

# ECJ sets boundaries for disclosure of cartel documents to damages claimants

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The European Court of Justice has clarified that the Commission can refuse access to its cartel file without having to analyse each document individually. Damages claimants can still gain access to a specific cartel document by substantiating their need for them. The Commission's draft Damages Directive rules out this possibility for leniency documents by introducing an absolute disclosure ban. Good news therefore for leniency applicants whose applications will be protected from disclosure in civil damages actions under the Directive. Cartel victims, however, should keep in mind that the Directive will soon cut off this route of evidence collection.

The European Court of Justice (ECJ) ruling seems to fit in with its earlier [judgments](#) regarding the interaction between access to cartel documents by damages claimants and national leniency programmes. In these judgments, the ECJ stated that it is up to the national courts to determine on a case-by-case basis, and in accordance with national law, whether the interests of disclosure of information outweigh the interests of protection of the information voluntarily provided by the leniency applicant.

The ECJ is currently [considering](#) a similar balancing act for requests to gain access to the European Commission's cartel file. Although first stating that the Commission is entitled to presume, without carrying out, a specific individual examination of each of the documents in a file relating to particular cartel proceedings, that "disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertaking involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding". It subsequently acknowledges the possibility of rebutting this presumption. Damages claimants should establish that it is necessary for them to be granted access to documents in the Commission's cartel file in order to enable the Commission "to weigh up, on a case-by-case basis, the respective interests in favour of disclosure of such documents and in favour of the protection of those documents, taking into account all the relevant factors in the case".

The question remains about how the ECJ's balancing act fits in with the disclosure ban on all leniency statements laid down in the Commission's [draft Directive](#) on antitrust damages. According to the [text](#) as endorsed by the Committee of Permanent Representatives, leniency statements will be exempted from disclosure of evidence. All documents accompanying those statements will, however, be disclosable. Other types of documents will be subject to full or partial disclosure in accordance with their relevance, proportionality and the companies' valid interest in protecting confidential information.

Thus, bringing us full circle to the balancing act as mentioned in the ECJ's rulings.