[6] According to the **Italian** Court of Cassation, an undertaking's confidential information may include information that makes it possible to identify its production cycle, its quality or its product. The **English** courts have ruled that information which is not entirely secret may nevertheless be regarded as confidential depending on the degree to which it is accessible to the public. That generous approach could stem from the context of the English pre-litigation procedure, which requires the disclosure of evidence ('minimum disclosure') between the parties and which aims to preserve their rights until the case is brought before the court.

[7] In that regard, in **France,** the protection of trade union secrets has resulted in a number of changes to the principle *audi alteram partem* (between the parties), which must be limited to what is strictly necessary in order to safeguard the employee's private life. In **Sweden**, the civil and administrative courts have treated as confidential (vis-à-vis the public) data relating to an individual's personal and economic situation in labour law disputes, in particular in the context of collective agreements and in disputes relating to discrimination, including within the civil service. The general rule under Swedish law remains that parties to a dispute have maximum access to procedural documents.

is based on the principle of protection of natural persons against intrusions into their private life. In **Sweden,** confidential treatment may be granted, at least in the context of administrative court proceedings, where disclosure is likely to cause considerable harm to the person concerned. [8]

12. Also in **Swedish** law, reference should be made to the confidentiality conferred on data relating to public procurement, [9] trade union negotiations [10] and collective actions in the civil service, which may apply not only as regards the public but also as between the parties in some cases, on account of the parallelism of those disputes with disputes which may be brought before the General Court.

II. PROCEDURAL AND SUBSTANTIVE REQUIREMENTS FOR A REQUEST FOR CONFIDENTIAL TREATMENT

13. Convergence is evident across the **six legal systems** with regard to the burden of proof and the extent of the restriction to procedural documents. Moreover, the procedure for granting confidential treatment is normally triggered upon request

[8] Under **Swedish** law, the commercial relationships of individuals with public authorities are granted confidentiality on the basis that disclosure of that information would cause harm to the person concerned. That logic underlies the confidential treatment of information in competition law cases. Indeed, the same protection of confidentiality is used in relation to denunciations and statements of leniency where disclosure of certain data contained therein would cause considerable harm to the person concerned.

[9] The **English** courts have used a method for protecting internal confidentiality in similar disputes. Thus, mention may be made of the practice of restricting access (limited to the lawyer and one person from the internal management of the applicant company) to data relating to the assessment of tenders in the context of public.

[10] It is appropriate to recall the adjustments to the adversarial procedure made in **French** law in order to preserve the rights of trade union members, with the purpose of protecting them from retaliation in the event of disclosure of their identities (see footnote 7).

from a party. [11]

14. A mere assertion of confidentiality does not suffice. It is always incumbent on the party claiming confidentiality to identify the data that are confidential and to give reasons for his or her request. [12] As a rule, the protection granted by the courts does not exceed what is strictly necessary to ensure the protection of the commercial/industrial secrets or personal secrecy at issue. The relevance of the document to the resolution of the dispute – and, in **English** law, the stage of the proceedings – is a factor taken into account to that end. Moreover, whether provided for by law or by simple practice, the party claiming confidentiality must provide a non-confidential version of the document concerned, from which the confidential information has been redacted.

15. While **German** law requires the party to identify the information establishing an interest deserving of protection and the disadvantages resulting from its disclosure, [13] **French** law on the protection of trade secrets makes clear that the party must produce a summary of the data concerned together with a written statement specifying, for each item of information or part of the document at issue, the reasons why it is secret in nature. Similarly, under **English** law, any

[11] In **France**, since the principle *audi alteram partem* is applied strictly, a court has the possibility of excluding from the court file only those documents that cannot be the subject of an exchange of arguments. Accordingly, this is not, strictly speaking, the same as granting confidential treatment to those documents.

[12] Apart, of course, from the cases in which confidential treatment is provided for by law (referred to in Part I above).

[13] A similar consideration arises under **Swedish** law, in that the court examines the likelihood that disclosure of the data will cause harm to the person claiming confidential treatment of those data. However, in **Sweden** transparency enjoys the status of a constitutional principle and there is a presumption in favour of disclosure. Consequently (and as stated in paragraphs 5 and 18 respectively), when a request for access to documents is made, it is generally for the court to examine of its own motion – and not for the party to the proceedings to justify – the need for confidential treatment of the data contained in the court file of the case pending before it. By contrast, information communicated by the court to the parties to a dispute is not, as a rule, subject to restrictions based on the protection of confidentiality.

request for confidential treatment must be properly targeted and supported by evidence that justifies the making of an order to that effect. Conversely, any refusal to disclose documents at the pre-litigation stage (referred to in paragraph 25 below) must be explained in a written statement setting out the reasons why the party regards that disclosure as disproportionate in the light of the issues raised in the dispute.

16. By contrast, **Polish** law proves more flexible, in that a request for proceedings to be held *in camera* may be made either in writing or orally at the hearing and at any time during the proceedings. That request cannot be justified by a mere reference to one of the possibilities of confidentiality or secrecy provided for by law. Similarly, as regards competition law cases, the Code of Civil Procedure lays down no formal or temporal requirements in relation to requests to restrict access to certain information contained in the court file.

17. As regards temporal requirements, only **Swedish** case-law expressly requires that the request for confidential treatment be submitted while the case is pending before the court hearing the case.

III. THE PROCEDURE FOR REQUESTS FOR CONFIDENTIAL TREATMENT

18. First of all, it should be recalled that civil proceedings are public in **all the Member States** covered by this note. In **Sweden**, there is also a presumption in favour of data disclosure, so that, even if certain data are of interest to one of the parties, disclosure is not automatically regarded as having a bearing on an interest deserving of judicial protection.

19. The national legal systems make no distinction as to whether the party requesting confidential treatment of data is a main party or an intervener. [14] Only in cases specifically provided for by law does the court consider of its own motion the need for confidential treatment. [15] **Sweden** is an exception in that regard, in that the law on public access to information and secrecy requires the courts (whether civil or administrative) to examine of their own motion whether or not data must be granted confidential treatment (vis-à-vis the public) for all disputes brought before them. [16]

20. Moreover, the procedural law of **all the Member States** under consideration confers a wide discretion on the courts in deciding on a request for confidential treatment. In **France**, in the matter under consideration, and in the **United Kingdom,** a court may rule, if necessary orally without a hearing on the disclosure or production of documents. In the **other Member States**, the decision on whether the case should be dealt with *in camera* and whether certain evidence should be treated confidentially is made by simple order, without a public hearing

[14] It is, however, possible to identify a recent trend in **Italian** administrative law whereby procedural measures and documents are accessible only to the main parties to a dispute, their representatives or lawyers and, under more limited conditions, interested persons, such as interveners and potential parties. By contrast, in civil disputes, the main parties and interveners all have the same level of access to the court file, and that access is subject to the same conditions.

[15] This is true, under **Polish** law, for cases covered by the law on the protection of competition and consumers, which provides for restricted access to evidence in the file in order to prevent disclosure of, inter alia, trade secrets. Similarly, in **France**, courts have the power to examine of their own motion the confidential nature of a document in competition law cases. Article L. 153-1 of the draft law amending the **French** Commercial Code confers the same power on courts in civil and commercial proceedings, where disclosure of a document is likely to infringe trade secrets. In the **United Kingdom**, under the law on trade secrets (transposing Directive 2016/943), a court may, of its own motion, prescribe the measures to be adopted in order to protect the confidentiality of a trade secret in the context of a dispute.

[16] As is apparent from paragraph 18 above, the confidentiality of evidence as between the parties to a dispute is rare under **Swedish** law.

and often without publication of the reasons for the decision. [17]

21. In the context of this research note, it would be useful to outline, first, some preliminary procedures […] (Part A) and, secondly, some procedures put in place for dealing with evidence from the files of the national administrative authorities (Part B).

A. PRELIMINARY PROCEDURES

22. Two legal systems (**Germany** and the **United Kingdom**) provide for 'preliminary' procedures, which are separate from the procedure for requests for confidential treatment and are relevant to this study. Those procedures allow restrictions, on grounds of confidentiality, in respect of the data contained in documents exchanged between the parties to legal proceedings.

23. First, mention should be made of the so-called Düsseldorf procedure, which comprises two stages and includes an independent procedure for the taking of evidence prior to the main proceedings. In that preliminary procedure, the patent holder may request that an expert report be drawn up to examine the infringement of his or her patent by the other party. In order to preserve the confidentiality of the other party's secrets, the expert report is first disclosed to the patent holder's lawyer or patent attorney alone, who is required to preserve the confidentiality of the facts brought to his or her attention by the report, in particular as regards the

[17] In **Poland**, an order on confidentiality granted (or refused) in the course of proceedings is generally not open to appeal. In **France** and **Sweden**, the order can be appealed against only together with the decision on the merits.

party that he or she represents. [18] Although the Düsseldorf procedure was designed for the protection of patents, it has gradually been applied in other spheres, including intellectual property and competition law. [19]

24. In that regard, mention may also be made of the possibility, laid down in Article L. 153-1 of the draft law amending the **French** Commercial Code, for a court, in the course of civil or commercial proceedings in which a measure of inquiry is sought before any substantive proceedings, to order an expert report and to seek the opinion of the parties' representatives for the purposes of safeguarding the confidentiality of trade secrets.

25. Secondly, the pre-litigation stage before the **English** courts is generally conducted by the parties, who negotiate and agree on the disclosure of evidence ('pre-trial disclosure'), in particular on the evidence contained in documents that must remain confidential. The parties may even grant access to that evidence by means of contractual provisions stipulating the participants to whom the evidence may be disclosed, usually their lawyers. In the absence of agreement, a party may ask the court to decide on the request for confidential treatment. [20]

[18] In that regard, the Federal Court of Justice has ordered that, in such circumstances, the person concerned cannot object to the disclosure of the expert report to the lawyer or patent attorney representing the patent holder and appointed by him or her.

[19] A similar measure exists in **German** civil law, in that a party who is adducing evidence and who seeks to preserve the confidentiality of his or her own trade secrets may request examination of the evidence by a person of trust, such as a notary. The court then takes evidence from that person of trust.

[20] A civil court or, where applicable, its principal clerk, may order 'standard disclosure', in which each party is required to disclose, in the form of a 'disclosure list', all the documents on which it relies, and which support or prejudice its position or the position of another party. Each party has the right to examine the documents appearing on the other party's disclosure list, and thus has a right of inspection. If a party wishes to refuse access to a document for inspection, or to a part thereof, for reasons such as confidentiality, that party must indicate its refusal on its disclosure list, together with the reasons for its refusal.

26. Moreover, **English** rules of civil procedure provide for the possibility of holding an informal meeting relating to the management of the proceedings at an early stage thereof. The parties attend that meeting, the objectives of which are the identification of the issues in dispute and the procedure to be followed for dealing with the case. That meeting takes place after the filing of the defence and the classification of the case according to its value and complexity, but before witness statements are served on the other party. Several such 'hearings' may be scheduled during the course of the dispute in order to assess the progress of the case and they may take the form of a telephone conference call. Such conference calls take place, in particular, for cases of significant value (that is to say 'multi-track cases').

B. PROCEDURES RELATING TO THE 'SUPPLEMENTARY DOSSIER'

27. Reference should be made to the procedures laid down in certain legal systems for disclosure of the 'supplementary dossier', that is to say the evidence gathered by an administrative authority in the context of an investigation whose final decision is challenged before the national courts. […]

28. First, the **German** administrative authorities are required to forward a dossier requested by the administrative court, [21] except in the cases provided for by law in specific areas including competition law. [22] The transmission of the dossier may,

[21] According to the **German** Administrative Code, transmission is ordered by the formation of the court hearing the case on the merits. By contrast, in the **United Kingdom**, use of an order for the production of confidential evidence is the last resort for the English courts, which normally rely on the parties' declarations concerning confidential data.

[22] Under Paragraph 72(2) of the **German** law against restrictions on competition, the right to inspect a supplementary dossier is granted only with the agreement of the authority that issues the dossier.

however, be challenged not only by the authority holding it but also by the person concerned by the dossier, either before the higher administrative court, [23] or before the competent regulatory authority.

29. Secondly, **Polish** law establishes a special method for documents that have been submitted in the course of the administrative procedure before the competition authority. Where certain information has been subject to protection as a trade secret in the procedure before that authority, it may be disclosed to the other party to the proceedings before the court responsible for the protection of competition and consumers only if (i) the party consents to such disclosure or (ii) the circumstances justifying its confidential treatment during the administrative procedure have changed significantly. By contrast, the court responsible for the protection of competition and consumers may, by order, restrict 'to the extent necessary' [24] access to evidence contained in the court file and produced before it, in order to prevent disclosure of trade or other secrets protected by law. Although that restriction is applied strictly, the detailed rules for making an application in that regard are not and a party may make such an application orally.

30. A separate system applies to documents submitted under leniency programmes, which are available for inspection by the parties to a dispute before the court responsible for the protection of competition and consumers, provided that they obtain prior written consent from the undertaking concerned or its manager. In the

[23] Within the framework of that **German** administrative procedure, the higher administrative court has the right to inspect the dossiers the transmission of which was refused. That court must preserve the confidentiality of the content of the dossiers in question, in particular when drafting the grounds for its order. The procedure is also subject to the rules of physical security. A similar solution is proposed for trade secrets by the draft law amending the **French** Commercial Code.

[24] In essence, the same criterion is set out in the 2018 **English** regulations transposing Directive 2016/943, in that the number of persons having access to information covered by trade secrets must not exceed what is strictly necessary for the legal proceedings.

absence of such express consent, only handwritten notes can be made on the basis of such documents as are available at the court registry, provided that a prior undertaking is given that the information thus collected will be used only for the purposes of those court proceedings.

31. Thirdly, under **Swedish** law, district courts may conduct a 'verification' procedure. According to the law on competitive disadvantages, the court may itself inspect a document held by the competition authority, with the aim of assessing whether it is relevant for the purpose of ruling on the dispute and therefore whether it is necessary to order its production. In those circumstances, the document is not disclosed to the parties before that verification is concluded. If the court finds that the document should not be produced or provided, that document must be returned immediately to the competition authority and no copy will be kept in the case file.

32. There is a similar procedure in **France** in actions for damages arising from anti-competitive practices, whereby the court alone may acquaint itself with a document in order to be in a position to determine the most appropriate methods of disclosure or non-disclosure of that document, in accordance with the principles of necessity and proportionality, with a view to reconciling the protection of trade secrets with observance of the rule that the parties should be heard in proceedings. In those circumstances, without holding a hearing the court decides on whether or not to disclose the document concerned.

IV. METHODS OF MANAGEMENT OF CONFIDENTIAL DATA

33. In **all the legal systems** under consideration, it is possible, exceptionally, for

hearings to be held *in camera* for the purpose of protecting certain confidential data. In **Poland**, this is in fact the default method for restricting public access to proceedings. [25] However, in the **vast majority of the Member States** under consideration, it is important to note the discretion granted to courts to determine, on a case-by-case basis, the methods of ensuring the confidentiality of the information in question. A wide range of methods of management of confidential data is available to the **English** and **Italian** courts, which may adopt any measure that they consider appropriate to protect confidential data in cases brought before them.

34. First of all, the **English** courts dealing with commercial matters have developed the practice of the 'confidentiality ring' (or 'confidentiality club'), which allows inspection of specific evidence or documents only by certain persons who are listed exhaustively. [26] The restriction thus imposed is of variable geometry in that, in some cases, confidential documents may be inspected only by independent experts and representatives unrelated to the parties ('external eyes only') or by lawyers alone ('counsel to counsel'). [27] It appears that the size of the undertaking

[25] **France**, **Poland** and **Sweden** prohibit the public from attending *in camera* hearings, but not the parties (including interveners) or their representatives or, in **Poland,** two persons of trust for each main party. In those jurisdictions, as well as in **Italy**, exchange of arguments requires disclosure of all documents and information contained in the court file or at least the possibility of inspecting that file if it contains confidential data. A parallel may be drawn with the practice of pre-litigation disclosure in the **United Kingdom**. By contrast in **Germany**, the so-called 'in chamber' procedure ('*in-camera Verfahren*') allows evidence to be taken behind closed doors in the absence of the other party, which is not even informed of the result of the taking of evidence, provided that confidential material is involved. In order to resolve any conflict of interests caused by such a procedure, the party adducing evidence may waive its right to participate in the taking of evidence.

[26] It should be stated at the outset that, in a recent judgment of the **English** High Court, a judge at that court expressed doubts as to the compatibility of that practice with the right to a fair trial provided for by Article 6 of the European Convention on Human Rights.

[27] While those measures for the protection of confidential data have been developed in the context of intellectual property and for the purpose of protecting trade secrets, they have gradually been used in competition law cases, public procurement cases and medical confidentiality cases. In the latter cases, restricted access to data covered by medical confidentiality may be granted to the other party's

plays a role in the application of such management methods, in that a large undertaking is presumed to be able to manage the internal flow of information.

35. The confidentiality ring is established either by order of the court [28] or by agreement between the parties to the proceedings. The parties usually give undertakings that they will comply with the conditions required by those management methods, but the court may issue an injunction to that end. In any event, the court determines the conditions for access to the confidential information, that is to say the persons designated, [29] the place where the information can be inspected and the manner of copying or disseminating that information. [30] Furthermore, inspection of documents containing sensitive or confidential data at the registry of the court hearing the case is a method used, inter alia, in **Poland**, **Sweden** and the **United Kingdom**. [31]

36. Next, in **almost all the courts** non-confidential versions of the documents before them are produced by the parties (internal confidentiality) and non-confidential versions of the decisions which they deliver are published (external confidentiality). In that regard, **Italian** courts have the power to order the registry to affix to a decision a note prohibiting the parties from disclosing the full text of the decision.

lawyers and medical experts, provided that the medical file is not transmitted to their clients or insurers.

[28] Similarly, **Italian** courts may restrict the circle of persons permitted to attend hearings and to access procedural documents (parties, representatives, lawyers, witnesses, administrative staff, etc.). **French** courts have similar discretion with regard to actions for damages resulting from anti-competitive practices.

[29] For persons outside that ring, the court may, however, allow access to a non-confidential version of any judicial decision from which the passages containing trade secrets have been deleted or redacted.

[30] Indeed, even access to *in camera* hearings may be limited to members of a confidentiality ring, to the exclusion of the parties themselves, third parties and the public.

[31] For example, that method has recently been used by the **Swedish** Supreme Administrative Court to allow consultation of a video recording.

37. Moreover, the most common methods of management of confidentiality in the Member States include the omission, anonymisation and replacement of certain confidential information that is irrelevant for the purposes of the dispute. [32] While, with regard to the methods consisting in the replacement or deletion of confidential information, the **English** courts do not call into question the decision to delete certain information from the file, except where it appears that the party has made an error in that respect, the **Swedish** courts insist on disclosure to the other party of at least the substance of the documents containing redacted information. [33]

38. Furthermore, some national courts have adopted the approach of the provision of a summary. Accordingly, by measures of inquiry addressed to the parties, those courts order the preparation of a summary of any confidential information if that information cannot itself be provided to the other party (**France** and **Sweden**). [34]

39. In addition, mention may also be made in that regard to methods under **French law**, [35] in the context of the investigation of a case, for using experts as independent experts who themselves determine the documents relevant to their task with a view to preparing an expert report for the court. The expert report may

[32] In **France**, information identifying members of a trade union section, while known to the court, may be rendered illegible or anonymised. Similarly, in the field of trade secrets, courts may order the preparation of summaries or non-confidential versions of the documents concerned for disclosure to the other party.

[33] Under **Swedish** law, such disclosure takes place, in the context of administrative disputes, on condition that the information is not likely to jeopardise seriously the interests that the confidentiality is intended to protect. That rule does not apply to the entire court proceedings, since the protection of confidentiality can never prevent the parties from having access to the data forming the basis of the decision delivered in the case, even if some of that data is confidential.

[34] In **Sweden**, the provision of a summary applies only in the context of administrative disputes.

[35] That solution is adopted in particular in the field of company law where, for example, a chartered accountant is used. A similar method is established for the purpose of protecting medical confidentiality, whereby parties cannot, for example, be present during the appraisals carried out by experts, such as a medical examination, but are allowed to discuss the conclusions of the expert report.

then be the subject of an exchange of arguments between the parties.

40. Finally, even though they do not constitute management methods in the strict sense, reference should be made to the penalties provided for in national law for unlawful disclosure of confidential data based on liability in tort. **All the Member States** provide for the civil liability of the party at fault, so that the injured party may claim damages not only for material damage but also for non-material damage caused by such disclosure. Under **English** law, there is even the possibility of ordering the restitution of profits derived from the use of a trade secret. Under **Italian law,** financial compensation may be claimed even in the event of unintentional disclosure or use of proprietary information.

41. As regards criminal penalties for infringement of confidentiality in judicial proceedings, **Italian** law provides for a penalty of up to 3 years' imprisonment and a fine of up to EUR 1 000. In **Poland**, public disclosure of information revealed during an *in camera* hearing is a criminal offence punishable by a fine, a penalty restricting personal liberty or a custodial sentence of up to 2 years. **English** law regards the disclosure of confidential information submitted in the course of court proceedings – whether occurring intentionally or by mere inadvertence – as constituting contempt of court. As regards, in particular, the improper use of confidential procedural documents (inter alia in the context of the protection of trade secrets), **English** courts may order the seizure, return or destruction of such documents or thus prohibit their placing or circulation on the market.

CONCLUSION

42. It follows from the foregoing that no Member State rules out restrictions on the transmission of certain confidential data between the parties to a dispute. Although some Member States are more willing to safeguard such internal confidentiality (**Germany**, **Italy** and the **United Kingdom**), they usually do so only during the pre-litigation stage (**Germany** and the **United Kingdom**). Other Member States permit internal confidentiality only to a very limited extent (**France**, **Poland** and **Sweden**). However, **the vast majority of Member States** provide for some adjustments to the exchange of arguments between the parties in the context of competition law.

43. […]

44. The other methods discussed in this note include the informal means of organising the procedure used in the **United Kingdom**, such as meetings and telephone conference calls with the parties. Those means are used mainly in financial cases in which the case files are particularly cumbersome, in order to facilitate the conduct of upcoming proceedings.

45. As regards management methods derived from case management, particularly in **common law**, it should be noted that, during the pre-litigation stage, they entail an additional commitment by and workload for the national courts. The same holds true of the **Düsseldorf** procedure. Admittedly, those practices sometimes have the effect of reducing the material scope of the dispute and/or the time required for the conduct of the proceedings. However, the basis for those practices is that such disputes will not all result in proceedings before the national courts, which are responsible for safeguarding the parties' rights, that is to say ensuring that no undue advantage is obtained in the course of pre-litigation negotiations.

46. As far as the **Swedish** verification procedure is concerned, similar forms of that

procedure exist in **Germany**, **France** and the **United Kingdom**, in the areas under consideration. That procedure allows national courts to exclude non-essential documents containing confidential data at an early stage of the proceedings, thereby reducing the need to rule on the confidentiality of such documents by order.

47. Finally, as regards methods for restricting access to procedural documents to certain persons designated by the national courts, mention should be made of the potential difficulties that such methods could entail, as regards the client-lawyer relationship and the exchange of arguments.

[…]