

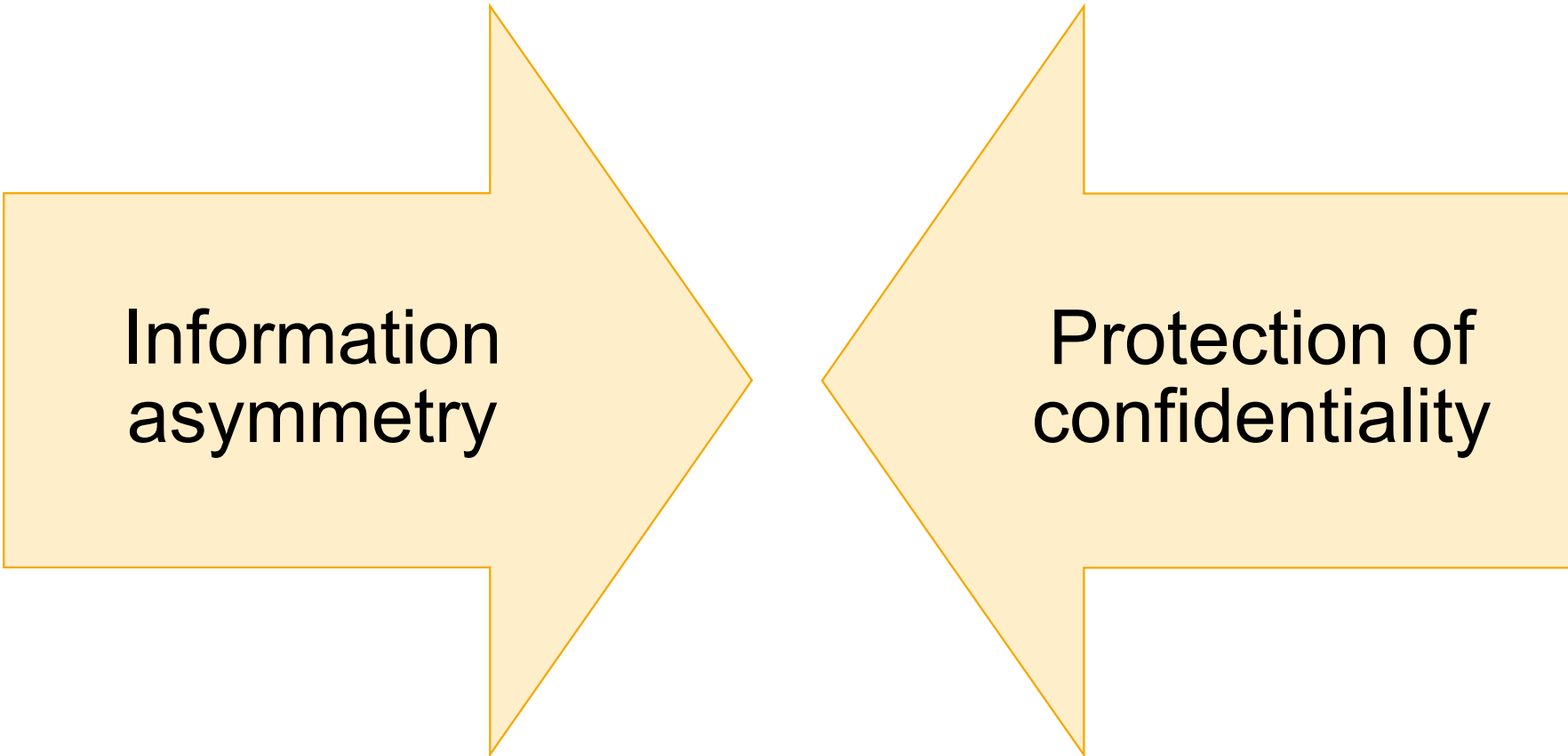


# Confidentiality arrangements and disclosure

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# Disclosure and confidentiality: clash



The diagram consists of two large, light-orange arrows pointing towards each other, creating a central gap. The left arrow points right and contains the text 'Information asymmetry'. The right arrow points left and contains the text 'Protection of confidentiality'. The arrows are outlined in a darker orange color.

Information  
asymmetry

Protection of  
confidentiality

# Disclosure and confidentiality

*While relevant evidence containing business secrets or otherwise confidential information should, in principle, **be available** in actions for damages, such **confidential information needs to be protected appropriately.***

*(Recital 18 Damages Directive)*

# Disclosure and confidentiality

## **Article 5(3) Damages Directive**

*Member States shall ensure that national courts limit the disclosure of evidence to that which is **proportionate**. (...) They shall, in particular, consider:*

*(c) whether the evidence the disclosure of which is sought contains **confidential information**, especially concerning any third parties, and what **arrangements** are in place for protecting such confidential information.*

# Disclosure and confidentiality

## **Article 5(4) Damages Directive**

*Member States shall ensure that national courts have the power to **order** the disclosure of evidence containing confidential information where they consider it **relevant** to the action for damages.*

*Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal **effective measures** to protect such information.*

## Effective measures

*Those measures could include the possibility of **redacting** sensitive passages in documents, conducting **hearings in camera**, **restricting the persons** allowed to see the evidence, and instructing **experts to produce summaries** of the information in an aggregated or otherwise non-confidential form.*

*(Recital 18 Damages Directive)*

# Effective measures: Austria

## § 37j KartG

*(6) The court shall order effective measures for the protection of confidential information; in doing so, it may in particular*

- 1. Order the production of an **extract** of a document purged of confidential information,*
- 2. **Exclude the public** from the hearing,*
- 3. **Restrict**, except for the parties and their representatives, **the persons who may obtain knowledge of the evidence**, provided that this does not unduly restrict the rights of the parties, or*
- 4. Instruct an expert to submit a **summary** that does not contain confidential information.*

# Effective measures: Spain

## **Artículo 283 bis b Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil**

*(5) Where it considers it necessary, in the light of the circumstances of the particular case, the court may order access by the applicant to sources of evidence containing confidential information, in any event taking effective measures to protect it.*

*To this end, the court may adopt, inter alia, the following measures:*

- 1. Dissociating **sensitive passages** in documents or other media.*
- 2. Holding hearings behind **closed doors** or restricting access to them.*
- 3. **Limiting the persons** allowed to examine the evidence.*
- 4. Commissioning experts to prepare **summaries** of information in a non-confidential aggregated form or in any other non-confidential form.*
- 5. Drafting a **non-confidential version** of a judicial decision in which passages containing confidential information have been deleted.*
- 6. Limiting access to certain sources of evidence **to the representatives and legal counsel of the parties and to experts** subject to confidentiality obligations.*



# 2020 Confidentiality Communication

22.7.2020

EN

Official Journal of the European Union

C 242/1

II

*(Information)*

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES  
AND AGENCIES

EUROPEAN COMMISSION

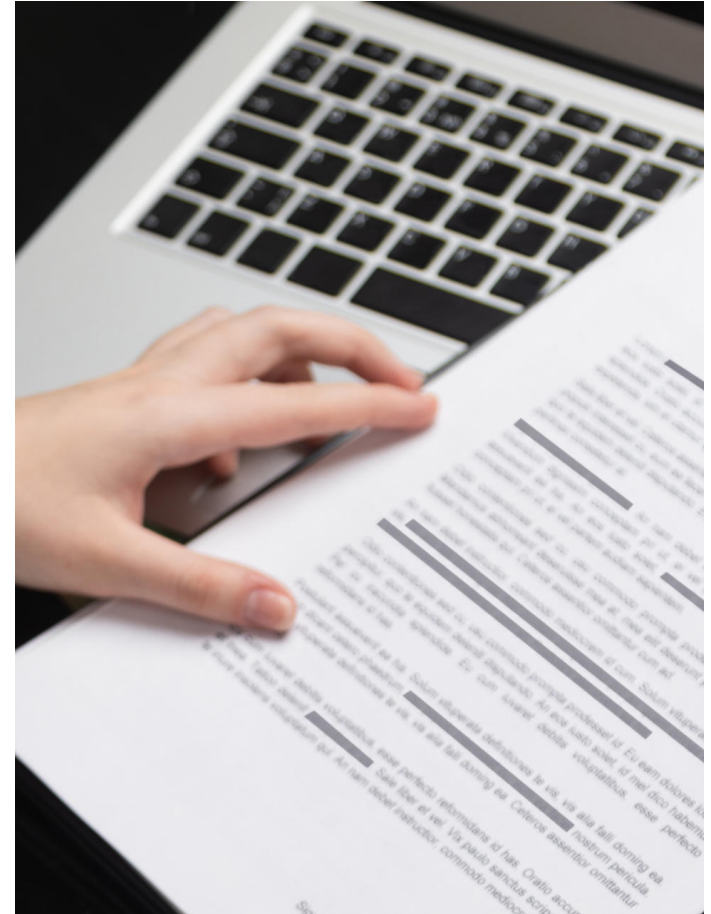
COMMUNICATION FROM THE COMMISSION

**Communication on the protection of confidential information by national courts in proceedings for  
the private enforcement of EU competition law**

(2020/C 242/01)

# Redaction

- Relevance of the information
- Comprehensibility of redacted document
- Ranges and summaries
- Cost-benefit analysis



# Confidentiality ring

## Installment

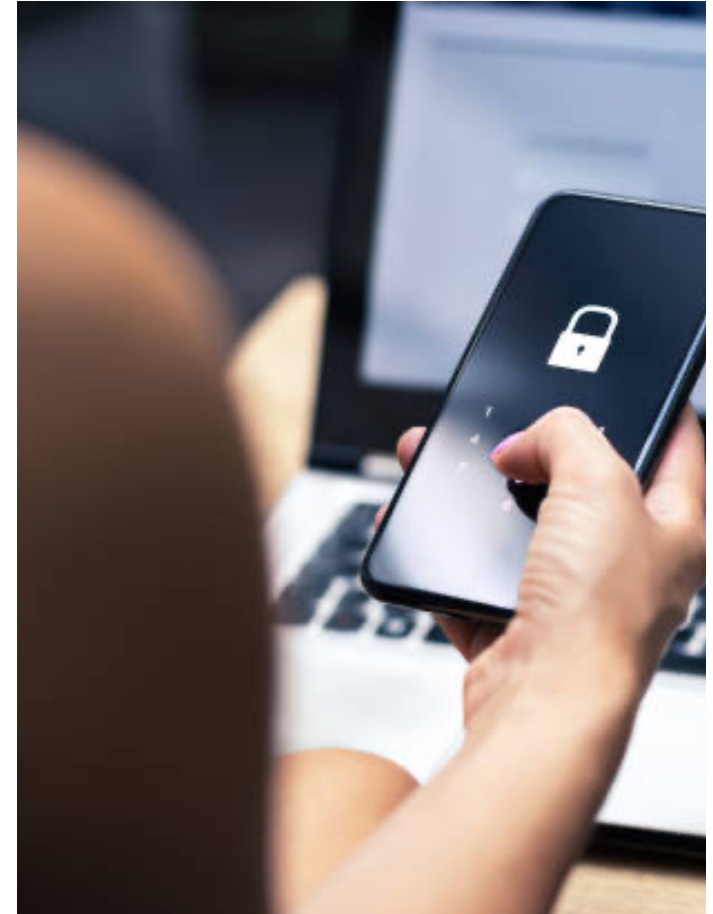
- Quantitative, strategic and decision-relevant data
- Procedural efficiency
- Electronic organization



# Confidentiality ring

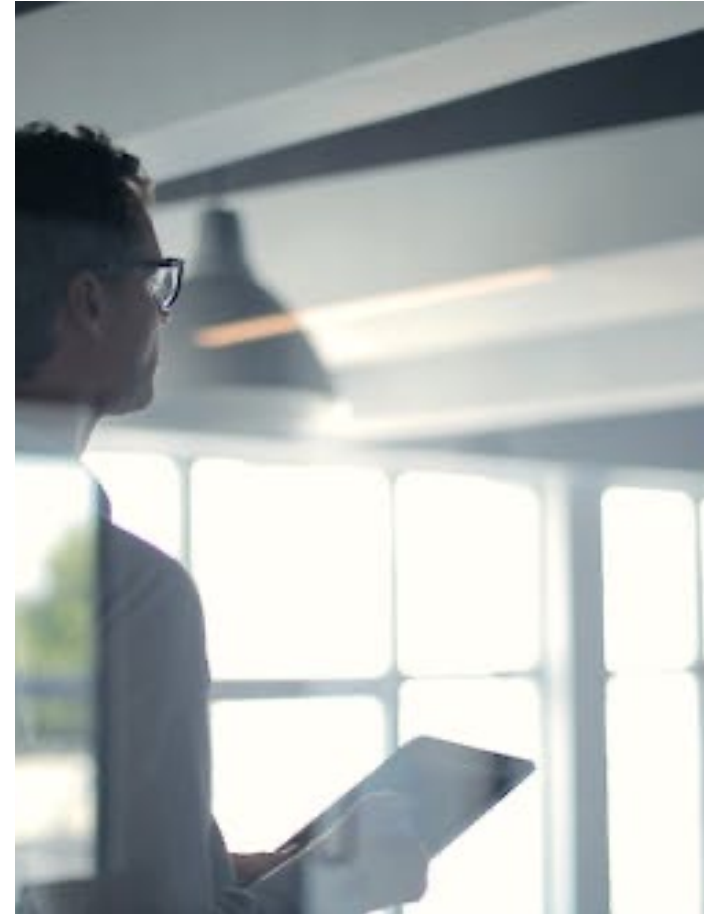
## Composition

- External legal advisers
- Other external advisors (auditors, experts)
- Company representatives
  - In-house lawyers
  - Clean teams / Chinese wall



# Experts

- Evidence intermediaries → problematic
- Supportive capacity, esp. non-confidential summaries



# Confidentiality protection during and after the civil proceedings

- 1) Written Pleadings
- 2) In-camera (exclusion of the public)
- 3) Access to the court file
- 4) Service of judgments
- 5) Publication of the decision

# Private enforcement and confidentiality: other issues

- Publication of the decision of the competition authority
- Access to file of the competition authority (including outside of the Damages Directive)



# Questions?

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Lena Hornkohl, The protection of confidential information and disclosure in EU private enforcement of competition law, G.C.L.R. 2023, 16(1), 47-56